

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION

November 14, 1980

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on November 14, 1980.

Law Revision Commission

Present: Beatrice P. Lawson, Chairperson
Jean C. Love, Vice Chairperson
Robert S. Berton
Thomas S. Loo
Bion M. Gregory, Ex Officio
Judith Meisels Ashmann

Absent: Omer L. Rains, Senate Member
Alister McAlister, Assembly Member
George Y. Chinn
Warren M. Stanton

Staff Members Present

John H. DeMouilly
Nathaniel Sterling

Consultants Present

Carol S. Bruch, Community Property
Stefan A. Riesenfeld, Creditors' Remedies

Others Present

Ricardo Hofer, Ph.D., Alameda County Conciliation Court
Susan I. Keel, State Bar Family Law Section--Community Property
Rina Rosenberg, Santa Clara County Commission on Status of Women
Timothy K. Roake, Research Assistant to Consultant Bruch

Note. The members of various sections, committees, and subcommittees of the State Bar attend as individuals and not as representatives of the State Bar.

ADMINISTRATIVE MATTERS

MINUTES OF THE OCTOBER 1980 MEETING

The Minutes of the October 10-11, 1980, meeting were approved without change.

FUTURE MEETINGS

The Executive Secretary reported that the turnover in the administrative and secretarial staff has placed a heavy demand on the financial resources available to the Commission. The loss of experienced support

staff personnel has resulted in heavy use of temporary and inexperienced assistance, and the productivity of these persons is, of course, substantially less than the experienced persons they replace. It will be necessary to cut back substantially on the amounts that otherwise would be available for research consultants and travel, since these are the only two areas where significant reductions are possible.

After discussing the problem, the Commission decided to hold two-day meetings every two months. Efforts should be made to meet in a meeting facility that is provided without cost to the State if the use of the facility would reduce the overall cost of a meeting.

The Commission adopted the following schedule for future meetings:

December 1980

December - No Meeting

January 1981

January 9 (Friday) - 10:00 a.m. - 5:00 p.m. Los Angeles
January 10 (Saturday) - 9:00 a.m. - 4:00 p.m.

March 1981

March 13 (Friday) - 10:00 a.m. - 5:00 p.m. San Francisco
March 14 (Saturday) - 9:00 a.m. - 4:00 p.m.

May 1981

May 15 (Friday) - 10:00 a.m. - 5:00 p.m. Los Angeles
May 16 (Saturday) - 9:00 a.m. - 4:00 p.m.

July 1981

July 10 (Friday) - 10:00 a.m. - 5:00 p.m. San Diego
July 11 (Saturday) - 9:00 a.m. - 4:00 p.m.

August 1981 - No Meeting

September 1981

September 11 (Friday) - 10:00 a.m. - 5:00 p.m. San Francisco
September 12 (Saturday) - 9:00 a.m. - 4:00 p.m.

PROCEDURE WHERE COMMISSION ATTENTION IS REQUIRED BUT NO MEETING IS SCHEDULED

The Commission discussed the procedure to be followed where a matter needs Commission attention or approval and no meeting is scheduled during the time within which such attention or approval is required.

Although a special meeting could be called by the Chairperson, it was recognized that it is difficult to obtain a quorum at a special meeting held on short notice. In some cases, material can be distributed to each member of the Commission with a request that comments be sent on the material by a specified date. This procedure has been followed where the Commission has approved a recommendation for printing with the requirement that a specific portion be revised and sent to all Commissioners. If no Commissioner objects to the revision, it has been deemed to have been approved. If one or more members of the Commission note problems of language, they are taken into account in printing the recommendation. If a Commissioner wishes to have the matter deferred and discussed at the next Commission meeting, the matter is deferred and set for discussion at the next meeting.

It was also suggested that a conference telephone call might be used in lieu of a Commission meeting. The staff was asked to make suggestions at a future meeting concerning the details of such a procedure.

STUDY D-300 - ENFORCEMENT OF JUDGMENTS (HOMESTEAD EXEMPTION)

The Commission considered Memorandum 80-94 and the attached draft of the homestead exemption and a procedure for discharging judgment liens. The Commission approved the draft of the exemption and discharge procedure for inclusion in the enforcement of judgments recommendation after having made the following changes:

- (1) The interests of married judgment debtors liable on the judgment should be sold as a unit and the exempt proceeds divided among them on the basis of their proportionate interests.
- (2) If there are two homesteads because the debtor and spouse are living separate and apart, they should be able to claim only one as exempt. If the debtor and spouse are unable to agree which is exempt, the court should select the homestead that is exempt.
- (3) If the judgment creditor levies on the homestead and it doesn't bring the minimum bid, an award of attorney's fees to the judgment debtor should be required, rather than permitted in the court's discretion.

(4) The procedure for discharging a judgment lien should not be available once the creditor has levied execution. Conversely, once the debtor has initiated the discharge procedure, levy of execution should not be permitted.

STUDY F-600 - COMMUNITY PROPERTY

The Commission resumed consideration of Memorandum 80-90 and the attached background study relating to problems of equal management and control of community property.

Interspousal rights and remedies generally. The Commission's consultant, Professor Bruch, stated that there is a need in the law to clearly establish norms by which spouses could act with respect to management and control of community property. Dr. Ricardo Hofer, a marriage counselor and conciliation court counselor, stated that marriage counseling could be made more effective if there were a clear statement of property rights of spouses backed up by effective remedies. Ms. Rina Rosenberg of the Santa Clara Commission on the Status of Women felt that a clear statement of property rights would be helpful in resolving marital property disputes since people desire to be in compliance with the law. It was also suggested that a statement of property rights could be given to spouses at the time of marriage.

The Commission was able to reach a consensus that a clear statement in the law of the property rights of the spouses would be useful, but was unable to agree as to what remedies, if any, should be available to enforce the rights. A number of Commissioners expressed the view that interspousal litigation to enforce property rights during marriage is not acceptable. Professor Bruch pointed out that existing statutes authorize interspousal litigation in some circumstances. Suggestions were made that property rights during marriage be enforced through conciliation court counseling or in small claims courts. The Commission determined to commence consideration of individual property rights of the spouses and to discuss remedies in connection with the individual rights.

Right to disclosure of assets. The Commission approved the concept that a spouse should be able to request from the other spouse a statement

of the community assets under the management and control of the other spouse and a statement of debts incurred by the other spouse for which community property is liable. The statement should not be admissible as evidence of the characterization as community or separate of assets or liabilities. No specific provisions relating to the confidentiality of the statement should be included. The staff should work on a draft that specifies the detail required in the statement--what types of assets must be disclosed, whether the assets must be valued, how far should assets be traced in case of a transmutation.

The staff should consider whether to amend the disclosure provisions into Civil Code Section 5125(e) (requirement of good faith in the management and control of community property). The Commission did not develop any specific remedies for failure to make disclosure when demanded or for failure to make full or accurate disclosure. The thought was expressed that the courts might fashion remedies if none were specifically provided and that fraud remedies might be available for false disclosures.

STUDY D-312 - LIABILITY OF MARITAL PROPERTY FOR DEBTS

The Commission considered Memorandum 80-93 and the attached revised recommendation relating to liability of marital property for debts. The Commission determined to defer introduction of legislation on this matter until it has completed work on the community property project generally. However, proposed Civil Code Section 5121(b), which requires that a nondebtor spouse be made a debtor under the judgment in order to reach the separate property of the spouse, should be incorporated in the enforcement of judgment legislation.

Professor Bruch distributed a draft of a section implementing orders of satisfaction (a copy of which is attached to these Minutes). The Commission approved the concept of a procedure comparable to the third-party claims procedure to implement orders of satisfaction when a creditor levies on property. Professors Bruch and Riesenfeld were requested to draft details for the procedure, including times, notices, hearings, forms, etc., in order to make the procedure workable. The procedure should make clear that the classification of a debt as community or separate does not occur until the time of the hearing under the

procedure implementing the order of satisfaction. If a debt is part community and part separate, it should be classified as all community. The Comment should point out that in the case of a tort debt, injury to person and property includes non-physical injury. The burden of proof on the characterization of the debt should be on the person invoking the order of satisfaction procedure. If property levied upon is part community and part separate, only the part primarily liable should be applied to satisfaction of the judgment. When a satisfactory draft is approved, it should be included in the tentative recommendation relating to liability of community property so that it can be reviewed by interested persons and organizations when the other portions of that tentative recommendation are reviewed.

The Commission also considered the amendment proposed by Professor Bruch to Civil Code Section 3440 relating to fraudulent conveyances (see attached copy). The Commission approved the addition of subdivision (i), deleting the phrase "without prejudice to the applicability of Section 3439.07." The Comment should point out that even though there is not a conclusive presumption of a fraudulent conveyance, there is a case-law inference of fraud in transfers between family members without change of possession.

APPROVED AS SUBMITTED _____
APPROVED AS CORRECTED _____ (for corrections, see Minutes of next meeting)

Date

Chairperson

Executive Secretary

Bruch and Riesenfeld: Proposed Draft of Section Implementing Orders of Satisfaction

1 § _____ . RELATIVE RIGHTS OF SPOUSES. Where a creditor's
2 resort to a debtor's separate or community property is subject to an
3 order of satisfaction, either spouse may require that the creditor's
4 payment be made according to that order so far as it can be done without
5 impairing the right of the creditor to complete satisfaction, and
6 without doing injustice to third persons. Either spouse may assert
7 his or her right by way of

8 (a) an action to enjoin the other spouse from making any payment
9 inconsistent with that order;

10 (b) an action for reimbursement from the other spouse for any
11 payment made inconsistent with that order;

12 (c) an action to direct the other spouse to make payment according
13 to that order;

14 (d) a claim pursuant to Division 4 (commencing with Section
15 720.010) of the Code of Civil Procedure. For the purposes
16 of those sections the right of a spouse under the order of
17 satisfaction is a right superior to the creditor's lien.

18 Notwithstanding any other provision of law,

19 (1) the filing of a claim pursuant to this subdivision
20 stays a sale of the property under a writ, or a transfer or
21 other disposition of the property levied upon, subject to the
22 court's power to impose conditions or vacate the stay
23 upon such terms as are just;

24 (2) the property shall remain subject to the creditor's lien
25 until the creditor's claim is satisfied; and

26 (3) the court may order that property alleged by the claimant

27 to be liable to prior resort be turned over to the
 28 sheriff; the court's order shall have the effect of a
 29 levy for the purposes of permitting the assertion of defenses,
 30 exemptions, and third party claims.

COMMENT

An order of satisfaction is imposed, for example, by Civil Code § 5122(b), which regulates the relative liability of community and separate property for a spouse's tort. In order to invoke this section's provisions, the spouse must establish both the relevant order of satisfaction and that property of prior resort is available for payment of the claim or was available at the time that payment from a source of lesser priority was made.

Bruch and Riesenfeld: Proposed Draft of Civil Code §3440 Concerning Fraudulent Conveyances

§ 3440. Transfers and liens without delivery

Conclusive presumption of fraud. Every transfer of personal property and every lien on personal property made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery followed by an actual and continued change of possession of the things transferred, is conclusively presumed fraudulent and void as against the transferor's creditors while he remains in possession and the successors in interest of those creditors, and as against any person on whom the transferor's estate devolves in trust for the benefit of others than the transferor and as against purchasers or encumbrancers in good faith subsequent to the transfer.

Exceptions. This section shall not apply to any of the following:

- (a) Things in action.
- (b) Ships or cargoes at sea or in a foreign port.
- (c) Security interests and the sale of accounts, contract rights or chattel paper governed by the Uniform Commercial Code, and contracts of bottomry or respondentia.

- (d) Wines or brandies in the wineries, distilleries, or wine cellars of the makers or owners of the wines or brandies, or other persons having possession, care, and control of the wines or brandies, and the pipes, casks, and tanks in which the wines or brandies are contained, if the transfers are made in writing and executed and acknowledged, and if the transfers are recorded in the book of official records in the office of the county recorder of the county in which the wines, brandies, pipes, casks, and tanks are situated.

(e) The transfer, or assignment, statutory or otherwise, made for the benefit of creditors generally or by any assignee acting under an assignment for the benefit of creditors generally, or to any security agreement made for the benefit of creditors generally.

(f) Property exempt from execution.

(g) Standing timber if the contract or grant in relation to the same is recorded as provided in Section 1220 of this code.

(h) A transfer of personal property if:

(1) Said personal property is leased back to the transferor immediately following said transfer.

(2) The transferor (lessee) or the transferee (lessor) records at least 10 days before the date of the transfer and leaseback in the office of the county recorder in the county or counties in which the personal property is situated, a notice of the intended transfer and leaseback which states the name and address of the transferor (lessee) and transferee (lessor). The notice shall contain a general statement of the character of the personal property intended to be transferred and leased back, and show the date when and place where the transaction is to be consummated.

(3) The transferor (lessee) or the transferee (lessor) publishes a copy of the notice pursuant to Section 6061 of the Government Code in a newspaper of general circulation published in the judicial district in which the personal property is situated, if there is one, and if there is none in the judicial district, then in a newspaper of general circulation in the county embracing the judicial district. The publication shall be completed not less than five days before the date of the intended transfer and leaseback.

(1) Transfers between members of the same household as to personal property within or incident to the household, without prejudice to the applicability of Section 3439.07.

Rights of secured party acquiring security interest from transferee or successor. This section shall not affect the rights of a secured party who acquires from the transferee or his successor a security interest in the personal property transferred if

1. The intended debtor or secured party records at least 10 days before the consummation of the security agreement in the office of the county recorder in the county or counties in which the personal property is situated, a notice of the transfer and intended security agreement which states the names and addresses of the transferor and transferee and of the intended debtor and secured party. The notice shall contain a general statement of the character of the personal property transferred and intended to be subject to the security interest, and show the date when and place where the security agreement is to be consummated, and

2. The intended debtor or secured party publishes a copy of the notice pursuant to Section 6061 of the Government Code in a newspaper of general circulation published in the judicial district in which the personal property is situated, if there is one, and if there is none in the judicial district, then in a newspaper of general circulation in the county embracing the judicial district. The publication shall be completed not less than five days before the date of the intended security agreement.

Subdivision (2) of Section 2402 of the Commercial Code is not restricted by the provisions of this section.

(Added by Stats.1951, c. 1687, p. 3884, § 2. Amended by Stats.1953, c. 1775, p. 3547, § 1; Stats.1959, c. 1794, p. 4274, § 1; Stats.1959, c. 1795, p. 4276, § 2; Stats.1963, c. 819, p. 2001, § 22, eff. Jan. 1, 1965; Stats.1967, c. 799, p. 2200, § 1.)