

12/1/78

Memorandum 78-69

Subject: Study D-300 - Enforcement of Judgments (Homestead Exemption)

Attached to this memorandum is a staff draft of provisions governing the exemption of dwellings. This draft will require further revisions and refinements as we give consideration to this subject; in its present form the draft provides the general framework for a unified and simplified postlevy dwelling exemption. It will be included in Chapter 7 (Exemptions) of the Enforcement of Judgments Law. A copy of the dwelling exemption provisions from existing law is also attached to the copy of this memorandum sent to Commissioners.

The draft does not deal with the problem of applying the exemption to separate and community property or to property held in joint tenancy or as tenants in common. We will prepare a memorandum on this subject for a future meeting.

The similarities and differences between the draft statute and existing law are briefly catalogued in the Comments to the draft sections. The staff has the following additional matters to discuss:

§§ 707.820, 707.830. Amount of exemption for persons 65 and older

Section 707.830 continues the exemption levels of existing law, but makes one clarifying change. Under existing law, a married person over 65 may qualify for either the head of a family exemption and the exemption for persons 65 or older. See Civil Code §§ 1260-1261. The amount of both of these exemptions is \$40,000. However, if a head of a family claims an exemption, it would be limited to one \$40,000 amount. If married debtors are both over 65, however, they arguably may claim two \$40,000 exemptions in community property.

The separate exemption for persons 65 and older was added in 1969. We assume that the purpose of this legislation was to protect older persons who were not entitled to claim the head of a family exemption. This legislation should not have the effect of doubling the head of a family exemption. Accordingly, we have limited the definition of "head of a family" to persons under 65.

§§ 707.840, 707.850. Procedural scheme

The staff draft provides two procedures for asserting a dwelling exemption. See Sections 707.840 and 707.850. The declared homestead provisions in the Civil Code would be repealed under this proposal. We

attempted to draft a single procedure for claiming a dwelling exemption but came to the conclusion that a two-procedure scheme fits better into the overall framework of the Enforcements of Judgments Law as it is currently drafted.

Section 690.31 in existing law requires the judgment creditor to apply to the court where the dwelling is located for an order for the issuance of a writ of execution. This results in writs of execution being issued for different purposes by different courts to the same county in a case where the dwelling is not located in the county where the judgment was entered. The staff thinks it is preferable to issue all writs out of one court. Hence, the exemption procedures of Sections 707.840 and 707.850 come into play only after the dwelling has been levied upon.

In the case of real property, there is no need to rush the exemption procedure or to postpone the levy of execution because under draft Section 703.640(h) (see the draft statute attached to Memorandum 78-46) the notice of sale of real property is delayed for 120 days after notice of levy is given the judgment debtor. The opportune time to determine the dwelling exemption is early in the 120-day period. Accordingly, Section 707.850 requires the judgment creditor to apply for an order permitting the sale of the property within 10 days after the dwelling is levied upon. This preserves the aspect of existing Section 690.31 that requires the judgment creditor to initiate proceedings in court that may lead to the eventual sale of the property.

However, in the case of personal property (and leasehold estates with an unexpired term of less than two years at the time of levy), there is no delay of the notice of sale. The same problems occur in this situation as where any other form of personal property is levied upon. Hence, draft Section 707.840 incorporates the general procedure for claiming exemptions set for Article 2 of the exemption chapter. This procedure requires the judgment debtor to file a claim of exemption with the levying officer within 10 days after notice of levy is mailed or delivered. If the judgment creditor opposes the claim of exemption, the claim will be determined at a court hearing. If no opposition to the claim is filed within the allowable time, the property is released from the levy.

This procedure is necessary regarding personal property for several reasons. The judgment creditor needs to be able to levy upon the property before notice is given in order to establish a priority and to restrict its transfer since a judgment lien only covers real property. Requiring a hearing, as under existing Section 690.31, defeats this interest. The exemption procedure must be expeditious, particularly under existing law, because the levy on a housetrailer or vessel requires the installation of a keeper for at least two days, the removal of the occupants, and the taking of exclusive custody of the dwelling which may involve moving it to another place for storage. This is obviously an expensive process. (For the manner of levy on personal property used as a dwelling, see Section 703.380 in the draft statute attached to Memorandum 78-46.)

This raises a problem concerning the manner of levy on easily moveable personal property used as a dwelling. The general principle governing levies on tangible personal property is that the levying officer needs to gain sufficient control over it so that it cannot be removed. If it is moveable, it is taken into custody and stored in a warehouse, unless there is a large amount of moveable property in a single location, in which case a keeper may be posted to watch over it. If the property is not easily moved, a keeper levy is employed. The staff has considered altering the manner of levy on mobilehomes and the like so as to reduce the costs involved in levying by keeper, moving the mobilehome, and storing it until it can be sold. This could be done by serving the debtor with the writ and notice of levy and enjoining the debtor against moving or transferring the dwelling. Obviously this does not achieve the sort of custody normally required for a valid levy, but it is much cheaper and less disruptive of the debtor and the debtor's family than installing a keeper and removing the family after two or more days. We think this sort of levy would be honored by most debtors, particularly since it would take place only when the debtor actually lived in the property.

This problem should not, however, be blown out of proportion. In view of the generosity of the dwelling exemption as applied to mobilehomes, we doubt that very many levies would occur in the first place, so the hardship on debtors as a class or on mobilehome dwellers as a class should be extremely minimal.

It should be noted that the draft statute would treat all mobile-homes and the like the same for purposes of levy and exemption claims, except in a situation where a mobilehome has been so affixed to the land that it has become real property. This treatment is preferable to existing law which provides for homestead declarations on real property (which may include erstwhile mobilehomes), debtor-initiated exemption claims after keeper levies on housetrailer, mobilehomes, houseboats, boats, or other waterborne vessels, and creditor-initiated proceedings on mobilehomes designed to be used without a permanent foundation which are in excess of 8 X 40 feet. Of course, a crafty debtor bent on avoiding payment of a judgment will frequently be able to evade enforcement process under any reasonable procedure.

§ 707.850(b), (d), (e). Appraisal

Under the declared homestead scheme, a judgment creditor may execute on property for which a homestead declaration has been recorded and must then petition for the appointment of appraisers within 60 days after levy. Civil Code §§ 1245-1248. Within 90 days after the petition, a hearing is held at which the court is to appoint three disinterested residents of the county to appraise the value of the homestead. Civil Code §§ 1248-1249. The appraisers are to file their report within 15 days after their appointment, after which the court determines whether the land should be divided or sold or is exempt. Civil Code §§ 1251-1254. Sale is precluded if no bid is received that exceeds the amount of the exemption and the amount of liens and encumbrances on the property. Civil Code § 1255.

Code of Civil Procedure Section 690.31(c) also provides for an appraisal if the judgment creditor alleges that the property has an excess value and incorporates the Civil Code appraisal procedures. The staff considers this a serious flaw in Section 690.31 because of the delay and expense involved. Accordingly, we have eliminated the outside appraiser procedure in favor of leaving the determination of the value of the property up to the court based on the evidence presented by the parties. This is consistent with the provision in Section 690.31(e)(2) that the judgment creditor has the burden of proving the value of the property. If the Commission finds this to be inadequate, we suggest that a provision be added giving the court discretion to appoint an expert appraiser

if it is dissatisfied with the evidence as to value presented by the judgment debtor and the judgment creditor.

On the other hand, the utility of any appraisal in this context should be considered. The only value of an appraisal is to bring an early end to the execution proceedings and avoid additional costs of notice and sale where it is determined that there is no excess value. If the appraisal shows that there is an excess value, the property proceeds to sale, but the appraisal has no further effect, since the property is sold only if there is a bid equal to or exceeding prior liens that are required to be paid off and the amount of the exemption. We could provide that the court need only determine that there is an excess value, without determining the amount thereof. It should also be considered whether the expense of determining the value of the property in a great number of cases is outweighed by the benefit of putting an early end to execution proceedings in cases where the property is found to have no excess value.

§ 707.850(g). Subsequent applications for order permitting sale

Subdivision (g) of draft Section 707.850 continues the spirit of Section 690.31(i) which requires judgment creditors attempting to reach a dwelling within 12 months of a denial of a writ to allege a material change in circumstances. We believe this is a good provision, but have some doubts about its proper scope. Section 690.31(i) applies to applications by "a judgment creditor", leaving open the question whether it applies only to the judgment creditor who made the original application, to all money judgment creditors, or to all creditors, secured and unsecured. In discussing this provision, Miller & Starr substitute the phrase "any judgment creditor" for "a judgment creditor" and state that the

language of this section indicates that the legislature intended the provision to apply to all creditors of the debtor claimant The purpose of this would be to avoid the costs, expense and other burdens inherent in a situation where there are several or even many creditors of the judgment debtor and each independently undertakes to seek a writ of execution against a dwelling house that has already been declared exempt in a hearing on a creditor application that took place within the 12 month period. However, in any case, each creditor would have the right to establish that the dwelling house is not entitled to an exemption as against that creditor because his judgment falls within the class excluded from the provisions of CCP § 690.31 by the exceptions contained in CCP

§ 690.31(b) (3)(i)(ii) or (iii) [mechanics', contractors', architects', vendors' liens, and debts secured by encumbrances on the property]. [3 H. Miller & M. Starr, Current Law of California Real Estate § 16:50, at 98 n.14 (rev. ed. 1977).]

As drafted, Section 707.850(g) applies to judgment creditors having money judgments and not to creditors seeking to satisfy a lien arising under other law. We believe that the policy expressed by Miller & Starr is desirable as to unsecured creditors, but are not convinced that the language of existing law covers or should cover secured creditors and preferred lien creditors.

Notices

Section 690.31 of existing law sets forth the form of notices required thereunder in both English and Spanish. The general approach taken by the Commission in the past has been to delegate this responsibility to the Judicial Council subject to some general guidelines. This is a preferable approach because forms frequently require alteration which is much easier and cheaper to accomplish on the administrative than the legislative level. The Commission has also decided that the Judicial Council should be directed to prepare notices in languages other than English in appropriate cases and to provide rules for their use. The attached statute has been drafted without specifying the content of any notices to the judgment debtor, consistent with the rest of the Enforcement of Judgments Law. However, in view of the history behind the enactment of Section 690.31, we may encounter strong resistance to this approach. As a compromise, we might add a section specifying the general nature of the information that should be included in the notices pertaining to the dwelling exemption, but the precise language should be left to the determination of the Judicial Council.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

STAFF DRAFT

Article 4. Dwelling Exemption[Chapter 7. Property Subject to Enforcement of
Money Judgments and Exemptions]§ 707.810. Dwelling

707.810. As used in this article, "dwelling" means the home in which the judgment debtor or the family of the judgment debtor actually resides, including, but not limited to, the following:

(a) A house together with the outbuildings and the land upon which they are situated.

(b) A mobilehome together with the outbuildings and the land upon which they are situated.

(c) A waterborne vessel.

(d) A condominium, as defined in Section 783 of the Civil Code.

(e) A planned development, as defined in Section 11003 of the Business and Professions Code.

(f) A stock cooperative, as defined in Section 11003.2 of the Business and Professions Code.

(g) A community apartment project, as defined in Section 11004 of the Business and Professions Code.

Comment. Section 707.810 supersedes the provisions of former law pertaining to the property that could be claimed to be exempt as a homestead or dwelling. See former Civil Code § 1237 (declared homestead); former Code Civ. Proc. §§ 690.3 (housetrailer, mobilehome, houseboat, boat, or other waterborne vessel), 690.31 (dwelling house). Section 707.810 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 family actually resides.

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§ 707.820. Head of a family

707.820. As used in this article, "head of a family" means a person under the age of 65 who is any of the following:

(a) The husband or wife where the judgment debtor is married.

(b) A person who is caring for or maintaining in the dwelling one of the following persons:

(1) His or her minor child, minor grandchild, or minor child of his or her deceased wife or husband.

(2) His or her minor brother or sister, or the minor child of a deceased brother or sister.

(3) His or her father, mother, grandfather, or grandmother.

(4) The father, mother, grandfather, or grandmother of his or her deceased husband or wife.

(5) An unmarried relative described in this section who has attained the age of majority and is unable to take care of or support himself or herself.

Comment. Section 707.820 continues the substance of former Civil Code Section 1261. Persons 65 years of age or older are excluded from this definition because they are entitled under Section 707.830(b) to the same exemption afforded the head of a family by Section 707.830(a).

368/224

§ 707.830. Exempt interest in dwelling

707.830. Any interest of the judgment debtor in a dwelling is exempt from enforcement of a money judgment as provided in this article in the following amounts over and above liens and encumbrances superior to the judgment creditor's lien:

(a) Forty thousand dollars (\$40,000) for the head of a family.

(b) Forty thousand dollars (\$40,000) for a person 65 years of age or older.

(c) Twenty-five thousand dollars (\$25,000) for any person other than one described by subdivision (a) or (b).

Comment. Section 707.830 supersedes the provisions of former law prescribing the nature of the judgment debtor's interest for which an exemption may be obtained. See former Civil Code §§ 1237, 1237.5, 1238; former Code Civ. Proc. §§ 690.3, 690.31. Under this section an exemption may be claimed for any interest in a dwelling that the judgment creditor may seek to apply to the satisfaction of a money judgment. The provisions of former Civil Code Sections 1237 and 1238 precluding the exemption of leases with less than a 30-year term is not continued.

The provisions for the amount of the exemption continue the substance of former Section 1260 of the Civil Code and former Section 690.3(a) of the Code of Civil Procedure. See also former Section 690.31(a) (incorporating former Civil Code § 1260). See Section 707.820 ("head of family" defined).

38/882

§ 707.840. Exemption claim for personal property dwelling or lease with less than two years' term

707.840. If the judgment debtor's interest in a dwelling is levied upon as personal property pursuant to Section 703.380 or is a leasehold estate with an unexpired term of less than two years at the

time of levy, an exemption claim shall be made and determined as provided in Article 2 (commencing with Section 707.310).

Comment. Section 707.840 incorporates the general procedure for claiming an exemption provided by Sections 707.310-707.410. This procedure applies where the property levied upon is not subject to the delay of sale provision of Section 703.640(h) (120-day delay of notice of sale of an interest in real property other than a leasehold estate with an unexpired term of less than two years). Under former law, a house trailer, mobilehome, houseboat, boat, or other waterborne vessel in which the judgment debtor or the judgment debtor's family actually resided could be claimed as exempt in a similar manner. See former Sections 690(a), 690.3, 690.50. This section also applies to claims of exemption for certain mobilehomes that under former law would have been determined as provided in former Section 690.31 (judgment creditor's application for writ of execution on dwelling, including a mobilehome as defined by Health & Saf. Code § 18008).

368/229

§ 707.850. Exemption procedure for real property dwelling

707.850. (a) If the judgment debtor's interest in a dwelling is levied upon pursuant to Section 703.310 as an interest in real property, other than a leasehold estate with an unexpired term of less than two years, within 10 days after the dwelling is levied upon the judgment creditor shall apply to the proper court in the county in which the dwelling is located for the issuance of an order permitting sale of the dwelling. If the money judgment was rendered in another county, the judgment creditor shall file an abstract of judgment in the form prescribed by Section 674 with the clerk of the court where the application is filed.

(b) The application shall be verified, shall describe the dwelling, and shall contain one or both of the following:

(1) A statement that the dwelling is not exempt and the reasons therefor.

(2) A statement that, if the dwelling is exempt, its current value exclusive of liens and encumbrances superior to the judgment creditor's lien, exceeds the amount of the applicable exemption, and a statement of the current value of the dwelling.

(c) The hearing on the judgment creditor's application shall be held not later than 20 days after the application is filed. Not later than 10 days before the time set for the hearing, the judgment creditor shall mail a copy of the application to the judgment debtor and shall serve a copy of the application on an occupant of the dwelling or, if

there is no occupant present when service is attempted, leave a copy in a conspicuous place at the dwelling. The judgment creditor shall file proof of mailing and of service on an occupant with the court.

(d) At the hearing on the judgment creditor's application, the judgment creditor has the burden of proof on the issue of the current value of the dwelling and the judgment debtor has the burden of proof on the issue of entitlement to the exemption.

(e) At the hearing the court shall determine by order whether the dwelling is exempt, the amount of the exemption, and, if the dwelling is exempt, whether its value is in excess of the exempt amount and any liens and encumbrances superior to the judgment creditor's lien. If the dwelling may be sold, the court shall issue an order permitting sale. A copy of the order shall be sent to the levying officer to whom the writ of execution is directed and to the clerk of the court that rendered the judgment if different from the court issuing the order permitting sale.

(f) If the order permitting sale is denied, the levying officer shall release the property from the lien of execution in the manner provided by Section 703.240.

(g) Any judgment creditor who seeks an order permitting sale pursuant to this section within 12 months after the denial of an order permitting sale by such judgment creditor or any other judgment creditor shall include with the application a statement under oath alleging that a material change of circumstances has affected the right to the exemption and shall set forth facts supporting the allegation.

(h) If the judgment creditor's application is filed in a county other than the county where the judgment is entered, the judgment creditor shall pay a filing fee of four dollars (\$4) to a justice court or six dollars (\$6) to a superior or municipal court.

(i) The provisions of Sections 707.390 and 707.400 apply to proceedings under this section.

Comment. Section 707.850 supersedes several provisions of former law for asserting and determining a homestead or dwelling exemption. See former Civil Code §§ 1244-1254, 1258-1259, 1261.1, 1262-1265, 1266-1269, 1300-1301, 1303-1304; former Code Civ. Proc. § 690.31(c)-(1), (1)-(p). This procedure applies where the sale of property levied upon is subject to the delay provided by Section 703.640(h) (120-day delay of notice of sale of an interest in real property other than a leasehold estate with an unexpired term of less than two years). The procedure for recording a homestead declaration formerly provided in Sections 1237-1304 of the Civil Code is not continued.

Subdivision (a) of Section 707.850 requires an application for an order permitting sale of a dwelling levied upon as an interest in real property (other than a leasehold estate with an unexpired term of less than two years), whereas former Section 690.31(c) required the judgment creditor to apply for issuance of a writ of execution. The provision requiring the filing of an abstract of judgment if the application is made in a county other than the county where the judgment was entered continues the last paragraph of former Section 690.31(c).

Subdivision (b) is based on portions of former Section 690.31(c). Subdivision (b) does not, however, require the appointment of three appraisers as was required by former law. See former Section 690.31(c) (incorporating the provisions for determining value in former Civil Code §§ 1237-1304). Note that the dwelling may not be sold on execution, regardless of its appraised value, if the amount bid at the sale is less than the total of any superior liens that are required to be satisfied and the amount of the applicable exemption of proceeds. See Sections 703.740 (minimum bid at execution sale), 707.860 (proceeds exemption). The purpose of the appraisal is to permit the early release of the dwelling from the lien of execution if it is determined that there is no excess value. See subdivision (f).

Subdivision (c) is new, but continues some features of the procedure in former Section 690.31. Subdivision (d) continues former Section 690.31(e). Subdivision (e) supersedes the first paragraph of former Section 690.31(f). Subdivision (f) continues a portion of former Section 690.31(m) (incorporating former Section 690.50(j)). Subdivision (g) continues the substance of former Section 690.31(i). Subdivision (h) continues the third paragraph of former Section 690.31(c).

Subdivision (i) incorporates the provisions in the general exemption procedure pertaining to extension of time (Section 707.390) and appeals (Section 707.400). This continues former Section 690.31(n) and a portion of former Section 690.31(m) (incorporating former Section 690.50(1)).

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§ 707.860. Exemption of dwelling proceeds

707.860. If the dwelling is voluntarily or involuntarily sold or is damaged or destroyed, the proceeds of sale or of insurance or other indemnification are exempt in the amount provided by Section 707.830 for a period of six months after the sale, in the case of a voluntary sale, or six months after the receipt of proceeds in all other cases.

Comment. Section 707.860 supersedes former Section 1257 of the Civil Code and the first sentence of former Section 690.31(k) of the Code of Civil Procedure.