

Second Supplement to Memorandum 88-10

Subject: Study L-831 - Recording of Personal Property Affidavit in  
Office of Recorder

Attached as Exhibit 1 is a letter from the State Bar Section commenting on the staff draft attached to Memorandum 88-10. In responding to the comments, the staff directs your attention to the revised staff draft set out in the First Supplement to Memorandum 88-10.

Generally the State Bar Section is very pleased with the staff proposal. However, the Section has some suggestions for improvement or implementation of the staff proposal.

Comment or Cross-Reference in Section 13101

To assist the person using the Section 13100 affidavit or declaration, Charles Collier suggests that a comment or cross-reference be made in Section 13101 to alert the person preparing or using the affidavit or declaration that additional information is required by Section 13106.5 if the item of property transferred is a debt or other obligation secured by a lien on real property.

The staff believes that this is a good suggestion. We would redesignate existing subdivision (c) of Section 13101 as subdivision (d) and would add a new subdivision (c), to read:

(c) If the particular item of property to be transferred under this chapter is a debt or other obligation secured by a lien on real property and the instrument creating the lien has been recorded in the office of the county recorder of the county where the real property is located, the affidavit or declaration shall satisfy the requirements both of this section and Section 13106.5.

Provision that Duty to Pay Does Not Arise Until Obligor Has Been  
Furnished With Certified Copy of Recorded Affidavit or Declaration.

The State Bar Section is concerned that a provision of the staff draft will create a practical problem. Subdivision (b) of the new proposed section provides:

(b) Any duty of the obligor under Section 13105 to pay the successor of the decedent or otherwise to satisfy the obligation does not arise until the obligor has been furnished with a certified copy of the affidavit or declaration recorded under subdivision (a).

The State Bar Section points out that it may be several months before the person recording the affidavit or declaration may be able to obtain a certified copy of the affidavit or declaration.

The staff would delete subdivision (b) entirely and revise the second sentence of subdivision (c) to read:

The recording of the affidavit or declaration under subdivision (a) shall be given the same effect as is given under ~~Section~~ Sections 2934 and 2935 of the Civil Code to recording an assignment of a mortgage and an assignment of the beneficial interest under a deed of trust.

The relevant portion of Section 2935 provides that "the record of the assignment of the mortgage or of the assignment of the beneficial interest under the deed of trust, is not of itself notice to the debtor, his heirs, or personal representative, so as to invalidate any payment made by them, or any of them, to the person holding such note, bond, or other instrument.

We would revise the Comment to the section to delete the paragraph discussing subdivision (b) (which has been deleted) and to add the following at the end of the first paragraph on page 4 of the First Supplement to Memorandum 88-10:

Any duty of the obligor under Section 13105 to pay the successor of the decedent or otherwise to satisfy the obligation does not arise until the obligor has been furnished with satisfactory evidence that the affidavit or declaration has been recorded and satisfies the requirements of subdivision (a). Such evidence might be, for example, a certified copy of the recorded affidavit or declaration, but any other satisfactory evidence of the recorded affidavit or declaration would be sufficient. The reference to Civil Code Section 2935 in subdivision (b) [formerly subdivision (c)] makes clear that the recording of the affidavit or declaration is not itself notice to the obligor so as to invalidate a payment made to the holder of the note secured by the lien on the real property.

**Should Recording of Affidavit or Declaration be Mandatory?**

The Executive Committee of the State Bar Section suggests that the recording of the affidavit or declaration in the office of the county recorder be permissive rather than mandatory, i.e., the "shall" should be a "may." The Executive Committee states that frequently a title

company will insure title without recordation of a formal order. The staff proposal does not provide for a formal order. It is the affidavit or declaration that is recorded, and a good faith purchaser, lender, or lessee who relies on the recorded affidavit or declaration is protected. The recording seems to be an essential element of the statutory scheme. We should not impose a duty to pay on the person obligated to pay unless we have provided a record title that will permit the person to have the discharge of the obligation made a matter of record. Presenting the affidavit or declaration to the obligor without recording it would create a serious cloud on the obligor's title to the real property and would create a serious problem in later establishing that the debt had been paid or obligation performed. Nothing will prevent a title company from relying on a declaration or the like as under existing law in circumstances where the title company has been willing to do so in the past, i.e., where the title company is satisfied that the debt actually was discharged even though the discharge is not a matter of record.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

**ESTATE PLANNING, TRUST AND  
PROBATE LAW SECTION  
THE STATE BAR OF CALIFORNIA**

*Chair*D. KEITH BILTER, *San Francisco**Vice-Chair*IRWIN D. GOLDRING, *Los Angeles**Advisors*

KATHRYN A. BALLSUN, *Los Angeles*  
HERMIONE K. BROWN, *Los Angeles*  
THEODORE J. GRANSTON, *La Jolla*  
LLOYD W. HOMER, *Campbell*  
KENNETH M. KLUG, *Fresno*  
JAMES C. OPEL, *Los Angeles*  
LEONARD W. POLLARD, II, *San Diego*  
JAMES V. QUILLINAN, *Mountain View*  
WILLIAM V. SCHMIDT, *Costa Mesa*  
HUGH NEAL WELLS, III, *Irvine*  
JAMES A. WILLETT, *Sacramento*

*Section Administrator*PRES ZABLAN-SOBERON, *San Francisco*

555 FRANKLIN STREET  
SAN FRANCISCO, CA 94102-4498  
(415) 561-8200

*Executive Committee*

D. KEITH BILTER, *San Francisco*  
OWEN G. FIORE, *San Jose*  
IRWIN D. GOLDRING, *Los Angeles*  
JOHN A. GROMALA, *Eureka*  
LYNN P. HART, *San Francisco*  
ANNE K. HILKER, *Los Angeles*  
WILLIAM L. HOISINGTON, *San Francisco*  
BEATRICE LAIDLEY-LAWSON, *Los Angeles*  
JAY ROSS MacMAHON, *San Rafael*  
VALERIE J. MERRITT, *Los Angeles*  
BARBARA J. MILLER, *Oakland*  
BRUCE S. ROSS, *Los Angeles*  
STERLING L. ROSS, JR., *Mill Valley*  
ANN E. STODDEN, *Los Angeles*  
JANET L. WRIGHT, *Fresno*

February 11, 1988

Mr. John H. DeMouilly  
Executive Director  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, CA 94303

CALIF. LAW REV. COMMISSION

FEB 12 1988

RECEIVED

Re: LRC Memos 88-10 and 88-6

Dear John:

I have enclosed a copy of Study Team 1's technical report on Memo 88-10. The report has been reviewed by the Executive Committee and represents the opinion of the Section with the following addition. The provisions in 13106.5 (a) should be permissive rather than mandatory, i.e. the "shall" should be a "may". Frequently the title is insured by a title company without recordation of a formal order. Declarations and the like are acceptable. Many practitioners have been able to accomplish this under the old and the current law. So a requirement to record in all circumstances seems to be an unnecessary expense and a burden on the county recorders. The provisions in 13106.5 (b) are an incorrect statement of law and would cause significant problems in the collection of the payments. Civil Code Section 2935 handles this problem and this new section only adds an additional burden on the affiant. Furthermore with the forty day waiting period several months could go by before the payments are actually made. This fact compounded with the fact that several counties currently take 2 to 3 months to provide certified copies makes this burden unacceptable.

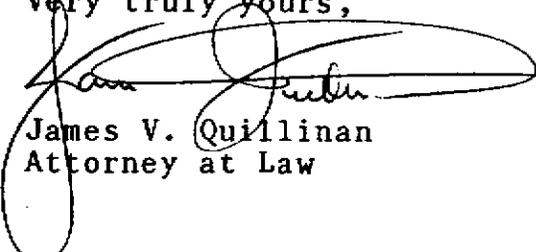
On Memo 88-6 you raise the issue of a comprehensive review of the rights of creditor's in a decedent's assets, in whatever form. We are working on this issue right now with one of our sub-committees under the direction of Ted Cranston. We anticipate to have this review complete sometime late this year or early next year. The review of the LRC's probate project has slowed us down on the review of creditor's rights, but with the completion of the probate project in sight, we will be able to dedicate more of our

Mr. John H. DeMouilly  
February 11, 1988  
Page 2

resources in this direction. Ted Cranston's report resulting in the bill for Trust Creditor's Claims was the first part of this overall project. We would anticipate sharing our work with the LRC and working with you on it.

Also, please let me know if my request that at the next LRC meeting the fee issues can be heard on Thursday 10, 1988 and the Multiple Party Memo can be heard on Friday March 11, 1988 is acceptable. I need to schedule the participants time. Your cooperation is most appreciated.

Very truly yours,



James V. Quillinan  
Attorney at Law

JVQ/h1  
Encls.

cc: Chuck Collier    Jim Opel    Valerie Merritt  
     Keith Bilter    Jim Devine    Bill Schmidt  
     Irv Goldring    Ted Cranston    Ann Hilker

R E P O R T

TO: VALERIE J. MERRITT  
D. KEITH BILTER  
IRWIN D. GOLDRING  
CHARLES A. COLLIER, JR.  
JAMES D. DEVINE  
JAMES C. OPEL  
THEODORE J. CRANSTON  
JAMES V. QUILLINAN  
LLOYD W. HOMER  
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT, STUDY TEAM NO. 1

DATE: FEBRUARY 4, 1988

SUBJECT: LRC MEMORANDUM 88-10 (Study L-831 - Recording of  
Personal Property Affidavit in Office of Recorder)

---

No formal office conference conducted by the members of Study Team No. 1. William V. Schmidt did, however, talk by telephone separately to Charles Collier and Michael Vollmer, and the thoughts expressed below in this report are the unanimous thoughts of all three of them.

Generally we are very pleased with this proposal. We feel that it fills a gap in the law which needs to be filled. We are pleased with the concept and grateful to those who conceived it.

To assist the person using the Section 13100 affidavit or declaration, Charles Collier suggests that a comment or cross-reference be made in Section 13101 to alert the person preparing or using the affidavit or declaration that additional information is required by Section 13106.5 if the

item of property transferred is a debt or other obligation secured by a lien on real property.

We are also somewhat concerned over the practical application of the language in subsection (b). This section states that the obligation of the obligor to pay the successor of the decedent does not arise until the obligor has been furnished the certified copy of the recorded affidavit or declaration. We are unsure whether it is possible at the time of recording a document to obtain a certified copy of that recorded document or whether we must wait until the recorded document is returned by mail to us before we can obtain a certified copy. If we must wait until the recorded document is returned by mail to us before we can obtain a certified copy there will be a delay or gap in time which will be longer -- perhaps two months or so -- in the busier counties. In most cases we will be dealing with a promissory note secured by a deed of trust. The majority of these promissory notes call for monthly payments. As proposed, it is possible for two or three months to elapse between the time of death and the time in which declarant is able to furnish a certified copy of the recorded affidavit of declaration to the obligor. Is this desirable?

In spite of the comments above, we again state that we are happy with the general concept of the proposal and we think it should be adopted.

Respectfully submitted,

STUDY TEAM NO. 1

By:



William V. Schmidt,  
Captain