

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATIONS

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August 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Statute of Limitations in Trust Matters: Probate Code Section 16460

November 1995

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Statute of Limitations in Trust Matters: Probate Code Section 16460*, 26 Cal. L. Revision Comm'n Reports 1 (1996).

STATE OF CALIFORNIA

PETE WILSON, Governor

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November 2, 1995

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

This recommendation proposes technical revisions in the Trust Law to clarify the applicable statute of limitations governing trustees' duties to account to beneficiaries. A recent appellate decision misinterpreted the applicable statutes, creating doubt about whether a three-year or four-year limitations period governs.

The proposed amendments will restore the original intent of the Trust Law that a three-year period is always applicable, running either from the time a sufficient accounting is received by the beneficiary or from the time that the beneficiary discovered or reasonably should have discovered the basis of a claim.

This recommendation is submitted pursuant to Resolution Chapter 87 of the Statutes of 1995.

Respectfully submitted,

Colin W. Wied
Chairperson

STATUTE OF LIMITATIONS IN TRUST MATTERS: PROBATE CODE SECTION 16460

In *DiGrazia v. Anderlini*,¹ the court held that the general four-year statute of limitations in Code of Civil Procedure Section 343 applies to claims for breach of trust where a “written account or report” was not given to the beneficiary, despite the three-year limitations period provided by Probate Code Section 16460. *DiGrazia* also holds that an “account or other report” sufficient to trigger the statute of limitations must meet the standards provided in sections governing the trustee’s duty to account to beneficiaries. While the equities in *DiGrazia* may support the court’s disposition of the case, the court’s statutory interpretations will create problems and are inconsistent with the intent of the Trust Law. The governing statute needs to be amended to clarify the law and restore the original intent of Probate Code Section 16460.

Applicable Statute of Limitations

The Trust Law, which was enacted on recommendation of the Law Revision Commission,² sets out a complete scheme governing claims by beneficiaries against trustees for breach of trust. Section 16460 provides a three-year statute of limitations, running from the time an account or report adequately discloses the existence of a claim or from when the beneficiary discovered or reasonably should have discovered the subject of the claim.³

The *DiGrazia* court concluded that the three-year limitations period provided in Section 16460(a) applies *only* where

1. 22 Cal. App. 4th 1337, 28 Cal. Rptr. 37 (1994).

2. See 1986 Cal. Stat. ch. 820; *Selected 1986 Trust and Probate Legislation*, 18 Cal. L. Revision Comm’n Reports 1201, 1207 (1986).

3. For the language of this section, see the “Proposed Legislation” *infra*.

an “interim or final account in writing, or other written report” is given. If such a report meeting standards determined by the court is not given, then the three-year statute does not apply. This led the court to the conclusion that the general, default four-year statute of limitations in Code of Civil Procedure Section 343 applies.⁴

4. *DiGrazia*, 22 Cal. App. 4th at 1346, 28 Cal. Rptr. 2d at 43. The court cites the Commission’s Comment to Section 16460 as enacted in support of its conclusion, but the opinion edits the Comment language in such a manner as to change its meaning.

The Law Revision Commission’s comments indicate it was well aware that its proposal would create a significant exception to the then-existing statute of limitations applicable to actions for breach of express trust. In the Comment which accompanied section 16460 as originally enacted, the Commission referred specifically to the rule of “prior law” announced in *Cortelyou v. Imperial Land Co.*, supra, 166 Cal. at page 20, 134 P. 981, and *Oeth v. Mason*, supra, 247 Cal.App.2d at pages 811-812, 56 Cal.Rptr. 69, and stated that “[s]ection 16460 is a new provision [which] is an exception to” that prior law.

22 Cal. App. 4th at 1347, 28 Cal. Rptr. 2d at 43.

The Comment actually states: “Section 16460 is an exception to the four-year rule provided in Code of Civil Procedure Section 343.” This is an independent statement, making unambiguous reference to the default statute of limitations in Section 343 — it does not refer to the case law, as the opinion states by using the phrase “that prior law.” In this fashion, the legislative history of Section 16460 was turned on its head.

Compare the court’s presentation with the full text of the relevant part of the Comment to Section 16460 as enacted in 1986. The court drew language from the first and last sentences:

Section 16460 is a new provision drawn in part from Section 7-307 of the Uniform Probate Code (1977). Section 16460 supersedes the provisions of former Civil Code Section 2282 relating to discharge of trustees. For a provision governing consent, release, and affirmance by beneficiaries to relieve the trustee of liability, see Sections 16463-16465. The reference in the introductory clause to claims “otherwise” barred also includes principles such as estoppel and laches that apply under the common law. See Section 15002 (common law as law of state). See also Sections 16461 (exculpation of trustee by provision in trust instrument), 16462 (nonliability for following instructions under revocable trust). During the time that a trust is revocable, the person holding the power to revoke is the one who must receive the account or report in order to commence the running of the limitations period provided in this section. See Sections

Section 16460 is intended as an exception to the general rule of Section 343. In 1986, the Trust Law changed the former rule under which the default four-year statute of limitations in Section 343 was applied, since there was formerly no special rule applicable to trusts. The statute was meant to provide a complete statutory rule, to avoid the need to look outside the statute, and to provide a single measure of the period of limitation. The three-year period is the same as the limitations applicable in cases of fraud.⁵

In applying this rule, there will still be a question of fact as to whether a sufficient disclosure has taken place that triggers the statute under subdivision (a)(1) of Section 16460 (“If a beneficiary has received an interim or final account in writing, or other written report, that adequately discloses the existence of a claim....”). Factual issues are also inherent in the second prong of the rule (“If an interim or final account or other report does not adequately disclose the existence of a claim....”), since the court will have to decide when a beneficiary knew or should have known of the basis of the claim. But the original statute was intended to eliminate this incentive to argue the facts to qualify for a different limitations period — a practice that is now encouraged under the *DiGrazia* rule.

15800 (limits on rights of beneficiary of revocable trust), 16064(b) (exception to duty to account). *Under prior law, the four-year limitations period provided in Code of Civil Procedure Section 343 was applied to actions for breach of express trusts.* See *Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 20, 134 P. 981 (1913); *Oeth v. Mason*, 247 Cal. App. 2d 805, 811-12, 56 Cal. Rptr. 69 (1967). *Section 16460 is an exception to the four-year rule provided in Code of Civil Procedure Section 343.*

See *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm’n Reports 501, 714-15 (1986); emphasis added.

The ellipsis in the last line of the language quoted in the *DiGrazia* opinion represents more than 200 words, in all or part of 13 sentences.

5. See Code Civ. Proc. § 338(d) (three-year period running from time of “discovery, by the aggrieved party, of the facts constituting the fraud”).

Nature of Account or Report Required To Trigger Statute of Limitations

Essential to the *DiGrazia* court's conclusion is the implicit finding that the trustee's letter and other communications to the beneficiary were not written accounts or reports within the terms of the statute. The court specifically holds that "to trigger the operation of section 16460, a trustee's report or account must conform to the minimum standards set out by sections 16061 or 16063 respectively."⁶ This holding is not consistent with the legislative intent, although the policy advanced by the court is worth considering.

An examination of these sections does not support the court's holding on the required contents of an account or report under Section 16460. The standard that needs to be met under Section 16460(a) is whether the account or report "adequately discloses the existence of a claim." On first blush, it may appear useful to clothe this language in Section 16460 with more detail by imposing standards drawn from Sections 16061 and 16063. However, the gain is illusory, since an accounting under Section 16061 or 16063 may or may not satisfy the adequate disclosure standard — the substantive analysis under Section 16460 still has to be made. Nothing is gained by refusing to trigger the statute when a less formal report (or letter) "adequately discloses the existence of a claim."

Recommendations

The Commission recommends amendment of Section 16460 to make clear, consistent with the original intent of the statute, that a three-year limitations period on claims for breach of trust applies whether or not an account or report is given to the beneficiary. If an adequate report is given, then the three-year period runs from the date the report is given;

6. *DiGrazia*, 22 Cal. App. 4th at 1349, 28 Cal. Rptr. 2d at 44-45.

otherwise the three-year period runs from the time the beneficiary discovered or reasonably should have discovered the basis of the claim.

The statute should also be amended to state explicitly that, for the purpose of the limitations period, an account or report need not satisfy the standards of Sections 16061 and 16063. An account or report starts the running of the three-year limitations period if it adequately discloses the basis of the claim.

PROPOSED LEGISLATION

Prob. Code § 16460. Limitations on proceedings against trustee

SECTION 1. Section 16460 of the Probate Code is amended to read:

16460. (a) Unless a claim is previously barred by adjudication, consent, limitation, or otherwise:

(1) If a beneficiary has received an interim or final account in writing, or other written report, that adequately discloses the existence of a claim against the trustee for breach of trust, the claim is barred as to that beneficiary unless a proceeding to assert the claim is commenced within three years after receipt of the account or report. An account or report adequately discloses existence of a claim if it provides sufficient information so that the beneficiary knows of the claim or reasonably should have inquired into the existence of the claim.

(2) If an interim or final account *in writing* or other *written* report does not adequately disclose the existence of a claim against the trustee for breach of trust *or if a beneficiary does not receive any written account or report*, the claim is barred as to that beneficiary unless a proceeding to assert the claim is commenced within three years after the beneficiary discovered, or reasonably should have discovered, the subject of the claim.

(b) For the purpose of subdivision (a), a beneficiary is deemed to have received an account or report, as follows:

(1) In the case of an adult who is reasonably capable of understanding the account or report, if it is received by the adult personally.

(2) In the case of an adult who is not reasonably capable of understanding the account or report, if it is received by the person's legal representative, including a guardian ad litem or other person appointed for this purpose.

(3) In the case of a minor, if it is received by the minor's guardian or, if the minor does not have a guardian, if it is received by the minor's parent so long as the parent does not have a conflict of interest.

(c) A written account or report under this section may, but need not, satisfy the standards provided in Section 16061 or 16063 or any other provision.

Comment. Subdivision (a)(2) of Section 16460 is amended to make clear that it applies both where an insufficient account or report is given the beneficiary as well as where the beneficiary has not received any written account or report. This revision is consistent with the original intent of this section, and rejects the contrary conclusion reached by the court in *DiGrazia v. Anderlini*, 22 Cal. App. 4th 1337, 1346-48, 28 Cal. Rptr. 2d 37, 42-44 (1994). The three-year statute of limitations under subdivision (a) is applicable to all claims for breach of trust and the four-year statute of Code of Civil Procedure Section 343 is inapplicable. See Comment to Section 16460 as enacted by 1986 Cal. Stat. ch. 820, *Selected 1986 Trust and Probate Legislation*, 18 Cal. L. Revision Comm'n Reports 1201, 1424-25 (1986), and as re-enacted by 1990 Cal. Stat. ch. 79, *Recommendation Proposing New Probate Code*, 20 Cal. L. Revision Comm'n Reports 1001, 1940-41 (1990).

Subdivision (c) is added to make clear that the requirements for a written account or report under this section are independent of other statutes. The governing rule determining whether paragraph (1) or paragraph (2) of subdivision (a) applies is whether the account or report "adequately discloses the existence of a claim." Subdivision (c) rejects the holding in *DiGrazia v. Anderlini*, 22 Cal. App. 4th 1337, 1348-49, 28 Cal. Rptr. 2d 37, 44-45 (1994), that an account or report under this section must satisfy the minimum standards set out in Section 16061 or 16063.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Inheritance From or Through Child
Born Out of Wedlock

November 1995

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Inheritance From or Through Child Born Out of Wedlock*, 26 Cal. L. Revision Comm'n Reports 13 (1996).

STATE OF CALIFORNIA

PETE WILSON, Governor

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November 2, 1995

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

This recommendation would make siblings of a child born out of wedlock and their issue subject to the same conditions for inheritance from or through the child as other relatives of the child — the parent or a relative of the parent must have acknowledged, and contributed to the care or support of, the child. In most cases, this will approximate the intent of a deceased intestate child born out of wedlock.

This recommendation is submitted pursuant to Resolution Chapter 87 of the Statutes of 1995.

Respectfully submitted,

Colin W. Wied
Chairperson

INHERITANCE FROM OR THROUGH CHILD BORN OUT OF WEDLOCK

With one exception, if a child is born out of wedlock, neither a natural parent nor a relative of that parent may inherit from or through the child on the basis of the parent and child relationship between that parent and the child unless the parent or a relative of the parent acknowledged and contributed to the care or support of the child.¹ The exception permits a brother or sister of the child or the issue of that brother or sister to inherit from the child notwithstanding failure of the parent or relative to acknowledge and support the child.²

The exception creates an undesirable risk that the estate of a deceased out-of-wedlock child will be claimed by siblings with whom the decedent had no contact during lifetime and of whose existence the decedent was unaware. This is illustrated by *Estate of Corcoran*.³ In the *Corcoran* case, the father had an out-of-wedlock daughter, Hazel, in 1922. The father did not acknowledge or support her. In 1931, the father married another woman. He had two children of that marriage, Thomas and Monica. Hazel died in 1989. Thomas, Hazel's half-brother, claimed a right to inherit from Hazel. There was no evidence that Hazel had known of Thomas' existence. Had Hazel made a will, she would not have provided for him. Although the court held the half-brother would inherit in

1. Prob. Code § 6452. Section 6452 is satisfied if the parent acknowledged the child and a relative of the parent provided the support, or vice versa.

2. *Id.*

3. 7 Cal. App. 4th 1099, 9 Cal. Rptr. 475 (1992).

preference to Hazel's cousins, it appears Hazel would have wanted her estate go to her cousins.⁴

Intestate succession law provides for a distribution that the average decedent probably would have wanted if an intention had been expressed by will.⁵ It is unlikely an out-of-wedlock child would include siblings in a will in circumstances where the parent or relative never acknowledged, supported, or cared for the out-of-wedlock child.

The Law Revision Commission recommends that the statutory exception for siblings of an out-of-wedlock child be deleted.⁶ This would impose on siblings and their issue the same standard for inheriting as other relatives of the out-of-wedlock child.⁷

4. Attorney Chilton Lee of Palo Alto reports a case where the decedent was born out of wedlock and was raised by her mother, aunt, and grandmother. When she died, inheritance was claimed by an alleged half-sibling who had been born out of wedlock to a different mother. The half-siblings did not know each other. Letter from Chilton Lee to California Law Revision Commission (Oct. 22, 1993) (attached to Memorandum 95-17, on file with California Law Revision Commission).

5. Niles, *Probate Reform in California*, 31 *Hastings L.J.* 185, 200 (1979).

6. The prohibition against inheriting from a deceased out-of-wedlock child could be applied to half siblings but not to wholeblood siblings, since the usual fact situation involves half siblings where there is the greatest likelihood that the decedent would have had no familial contact with them during lifetime. *Cf.* Prob. Code § 6451(b). However, the likelihood of an out-of-wedlock child not being acknowledged or supported by the parent but having wholeblood siblings is remote. For this reason, the exception is not worth preserving for wholeblood siblings. Deleting the exception in its entirety will make the statute clearer and easier to understand and apply.

7. It will also minimize the opportunity for fraudulent claims against the estate of the out-of-wedlock child by strangers.

PROPOSED LEGISLATION

Prob. Code § 6452 (amended). Effect of birth out of wedlock

SECTION 1. Section 6452 of the Probate Code is amended to read:

6452. If a child is born out of wedlock, neither a natural parent nor a relative of that parent, ~~except for a brother or sister of the child or the issue of that brother or sister,~~ inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied:

(a) The parent or a relative of the parent acknowledged the child.

(b) The parent or a relative of the parent contributed to the support or the care of the child.

Comment. Section 6452 is amended to delete the “except” clause. This makes siblings of a child born out of wedlock and their issue subject to the same requirements under Section 6452 as other relatives of the out-of-wedlock child. This changes the rule in *Estate of Corcoran*, 7 Cal. App. 4th 1099, 9 Cal. Rptr. 2d 475 (1992).

Although a sibling may not inherit from a deceased out-of-wedlock child through a parent who has failed to acknowledge or contribute to the support of the deceased child, the sibling may nonetheless inherit through the other parent if that parent is not disqualified.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Collecting Small Estate Without Administration

January 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Collecting Small Estate Without Administration*, 26 Cal. L. Revision Comm'n Reports 21 (1996).

STATE OF CALIFORNIA

PETE WILSON, Governor

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January 19, 1996

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

The Commission proposes to codify case law to the effect that property in a trust revocable by the decedent during lifetime is excluded from the maximum estate value for use of summary procedures to collect decedent's property without court-supervised administration.

This recommendation is submitted pursuant to Resolution Chapter 87 of the Statutes of 1995.

Respectfully submitted,

Colin W. Wied
Chairperson

COLLECTING SMALL ESTATE WITHOUT ADMINISTRATION

If the gross value of a decedent's property in this state is small, various summary procedures may be used to collect or obtain title to decedent's property without the need for court-supervised administration.¹ Various kinds of property are excluded from the maximum estate value for use of summary procedures, including joint tenancy property and property in which the decedent had a life or other interest terminable at death.²

The statutory exclusions do not mention property held in a trust revocable³ by the decedent during lifetime. Property in a revocable inter vivos trust is excluded from the \$60,000 estate maximum, because such property is not part of the decedent's estate.⁴ The inter vivos trust is now an important estate planning instrument, and it would be helpful to interested

1. Summary procedures include collecting personal property by affidavit if the gross value of decedent's estate in California does not exceed \$60,000, obtaining a court order determining succession if the gross value of the estate in California does not exceed \$60,000, and obtaining title to real property by affidavit if the gross value of California real property does not exceed \$10,000. See Prob. Code §§ 13000-13210.

2. Prob. Code § 13050.

3. Property in a revocable inter vivos trust is treated for some purposes as decedent's property. See Prob. Code § 19001 (decedent's revocable trust subject to creditors' claims if estate inadequate). *Cf.* Prob. Code § 18200 (revocable trust subject to creditors' claims during settlor's lifetime). Property in an irrevocable inter vivos trust is more immune to creditors' claims, but may be reached by creditors if the settlor is a beneficiary of the trust, Prob. Code § 15304, or received no consideration for creating it, Civ. Code §§ 3439.04, 3439.05. See generally California Trust Administration § 10.32, at 427 (Cal. Cont. Ed. Bar, Feb. 1995).

4. Estate of Heigho, 186 Cal. App. 2d 360, 365, 9 Cal. Rptr. 196 (1960). *Accord*, California Practice Guide Probate § 2:12 (Rutter Group 1994) (inter vivos trust assets "should be disregarded in calculating the dollar limitation").

persons if the statutory exclusions made specific reference to it.⁵ This would not change existing law.

The Commission recommends it be made clear by an express exclusion that property in a revocable inter vivos trust is not included in the decedent's estate for the purpose of the affidavit procedure for collection of decedent's property and other summary collection provisions for small estates.

5. This was suggested by Judge Richard O. Frazee, Sr., Supervising Judge of the Probate Department of the Orange County Superior Court. Letter from Judge Richard O. Frazee, Sr., to Law Revision Commission (September 13, 1995) (attached to Memorandum 95-59, on file with California Law Revision Commission).

PROPOSED LEGISLATION

Prob. Code § 13050 (amended). Property excluded

SECTION 1. Section 13050 of the Probate Code is amended to read:

13050. (a) For the purposes of this part:

(1) Any property or interest or lien thereon which, at the time of the decedent's death, was held by the decedent as a joint tenant, or in which the decedent had a life or other interest terminable upon the decedent's death, *including but not limited to property in a trust revocable by the decedent during lifetime*, or which was held by the decedent and passed to the decedent's surviving spouse pursuant to Section 13500, shall be excluded in determining the property or estate of the decedent or its value.

(2) A multiple-party account to which the decedent was a party at the time of the decedent's death shall be excluded in determining the property or estate of the decedent or its value, whether or not all or a portion of the sums on deposit are community property, to the extent that the sums on deposit belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary. For the purposes of this paragraph, the terms "multiple-party account," "party," "P.O.D. payee," and "beneficiary" are defined in Article 2 (commencing with Section 5120) of Chapter 1 of Part 2 of Division 5.

(b) For the purposes of this part, all of the following property shall be excluded in determining the property or estate of the decedent or its value:

(1) Any vehicle registered under Division 3 (commencing with Section 4000) of the Vehicle Code or titled under Division 16.5 (commencing with Section 38000) of the Vehicle Code.

(2) Any vessel numbered under Division 3.5 (commencing with Section 9840) of the Vehicle Code.

(3) Any manufactured home, mobilehome, commercial coach, truck camper, or floating home registered under Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code.

(c) For the purposes of this part, the value of the following property shall be excluded in determining the value of the decedent's property in this state:

(1) Any amounts due to the decedent for services in the armed forces of the United States.

(2) The amount, not exceeding five thousand dollars (\$5,000), of salary or other compensation, including compensation for unused vacation, owing to the decedent for personal services from any employment.

Comment. Subdivision (a)(1) of Section 13050 is amended to add the reference to a trust revocable by the decedent during lifetime. It is a specific application of the principle stated in subdivision (a)(1) that property in which the decedent had an interest terminable at death is excluded in determining the property or estate of the decedent for purposes of this part. This codifies case law. See Estate of Heigho, 186 Cal. App. 2d 360, 364-65, 9 Cal. Rptr. 196 (1960).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Repeal of Civil Code Section 1464:
The First Rule in Spencer's Case

November 1995

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Repeal of Civil Code Section 1464: The First Rule in Spencer's Case*, 26 Cal. L. Revision Comm'n Reports 29 (1996).

STATE OF CALIFORNIA

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November 2, 1995

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

This recommendation of the California Law Revision Commission proposes the repeal of Civil Code Section 1464, a relic of the 1872 Field Code. Section 1464 codifies the First Rule in Spencer's Case (1583) — that a covenant affecting something not in being does not run with the land unless the word "assigns" is mentioned. The section is inconsistent with modern concepts of construction of instruments and conflicts with more recently enacted statutes.

This recommendation is submitted pursuant to Resolution Chapter 87 of the Statutes of 1995.

Respectfully submitted,

Colin W. Wied
Chairperson

REPEAL OF CIVIL CODE SECTION 1464: THE FIRST RULE IN SPENCER'S CASE

Civil Code Section 1464 provides:

1464. A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property, and made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with land so far only as the assigns thus mentioned are concerned.

This provision was enacted as part of the 1872 Civil Code and has not been amended since. It is drawn from David Dudley Field's draft code¹ and codifies the common law First Rule in Spencer's Case.² That case deals with the question whether a covenant by a tenant "for him, his executors, and administrators" to build a brick wall on leased premises binds the tenant's assignee. The First Rule in Spencer's Case states that a covenant concerning something not in existence must expressly mention "assigns" in order to run with the land. (The Second, and more important Rule in Spencer's Case, is that a covenant must "touch and concern" the land in order to run.³)

Section 1464 addresses the issue of the requisite expression of intent for a covenant to run with the land. The ancient concept that a specific word such as "assigns" must be mentioned has generally been discarded throughout the United

1. Section 695.

2. 5 Co. Rep. 16a, 77 Eng. Rep. 72, 74 (K.B. 1583).

3. *Spencer's Case*, 77 Eng. Rep. at 74.

States,⁴ as well as in England⁵ where the concept originated. The modern concept is that whether a covenant is intended to run with the land is determined from the entire instrument and that use of the word “assigns” is not necessary.⁶

The requirement of Section 1464 that assigns must be mentioned has been largely eclipsed by later enacted provisions of the Civil Code that provide a more liberal standard for determining intent. Sections 1469 and 1470, enacted in 1953, include a provision that a covenant by an owner of property to improve contiguous leased premises does not run with the land unless successive owners “are in the lease expressed to be bound thereby for the benefit of the demised real property.” Likewise, Section 1468(b), as revised in 1968 and thereafter, includes a provision that a covenant for improvement of land made between a grantor and grantee of the land runs with the land if “successive owners of the land are in such instrument expressed to be bound thereby for the benefit of the land owned by, granted by, or granted to the covenantee.”

The later enacted statutes codify the modern trend of the law concerning formalities such as use of the word “assigns.”⁷ The later enacted statutes are also broader in their application than the codification in Section 1464 of the particular

4. See, e.g., *Purvis v. Shuman*, 273 Ill. 286, 112 N.E. 679 (1916); Williams, *Restrictions on the Use of Land: Covenants Running with the Land at Law*, 27 Tex. L. Rev. 428-29 (1949); C. Berger, *Land Ownership and Use* § 10.5 (3d ed. 1983); 5 R. Powell & P. Rohan, *Powell on Real Property* ¶ 673[2] [b] (1994).

5. Bordwell, *English Property Reform and Its American Aspects*, 37 Yale L.J. 1, 27 (1927).

6. See, e.g., French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. Cal. L. Rev. 1261, 1285 (1982); Coskran, *Assignment and Sublease Restrictions: The Tribulations of Leasehold Transfers*, 22 Loy. L.A. L. Rev. 405, 557 (1989).

7. See 7 H. Miller & M. Starr, *Current Law of California Real Estate* § 22:2 (2d ed. 1990); 4 B. Witkin, *Summary of California Law Real Property* § 487 (9th ed. 1987).

circumstances of Spencer's Case. If a case were to arise in which either Section 1464 or one of the later enacted statutes could be applied, it is not clear which would be held to prevail.

The Law Revision Commission recommends that Section 1464 be repealed. It is an unnecessarily formalistic relic of a bygone era and is inconsistent with modern concepts of construction of instruments. It conflicts with more recently enacted statutes, and its existence creates the potential for litigation over which statute should be applied. Repeal of the provision would supplant a codification of 1583 English law with modern legislation and contemporary common law.

PROPOSED LEGISLATION

Civ. Code § 1464 (repealed). First Rule in Spencer's Case

SECTION 1. Section 1464 of the Civil Code is repealed.

~~1464. A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property, and made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with land so far only as the assigns thus mentioned are concerned.~~

Comment. Section 1464 is repealed because it is inconsistent with modern principles of construction of instruments and is eclipsed by the broader provisions of more recently enacted statutes. See Sections 1468, 1469, and 1470, which do not require use of the word "assigns" in order that a covenant run with the land, but only that successive owners are "expressed to be bound" in the instrument. See also 7 H. Miller & M. Starr, *Current Law of California Real Estate* § 22:2 (2d ed. 1990); 4 B. Witkin, *Summary of California Law Real Property* § 487 (9th ed. 1987). Section 1464 codified the First Rule in Spencer's Case, a common law principle that is now discredited in both the United States and Great Britain. See, e.g., Bordwell, *English Property Reform and Its American Aspects*, 37 *Yale L.J.* 1, 27 (1927); C. Berger, *Land Use and Ownership* § 10.5 (3d ed. 1983); 5 R. Powell & P. Rohan, *Powell on Property* ¶ 673[2] (1994).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Homestead Exemption

April 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Homestead Exemption*, 26 Cal. L. Revision Comm'n Reports 37 (1996).

STATE OF CALIFORNIA

PETE WILSON, Governor

CALIFORNIA LAW REVISION COMMISSION

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April 12, 1996

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

The Commission proposes repealing the declared homestead exemption and amending the automatic homestead exemption to protect proceeds of a voluntary sale on the same basis as other homestead proceeds are protected. Dwelling proceeds would be exempt in the homestead exemption amount, to the extent traceable in deposit accounts and cash or its equivalent, with the burden on the exemption claimant to prove the exemption. Proceeds would be exempt for six months for the purpose of purchasing another qualifying homestead or else applied to satisfaction of creditors' liens. Consistent with the general rule applicable to execution sales, the statute would be revised to require satisfaction of senior liens and encumbrances, rather than all liens and encumbrances on the property, and junior liens would be extinguished by an execution sale on a senior lien.

This recommendation is submitted pursuant to Resolution Chapter 87 of the Statutes of 1995.

Respectfully submitted,

Colin W. Wied
Chairperson

HOMESTEAD EXEMPTION

The Enforcement of Judgments Law¹ contains two procedures relating to homestead exemptions from enforcement of money judgments: the automatic homestead exemption and the homestead declaration.² This recommendation proposes repealing the homestead declaration procedure and preserving its primary benefit, the voluntary sale proceeds exemption, in the general automatic homestead exemption. Additional technical revisions are also proposed.

Background

The California Constitution requires the Legislature to “protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families.”³ But there is no requirement that the law provide a homestead *declaration* procedure. The procedure for implementing this constitutional mandate is determined by the Legislature.⁴

California has not always had a homestead declaration procedure. A claimed homestead procedure existed from 1851 until it was superseded by the declared homestead in the early

1. See 1982 Cal. Stat. ch. 1364, operative July 1, 1983. The Enforcement of Judgments Law was enacted on recommendation of the Commission. See *1982 Creditors' Remedies Legislation*, 16 Cal. L. Revision Comm'n Reports 1001, 1009 (1982).

2. See Code Civ. Proc. §§ 704.710-704.850 (“automatic” homestead exemption), 704.910-704.995 (declared homesteads). (All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.) The homestead declaration procedure is not complete, incorporating many substantive provisions of the automatic homestead exemption. See Sections 704.910(c) & (e), 704.950(c)(2), 704.960(a), 704.965, 704.970(b), 704.995(c). The Commission recommended repeal of the declared homestead in favor of the automatic homestead in its 1980 report. See *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001, 2090-93, 2611-12 (1980).

3. Cal. Const. art. XX, § 1.5.

4. See, e.g., *Noble v. Hook*, 24 Cal. 638 (1864).

1860's.⁵ For over a century, the homestead was protected against money judgment liens only if the homestead declaration was recorded before the judgment lien. The principle of first in time, first in right was applied with drastic consequences to the tardy debtor. To protect families of debtors who failed to record the exemption before death, the probate homestead procedure was developed, permitting the court to declare an exemption.⁶

In 1974, the Legislature enacted a second procedure enabling a debtor who had not recorded a homestead declaration to claim an exemption when the dwelling was levied on under a writ of execution.⁷ The judgment creditor was required to petition for issuance of a writ of execution directed against a dwelling and give notice to the debtor who could then assert the exemption. This procedure was substantially revised in the Enforcement of Judgments Law enacted in 1982, resulting in the homestead exemption procedure in Code of Civil Procedure Sections 704.710-704.850. The probate homestead was put on an independent footing, unrelated to the homestead declaration.⁸

Automatic Homestead Exemption

The “automatic” homestead exemption — or dwelling house exemption, as it is also known — requires the judgment creditor to initiate court proceedings to determine whether the property is exempt and the amount of the exemption. Gener-

5. For detailed background on the history of the exemption, see *Taylor v. Madigan*, 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1975); Adams, *Homestead Legislation in California*, 9 Pac. L.J. 723 (1978) (prepared by Commission consultant).

6. See *Taylor v. Madigan*, 53 Cal. App. 3d 943, 968, 126 Cal. Rptr. 376 (1975).

7. See 1974 Cal. Stat. ch. 1251, superseded by a revised but similar procedure, 1976 Cal. Stat. ch. 1000.

8. See Prob. Code §§ 60, 6520-6528; *Recommendation Relating to Probate Homestead*, 15 Cal. L. Revision Comm'n Reports 401 (1980).

ally where property is levied on to enforce a money judgment, the debtor is given notice of levy and must make an exemption claim within 10 days.⁹ A creditor who levies on a “dwelling,”¹⁰ which may be an exempt homestead, may not have it sold to enforce a money judgment without first obtaining a court order for sale. The creditor must apply for the order for sale within 20 days after notice of levy is served on the judgment debtor.¹¹ The judgment creditor’s application is not simple: the creditor must determine whether the county tax assessor’s records show a current homeowner’s exemption or disabled veteran’s exemption, must state on information and belief whether the dwelling is a homestead, the amount of the exemption, and whether there is a homestead declaration recorded, and must state the amount of liens and encumbrances and the address of other lien creditors and encumbrancers as shown in the recorder’s files.¹² The creditor must give notice of the application, including personal service on any occupant, at least 30 days before the hearing.¹³ At the hearing, the creditor has the burden of showing the dwelling is not exempt if there is a tax exemption on file in the tax assessor’s office; otherwise, the burden is on the debtor to prove the exempt status.¹⁴ The property is appraised, and if it is of sufficient value, it is ordered to be sold. Notice of the sale cannot be given until at least 120 days after the notice of levy.¹⁵ Ultimately, the homestead cannot be sold unless the bid exceeds the amount of the applicable homestead exemp-

9. Section 703.520.

10. A detailed definition of “dwelling” is set out in Section 704.710.

11. Sections 704.740-704.750.

12. Section 704.760.

13. Section 704.770.

14. Section 704.780(a). This delay affords an opportunity for the debtor to redeem from the lien.

15. Section 701.545.

tion plus the amount necessary to satisfy all liens and encumbrances on the property, and the price must be 90 percent of the appraised value unless the court orders otherwise.¹⁶ Proceeds of a sale are distributed first to pay off “all liens and encumbrances,” second to the debtor in the amount of the exemption, third to the levying officer for costs, and finally to the judgment creditor to apply to the judgment.¹⁷

This procedure is highly protective of debtors’ homesteads. There are multiple notices, including personal service, built-in delays and a second chance proceeding, significant procedural burdens, appraisals with presumptive minimum bids, and burden shifting. In light of these protections, there is no need for a separate homestead declaration procedure.

Modern Declared Homestead Exemption

The minimal declared homestead procedure that has existed since 1982 is largely a formality. A homeowner or spouse of a homeowner may record a homestead declaration describing the principal dwelling. The declaration must be acknowledged in the manner of a conveyance of real property.¹⁸ Unlike its predecessor, the modern homestead declaration has no effect on the right to convey or encumber the property.¹⁹ Nor does it prevent creation of judgment liens.²⁰ It does not prevent attachment liens²¹ or state tax liens.²²

While the real homestead protection lies in the automatic exemption statute, the homestead declaration provides several

16. Section 704.800.

17. Section 704.850.

18. Sections 704.920-704.930.

19. Section 704.940.

20. Section 704.950(c).

21. Section 487.025.

22. Gov’t Code § 7170(a).

distinct features that must be evaluated before the procedure can be repealed:

1. *Judgment lien attaches only to surplus value.* Section 704.950 is a major source of confusion. Subdivision (a) provides that judgment liens do not attach to property subject to a prior homestead declaration, seemingly preserving the old shield rule. However, subdivision (a) is subject to the exception provided in subdivision (c), which provides that a judgment lien *does* attach to the surplus value of the property over all senior liens and encumbrances plus the homestead exemption amount. Thus, the exception in subdivision (c) eats up the rule in subdivision (a).²³

This section presents a conceptual conundrum. How can it be determined whether the judgment lien has attached? The amount of the homestead exemption can change, as well as the amount of senior liens. A judgment lien attaches to any property owned or acquired by a debtor in the county where the abstract of judgment is recorded; it is a “dragnet” lien and is not directed at particular property.²⁴ How can it be determined when the lien attaches since the value of the property is unknown in the absence of a sale or appraisal? Section 704.950(a) provides that the lien does not attach, subject to the exception in subdivision (c). Subdivision (c) provides that the lien attaches to the surplus value, but does not say when the lien attaches. Arguably it attaches only when the surplus value exists. Section 704.965 locks in the exemption amount at the time when the lien attaches, but when is that?

This rule, then, does not appear to provide any clear advantage to the homestead declaration. Theoretically, it might be easier to sell real property free of the judgment lien if there

23. Subdivision (c) was added to Section 704.950 at the last opportunity when the bill was before the Legislature, as is evident from the Comment which was not revised to reflect the final statutory language.

24. See Section 697.340.

were a prior homestead declaration recorded, assuming that the debtor's equity in the property was agreed by all parties to be less than the homestead exemption amount at the time of transfer. But this does not appear to be a practical advantage, and does not justify continuing the cumbersome homestead declaration procedure.

2. *Exemption of proceeds of voluntary sale.* Section 704.960(a) protects the proceeds of a voluntary sale of the homestead for six months after the date of sale.²⁵ The automatic homestead exemption protects proceeds of sale, but only where the homestead is sold at an execution sale, is damaged or destroyed, or is acquired for public use — in other words, not in the case of a voluntary sale.²⁶ The proceeds exemption is limited, however, so that it does not include any increase in the exemption occurring after a judgment lien attaches.²⁷ This is consistent with the general rule that the amount of an exemption is determined according to the law in effect when the creditor's lien attaches to the property.²⁸

25. The voluntary sale proceeds exemption originated in 1911. See former Civ. Code § 1265, as amended by 1911 Cal. Stat. ch. 45, § 1. The proceeds exemption remained essentially unchanged until it was replaced by Section 704.960 in 1982. See 1982 Cal. Stat. ch. 497, § 8; 1982 Cal. Stat. ch. 1364, § 2.

26. See Section 704.720(b).

27. Section 704.965. This rule was added to the law in conjunction with a bill increasing the amount of the homestead exemption. See 1984 Cal. Stat. ch. 454. The limitation in Section 704.965 is irrelevant to the homestead exemption as applied in a forced sale by the judgment creditor. See Section 704.970(b). If a second homestead is purchased with exempt proceeds limited by the rule in Section 704.965, it appears that the exemption of voluntary sale proceeds from the second homestead would also be limited to the level locked in by the order of recording the judgment lien and initial homestead declaration. Similarly, if the homestead declaration had been recorded before any attachment or judgment lien, the debtor would have the benefit of any increased exemption amounts based solely on order of recording.

28. Section 703.050. See also Section 703.060 (liens deemed granted by statute in recognition of power of state to repeal, alter, or add to exemptions).

Under existing law, a sufficiently sophisticated debtor would simply record a homestead declaration before a voluntary sale of the home and thereby protect the proceeds for six months in the amount applicable when the creditor's lien attached. The Commission can envision no public policy that is served by the formality of recording a declaration in such circumstances. The creditor cannot prevent the recording of the declaration. The proceeds exemption follows mechanically from the act of recording a piece of paper. The specific amount of the voluntary proceeds exemption depends on the fortuity of the order in which the debtor and the creditor record their respective papers. The recording has no relation to any other act. It is not reviewed and notice is not given. It is not subject to contest at the time of recording. The protection of voluntary sale proceeds depends solely on the arbitrary factor of whether the debtor has remembered to record a paper, a paper which will then clutter up the public records for years, since it describes as a homestead property that the debtor intends to sell shortly after the declaration is recorded.

The justification for the reforms of the old homestead declaration, which resulted in the modern automatic homestead exemption, apply as well to the exemption of proceeds. Since a prior judgment lien does not prevent recording a homestead declaration with its attendant voluntary sale proceeds exemption, the proceeds exemption should be incorporated into the automatic homestead exemption. The better procedure is the general one — proceeds of a voluntary sale are exempt for six months following sale and the burden is on the debtor to prove the exemption and trace the proceeds.²⁹ Consistent with general principles,³⁰ the exemption amount would be deter-

29. For the general rules applicable to proceeds exemptions, see, e.g., Sections 703.030 (manner of claiming exemptions; effect of failure to claim), 703.080 (tracing exempt funds).

30. See Section 703.100.

mined under the law in effect at the time the judgment creditor's lien attached to the homestead.

An important limitation on the proceeds exemption should be codified. The purpose of the proceeds exemption is to enable the judgment debtor to substitute one home for another without losing the exemption.³¹

3. *Relation-back of declared homestead.* Section 704.960(b) provides a portability feature, permitting the debtor to record a homestead declaration on property acquired with proceeds from a sale of a declared homestead and continue the original recording priority in the new homestead. This applies to any exempt homestead proceeds, whether from voluntary or forced sale, or reimbursement from insurance, so long as the new declaration is recorded within six-month period during which proceeds are protected.

This feature also permits the debtor to lock in the opportunity to take advantage of later statutory increases in the homestead exemption amounts.³² A person who records a homestead declaration before a creditor's lien attaches can preserve that priority and receive the benefit of increased exemptions in proceeds and in a home purchased with exempt proceeds.³³

31. *Thorsby v. Babcock*, 36 Cal. 2d 202, 205, 222 P. 2d 863 (1950); *Ortale v. Mulhern*, 58 Cal. App. 3d. 861, 864, 130 Cal. Rptr. 277 (1976).

32. See Section 704.965.

33. The exact outcome depends on the interpretation given Section 704.965. If the creditor's judgment lien attaches as of the time it is recorded, notwithstanding the language of Section 704.950(c) concerning what amount the lien attaches to (surplus over senior liens and homestead exemption amount under Section 704.730), then the problem is a simple one of comparing dates of recording. But if the creditor "obtains" a lien only at the instant that the value of the homestead actually exceeds the value of liens senior to the judgment lien at the time it was recorded plus the value of the homestead exemption — then the increased exemption, by relation back, would have the effect of forestalling the time when the judgment lien could attach to any surplus value. It is also assumed that Section 704.965 serves as an exception to the general rule in Section 703.050 that the amount of an exemption is fixed as of the time the creditor's lien is created on the property.

The general rule is that the amount of an exemption is determined under the law in effect when the creditor's lien attached to the property.³⁴ The general rule should be applied to homesteads, independent of the fortuity of whether a homestead declaration may have been filed.

4. *Continuation of homestead after death.* Section 704.995 provides that the protection of the declared homestead from a creditor having an attachment lien, execution lien, or judgment lien continues after the death of the declared homestead owner if the dwelling was the principal dwelling of the surviving spouse or a member of the decedent's family to whom an interest in the dwelling passes. But subdivision (c) provides that the amount of the exemption is determined under Section 704.730 in the general procedure depending on the circumstances of the case at the time the amount is required to be determined.³⁵ Where special protection of the family home is appropriate, the probate homestead is the better procedure.³⁶ The existing homestead declaration procedure provides no meaningful, additional protection in the case of enforcement proceedings. Section 704.995 harks back to a time when the declared homestead created important rights in homestead property that could descend to the survivors even contrary to a testamentary disposition.

5. *Prima facie evidence.* Section 704.940 provides that the homestead declaration is prima facie evidence of the matters stated, which would include the statement that the property is the dwelling of the persons listed. Arguably, this provision may put some burden on the judgment creditor in proceedings to sell a dwelling. However, the relevant procedural provi-

34. Section 703.050.

35. This is in apparent conflict with the rule in Section 704.965.

36. See Prob. Code §§ 60, 6520-6528; *Recommendation Relating to Probate Homestead*, 15 Cal. L. Revision Comm'n Reports 401 (1980).

sions do not shift the burden to the creditor as in the case of a current homeowner's tax exemption or disabled veteran's tax exemption.³⁷ While the creditor is required to determine and report whether there is homestead declaration³⁸ as part of the procedure for obtaining an order for sale of a dwelling, no statutory duty results from the report.

Problems Created by Separate Homestead Declaration

Procedure

The declared homestead provisions present a number of problems which should be weighed against any claimed advantages:

1. *Uncertainty.* The one feature a declared homestead procedure based on filing with the county recorder should have is certainty — yet no one can rely on the validity of a homestead declaration. The filing sits in the records, but has little meaning unless it is tested in execution proceedings. The debtor may have moved to another residence or the debtor's marriage may be dissolved. A later declaration as to different property acts as an abandonment *pro tanto* of the interest of the declarant.³⁹ Thus, if spouses choose to live apart, and a second (or second and third) declaration is recorded, the first declaration becomes meaningless.

2. *Illusory protection.* The homestead declaration provides little real protection for the family home. The most important protections (other than the voluntary sale proceeds exemption) are embodied in the automatic homestead. The homestead declaration can only give a false sense of security. In any event, most homeowners have no need for the protection, because most homeowners never become judgment debtors. If

37. See Section 704.780.

38. Section 704.760(b).

39. Section 704.990(b).

they do become judgment debtors, the statute should provide essential protections without regard to whether a paper may have been filed at some time in the past.

3. *Opportunity for misleading homestead declaration mills.* Anyone who has purchased a house in recent years has probably received one or more solicitations from the homestead declaration mills.⁴⁰ Experience with these dubious operations, whose broadsides typically misrepresent the law, impelled the Legislature to enact a consumer protection statute governing homestead filing services.⁴¹ One operator who ran afoul of the statute mailed approximately four million solicitations in a four-year period *after* enactment of the regulatory statute.⁴² Repeal of the declared homestead would put an end to the opportunity to profit from causing undue alarm and confusing homeowners throughout the state.

Satisfaction of Other Liens and Encumbrances

The minimum bid in the sale of a homestead must include an amount sufficient to satisfy “all liens and encumbrances on the property.”⁴³ This language is an artifact surviving from the time when a judgment lien could not attach if there was a prior homestead declaration on record.⁴⁴ Notwithstanding the

40. See Arthur M. Louis, *Homesteading Scam Targets Unwary Homeowners*, San Francisco Chronicle, Sept. 19, 1994, at B1, B3. For a sample solicitation from Morse & Associates, see Memorandum 95-22, Exhibit pp. 22-24, on file with California Law Revision Commission. The text of the solicitation is also set out in Appendix A to *In re Morse*, 11 Cal. 4th 184, 900 P.2d 1170, 44 Cal. Rptr. 2d 620, 637-39 (1995).

41. See Bus. & Prof. Code § 17537.6.

42. See *People v. Morse*, 21 Cal. App. 4th 259, 25 Cal. Rptr. 2d 816 (1993); see also *In re Morse*, 11 Cal. 4th 184, 900 P.2d 1170, 44 Cal. Rptr. 2d 620 (1995).

43. Section 704.800.

44. See discussions of prior law in *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001,

prior homestead declaration, however, the creditor could seek enforcement of the money judgment by writ of execution. If the property was sold on execution without a pre-existing judgment lien in favor of the creditor, there would be no junior liens practically speaking, and *all* the other liens on the property, whether mortgage liens, tax liens, other judgment liens, would be superior to the creditor's execution lien. If the creditor had won the race to the recorder's office and the judgment lien had attached first, then there would be no application of the "all liens and encumbrances" language since the homestead exemption would not apply. Instead, the various lienors would have had an opportunity to engage in several rounds of redemptions, with junior lienholders redeeming from their seniors and the debtor redeeming where possible.

Under existing law, the "all liens and encumbrances" language can act in an arbitrary and unreasonable manner, benefiting the profligate or severely unlucky debtor. If a debtor has enough liens on the property, no creditor can reach it because any creditor would have to pay off all other liens, junior and senior, under the terms of the statute. On the other side of the coin, the home of a more responsible debtor would not be as hard to reach.

Recommendations⁴⁵

Continuation of voluntary sale proceeds exemption. The Commission proposes repealing the declared homestead exemption and amending the automatic homestead exemption to protect proceeds of a voluntary sale for a six-month period on the same basis as other homestead proceeds are protected. Dwelling proceeds would be exempt to the extent traceable in

2094 (1980); Adams, *Homestead Legislation in California*, 9 Pac. L.J. 723 (1978); Taylor v. Madigan, 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1975).

45. Additional technical revisions would also be made. These changes are noted in the Comments to the sections in the proposed legislation, *infra*.

deposit accounts and cash or its equivalent, with the burden on the exemption claimant to prove the exemption.

Limitation on use of proceeds. Exempt proceeds would be held as agreed by the debtor and creditor or deposited in a controlled account subject to the limitation that the funds could be applied only to a new qualifying homestead or to satisfaction of the judgment. This rule is consistent with the purpose of the exemption to protect a home for the debtor and the debtor's family. During the six-month period, the exempt fund would continue to be subject to unsatisfied liens on the homestead.

Priority treatment of support enforcement. The proceeds from a voluntary sale of a homestead should presumptively be subject to enforcement of judgments for child, family, or spousal support. However, if a support obligor has other obligations for child, family, or spousal support, the support obligor should be able to seek a court order on noticed motion for an equitable determination of the extent to which the exemption should apply.⁴⁶

Elimination of "all liens and encumbrances" rule. The statute should be revised to require satisfaction of *senior* liens and encumbrances, rather than *all* liens and encumbrances on the property, and junior liens would be extinguished, consistent with the general rule applicable to execution sales.

46. This proposal rectifies a confusing aspect of the existing statutes. Under general exemption rules provided in Section 703.070, exemptions apply to enforcement of child, family, or spousal support unless the support obligee obtains an order for the equitable determination of the extent to which the exemption can be applied to the support obligation. However, under Section 704.950(b), a homestead declaration does not apply to a judgment lien created by recording a support judgment. The full implications of this section are unclear, but it has been interpreted in practice to mean that there is no exemption of proceeds of a voluntary sale of a homestead.

PROPOSED LEGISLATION

Bus. & Prof. Code § 17537.6 (repealed). Homestead filing service regulation

SECTION 1. Section 17537.6 of the Business and Professions Code is repealed.

~~17537.6. (a) It is unlawful for any person to make any untrue or misleading statements in any manner in connection with the offering or performance of a homestead filing service. For the purpose of this section, an “untrue or misleading statement” means and includes any representation that any of the following is true:~~

~~(1) The preparation or recordation of a homestead declaration will in any manner prevent the forced sale of a judgment debtor’s dwelling.~~

~~(2) The preparation or recordation of a homestead declaration will prevent the foreclosure of a mortgage, deed of trust, or mechanic’s lien.~~

~~(3) Any of the provisions relating to the homestead exemption set forth in Article 4 (commencing with Section 704.710) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure are available only to persons who prepare or record a homestead declaration.~~

~~(4) A homestead declaration is in any way related to the obtaining of any applicable homeowner’s exemption to real property taxes.~~

~~(5) The preparation or recordation of a homestead declaration is required by law in any manner.~~

~~(6) The offeror of the homestead filing service has a file or record covering a person to whom a solicitation is made.~~

~~(7) The offeror of the homestead filing service is, or is affiliated with, any charitable or public service entity unless the offeror is, or is affiliated with, a charitable organization~~

~~which has qualified for a tax exemption under Section 501(c)(3) of the Internal Revenue Code.~~

~~(8) The offeror of the homestead filing service is, or is affiliated with, any governmental entity. A violation of this paragraph includes, but is not limited to, the following:~~

~~(A) The misleading use of any governmental seal, emblem, or other similar symbol.~~

~~(B) The use of a business name including the word "homestead" and the word "agency," "bureau," "department," "division," "federal," "state," "county," "city," "municipal," "California," or "United States," or the name of any city, county, city and county, or any governmental entity.~~

~~(C) The use of an envelope that simulates an envelope containing a government check, tax bill, or government notice or an envelope which otherwise has the capacity to be confused with, or mistaken for, an envelope sent by a governmental entity.~~

~~(b)(1) It is unlawful to offer to perform a homestead filing service without making the following disclosure:~~

~~THIS HOMESTEAD FILING SERVICE IS NOT ASSOCIATED WITH ANY GOVERNMENT AGENCY.~~

~~YOU DO NOT HAVE TO RECORD A HOMESTEAD DECLARATION.~~

~~RECORDING A HOMESTEAD DECLARATION DOES NOT PROTECT YOUR HOME AGAINST FORCED SALE BY A CREDITOR. YOU MAY WISH TO CONSULT A LAWYER ABOUT THE BENEFITS OF RECORDING A HOMESTEAD DECLARATION.~~

~~IF YOU WANT TO RECORD A HOMESTEAD, YOU CAN FILL OUT A HOMESTEAD DECLARATION FORM BY YOURSELF, HAVE YOUR SIGNATURE NOTARIZED, AND HAVE THE FORM RECORDED BY THE COUNTY RECORDER.~~

(2) The disclosure specified in paragraph (1) shall be placed at the top of each page of every advertisement or promotional material disseminated by an offeror of a homestead filing service and shall be printed in 12-point boldface type enclosed in a box formed by a heavy line.

(3) The disclosure specified in paragraph (1) shall be recited at the beginning of every oral solicitation and every broadcast advertisement and shall be delivered in printed form as prescribed by paragraph (2) before the time each person who responds to the oral solicitation or broadcast advertisement is obligated to pay for any service.

(c) In addition to any other service, every offeror of a homestead filing service shall deliver each notarized homestead declaration to the appropriate county recorder for recordation as soon as needed or required by a homestead declarant, but no later than 10 days after the homestead declaration is notarized. The offeror of the homestead filing service shall pay all fees charged in connection with the notarization and recordation of the homestead declaration.

(d) No offeror of a homestead filing service shall charge, demand, or collect any money until after the homestead declaration is recorded. The total amount charged, demanded, or collected by an offeror of a homestead filing service, including all fees for notarization and recordation, shall not exceed twenty-five dollars (\$25).

(e) For the purposes of this section, the following definitions apply:

(1) "Homestead filing service" means any service performed or offered to be performed for compensation in connection with the preparation or completion of a homestead declaration or in connection with the assistance in any manner of another person to prepare or complete a homestead declaration. "Homestead filing service" does not include any service performed by an attorney at law authorized to practice

~~in this state for a client who has retained that attorney or an employee of that attorney acting under the attorney's direction and supervision.~~

(2) A "homestead declaration" has the meaning described in ~~Article 5 (commencing with Section 704.910) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure.~~

Comment. Former Section 17537.6 is superseded by new Section 17537.6.

Bus. & Prof. Code § 17537.6 (added). Unlawful to offer homestead filing service

SEC. 2. Section 17537.6 is added to the Business and Professions Code, to read:

17537.6. (a) On and after January 1, 1997, it is unlawful for any person to offer a homestead filing service.

(b) For the purposes of this section, the following definitions apply:

(1) "Homestead filing service" means any service performed or offered to be performed for compensation in connection with the preparation or completion of a homestead declaration or in connection with the assistance in any manner of another person to prepare or complete a homestead declaration.

(2) A "homestead declaration" has the meaning provided in former Article 5 (commencing with Section 704.910) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure.

Comment. Section 17537.6 reflects the repeal of the homestead declaration procedure. See also Code Civ. Proc. § 694.090 (effect of homestead declaration under former law).

Code Civ. Proc. § 487.025 (repealed). Right to attach declared homestead

SEC. 3. Section 487.025 of the Code of Civil Procedure is repealed:

~~487.025. (a) The recording of a homestead declaration (as defined in Section 704.910) does not limit or affect the right of a plaintiff to attach the declared homestead described in the homestead declaration, whether the homestead declaration is recorded before or after the declared homestead is attached.~~

~~(b) An attachment lien attaches to a homestead (as defined in Section 704.710) in the amount of any surplus over the total of the following:~~

~~(1) All liens and encumbrances on the homestead at the time the attachment lien is created.~~

~~(2) The homestead exemption set forth in Section 704.730.~~

~~(c) Nothing in subdivision (a) or (b) limits the right of the defendant to an exemption under subdivision (b) of Section 487.020.~~

~~(d) Notwithstanding subdivision (b), a homestead (as defined in Section 704.710) is exempt from sale to the extent provided in Section 704.800 when it is sought to be sold to enforce the judgment obtained in the action in which the attachment was obtained.~~

Comment. Section 6528 is repealed because it is not necessary in view of the repeal of the homestead declaration procedure. See also Code Civ. Proc. § 694.090 (effect of homestead declaration under former law).

Code Civ. Proc. § 694.090 (amended). Effect of homestead declaration

SEC. 4. Section 694.090 of the Code of Civil Procedure is amended to read:

694.090. On and after the operative date *January 1, 1997*, a declaration of homestead made under prior law pursuant to Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code is effective only to the extent provided in

or Article 5 (commencing with Section 704.910) of Chapter 4 of Division 2 of *this code is ineffective*.

Comment. Section 694.090 is amended to reflect the repeal of the homestead declaration procedure in Sections 704.910-704.995. The homestead exemption is governed by Sections 704.710-704.860. The protection of voluntary sale proceeds under the former homestead declaration procedure is continued in Section 704.720.

Code Civ. Proc. § 703.145 (added). Homestead exemption in bankruptcy

SEC. 5. Section 703.145 is added to the Code of Civil Procedure, to read:

703.145. For the purpose of subdivision (a) of Section 703.140, the amount of and qualifications for the homestead exemption shall be determined under Article 4 (commencing with Section 704.710) without regard to the procedural rules, the rules governing the rights of judgment creditors, and other limitations and conditions provided by that article.

Comment. Section 703.145 is new. This section is intended to avoid problems in applying the state homestead exemption in bankruptcy pursuant to Section 703.140. Substantive rules are applied but not procedural rules, since the procedural rules are designed for use in state money judgment enforcement proceedings. For bankruptcy purposes, only the substantive rules governing the homestead exemption are borrowed. Thus, the amount of the exemption is determined based on the bankrupt's personal circumstances under Section 704.730. If proceeds are claimed as exempt in bankruptcy proceedings, the protection provided in Section 704.720 would apply, but is not limited to six months or for the purpose of purchasing another qualifying homestead. Similarly, the rules concerning creditors' rights and agreements between debtors and creditors should not apply in the bankruptcy context.

Code Civ. Proc. § 704.720 (amended). Homestead exemption

SEC. 6. Section 704.720 of the Code of Civil Procedure is amended to read:

704.720. (a) A homestead is exempt from *enforcement of a money judgment as provided in this article and is exempt*

from sale under this division to the extent provided in Section 704.800.

(b) *The proceeds from a disposition of a homestead are exempt for the purpose of purchasing another qualifying homestead under the following conditions:*

(1) *If a homestead is sold under this division or is damaged or destroyed or is acquired for public use, the proceeds of sale or of insurance or other indemnification for damage or destruction of the homestead or the proceeds received as compensation for a homestead acquired for public use are exempt in the amount of the homestead exemption provided in Section 704.730. ~~The proceeds are exempt for a period of six months after the time date the proceeds are actually received by or become payable in an amount certain to the judgment debtor, whichever is the earlier date except that, if a homestead exemption is applied to other property of the judgment debtor or the judgment debtor's spouse during that period, the proceeds thereafter are not exempt.~~*

(2) *If a homestead is voluntarily sold, or otherwise sold in a manner not described in paragraph (1), the proceeds of sale are exempt in the amount of the homestead exemption provided in Section 704.730 for a period of six months after the date of sale.*

(3) *If a homestead exemption is applied to other property of the judgment debtor or the judgment debtor's spouse during the six-month period provided in paragraph (1) or (2), the proceeds exemption terminates.*

(c) *If the judgment debtor and spouse of the judgment debtor reside in separate homesteads, only the homestead of one of the spouses is exempt and only the proceeds of the exempt homestead are exempt.*

(d) *The exemption of proceeds provided in paragraph (2) of subdivision (b) does not apply to the enforcement of a judgment for child, family, or spousal support, unless the*

judgment debtor has other obligations for child, family, or spousal support and obtains an order, on noticed motion, that all or part of the proceeds are exempt. In making this determination, the court shall apply the standards provided in subdivision (c) of Section 703.070.

(e) Except as otherwise agreed by the judgment debtor and judgment creditor, if an exemption is claimed for proceeds under this section, the proceeds shall be deposited with the court, or held in a controlled deposit account, subject to the judgment creditor's lien. At any time during the applicable six-month exemption period provided in subdivision (b), the court shall, on noticed motion of the judgment debtor, make an order applying all or part of the proceeds to the purchase of another dwelling that qualifies for a homestead exemption under this article. Unless the judgment debtor purchases another dwelling that qualifies for a homestead exemption under this article during the six-month exemption period, the court, on noticed motion, shall order the proceeds applied to the satisfaction of the judgment.

(f) The proper court for filing motions under this section is the court where an application for an order of sale of the dwelling would be made under Section 704.750.

Comment. Subdivision (a) of Section 704.720 is revised for clarity and for consistency with other exemption provisions. See, e.g., Sections 703.010, 704.010, 704.020.

Subdivision (b) is amended to adopt as a general rule the exemption for proceeds of voluntary sales under former Section 704.960 (homestead declaration). Subdivision (b)(3) is generalized from the last clause of former subdivision (b) of this section. See also Section 703.080 (tracing exempt funds).

Subdivision (d) is a new provision that implements the application of the general rule on equitable division of exemptions in Section 703.070 in a situation where the judgment debtor has multiple support obligees. Unlike the general rule, however, subdivision (d) places the burden on the judgment debtor to file the motion and seek the court order.

Subdivision (e) provides a new procedure for claiming the proceeds exemption and restricting the availability of the funds to the purpose of

acquiring a new homestead. Accordingly, during the six-month period during which proceeds are exempt, the money is held in a court account or other controlled account for the purchase of another homestead that qualifies under this article. The judgment creditor's lien priority is preserved on the proceeds during the six-month period. If the proceeds have been levied upon after they were received by the judgment debtor, such as in a case where the debtor has deposited the proceeds in a deposit account, the general exemption procedure following levy of execution is applicable. See Section 703.510 *et seq.* The tracing rules in Section 703.080 apply to determine the extent to which a fund contains the exempt proceeds from disposition of a homestead.

Subdivision (f) specifies the proper court for proceedings under this section.

Revised Background Comment (1982). Subdivision (a) of Section 704.720 supersedes former Civil Code Section 1240 (providing for a declared homestead) and former Code of Civil Procedure Sections 690.3 and 690.31(a) (providing for a claimed dwelling exemption). Unlike the former provisions, Section 704.720 does not specify the interest that is protected and does not limit the homestead in a leasehold to a long-term lease; any interest sought to be reached by the judgment creditor in the homestead may be entitled to the exemption. The homestead exemption does not apply where a lien on the property other than an enforcement lien is being foreclosed. See Section 703.010.

Subdivision (b)(1) provides an exemption for proceeds of an execution sale of a homestead, for proceeds from insurance or indemnification for the damage or destruction of a homestead, and for an eminent domain award or proceeds of a sale of the homestead for public use. Subdivision (b)(1) supersedes portions of former Civil Code Sections 1256 and 1265 and of former Code of Civil Procedure Sections 690.8 and 690.31(k). The exemption for insurance proceeds was not found in former law. *But see* Houghton v. Lee, 50 Cal. 101, 103 (1875) (insurance proceeds for destruction of declared homestead exempt).

Subdivision (c) is new. The spouses may select which of the homesteads is exempt. If the spouses are unable to agree, the court determines which homestead is exempt. See Section 703.110 (application of exemptions to marital property). Note that a married person may, after a decree of legal separation or an interlocutory judgment of dissolution of marriage, be entitled to a homestead in his or her own right, and this right is not affected by subdivision (c). See Section 704.710(d) ("spouse" defined) & Comment.

Code Civ. Proc. § 704.760 (amended). Contents of application for sale of dwelling

SEC. 7. Section 704.760 of the Code of Civil Procedure is amended to read:

704.760. The judgment creditor's application shall be made under oath, shall describe the dwelling, and shall contain all of the following:

(a) A statement whether or not the records of the county tax assessor indicate that there is a current homeowner's exemption or disabled veteran's exemption for the dwelling and the person or persons who claimed ~~any~~ *such the* exemption.

(b) A statement, which may be based on information and belief, whether the dwelling is a homestead and the amount of the homestead exemption, if any, ~~and a statement whether or not the records of the county recorder indicate that a homestead declaration under Article 5 (commencing with Section 704.910) that describes the dwelling has been recorded by the judgment debtor or the spouse of the judgment debtor.~~

(c) A statement of the amount of any liens or encumbrances on the dwelling, the name of each person having a lien or encumbrance on the dwelling, and the *person's* address of ~~such person~~ used by the county recorder for the return of the instrument creating ~~such the~~ *the* person's lien or encumbrance after recording.

Comment. Subdivision (b) of Section 704.760 is amended to delete the obsolete reference to the repealed homestead declaration procedure. See also Section 694.090 (effect of homestead declarations under prior law). The other changes are technical, nonsubstantive revisions.

Code Civ. Proc. § 704.780 (amended). Hearing

SEC. 8. Section 704.780 of the Code of Civil Procedure is amended to read:

704.780. (a) The burden of proof at the hearing is determined in the following manner:

(1) If the records of the county tax assessor indicate that there is a current homeowner's exemption or disabled veteran's exemption for the dwelling claimed by the judgment debtor or the judgment debtor's spouse, the judgment creditor has the burden of proof that the dwelling is not a homestead. If the records of the county tax assessor indicate that there is not a current homeowner's exemption or disabled veteran's exemption for the dwelling claimed by the judgment debtor or the judgment debtor's spouse, the burden of proof that the dwelling is a homestead is on the person who claims that the dwelling is a homestead.

(2) If the application states the amount of the homestead exemption, the person claiming the homestead exemption has the burden of proof that the amount of the exemption is other than the amount stated in the application.

(b) The court shall determine whether the dwelling is exempt. If the court determines that the dwelling is exempt, the court shall determine the amount of the homestead exemption and the fair market value of the dwelling. The court shall make an order for sale of the dwelling subject to the homestead exemption, unless the court determines that the sale of the dwelling would not be likely to produce a bid sufficient to satisfy any part of the amount due on the judgment pursuant to Section 704.800. The order for sale of the dwelling subject to the homestead exemption shall specify the amount of the proceeds of the sale that is to be distributed *pursuant to Section 704.850* to each person having a lien or encumbrance on the dwelling *that is superior to the judgment creditor's lien*, and shall include the name and address of

each such person. Subject to the provisions of this article, the sale is governed by Article 6 (commencing with Section 701.510) of Chapter 3. If the court determines that the dwelling is not exempt, the court shall make an order for sale of the property in the manner provided in Article 6 (commencing with Section 701.510) of Chapter 3.

(c) The court clerk shall transmit a certified copy of the court order (1) to the levying officer and (2) if the court making the order is not the court in which the judgment was entered, to the clerk of the court in which the judgment was entered.

(d) The court may appoint a qualified appraiser to assist the court in determining the fair market value of the dwelling. If the court appoints an appraiser, the court shall fix the compensation of the appraiser in an amount determined by the court to be reasonable, not to exceed similar fees for similar services in the community where the dwelling is located.

Comment. Subdivision (b) of Section 704.780 is amended to make clear that only liens with priority over the judgment creditor's lien, upon which the property is to be sold, are entitled to satisfaction from the proceeds of sale. See also Sections 704.800 (minimum bid), 704.850 (distribution of proceeds).

Code Civ. Proc. § 704.800 (amended). Minimum bid at sale of homestead

SEC. 9. Section 704.800 of the Code of Civil Procedure is amended to read:

704.800. (a) If no bid is received at a sale of a homestead pursuant to a court order for sale that exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property, including but not limited to any attachment or judgment lien, *that are superior to the judgment creditor's lien*, the homestead shall not be sold and shall be released and is not thereafter subject to a court order for sale upon

subsequent application by the same judgment creditor for a period of one year *after the date set for the sale*.

(b) If no bid is received at the sale of a homestead pursuant to a court order for sale that is 90 percent or more of the fair market value determined pursuant to Section 704.780, the homestead shall not be sold unless the court, upon motion of the judgment creditor, does one of the following:

(1) Grants permission to accept the highest bid that exceeds the amount of the minimum bid required by subdivision (a).

(2) Makes a new order for sale of the homestead.

Comment. Subdivision (a) of Section 704.800 is amended to provide that only liens senior to the judgment creditor's lien, taking into account any relation back, are entitled to satisfaction out of the proceeds from the sale of a dwelling under this article. See also Sections 704.780 (hearing), 704.850 (distribution of proceeds).

Code Civ. Proc. § 704.840 (amended). Costs incurred in sale proceedings

SEC. 10. Section 704.840 of the Code of Civil Procedure is amended to read:

704.840. (a) Except as provided in subdivision (b), the judgment creditor is entitled to recover reasonable costs incurred in a proceeding under this article.

(b) If no bid is received at a sale of a homestead pursuant to a court order for sale that exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property *that are superior to the judgment creditor's lien*, the judgment creditor is not entitled to recover costs incurred in a proceeding under this article or costs of sale.

Comment. Section 704.840 is amended for consistency with Section 704.800.

Code Civ. Proc. § 704.850 (amended). Distribution of proceeds of sale of homestead

SEC. 11. Section 704.850 of the Code of Civil Procedure is amended to read:

704.850. (a) The levying officer shall distribute the proceeds of sale of a homestead in the following order:

(1) To the discharge of all liens and encumbrances, ~~if any,~~ on the property *that are superior to the judgment creditor's lien.*

(2) To the judgment debtor in the amount of any applicable exemption of proceeds pursuant to Section 704.720.

(3) To the levying officer for the reimbursement of the levying officer's costs for which an advance has not been made.

(4) To the judgment creditor to satisfy the following:

(A) First, costs and interest accruing after issuance of the writ pursuant to which the sale is conducted.

(B) Second, the amount due on the judgment with costs and interest, as entered on the writ.

(5) *To any other judgment creditors who have delivered writs of execution to the levying officer, accompanied by instructions to levy on the proceeds of sale, in the amounts to which the persons are entitled in order of their respective priorities.*

(6) To the judgment debtor in the amount remaining.

(b) Sections 701.820 and 701.830 apply to distribution of proceeds under this section.

Comment. Subdivision (a)(1) of Section 704.850 is amended for consistency with Section 704.800. The words "if any" are deleted as surplus. A new subdivision (a)(5) is added to permit junior creditors whose liens will be extinguished pursuant to Section 704.860 to seek satisfaction from any excess proceeds at the sale, by delivering a writ of execution and levy instructions to the levying officer. This procedure is consistent with the general rule in Section 701.810(g) (distribution of proceeds of sale or collection). Note that under the rule in Section 704.800(a) the items listed in paragraphs (1) and (2) of subdivision (a) are of equal priority since the homestead may not be sold unless all

senior liens and encumbrances are satisfied and the judgment debtor receives the full amount of the applicable exemption.

Revised Background Comment (1982). Subdivision (a) of Section 704.850 continues the priority of distribution of proceeds provided by subdivision (j) of former Section 690.31 and of former Civil Code Section 1255. This section is an exception to the general rules on distribution of proceeds provided by Section 701.810. Liens and encumbrances required to be satisfied under subdivision (a)(1) include not only preferred labor claims to be satisfied pursuant to Section 1206 and the amount of any state tax lien (as defined in Government Code Section 7162) but also any other liens and encumbrances with priority over the judgment creditor's lien.

Subdivision (b) makes clear that the general provisions governing the time for distributing proceeds (Section 701.820) and the resolution of conflicting claims to proceeds (Section 701.830) apply to the distribution of proceeds from the sale of a homestead.

Code Civ. Proc. § 704.860 (added). Extinction of liens upon sale

SEC. 12. Section 704.860 is added to the Code of Civil Procedure, to read:

704.860. If property is sold pursuant to this article, the lien under which it is sold and any liens subordinate thereto on the property sold are extinguished.

Comment. Section 704.860 is new. The rule in this section applicable to homestead sales is consistent with the general rule under Section 701.630.

Code Civ. Proc. §§ 704.910-704.995 (repealed). Declared homestead

SEC. 13. Article 5 (commencing with Section 704.910) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure is repealed.

Note. The text of Sections 704.910-704.995 is set out *infra*. See material under "Comments to Repealed Sections."

Gov't Code § 7170 (technical amendment). Attachment of tax lien

SEC. 14. Section 7170 of the Government Code is amended to read:

7170. (a) Except as provided in subdivisions (b) and (c), a state tax lien attaches to all property and rights to property whether real or personal, tangible or intangible, including all after-acquired property and rights to property, belonging to the taxpayer and located in this state. ~~A state tax lien attaches to a dwelling notwithstanding the prior recording of a homestead declaration (as defined in Section 704.910 of the Code of Civil Procedure).~~

(b) A state tax lien is not valid as to real property against the right, title, or interest of any of the following persons where the person's right, title, or interest was acquired or perfected prior to recording of the notice of state tax lien in the office of the county recorder of the county in which the real property is located pursuant to Section 7171:

(1) A successor in interest of the taxpayer without knowledge of the lien.

(2) A holder of a security interest.

(3) A mechanic's lienor.

(4) A judgment lien creditor.

(c) A state tax lien is not valid as to personal property against:

(1) The holder of a security interest in the property whose interest is perfected pursuant to Section 9303 of the Commercial Code prior to the time the notice of the state tax lien is filed with the Secretary of State pursuant to Section 7171.

(2) Any person (other than the taxpayer) who acquires an interest in the property under the law of this state without knowledge of the lien or who perfects an interest in accordance with the law of this state prior to the time that the

notice of state tax lien is filed with the Secretary of State pursuant to Section 7171.

(3) A buyer in ordinary course of business who, under Section 9307 of the Commercial Code, would take free of a security interest created by the seller.

(4) Any person (other than the taxpayer) who, notwithstanding the prior filing of the notice of the state tax lien:

(A) Is a holder in due course of a negotiable instrument.

(B) Is a holder to whom a negotiable document of title has been duly negotiated.

(C) Is a bona fide purchaser of a security.

(D) Is a purchaser of chattel paper or an instrument who gives new value and takes possession of the chattel paper or instrument in the ordinary course of business.

(E) Is a holder of a purchase money security interest.

(F) Is a collecting bank holding a security interest in items being collected, accompanying documents and proceeds, pursuant to Section 4210 of the Commercial Code.

(G) Acquires a security interest in a deposit account or in the beneficial interest in a trust or estate.

(H) Acquires any right or interest in letters of credit, advices of credit, or money.

(I) Acquires without actual knowledge of the state tax lien a security interest in or a claim in or under any policy of insurance including unearned premiums.

(J) Acquires any right or interest in property subject to a certificate of title statute of another jurisdiction under the law of which indication of a security interest on the certificate of title is required as a condition of perfection of the security interest.

(5) A judgment lien creditor whose lien was created by the filing of a notice of judgment lien on personal property with the Secretary of State prior to the time the notice of state tax

lien is filed with the Secretary of State pursuant to Section 7171.

Comment. The second sentence of Section 7170(a) is deleted in view of the repeal of the homestead declaration procedure. See also Code Civ. Proc. §§ 688.030 (exemptions from enforcement of tax), 694.090 (effect of homestead declaration under former law), 704.850 (satisfaction of liens upon execution sale of homestead).

Prob. Code § 6528 (repealed). Declared homestead

SEC. 15. Section 6528 of the Probate Code is repealed.

~~6528. Nothing in this chapter terminates or otherwise affects a declaration of homestead by, or for the benefit of, a surviving spouse or minor child of the decedent with respect to the community, quasi-community, or common interest of the surviving spouse or minor child in property in the decedent's estate. This section is declaratory of, and does not constitute a change in, existing law.~~

Comment. Section 6528 is repealed because it has no purpose in view of the repeal of the homestead declaration procedure. See also Code Civ. Proc. § 694.090 (effect of homestead declaration under former law). Repeal of this section has no effect on the ability of a surviving judgment debtor to take advantage of the homestead exemption provided in Code of Civil Procedure Sections 704.710-704.860.

COMMENTS TO REPEALED SECTIONS

Code Civ. Proc. §§ 704.910-704.995 (repealed). Declared homestead

Note. Sections 704.910-704.995 are set out below for reference purposes. A Comment to each section indicates its proposed disposition in the revised statute or its relation to the general homestead exemption provisions that supersede the homestead declaration procedure.

Article 5. Declared Homesteads

§ 704.910 (repealed). Definitions

704.910. As used in this article:

(a) “Declared homestead” means the dwelling described in a homestead declaration.

(b) “Declared homestead owner” includes both of the following:

(1) The owner of an interest in the declared homestead who is named as a declared homestead owner in a homestead declaration recorded pursuant to this article.

(2) The declarant named in a declaration of homestead recorded prior to July 1, 1983, pursuant to former Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code and the spouse of such declarant.

(c) “Dwelling” means any interest in real property (whether present or future, vested or contingent, legal or equitable) that is a “dwelling” as defined in Section 704.710, but does not include a leasehold estate with an unexpired term of less than two years or the interest of the beneficiary of a trust.

(d) “Homestead declaration” includes both of the following:

(1) A homestead declaration recorded pursuant to this article.

(2) A declaration of homestead recorded prior to July 1, 1983, pursuant to former Title 5 (commencing with former Section 1237) of Part 4 of Division 2 of the Civil Code.

(e) “Spouse” means a “spouse” as defined in Section 704.710.

Comment. Former Section 704.910 is superseded by Section 704.710.

§ 704.920 (repealed). Manner of selection of homestead

704.920. A dwelling in which an owner or spouse of an owner resides may be selected as a declared homestead pursuant to this article by recording a homestead declaration in the office of the county recorder of the county where the dwelling is located. From and after the time of recording, the dwelling is a declared homestead for the purposes of this article.

Comment. Former Section 704.920 is superseded by the homestead exemption procedure in Sections 704.710-704.860. See also Sections 694.090 (effect of homestead declaration under prior law), 704.710 (definitions).

§ 704.930 (repealed). Execution and contents of homestead declaration

704.930. (a) A homestead declaration recorded pursuant to this article shall contain all of the following:

(1) The name of the declared homestead owner. A husband and wife both may be named as declared homestead owners in the same homestead declaration if each owns an interest in the dwelling selected as the declared homestead.

(2) A description of the declared homestead.

(3) A statement that the declared homestead is the principal dwelling of the declared homestead owner or such person’s spouse, and that the declared homestead owner or such person’s spouse resides in the declared homestead on the date the homestead declaration is recorded.

(b) The homestead declaration shall be executed and acknowledged in the manner of an acknowledgment of a conveyance of real property by at least one of the following persons:

(1) The declared homestead owner.

(2) The spouse of the declared homestead owner.

(3) The guardian or conservator of the person or estate of either of the persons listed in paragraph (1) or (2). The guardian or conservator may execute, acknowledge, and record a homestead declaration without the need to obtain court authorization.

(4) A person acting under a power of attorney or otherwise authorized to act on behalf of a person listed in paragraph (1) or (2).

(c) The homestead declaration shall include a statement that the facts stated in the homestead declaration are known to be true as of the personal knowledge of the person executing and acknowledging the homestead declaration. If the homestead declaration is executed and acknowledged by a person listed in paragraph (3) or (4) of subdivision (b), it shall also contain a statement that the person has authority to so act on behalf of the declared homestead owner or the spouse of the declared homestead owner and the source of the person's authority.

Comment. Former Section 704.930 is superseded by the homestead exemption procedure in Sections 704.710-704.860.

§ 704.940 (repealed). Right to convey or encumber not limited; evidentiary effect of homestead declaration

704.940. A homestead declaration does not restrict or limit any right to convey or encumber the declared homestead. A homestead declaration, when properly recorded, is prima facie evidence of the facts therein stated, and conclusive evidence thereof in favor of a purchaser or encumbrancer in good faith and for a valuable consideration.

Comment. Former Section 704.940 is superseded by the homestead exemption procedure in Sections 704.710-704.860. See also Section 704.780 (burden of proof in hearing on homestead exemption).

§ 704.950 (repealed). Attachment of judgment lien to homestead

704.950. (a) Except as provided in subdivisions (b) and (c), a judgment lien on real property created pursuant to Article 2

(commencing with Section 697.310) of Chapter 2 does not attach to a declared homestead if both of the following requirements are satisfied:

(1) A homestead declaration describing the declared homestead was recorded prior to the time the abstract or certified copy of the judgment was recorded to create the judgment lien.

(2) The homestead declaration names the judgment debtor or the spouse of the judgment debtor as a declared homestead owner.

(b) This section does not apply to a judgment lien created under Section 697.320 by recording a certified copy of a judgment for child, family, or spousal support.

(c) A judgment lien attaches to a declared homestead in the amount of any surplus over the total of the following:

(1) All liens and encumbrances on the declared homestead at the time the abstract of judgment or certified copy of the judgment is recorded to create the judgment lien.

(2) The homestead exemption set forth in Section 704.730.

Comment. Former Section 704.950 is superseded by the homestead exemption procedure in Sections 704.710-704.860.

§ 704.960 (repealed). Proceeds exemption after voluntary sale; reinvestment of proceeds of voluntary or involuntary sale and effect of new declaration

704.960. (a) If a declared homestead is voluntarily sold, the proceeds of sale are exempt in the amount provided by Section 704.730 for a period of six months after the date of sale.

(b) If the proceeds of a declared homestead are invested in a new dwelling within six months after the date of a voluntary sale or within six months after proceeds of an execution sale or of insurance or other indemnification for damage or destruction are received, the new dwelling may be selected as a declared homestead by recording a homestead declaration

within the applicable six-month period. In such case, the homestead declaration has the same effect as if it had been recorded at the time the prior homestead declaration was recorded.

Comment. Former Section 704.960 is superseded by the homestead exemption procedure in Sections 704.710-704.860. The proceeds exemption is continued in Section 704.720(b).

§ 704.965 (repealed). Determination of amount of exemption

704.965. If a homestead declaration is recorded prior to the operative date of an amendment to Section 704.730 which increases the amount of the homestead exemption, the amount of the exemption for the purposes of subdivision (c) of Section 704.950 and Section 704.960 is the increased amount, except that, if the judgment creditor obtained a lien on the declared homestead prior to the operative date of the amendment to Section 704.730, the exemption for the purposes of subdivision (c) of Section 704.950 and Section 704.960 shall be determined as if that amendment to Section 704.730 had not been enacted.

Comment. Former Section 704.965 is superseded by the homestead exemption procedure in Sections 704.710-704.860. The principle in former Section 704.965 is applicable under the general rule in Section 703.050 (exemptions in effect at time of lien govern).

§ 704.970 (repealed). Effect of article on rights after levy of execution

704.970. Whether or not a homestead declaration has been recorded:

(a) Nothing in this article affects the right of levy pursuant to a writ of execution.

(b) Any levy pursuant to a writ of execution on a dwelling (as defined in Section 704.710) and the sale pursuant thereto shall be made in compliance with Article 4 (commencing with Section 704.710) and the judgment debtor and the judgment creditor shall have all the rights and benefits provided by that article.

Comment. Section 704.970 is repealed as unnecessary following repeal of the homestead declaration procedure. The homestead exemption is now governed exclusively by Article 4 (commencing with Section 704.710) and related rules.

§ 704.980 (repealed). Declaration of abandonment

704.980. (a) A declared homestead may be abandoned by a declaration of abandonment under this section, whether the homestead declaration was recorded pursuant to this article or pursuant to former Title 5 (commencing with former Section 1237) of Part 4 of Division 2 of the Civil Code.

(b) A declaration of abandonment shall be executed and acknowledged in the manner of an acknowledgment of a conveyance of real property. It shall be executed and acknowledged by a declared homestead owner or by a person authorized to act on behalf of a declared homestead owner. If it is executed and acknowledged by a person authorized to act on behalf of a declared homestead owner, the declaration shall contain a statement that the person has authority to act on behalf of the declared homestead owner and the source of the person's authority.

(c) The declaration of abandonment does not affect the declared homestead of any person other than the declared homestead owner named in the declaration of abandonment.

Comment. The procedure for abandonment in former Section 704.980 is obsolete in view of the repeal of the homestead declaration procedure. See also Section 694.090 (effect of homestead declarations under prior law).

§ 704.990 (repealed). Abandonment of homestead by recording homestead declaration for different property

704.990. (a) A declared homestead is abandoned by operation of law as to a declared homestead owner if the declared homestead owner or a person authorized to act on behalf of the declared homestead owner executes, acknowledges, and records a new homestead declaration for

the declared homestead owner on different property. An abandonment under this subdivision does not affect the declared homestead of any person other than the declared homestead owner named in the new homestead declaration.

(b) Notwithstanding subdivision (a), if a homestead declaration is recorded which includes property described in a previously recorded homestead declaration, to the extent that the prior homestead declaration is still valid, the new homestead declaration shall not be considered an abandonment of the prior declared homestead.

Comment. Former Section 704.990 relating to abandonment is obsolete in view of the repeal of the homestead declaration procedure. See also Section 694.090 (effect of homestead declarations under prior law).

§ 704.995 (repealed). Continuation of protection after death of declared homestead owner

704.995. (a) The protection of the declared homestead from any creditor having an attachment lien, execution lien, or judgment lien on the dwelling continues after the death of the declared homestead owner if, at the time of the death, the dwelling was the principal dwelling of one or more of the following persons to whom all or part of the interest of the deceased declared homestead owner passes:

- (1) The surviving spouse of the decedent.
- (2) A member of the family of the decedent.

(b) The protection of the declared homestead provided by subdivision (a) continues regardless of whether the decedent was the sole owner of the declared homestead or owned the declared homestead with the surviving spouse or a member of the decedent's family and regardless of whether the surviving spouse or the member of the decedent's family was a declared homestead owner at the time of the decedent's death.

(c) The amount of the homestead exemption is determined pursuant to Section 704.730 depending on the circumstances

of the case at the time the amount is required to be determined.

Comment. Former Section 704.995 is superseded by the homestead exemption procedure in Sections 704.710-704.860. The general homestead exemption applies with full force to the interest of the survivor, consistent with the rule in subdivision (c). Additional protection is provided by the probate homestead procedure. See Prob. Code §§ 6520-6527.

REVISED COMMENT

Code Civ. Proc. § 704.710 (revised comment). Definitions

Revised Background Comment (1982). Subdivision (a) of Section 704.710 supersedes the provisions of former law pertaining to the property that could be exempt as a homestead or dwelling. See former Civ. Code § 1237 (declared homestead); former Code Civ. Proc. §§ 690.3 (house trailer, mobile home, houseboat, boat, or other waterborne vessel), 690.31(a) (dwelling house). Subdivision (a) is intended to include all forms of property for which an exemption could be claimed under former law and any other property in which the judgment debtor or the judgment debtor's spouse actually resides.

Subdivision (b) continues the substance of former Civil Code Section 1261(2) except that the minor grandchild of a deceased spouse and a child or grandchild of a former spouse are included in the listing.

Subdivision (c) is intended to preclude a judgment debtor from moving into a dwelling after creation of a judgment lien or after levy in order to create an exemption. Subdivision (c) also makes clear that, even though an abstract of judgment has been recorded to create a judgment lien, the existence of the lien does not prevent a homestead exemption on after-acquired property that is acquired as the principal dwelling using exempt proceeds. Subdivision (c) is an exception to the rule of Section 703.100 (time for determination of exemption).

Subdivision (d) preserves the effect of former Civil Code Sections 1300-1304 (married person's separate homestead). The effect of subdivision (d) is to permit each spouse to claim a separate homestead after entry of a judgment decreeing legal separation or of an interlocutory judgment of dissolution of the marriage, because subdivision (c) of Section 704.720 is not applicable.

Revised Background Comment (1983). Section 704.710 is amended to delete "actually" which appeared before "resides" or "resided" in various provisions. The word "actually" is deleted to avoid a possible construction that a person temporarily absent (such as a person on

vacation or in the hospital) could not claim a homestead exemption for the principal dwelling merely because the person is temporarily absent, even though the dwelling is the person's principal dwelling and residence.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Tolling Statute of Limitations When Defendant Is Out of State

November 1995

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Tolling Statute of Limitations When Defendant Is Out of State*, 26 Cal. L. Revision Comm'n Reports 83 (1996).

STATE OF CALIFORNIA

PETE WILSON, Governor

CALIFORNIA LAW REVISION COMMISSION

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November 2, 1995

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

This recommendation proposes the repeal of Code of Civil Procedure Section 351, which tolls statutes of limitations when the defendant is out of the state. Section 351 is based on outdated notions of personal jurisdiction and service of process, and it is unconstitutional as applied to cases involving interstate commerce. Repeal of Section 351 would further the policies underlying statutes of limitations, eliminate inequities that may arise when tolling is applied to brief periods of absence, and remove unnecessary litigation issues from the court system.

The recommendation would also require courts to extend the delay reduction deadline for service of process where the plaintiff shows that even with the exercise of due diligence, service cannot be achieved in the time required.

This recommendation is submitted pursuant to Resolution Chapter 87 of the Statutes of 1995.

Respectfully submitted,

Colin W. Wied
Chairperson

TOLLING STATUTE OF LIMITATIONS WHEN DEFENDANT IS OUT OF STATE

INTRODUCTION

Code of Civil Procedure Section 351 tolls the statute of limitations when the defendant is out of state:

351. If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.

The tolling provision now codified as Section 351 dates from as early as 1850,¹ in an era when out-of-state service of process was insufficient to confer personal jurisdiction.² Without tolling, a defendant could escape liability by staying outside the state where a cause of action accrued until the statute of limitations ran. A plaintiff who was unable or unwilling to pursue the defendant in the defendant's place of residence was left without a means of redressing the injury. By tolling the limitations period during a defendant's absence from California, Section 351 preserved the plaintiff's right to redress until the defendant could be served within the state.

Out-of-state service of process is now widely available, and recent commentary and judicial decisions criticize Section 351.³ Additionally, the tolling of Section 351 is riddled with

1. See 1850 Cal. Stat. ch. 127, § 22.

2. See *Pennoyer v. Neff*, 95 U.S. 714 (1877).

3. See *O'Laskey v. Sortino*, 224 Cal. App. 3d 241, 252 n.8, 273 Cal. Rptr. 674 (1990) (Section 351 no longer makes sense and should be repealed); *Abramson v. Brownstein*, 897 F.2d 389, 391-93 (9th Cir. 1990) (Section 351 is unconstitutional as applied to cases involving interstate commerce); Comment,

exceptions. It does not apply to corporations,⁴ limited partnerships,⁵ nonresident motorists,⁶ or certain resident motorists,⁷ nor in certain tax proceedings⁸ or actions in rem.⁹

The Law Revision Commission has examined Section 351, its purposes and operation, and other mechanisms in the law available to achieve the same goals. The Commission has concluded that Section 351 causes substantial problems and no longer serves a useful purpose.¹⁰ It should be repealed.

California Code of Civil Procedure Section 351: Who's Really Paying the Toll?, 23 Pac. L.J. 1639 (1992).

4. *Epstein v. Frank*, 125 Cal. App. 3d 111, 119 n.4, 177 Cal. Rptr. 831 (1981) (“[n]either a foreign corporation nor a domestic corporation is deemed absent from the state when its officers are absent and the statute of limitations is not tolled pursuant to section 351 of the Code of Civil Procedure as to either of such entities”); see also Corp. Code § 2111; *Cardoso v. American Medical Systems, Inc.*, 183 Cal. App. 3d 994, 998-99, 228 Cal. Rptr. 627 (1986); *Loope v. Greyhound Lines, Inc.*, 114 Cal. App. 2d 611, 250 P.2d 651 (1952).

5. *Epstein v. Frank*, 125 Cal. App. 3d 111, 120, 177 Cal. Rptr. 831 (1981).

6. *Bigelow v. Smik*, 6 Cal. App. 3d 10, 15, 85 Cal. Rptr. 613 (1970) (“since a nonresident motorist is amenable to service of process within the state and to the entry of personal judgment against him, the reason for section 351 is not present, the section does not apply, and the period of limitation for commencing suit against him does not suspend”).

7. Vehicle Code Section 17460 provides that by accepting a California driver’s license, a California resident consents to out-of-state service of process in any action arising out of the resident’s “operation” of a motor vehicle in California. Vehicle Code Section 17459 is a similar provision pertaining to a resident’s acceptance of a certificate of ownership or registration. Under Vehicle Code Section 17463, if service can be made pursuant to Vehicle Code Section 17459 or 17460, then the tolling of Section 351 does not apply, “except when [the resident] is out of this State and cannot be located through the exercise of reasonable diligence.”

8. See Rev. & Tax. Code §§ 177, 3725, 3809.

9. *Ridgway v. Salrin*, 41 Cal. App. 2d 50, 54, 105 P.2d 1024 (1940).

10. But see Code of Civil Procedure Section 116.340, which requires plaintiffs in most small claims cases to serve process within the state. The Commission’s proposed legislation includes a statute preserving out-of-state tolling where that requirement applies. However, even where Section 116.340 requires plaintiffs to serve small claims process within the state, such plaintiffs are not wholly barred from serving process outside California. Instead of suing

PROBLEMS WITH SECTION 351

Unconstitutional as Applied to Interstate Commerce

Section 351 imposes a significant burden on nonresidents. Essentially, it means that the statute of limitations on a cause of action will never run so long as the defendant remains out of the state. Thus, a nonresident potentially subject to suit in California must either stay in the state for the duration of the applicable limitations period, or must remain subject to suit in California in perpetuity.¹¹ Because Section 351 imposes that heavy burden without sufficient justification, the Ninth Circuit Court of Appeals ruled it unconstitutional as applied to cases involving interstate commerce.¹²

Uncertain and Unfair Results

Section 351 applies to any absence from California, no matter how long or short.¹³ Because out of state travel now occurs routinely for vacation, business, and other purposes, the tolling mandated by Section 351 makes it difficult to properly apply the statute of limitations.

Moreover, a plaintiff who misses the statute of limitations by a few days may point to Section 351 and contend that the defendant was out of California for part of the limitations period so tolling applies and the suit is timely. The fortuity of whether the defendant happened to take a brief vacation out of the state during the limitations period may thus determine the outcome of the suit. That is arbitrary and unfair, particu-

in small claims court, they may sue in municipal court and thus avoid the requirement of Section 116.340.

11. *Abramson v. Brownstein*, 897 F.2d 389, 392 (9th Cir. 1990).

12. *Id.* at 393; *see also* *Bendix Corp. v. Midwesco Enterprises*, 486 U.S. 888 (1988).

13. *See, e.g.,* *Mounts v. Uyeda*, 227 Cal. App. 3d 111, 114, 277 Cal. Rptr. 730 (1991) (four-day absence); *Garcia v. Flores*, 64 Cal. App. 3d 705, 709, 134 Cal. Rptr. 712 (1976) (eight-day absence).

larly with regard to a plaintiff who lacked contemporaneous knowledge of the defendant's absence and cannot claim that the absence interfered with serving the defendant.¹⁴

Misleading Statement of the Law

Section 351 appears to be a clear statement of the law, but the apparent clarity is misleading. Although the language of the statute is absolute and unqualified, it is in fact subject to numerous codified and uncodified exceptions and limitations that are not readily apparent.¹⁵ The potential for misplaced reliance on the apparent unqualified tolling of the statute of limitations under Section 351 is substantial.

Adverse Effects on Courts

Section 351 adversely affects court operations in a number of respects. First, disagreements over whether Section 351 applies in a particular case are not uncommon.¹⁶ Litigants and courts must spend resources resolving these side issues, instead of focusing on the underlying dispute. That occurs at the expense of taxpayers who fund the court system and at the cost of delayed justice for all citizens.

Second, statutes of limitation are not empty procedural requirements. They serve the important purpose of ensuring that disputes are litigated when courts can most effectively determine the truth and achieve justice — when memories are fresh, witnesses available, and evidence still at hand. Tolling provisions such as Section 351 delay adjudication, causing

14. Comment, *California Code of Civil Procedure Section 351: Who's Really Paying the Toll?*, 23 Pac. L.J. 1639, 1674-75 (1992); see also N.Y. Law Revision Comm'n, Report, *Acts, Recommendation and Study relating to Application of Foreign Periods of Limitation and Tolling of the Statute of Limitations by Absence of Defendant* 127, 168 (Legis. Doc. No. 69, 1943).

15. See sources cited in notes 4-9, *supra*.

16. See, e.g., *Pratali v. Gates*, 4 Cal. App. 4th 632, 5 Cal. Rptr. 2d 733 (1992); *Mounts v. Uyeda*, 227 Cal. App. 3d 111, 121-22, 277 Cal. Rptr. 730 (1991); *Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. 1990).

courts to handle stale claims. That should be done only if there is a strong countervailing justification for the tolling.

Finally, Section 351 tolls a limitations period even if, at the time the cause of action accrued, the parties resided outside the state and did not move into the state until much later. This means that a cause of action having no other connection to California may be asserted in the state long after it accrued, simply because the defendant moved to California after the fact.¹⁷ Although this situation may be infrequent, the state should not have to devote judicial resources to such stale claims lacking any significant nexus to the state.

SECTION 351 IS NO LONGER NECESSARY

In addition to having serious drawbacks, Section 351 no longer serves a useful purpose.¹⁸ It is not necessary for jurisdictional reasons, nor does it coherently address any other goal.

Out of State Service

The United States Supreme Court has overturned the jurisdictional doctrine requiring service within the forum state. A state may now exercise personal jurisdiction over any person

17. Comment, *California Code of Civil Procedure Section 351: Who's Really Paying the Toll?*, 23 Pac. L.J. 1639, 1672-73 (1992); see also *Kohan v. Cohan*, 204 Cal. App. 3d 915, 251 Cal. Rptr. 570 (1988). Code of Civil Procedure Section 361, which applies foreign limitations periods to causes of action arising outside California against nonresidents, may bar some such claims. But the borrowing statute is of no use if the borrowed statute of limitations is very long or is subject to liberal tolling rules. See N.Y. Law Revision Comm'n, Report, *Acts, Recommendation and Study relating to Application of Foreign Periods of Limitation and Tolling of the Statute of Limitations by Absence of Defendant* 127, 170 (Legis. Doc. No. 69, 1943); Note, *Limitations of Actions: Absence of the Defendant: Tolling the Statute of Limitations on a Foreign Cause of Action*, 1 UCLA L. Rev. 619, 621 (1954).

18. But see note 10, *supra*, regarding small claims cases.

having minimum contacts with the state.¹⁹ Service may be achieved by a variety of means: Under California's long arm statute and other statutes regulating service of process,²⁰ "any defendant *anywhere* can be served with summons — one way or another."²¹ Section 351 is no longer necessary to preserve a plaintiff's rights to redress.²²

Difficulties in serving particular defendants may still occur. But Section 351 is no longer needed to protect plaintiffs encountering problems in serving out-of-state defendants. The law provides other rules better-tailored to addressing difficulty of service of process and its aftermath. These include:

Delay reduction rules. Under Government Code Section 68616, delay reduction rules may require service of the complaint within 60 days after filing. Many superior courts have adopted a delay reduction deadline for service of process, but the rules generally provide a means of obtaining relief from the deadline if the circumstances warrant it, such as when achieving service is difficult.²³

19. Minimum contacts exist when the connection between the person and the state is such that exercising jurisdiction over the person does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

20. See Code Civ. Proc. §§ 410.10, 413.10, 413.30, 415.10-415.50.

21. R. Weil & I. Brown, Jr., *California Practice Guide: Civil Procedure Before Trial* § 4.3 (Rutter Group, rev. #1, 1994) (emph. in original); *but see* note 10, *supra*, regarding small claims cases.

22. *O'Laskey v. Sortino*, 224 Cal. App. 3d 241, 252 n.8, 273 Cal. Rptr. 674 (1990); Comment, *California Code of Civil Procedure Section 351: Who's Really Paying the Toll?*, 23 Pac. L.J. 1639, 1648-49, 1676 (1992).

23. See, e.g., Superior Court Rule 7.7, County of Los Angeles (complaint to be served in 60 days but court may extend time upon showing of good cause); Superior Court Rule 1.4, County of San Diego (complaint to be served in 60 days unless a Certificate of Progress has been filed "indicating why service has not been effected on all parties and what is being done to effect service"); Superior Court Rule 2.4, City and County of San Francisco (complaint to be served in 60 days unless an order extending time has been obtained "upon a written application therefor showing why service has not been effected, the steps

Discretionary dismissal. Sections 583.410 and 583.420 of the Code of Civil Procedure authorize courts to dismiss actions for delay in prosecution if “[s]ervice is not made within two years after the action is commenced against the defendant.” Such dismissals are not mandatory, however, and courts considering whether to dismiss must consider the availability of parties for service of process and the diligence in seeking to effect service of process.²⁴

Service within three years. Section 583.210 of the Code of Civil Procedure provides that “[t]he summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant.” To account for difficulties in achieving service, the statute directs courts applying the three-year deadline to exclude any time during which “[t]he defendant was not amenable to the process of the court” or “[s]ervice, for any other reason, was impossible, impracticable, or futile due to causes beyond the plaintiff’s control.”²⁵

Trial within five years. Every civil action “shall be brought to trial within five years after the action is commenced against the defendant.”²⁶ Like the preceding rules, this deadline accommodates difficulties in serving process. Courts applying the five-year deadline must exclude any time during which it

that have been taken to effect service, and the proposed date by which service is expected to be effected”). To prevent injustice to diligent plaintiffs encountering difficulties serving process, Government Code Section 68616 should be amended to require extension of any delay reduction deadline for service of process where the plaintiff shows that even with the exercise of due diligence, service cannot be achieved in the time required.

24. Rules 372 and 373 of the California Rules of Court outline the procedure for requesting such a dismissal and list factors the court should consider in ruling on the request.

25. Code Civ. Proc. § 583.240.

26. Code Civ. Proc. § 583.310.

was “impossible, impracticable, or futile” to bring the action to trial.²⁷

Default judgments based on process other than personal service. A plaintiff resorting to a method of service other than personal service may on occasion obtain a default judgment against a defendant who never got actual notice of the action. Within a reasonable time (up to two years) after entry of the judgment, the defendant may move to set it aside, and the court may grant the motion “on whatever terms as may be just.”²⁸ Courts also have inherent, equitable power to set aside judgments due to extrinsic fraud or mistake.²⁹ These doctrines may be invoked to relieve defendants from the consequences of judgments entered without their participation. Any such relief is to be on equitable terms, however, protecting the interests of diligent plaintiffs who could not achieve personal service.

Compensating for Difficulty of Service

Recognizing that the traditional jurisdictional rationale for Section 351 no longer withstands scrutiny, the courts have postulated that the Legislature retains the statute to compensate for hardship and expense in pursuing an out of state defendant.³⁰

Section 351 is poorly tailored for this purpose. It applies whether the defendant is in state or out of state at the time

27. Code Civ. Proc. § 583.340.

28. Code Civ. Proc. § 473.5.

29. R. Weil & I. Brown, Jr., *California Practice Guide: Civil Procedure Before Trial* § 5:435 (Rutter Group, rev. #1, 1994). The terms extrinsic fraud and mistake “are given a broad interpretation and cover almost any circumstance by which a party has been *deprived of a fair hearing*.” *Id.* at § 5:438; *see also In re Marriage of Park*, 27 Cal. 3d 337, 342, 612 P.2d 882, 165 Cal. Rptr. 792 (1980).

30. *Dew v. Appleberry*, 23 Cal. 3d 630, 637, 510 P.2d 509, 153 Cal. Rptr. 219 (1979).

service is attempted. Moreover, difficulty of service is not a problem unique to out of state defendants. It may be equally or more difficult to pursue an in state defendant who seeks to evade service of process. The Code of Civil Procedure provides readily available means of substituted service, whether the defendant is inside or outside the state. Section 351 is unnecessary for this purpose.

RECOMMENDATION

Statutes of limitations protect defendants from being unfairly surprised by stale claims — claims that may no longer be fairly tried because evidence has been misplaced, witnesses have disappeared, and facts have been forgotten.³¹ The tolling required by Section 351 is inconsistent with these objectives, unclear and unfair in its application, unreasonably burdensome on limited judicial resources, and unconstitutional as applied to cases involving interstate commerce. Under modern concepts of personal jurisdiction and service of process, there is no countervailing justification for these detriments. Section 351 is an anachronism that should be repealed.

31. *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944).

PROPOSED LEGISLATION

Code Civ. Proc. § 116.350 (added). Tolling of limitation periods

SECTION 1. Section 116.350 is added to the Code of Civil Procedure, to read:

116.350. (a) In computing the statute of limitations on a claim, any time during which Section 116.340 precluded service on the defendant shall be excluded.

(b) Subdivision (a) applies regardless of whether the claim is transferred from small claims court to another court, but if the amount of the claim is increased following the transfer, subdivision (a) does not apply to any excess over the jurisdictional limit of the small claims court applicable at the time the case was filed.

(c) The time excluded pursuant to subdivision (a), whether continuous or interrupted, is limited to five years for any claim.

Comment. Section 116.350 is a new provision that preserves limited tolling in specified small claims cases. This section is added in light of the repeal of Section 351, which tolled the statute of limitations when the defendant was out of the state. In most contexts, such tolling is no longer necessary, because plaintiffs may serve defendants outside the state. See former Section 351 Comment. In small claims cases, however, Section 116.340 generally precludes out-of-state service. Under subdivision (a), tolling continues in that context.

Under subdivision (b), asserting an inflated cross-claim in another court and successfully seeking transfer of the small claims case to the other court pursuant to Section 116.390 does not affect the availability of tolling and so is not a means of defeating a claim that is timely only if out-of-state tolling applies.

Subdivision (c) furthers the goal of finality and prevents stale claims by setting an absolute five-year time limit on tolling pursuant to subdivision (a). Where the combined effect of subdivision (c) and Section 116.340 would preclude a plaintiff from suing in small claims court, the plaintiff has the alternative of suing in municipal court. *Compare* Section 116.220 (jurisdiction of small claims courts) *with* Section 86 (jurisdiction of municipal courts).

Code Civ. Proc. § 351 (repealed). Tolling limitations period when defendant is absent

SEC. 2. Section 351 of the Code of Civil Procedure is repealed.

~~351. If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.~~

Comment. Section 351 is repealed consistent with modern concepts of personal jurisdiction and service of process. *See* Sections 410.10, 413.10, 413.30, 415.20-415.50; *see also* *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *cf.* *Pennoyer v. Neff*, 95 U.S. 714 (1877) (endorsing now outmoded doctrine that defendant must be served in state to confer in personam jurisdiction). Section 351 is unconstitutional as applied to cases involving interstate commerce. *See* *Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. 1990). For further background and explanation, see Comment, *California Code of Civil Procedure Section 351: Who's Really Paying the Toll*, 23 Pac. L.J. 1639 (1992); Note, *Limitations of Actions: Absence of the Defendant: Tolling the Statute of Limitations on a Foreign Cause of Action*, 1 UCLA L. Rev. 619 (1954).

For causes of action accruing before the effective date of the repeal, the act that repealed this section provides a one-year grace period, so that a plaintiff relying on the tolling of the repealed statute as a basis for delaying suit has adequate opportunity to commence an action.

Gov't Code § 68616 (operative until Jan. 1, 1999) (amended). Delay reduction deadlines and procedures

SEC. 3. Section 68616 of the Government Code (operative until Jan. 1, 1999) is amended to read:

68616. Delay reduction rules shall not require shorter time periods than as follows:

(a) Service of the complaint within 60 days after filing. Exceptions, for longer periods of time, may be granted as authorized by local rule *and shall be granted on a showing that service cannot be achieved within the time required with the exercise of due diligence.*

(b) Service of responsive pleadings within 30 days after service of the complaint. The parties may stipulate to an additional 15 days. Exceptions, for longer periods of time, may be granted as authorized by local rule.

(c) Time for service of notice or other paper under Sections 1005 and 1013 of the Code of Civil Procedure and time to plead after service of summons under Section 412.20 of the Code of Civil Procedure shall not be shortened except as provided in those sections.

(d) Within 30 days of service of the responsive pleadings, the parties may, by stipulation filed with the court, agree to a single continuance not to exceed 30 days.

It is the intent of the Legislature that these stipulations not detract from the efforts of the courts to comply with standards of timely disposition. To this extent, the Judicial Council shall develop statistics that distinguish between cases involving, and not involving, these stipulations.

(e) No status conference, or similar event, other than a challenge to the jurisdiction of the court, may be required to be conducted sooner than 30 days after service of the first responsive pleadings, or no sooner than 30 days after expiration of a stipulated continuance, if any, pursuant to subdivision (d).

(f) Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure shall govern discovery, except in arbitration proceedings.

(g) An order referring an action to arbitration or mediation may be made at any status conference held in accordance with subdivision (e), provided that any arbitration ordered may not commence prior to 210 days after the filing of the complaint, exclusive of the stipulated period provided in subdivision (d). Any mediation ordered pursuant to Section 1775.3 of the Code of Civil Procedure may be commenced prior to 210 days after the filing of the complaint, exclusive of the

stipulated period provided in subdivision (d). No rule adopted pursuant to this article may contravene Sections 638 and 639 of the Code of Civil Procedure.

(h) Unnamed (DOE) defendants shall not be dismissed prior to the conclusion of the introduction of evidence at trial, except upon stipulation or motion of the parties.

(i) Notwithstanding Section 170.6 of the Code of Civil Procedure, in direct calendar courts, challenges pursuant to that section shall be exercised within 15 days of the party's first appearance. Master calendar courts shall be governed solely by Section 170.6 of the Code of Civil Procedure.

(j) This section applies to all cases subject to this article which are filed on or after January 1, 1991.

(k) This section shall remain in effect only until January 1, 1999, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1999, deletes or extends that date.

Comment. Subdivision (a) of Section 68616 is amended to ensure that delay reduction deadlines for service of process are extended when plaintiffs are unable to achieve service within the prescribed period despite diligent efforts to do so. This amendment is necessary to adjust the delay reduction rules to take account of the repeal of Code of Civil Procedure Section 351, which tolled the statute of limitations when the defendant was out of the state. However, the new rule applies regardless of whether the hard-to-serve defendant is in the state or not.

Gov't Code § 68616 (operative Jan. 1, 1999) (amended). Delay reduction deadlines and procedures

SEC. 4. Section 68616 of the Government Code (operative Jan. 1, 1999) is amended to read:

68616. Delay reduction rules shall not require shorter time periods than as follows:

(a) Service of the complaint within 60 days after filing. Exceptions, for longer periods of time, may be granted as authorized by local rule *and shall be granted on a showing*

that service cannot be achieved within the time required with the exercise of due diligence.

(b) Service of responsive pleadings within 30 days after service of the complaint. The parties may stipulate to an additional 15 days. Exceptions, for longer periods of time, may be granted as authorized by local rule.

(c) Time for service of notice or other paper under Sections 1005 and 1013 of the Code of Civil Procedure and time to plead after service of summons under Section 412.20 of the Code of Civil Procedure shall not be shortened except as provided in those sections.

(d) Within 30 days of service of the responsive pleadings, the parties may, by stipulation filed with the court, agree to a single continuance not to exceed 30 days.

It is the intent of the Legislature that these stipulations not detract from the efforts of the courts to comply with standards of timely disposition. To this extent, the Judicial Council shall develop statistics that distinguish between cases involving, and not involving, these stipulations.

(e) No status conference, or similar event, other than a challenge to the jurisdiction of the court, may be required to be conducted sooner than 30 days after service of the first responsive pleadings, or no sooner than 30 days after expiration of a stipulated continuance, if any, pursuant to subdivision (d).

(f) Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure shall govern discovery, except in arbitration proceedings.

(g) No case may be referred to arbitration prior to 210 days after the filing of the complaint, exclusive of the stipulated period provided for in subdivision (d). No rule adopted pursuant to this article may contravene Sections 638 and 639 of the Code of Civil Procedure.

(h) Unnamed (DOE) defendants shall not be dismissed prior to the conclusion of the introduction of evidence at trial, except upon stipulation or motion of the parties.

(i) Notwithstanding Section 170.6 of the Code of Civil Procedure, in direct calendar courts, challenges pursuant to that section shall be exercised within 15 days of the party's first appearance. Master calendar courts shall be governed solely by Section 170.6 of the Code of Civil Procedure.

(j) This section applies to all cases subject to this article which are filed on or after January 1, 1991.

(k) This section shall become operative on January 1, 1999.

Comment. Subdivision (a) of Section 68616 is amended to ensure that delay reduction deadlines for service of process are extended when plaintiffs are unable to achieve service within the prescribed period despite diligent efforts to do so. This amendment is necessary to adjust the delay reduction rules to take account of the repeal of Code of Civil Procedure Section 351, which tolled the statute of limitations when the defendant was out of the state. However, the new rule applies regardless of whether the hard-to-serve defendant is in the state or not.

Rev. & Tax. Code § 177 (amended). Deeds issued by taxing agencies

SEC. 5. Section 177 of the Revenue and Taxation Code is amended to read:

177. (a) A proceeding based on an alleged invalidity or irregularity of any deed heretofore or hereafter issued upon the sale of property by any taxing agency, including taxing agencies which have their own system for the levying and collection of taxes, in the enforcement of delinquent property taxes or assessments, or a proceeding based on an alleged invalidity or irregularity of any proceedings leading up to such *the* deed, can only be commenced within one year after the date of recording of such *the* deed in the county recorder's office ~~or within one year after June 1, 1954, whichever is later.~~

(b) A defense based on an alleged invalidity or irregularity of any deed heretofore or hereafter issued upon the sale of

property by any taxing agency, including taxing agencies which have their own system for the levying and collection of taxes, in the enforcement of delinquent property taxes or assessments, or a defense based on an alleged invalidity or irregularity of any proceedings leading up to such *the* deed, can only be maintained in a proceeding commenced within one year after the date of recording of such *the* deed in the county recorder's office ~~or within one year after June 1, 1954, whichever is later.~~

(c) Sections 351 352 to 358, inclusive, of the Code of Civil Procedure do not apply to the time within which a proceeding may be brought under the provisions of this section.

(d) Nothing in this section shall operate to extend the time within which any proceeding based on the alleged invalidity or irregularity of any tax deed may be brought under any other section of this code.

(e) This section shall not apply to any deed issued by a taxing agency within five years from the time the property was sold to said taxing agency.

Comment. Section 177 is amended to reflect the repeal of Code of Civil Procedure Section 351. The amendment also deletes obsolete language and makes other technical revisions.

Rev. & Tax. Code § 3725 (amended). Proceeding based on invalidity or irregularity

SEC. 6. Section 3725 of the Revenue and Taxation Code is amended to read:

3725. A proceeding based on alleged invalidity or irregularity of any proceedings instituted under this chapter can only be commenced within one year after the date of execution of the tax collector's deed.

Sections 351 352 to 358, inclusive, of the Code of Civil Procedure do not apply to the time within which a proceeding may be brought under this section.

Comment. Section 3725 is amended to reflect the repeal of Code of Civil Procedure Section 351.

Rev. & Tax. Code § 3809 (amended). Proceeding based on invalidity or irregularity

SEC. 7. Section 3809 of the Revenue and Taxation Code is amended to read:

3809. A proceeding based on alleged invalidity or irregularity of any agreement or deed executed under this article can only be commenced within one year after the execution of the instrument.

Sections 351 352 to 358, inclusive, of the Code of Civil Procedure do not apply to the time within which a proceeding may be brought under this section.

Comment. Section 3809 is amended to reflect the repeal of Code of Civil Procedure Section 351.

Veh. Code § 17463 (repealed). Computation of limitations period

SEC. 8. Section 17463 of the Vehicle Code is repealed.

~~17463. Notwithstanding any provisions of Section 351 of the Code of Civil Procedure to the contrary, when summons may be personally served upon a person as provided in Sections 17459 and 17460, the time of his absence from this State is part of the time limited for the commencement of the action described in those sections, except when he is out of this State and cannot be located through the exercise of reasonable diligence, except this section in no event shall be applicable in any action or proceeding commenced on or before September 7, 1956.~~

Comment. Section 17463 is repealed to reflect the repeal of Code of Civil Procedure Section 351. For causes of action accruing before the effective date of the repeals, the act that repealed this section provides a one-year grace period, so that a plaintiff relying on the tolling of a repealed statute as a basis for delaying suit has adequate opportunity to commence an action.

Transitional provision

SEC. 9. Notwithstanding the repeal by this act of Section 351 of the Code of Civil Procedure and Section 17463 of the

Vehicle Code, if a cause of action accrued before the effective date of this act:

(a) Those sections shall continue to apply to the cause of action for a period of one year after the effective date.

(b) Any tolling under those sections before the effective date or, pursuant to subdivision (a), after the effective date, shall be taken into account in computing the time limited for commencement of the action.

Comment. For causes of action accruing before the effective date of this act, the transitional provision affords a one-year grace period, so that a plaintiff relying on the tolling of a repealed statute as a basis for delaying suit has adequate opportunity to commence an action.
