



HERRING LAW GROUP

Certified Specialist, Family Law, The California Board
of Legal Specialization of the State Bar of California

Fellow of the American Academy of Matrimonial Lawyers
Fellow of the International Academy of Family Lawyers

Writer's direct email: gherring@theherringlawgroup.com

Trust, but *Securitize* *by Gregory W. Herring*

Doveriyai, no proveryai: “Trust, but verify.” Ronald Reagan famously repeated this Russian proverb in missile limitation talks with Soviet leader, Mikhail Gorbachev. Family law lawyers do not negotiate arms treaties (although it sometimes seems like it in our often-volatile cases!). But we do seek for ourselves and for our clients the same kind of assurances “verification” provided in that Cold War context.

Debt is integral to our work, and cuts a wide swath. Clients have debts to us. Parties have them to each other, and to their children.

For every debtor, there is a *creditor*. It is better to be a creditor *with* a security interest than one *without* one. A “security interest” is an interest in property that secures payment or performance of an obligation.

Security basics:

- *Statutory liens* are authorized by codes.
- *Judicial liens* are ordered by courts.
- *Voluntary liens* are made by individuals. They require (1) attachment and (2) perfection.
- *Attachment* occurs when a security interest becomes enforceable against the debtor. Essential requirements are the existence of a security agreement and the debtor's ongoing rights to the property used as collateral.
- *Perfection* happens when a security interest becomes enforceable against the rest of the world. It requires attachment and usually some form of notice of the secured party's interest -- often a UCC-1 filing under the Commercial Code (relating to fixtures and personal property) or a recorded deed of trust (relating to real property).

This discusses how formal security interests and like vehicles can provide increased assurances, especially in fraught times like these, in our family law practices.



Attorney Fees

In re Marriage of Hatch (1985) 169 Cal.App.3d 1213 recognized that the practice of family law often requires attorneys to finance litigation by deferring fees, advancing case-related overhead, and even pulling from their own pockets for depositions and experts. “Banks and finance companies are licensed for the purpose of lending money; lawyers are not.”¹

So how do we try to assure payment of fees?

The straightforward way is to require adequate retainers and attend to accounts receivable. Rules of Professional Conduct, Rule 1.15, governs the maintenance of trust funds and attorneys’ use of client funds to pay their bills. Address these topics in written fee agreements.

Attachment of client files is *not* allowed.²

Family Code³ section 290 enables enforcement of fees orders under section 2030 (as well as any judgment or order under the Family Code) by “... execution, the appointment of a receiver, or contempt, or by any other order as the court in its discretion determines from time to time to be necessary.” Judicial liens on property are possible.⁴

Section 2032 subd. (d) authorizes a trial court to deem a case as involving complex or substantial issues of fact or law. It may then proactively determine the appropriate and equitable allocation of fees and costs, the sources for payments thereof, and related security.⁵

Family Law Real Property Liens (“FLARPLs”) are statutory liens secured by community real property (see sections 2033 & 2034). Our brothers and sisters in other areas of practice sometimes marvel at how FLARPLs “guarantee” that family law lawyers will be paid in full! Besides an economic meltdown that erases all equity (wait, what’s this COVID thing again?), what could go wrong?! *In re Marriage of Turkanis & Price* (2013) 213 Cal.App.4th 332, 352 answered that – courts are also empowered to modify and expunge FLARPLs, even after recordation.

This is not radically different, though, from a court’s powers relating to section 2030 fees orders. They, too, may be modified -- and even vacated -- pending a case’s completion.⁶ At least the

¹ *Hatch*, at pp. 1218, fn. 2.

² *Academy of California Optometrists, Inc. v. Super. Court (Damir)* (1975) 51 Cal.App.3d 999; California Rules of Professional Conduct, Rule 1.16 subd. (e).

³ All statutory references in the text are to the Family Code unless otherwise indicated.

⁴ *Rosenthal v. Rosenthal* (1961) 197 Cal.App.2d 289, 297-298.

⁵ Fam. Code §2032 subd. (d).

⁶ *In re Marriage of Cryer* (2011) 198 Cal.App.4th 1039, 1056. In *Csupo v. Csupo (Csupo I)* (2012) WL 1021716, an unpublished case, the Second District affirmed a trial court’s assertion of this authority in approving the parties’ “*cancellation*” of prior fees orders against the benefitting attorney’s objection!



statutory lien provided by FLARPLs allows them to withstand bankruptcy.⁷ FLARPLs can still prove useful in select cases; do not let *Turkanis* totally eclipse them.

Voluntary charging liens can accomplish attachment. These are attorney liens upon funds at issue or judgments. *Fletcher v. Davis* (2004) 33 Cal.4th 61. *Hawk v. State Bar* (1988) 45 Cal.3d 589, 601 requires a clear written agreement and opportunity for the client to seek independent legal counsel. *Cal-Western Reconveyance Corp. v. Reed et al.* (2007) 152 Cal.App.4th 1308, 1321 clarified that, after the client obtains a judgment, the attorney must bring a separate independent action to establish the existence and amount of the lien, and to enforce it.

Third party guarantees, often made by parents and significant others toward ensuring a client's ongoing representation, can be secured through voluntary liens. An issue might be whether an attorney filing a Request for Orders for contribution to fees must disclose an existing third-party guarantee. The reputation-preserving answer is "yes!"

Child Support and Spousal Support

Abstracts of support judgments are not security interests or liens, but they can help ensure payments. Code of Civil Procedure section 697.320 subd. (a) authorizes them; the requirements are stated in Family Code section 4506. Abstracts, or the orders themselves, should be recorded in all counties where a support obligor might own property (commission a property search). If the obligor wishes to sell, encumber, or refinance real property in a county where such papers are recorded, he must first gain clearance from the support recipient, affirming a lack of arrears.

The forms can be modified to cover *pre-judgment* orders. County recorders' offices sometimes accept those versions.

A risk of signing an abstract on a client's behalf is that the client may later be unreachable or uncooperative toward authorizing a release when the obligor eventually demands one. Avoid being caught in the middle by having *clients* sign and record abstracts.

When addressing support arrears arising from a real property transaction "tripped up" by an abstract, it is also a good time to consider whether to request the support obligor to post a bond from the sales proceeds (see below).⁸

Section 5230 provides for earnings assignment orders for payment of child support and spousal support. An assignment for support has priority over any earnings withholding order.⁹

⁷ See *In re Scott* (2009) 400 B.R. 257, a Santa Barbara case arising from a debtor spouse's attempt in bankruptcy to avoid a FLARPL for my fees. While "judicial" liens are dischargeable, "statutory" ones are not.

⁸ California family law guru, Garrett Dailey, suggests this in his *Attorney's Briefcase* resource.

⁹ Code Civ. Proc. §706.031 subd. (b).



Section 4012 authorizes court-ordered security for child support upon a showing of good cause. *Franklin Life Ins. v. Kitchens* (1967) 249 Cal.App.2d 623, 636 interpreted an earlier version of that statute to permit a court to order a payor to maintain the children as beneficiaries of community property life insurance as reasonable security. *In Re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1165 upheld section 4012 orders, requiring a stock pledge and a real property lien, for a disabled adult child.

Courts may compel parents to deposit funds as security for child support.¹⁰ Sections 4600 *et. seq.* provide for asset deposit and sale orders for child support obligors who in bad faith fail their obligations. Section 17523 authorizes judicial liens on personal property against delinquent child support obligors. Notwithstanding a “shutdown” clause, Probate Code section 15305 gives courts discretion to order trustees to make income and principal distributions to satisfy child support orders.¹¹

Section 4339 authorizes court-ordered security for spousal support. This can include a forced trust fund.¹²

Section 4360 allows a court to order an obligor to establish an annuity, obtain life insurance, or create a trust where it is “just and reasonable” in view of the needs of supported spouse. Arguably, this creates a significant exception to the foundational point of section 4337. That statute mandates the termination of spousal support on the death of either party (or the remarriage of the supported one) except as otherwise agreed. *In re Marriage of Ziegler* (1989) 207 Cal.App.3d 788, 791 affirmed an order for a support obligor to maintain his survivor benefit plan for the benefit of his former wife, emphasizing that the obligor’s spousal support obligation would still, in fact, terminate upon his death, with the insurance benefits then being paid by the third-party insurance company.

Code of Civil Procedure section 697.320 authorizes liens on the real property of any support obligor. *In re Marriage of O’Connell* (1992) 8 Cal.App.4th 565, 572 authorizes life insurance for child support and spousal support “security.”

ATROS and Notices

Section 2040 mandates Automatic Temporary Restraining Orders (“ATROs”) in the summons beginning any nullity, dissolution, or legal separation case. ATROs do not provide security interests. They do require maintaining insurance beneficiaries, prohibit non-probate transfers to “disappear” property, and bar the transfer, encumbrance, hypothecation, concealment or disposal of any property, except for transactions made in the “usual course of business” or for the “necessities of life.”¹³ The other exceptions are the other party’s written permission or else orders of the court.¹⁴

¹⁰ Fam. Code §4550.

¹¹ *Pratt v. Ferguson* (2016) 3 Cal.App.5th 102, 114.

¹² *Witaschek v. Witaschek* (1942) 56 Cal.App.2d 277, 282.

¹³ Fam. Code §2040 subd. (a)(2)(A).

¹⁴ *Ibid.*



Post-filing notices of pending proceedings that may be served on insurance carriers toward maintaining health, life or disability insurance for a spouse's or children's benefits are authorized by section 2050. Section 2051 provides for notices to insurers following orders to maintain or purchase insurance. Other non-statutory "notices" may be sent to financial institutions, for instance toward "freezing" endangered accounts – be creative. In those situations, get court orders, too!

Parties may record notices of *lis pendens*. Careful: an initial petition failing to allege a community interest in specific real property does not state a "real property claim" supporting this.¹⁵ "It is strictly a binary process: If you properly plead a real property claim, you can file a notice of *lis pendens*; if you don't, you can't."¹⁶ Attorney fees and costs may be awarded against a party improperly recording a *lis pendens* and then opposing a motion for expungement.¹⁷

Settlements/Judgments

Voluntary liens can facilitate resolutions. They are often included as part of marital settlement agreements and other family law "deals." Securitization in an equities-heavy estate, for instance, might involve the creation of a security agreement and recordation of a UCC-1 lien attendant to a promissory note and stock pledges.

Seek options for collateral. Besides shares of stock, it might include paintings, collections, crops and endless other possibilities. I once used Roman columns in a Montecito case; they are "fixtures" subject to a UCC lien.

Landmines, which are often encountered during pressured settlement proceedings, include:

- *Under*-securitization or *over*-securitization. The creditor party will want adequate security. The debtor will chafe at having too much property tied-up. Appraisals might help ensure the right balance.
- Superior-positioned creditors. Commission title searches and purchase litigation guarantees.
- The *extent* of competing security rights. If the creditor party takes a subordinate position, will enough equity exist following a potential default?
- "Rights of first refusal." These can diminish marketability and enable mischief by the holder.
- Failure to provide an obligor the right to potentially substitute alternative security *in lieu* of the original.
- Inadequate specification of requirements and timelines for a party to refinance a loan (typically a mortgage) to eliminate the other party therefrom. "Best efforts" can be code for "later litigation!"
- Foreign property. Does a creditor really want to have to retain foreign counsel and follow another country's enforcement procedure?

¹⁵ *Gale v. Super. Ct. (Gale)* (2004) 122 Cal.App.4th 1388, 1394 - 1398.

¹⁶ *Kirkeby v. Super. Court (Fascenelli)* (2004) 33 Cal.4th 642, 648

¹⁷ Code Civ. Proc. §405.38.



- Failures to perfect. After negotiating and attaching a security interest (and billing therefor), counsel will have an unpleasant time explaining its worthlessness following this mistake.
- Failures to consider the Marketable Record Title Act (Civ. Code § 880.020 *et seq.*) anti-deficiency laws, state and federal securities laws and the like.

Transactional and real property attorneys exist for good reason – retain their assistance!

Conclusion

Security interests and like vehicles can provide increased assurances in family law practice. Creatively consider the tools available toward both collecting fees and zealously pursuing clients' best interests.