

## Memorandum 79-60

Subject: Study L-300 - The Probate Homestead (Comments on Tentative Recommendation)

The Commission in late September distributed for comment its tentative recommendation relating to the probate homestead, a copy of which is attached. The basic effect of the tentative recommendation is to abolish the survivorship right in the declared homestead and to limit the probate homestead to a term of years based upon need rather than a fee estate that vests automatically in the survivors.

The comments received on the tentative recommendation were all favorable to the basic concept. The San Diego County Marshal (Exhibit 2), Mr. H. Neal Wells III (Exhibit 6), the Death and Gift Tax Subcommittee of the State Bar (Exhibit 7), Ms. Wanda Underhill (Exhibit 8), and Mr. Ira E. Bilson (Exhibit 9) approve the tentative recommendation as proposed. The remaining commentators approve the tentative recommendation with suggested changes, which are analyzed below.

General Comment

One commentator, Mr. John W. Schooling (Exhibit 4), agrees that the proposed revision of the probate homestead is a step in the right direction, but goes on to argue for the complete elimination of the probate homestead, or at least a probate homestead based on need with court authority to trade the homestead for other estate assets that would otherwise go to the homestead recipient.

The staff believes the Commission's draft accomplishes this to a certain extent. Section 660 makes clear that the granting of the homestead is in the discretion of the court. Section 664 requires the court, in setting aside a homestead, to consider the needs of both the survivors and the heirs or devisees or the decedent. It would be possible to tighten these standards further, but the staff believes the fairly broad discretion of the court is desirable. It might be useful to add the following sentence at the end of Section 664(a): The court may condition setting apart a homestead upon assignment by the homestead recipient of other property to the heirs or devisees of the property set

apart as a homestead or upon such other terms as may appear just. The Commission had such a provision in an earlier draft of the probate homestead recommendation, but deleted it as being unnecessary after revising the recommendation so that the homestead is only set apart for a term of years.

The Commission should also consider whether the probate homestead really serves a useful purpose and might not be abolished outright.

Probate Code § 660

Mr. Gerald E. Lichtig (Exhibit 3) notes a general problem with the homestead and the family allowance provisions (and, the staff believes, with other provisions of the Probate Code that relate to property rights of a "surviving spouse"). Mr. Lichtig states that, under the Family Law Act, a marriage can be dissolved without a contemporaneous property division--the court may bifurcate the trial and retain jurisdiction to later divide the community and quasi-community property. What happens if one of the former spouses dies after the time of the dissolution but before the property is divided? What are the rights of the former spouses in the community property? In intestate succession to separate property? In other matters? Mr. Lichtig argues that at least for purposes of the probate homestead and the family allowance the former spouse should not lose the rights of a "surviving spouse", since the former spouse has not received his or her share of the community property and the right of the former spouse to support has been terminated by the death of the other spouse. The staff disagrees. The probate homestead defeats the will of the decedent to convey the family home to a person other than the surviving spouse; the probate homestead is permitted to the surviving spouse because of the obligations of marriage. But where the marriage has terminated, the obligations terminate. The former spouse should not be considered a "surviving spouse". The staff recognizes that this is a general problem of community property law, however, and suggests that we refer the problem to our consultant, Professor Bruch, to consider in the process of the community property study.

Subdivison (a). Existing law permits the surviving family of a decedent to remain in the family dwelling until the filing of the inventory in probate, and upon the filing of the inventory to petition for a

probate homestead. The California Bankers Association (Exhibit 11) points out that there will be a delay between the filing of the inventory and the granting of a homestead, and that this gap should be covered in the statute. The staff suggests that Section 660(a) be revised to read:

(a) Until the inventory is filed and for a period of 60 days thereafter or such longer or shorter period as is ordered by the court for good cause, the decedent's surviving spouse and minor children are entitled to remain in possession of the family dwelling, the wearing apparel of the family, the household furniture, and other property of the decedent exempt from execution.

Subdivision (b). Under existing law and the proposed draft, the homestead is set apart only on petition. Professor Charles W. Adams (Exhibit 10), our homestead consultant, suggests that the court be authorized to set apart a homestead on its own motion. While this might be useful to survivors of the decedent who are not represented by counsel, the staff believes it has a greater potential for mischief where the survivors have not requested the homestead for tax or other reasons. The probate homestead is inimical to the will of the decedent and should not be set apart except upon specific request for it by the survivors.

Subdivision (b)(1). Mr. John W. Schooling (Exhibit 4) points out a defect in subdivision (b)(1), which permits setting apart property "exempt from execution"--this arguably could include a second homestead. The staff would revise subdivision (b)(1) to permit setting apart "property of the decedent exempt from execution other than a homestead."

Probate Code § 661

Subdivision (a). Subdivision (a) of Section 661 allows a probate homestead to be set apart either for the surviving spouse or for the minor children. Mr. John W. Schooling (Exhibit 4) suggests that two homesteads be permitted in the event the minor children are not the children of the surviving spouse. The California Bankers Association (Exhibit 11) raises the same issue, noting the possibility that the minor children may not continue to live with the surviving spouse. The staff does not believe it is advisable to authorize two homesteads. One homestead causes enough problems with the decedent's estate; two would be insufferable.

Subdivision (b). Subdivision (b) permits selection of the homestead out of separate property of the decedent as well as out of community property and property owned in common by the decedent and survivors. Subdivision (b) refers to Section 664, which requires the court to give first preference to property other than the separate property of the decedent in selecting the homestead. Mr. Schooling points out that the reference to Section 664 is overbroad, since Section 664 includes a number of factors in addition to the first preference provision. The staff plans to delete the reference to Section 664 and incorporate the first preference language in subdivision (b). This is the solution suggested by Professor Adams (Exhibit 10) also.

Subdivision (c)(1). Subdivision (c)(1) prohibits a probate homestead out of property the survivor receives from the decedent. Professor Adams questions the need for this provision, since the court has broad discretion not to set apart a homestead. The reason for the prohibition is that the probate homestead confers immunity from claims of creditors, and property owned outright by the survivor should not receive this immunity but should be subject to the claims of creditors to the same extent any other dwelling can be reached by creditors.

Commissioner Stodden (Exhibit 5) asks whether the prohibition means that a survivor may take the family home by will or intestate succession and also have a different piece of property set apart as a probate homestead. Mr. Schooling asks the same question. The answer to this question is yes, in theory; if for some reason the court felt that the family home was not adequate and that a probate homestead was necessary, it could set apart the probate homestead. But it would be set apart as a probate homestead only for a limited period and only as long as the survivors lived in it; meanwhile the former family home would be subject to the claims of creditors. The staff sees no problem here. If the Commission is not satisfied with this answer, we could provide that a probate homestead may not be set apart if the person seeking to have it set apart is the owner of the family home. While this provision would be a simpler and more direct means of achieving the result of the tentative recommendation, the staff does not favor it because it eliminates the discretion of the court in cases where the family home may no longer be appropriate for the survivors.

Subdivision (c)(2). Subdivision (c)(2) precludes a probate homestead on property in which a third person has the right to possession, such as a lessee or a part owner. Mr. Schooling believes that as drafted the provision is not clear. Professor Adams believes that as drafted the provision is overbroad and might be subject to misinterpretation. Commissioner Stodden believes that combined with subdivision (c)(1), there would probably be no property left in the probate estate from which a homestead could be selected. Perhaps the provision could be clarified by revising it along lines suggested by Mr. Greg Price (Exhibit 1) to read, "The homestead shall not be selected out of property the right to possession of which is vested in a **person other than the person for whose use the homestead is set apart third person** , unless the **person in whom the right to possession is vested third person** consents thereto. As used in this paragraph, "third person" means a person whose right to possession of the property existed at the time of the death of the decedent and was not created by testate or intestate succession from the decedent." If this eliminates most property from consideration for a probate homestead, that is as it should be. The staff does not believe it is proper to deny a person the right to possession in favor of a probate homestead unless the person's only claim of right is through inheritance.

Probate Code § 663

Subdivision (a). Subdivision (a) makes the property out of which a probate homestead is set apart subject to claims against the decedent's estate and makes the probate homestead itself subject to secured claims on the property against the decedent's estate. Professor Adams (Exhibit 10) believes that the property and the probate homestead should not be subject to claims against the decedent's estate if the property would not have been subject to the claims at the time of the decedent's death pursuant to the dwelling exemption statutes. The staff agrees with part of this suggestion and disagrees with part. The staff sees little benefit in exempting the property itself, since the property will be going to persons other than the homestead recipients; there is no apparent reason to protect the interest of the ultimate heirs or devisees at the expense of the decedent's creditors. It does make sense,

however, to protect the probate homestead itself if the dwelling would have been protected during the decedent's lifetime. The purpose of both the probate homestead and the dwelling exemption is to protect the residence of the debtor and spouse and dependents; the death of the debtor should not defeat this purpose. The staff would revise the second sentence of Section 663(a) to read, "The homestead right in property of the decedent is liable for claims ~~against the estate of the decedent~~ that are secured by liens and encumbrances on the property at the time of the decedent's death unless the property would have been exempt from enforcement procedures to satisfy such claims at the time of the decedent's death ." The language relating to claims "against the estate of the decedent" is deleted to cure a problem noted by the California Bankers Association (Exhibit 11)--many liens and encumbrances on the property of the decedent are not claims against the estate of the decedent because the secured party prefers to foreclose rather than present a claim against the estate.

The California Bankers Association also raises the question whether the probate homestead should be subject to claims which, prior to repeal of the declared homestead, would have been subordinate and not enforceable against the declared homestead. Repeal of the declared homestead would have the effect of elevating such liens to enforceability. The staff believes that this transitional problem is not a great one and that the revision of subdivision (a) as set out above will cure most of the hard cases.

Subdivision (b). Subdivision (b) of Section 663 exempts the homestead right absolutely against all claims of creditors. Mr. John W. Schooling (Exhibit 4) and Professor Adams both question granting a greater right in the probate homestead than in dwellings generally. The reason for the greater right is practicality rather than policy: The homestead right is only a term of years, modifiable and terminable by the court; such a property interest is too speculative to permit execution on; the probate homestead is recorded, so creditors will have notice not to rely on it as security. In addition, the probate homestead is based on need, whereas the general dwelling exemption is automatic; thus, it is appropriate to give the probate homestead greater

protection than an ordinary dwelling. The staff is not inclined to make any changes here.

Subdivision (c). Subdivision (c) permits creditors of a remainderman to enforce a judgment out of the interest of the remainderman. Mr. Schooling notes the need for a statement of priorities among creditors of the estate and creditors of the remainderman. The staff believes the priorities are built into the statute--first the creditors of the estate and then the creditors of the remainderman. This is a problem of general probate law and is not peculiar to the probate homestead--to what extent do creditors of the estate take priority over creditors of the heirs or devisees? The staff sees no need to deal with this problem in the context of the probate homestead.

Probate Code § 664

Subdivision (a). Commissioner Stodden (Exhibit 5) is concerned that the proposed legislation does not require that the homestead be suitable for a dwelling. The staff notes that Section 664(a) requires the court, in selecting property as a homestead consider "the suitability of the property for use as a dwelling." While this is not a direct limitation, it comes pretty close, and the staff believes it is sufficient. We do not believe there is a real possibility of abuse.

The California Bankers Association (Exhibit 11) suggests that included among the factors the court should consider in the exercise of its discretion to select and set apart the probate homestead should be the general dispositive scheme of the testator expressed through probate and nonprobate transfers and any expressions of the decedent with respect to the property available to be set apart. The staff believes this is appropriate and would add to the factors, "the intent of the decedent with respect to the property in the estate and the estate plan of the decedent as expressed in inter vivos and testamentary transfers or by other means."

Subdivision (b). Both Mr. John W. Schooling (Exhibit 4) and Commissioner Stodden object to Section 664(b), which permits the court to order payment of liens on the homestead property and subrogates the estate to the liens. Mr. Schooling points out that this permits further destruction of the decedent's estate plan, and questions how the subrogation will work. Commissioner Stodden has the same concerns. The

California Bankers Association notes problems with the operation of the subrogation provision. The staff agrees with these comments and suggests that subdivision (b) be deleted; exoneration of liens is not as important if Section 663(a) is revised as proposed above to preclude enforcement of liens if the property would have been exempt from enforcement at the time of the decedent's death.

Probate Code § 665

Subdivision (a)(1). Subdivision (a)(1) gives the probate court continuing jurisdiction to modify or terminate the homestead right. Commissioner Stodden (Exhibit 5) disagrees with this provision. "This would mean that the order setting aside the homestead would have no finality and would cause problems to all parties dealing with the estate, the holders of the remainder interests, and the holder of the probate homestead." While it is true that this may cause problems, the staff believes the ability to modify or terminate the probate homestead is essential to making an effective probate homestead based upon need. An answer to some of the problems raised by Commissioner Stodden can be found in the suggestion of Mr. Greg Price (Exhibit 1) that the Legal Estates Principal and Income Law be applied to the probate homestead. This law, located at Civil Code Sections 731 to 731.15, governs "the ascertainment of income and principal and the apportionment of receipts and expenses between tenants and remaindermen in all cases where a principal has been established without the interposition of a trust." Under this law, the court setting apart the probate homestead could vary the rules if it so desired. See Section 731.04. The staff would add a new provision incorporating this law by reference.

Subdivision (a)(2). Subdivision (a)(2) gives the court authority to transfer the probate homestead from the original property to some other property. Professor Adams (Exhibit 10) expresses disappointment that the homestead is not freely transferable by the recipient but recognizes that this is a natural consequence of limiting the homestead to a life estate. The California Bankers Association (Exhibit 11) is concerned that where the probate homestead is transferred to other property, the law should be clear that the liens and encumbrances are not also transferred from the original property. The implication that



liens are transferred could be avoided by rephrasing subdivision (a)(2) as follows:

(2) If the homestead was selected out of property other than the separate property of the decedent, direct sale of the property and investment of the proceeds in , or exchange of the property for, other suitable property which shall be subject to the same rights and liabilities of the parties as the property set apart as a homestead . The homestead right and the rights of the testate or intestate successors of the decedent or other successors to the property after administration are transferred to the other property. Except to the extent provided in this paragraph, the homestead right is not transferrable.

The language relating to "exchange" is added for completeness.

Probate Code § 666

Mr. Greg Price (Exhibit 1) notes a technical defect in the definition of quasi-community property in subdivision (a). Quasi-community property is defined in terms of property acquired by either spouse, but for purposes of the probate homestead the homestead should be selected only out of quasi-community property of the decedent; the quasi-community property of the survivor remains the survivor's separate property. The staff plans to make this change.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary



EXHIBIT 1  
**UNITED CALIFORNIA BANK**

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MAILING ADDRESS: BOX 7560 • SAN FRANCISCO, CALIFORNIA 94120

October 8, 1979

Mr. John DeMouilly  
Executive Secretary  
The California Law Revision Commission  
Stanford Law School  
Stanford, California 94305

Dear John:

As promised in our telephone conversation on October 5, I will set out the following comments with respect to the Tentative Recommendation relating to the Probate Homestead dated September 14, 1979.

1. Prob. C. Section 661 (c)(2) (Recommendation page 16)

It is suggested that this exclusion be expressly limited to "Property the right to possession of which is vested other than by reason of passage from the decedent under the provisions of law relating to testate or intestate succession, in a person . . ."

2. Prob. C. Section 666 (Recommendation page 24)

It is noted that the definition of quasi-community property set forth in this section would include property as to which the survivor is the acquiring spouse. It is possible that, in each instance in which the term is used, the context would limit its meaning to such property as to which the decedent was the acquiring spouse. Failing this determination, however, there appears to be no reason not to limit this definition to decedent-acquired property.

Mr. John DeMouilly  
October 8, 1979

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3. Civil Code Section 731 et seq.

This chapter which is referred to as the Legal Estates Principal and Income Law sets out the relative rights and duties of holders of present and future rights to possession in the same property. It is a well reasoned set of rules which, in my opinion, should expressly be made applicable to the relationship between the grantee of the homestead and those to whom possession of the property will pass upon termination of the homestead. Power could, of course, be conferred upon the Court to vary the statutory scheme either at the time of setting aside the homestead or by subsequent order.

As always I am thoroughly impressed by the scholarship and draftsmanship displayed in the recommendation. The need for reform is evident and the solution well reasoned.

Sincerely,



G. S. Price  
Vice President  
(415) 544-5641

GSP:mav1/1

DEPARTMENT OF THE MARSHAL  
MUNICIPAL COURT OF CALIFORNIA  
County of San Diego  
MICHAEL GOBBA, MARSHAL



October 15, 1979

California Law Revision Commission  
Stanford Law School  
Stanford, CA. 94305

Gentlemen:

We have reviewed the tentative recommendations relating to:

1. The Probate Homestead Dated 09-14-79
2. Enforcement of Claims and Judgements Against Public Entities Dated 09-17-79
3. Agreements for Entry of Paternity and Support Judgements Dated 09-17-79
4. Enforcement of Obligations after Death Dated 10-02-79

The proposals appear to be appropriate reforms in their respective areas and we have no comment on them other than to indicate our approval.

Yours truly,

MICHAEL GOBBA, Marshal

by

  
R.A. Aguilar, Lieutenant

EDWARD M. RASKIN  
GERALD E. LICHTIG  
JOHN A. ELLIS

RASKIN, LICHTIG & ELLIS  
ATTORNEYS AT LAW  
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TELEPHONE  
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October 23, 1979

California Law Revision Commission  
Stanford Law School  
Stanford, California 94305

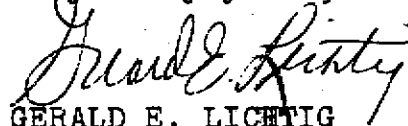
Ladies and Gentlemen:

I have reviewed the Tentative Recommendation relating to The Probate Homestead promulgated September 14, 1979. As a Family Law practitioner, I have found that the probate homestead creates a problem with respect to dissolution proceedings in which the court decides to bifurcate the trial, granting an immediate judgment of dissolution of marriage and retaining jurisdiction to divide the community property and quasi-community property of the parties at a later time.

Under those circumstances, the status of husband and wife will be terminated upon the entry of the final judgment of dissolution of marriage. Upon the death of one of the spouses thereafter and before the distribution of property takes place, the survivor would no longer be a "surviving spouse" for purposes of a probate homestead. Thus the estranged spouse whose marriage has not been dissolved, at present and under the proposed revision, would be entitled to a probate homestead, mandatory at present and permissive under the revision; the estranged spouse whose marriage had been dissolved, but whose property had not yet been divided, would not be entitled to any probate homestead under present law or under the revision. The anomaly in the two sets of circumstances should, I believe, be rectified, since the same need may well exist with respect to a surviving "former spouse" who has not yet received his or her half of the community property or quasi-community property and whose right to support and family allowance has been terminated by the death of his or her former spouse, and an estranged spouse who has not lost these rights by reason of the court's bifurcation of the issues and termination of the marital status.

This same problem exists with respect to probate family allowance. It would seem fair that the mere termination of the marital status at an early date, as permitted by Civil Code § 4800(a), without dividing the community and quasi-community property of the parties, should not terminate the probate court's right to grant either a probate homestead or a family allowance to the surviving "former spouse."

Very truly yours,

  
GERALD E. LICHTIG

GEL:ei

OCT 31 1979

## PETERS, FULLER, RUSH, SCHOOLING &amp; LUVAAS

G D &amp; C-NEWPORT

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JEROME D. PETERS, JR.  
DAVID R. FULLER, INC.  
DAVID H. RUSH  
JOHN W. SCHOOLING, INC.  
JOHN L. LUVAAS, JR.  
JOHN JEFFERY CARTER

October 26, 1979

Ms. Colleen M. Claire  
Gibson, Dunn & Crutcher  
P. O. Box 2490  
Newport Beach, Ca. 92663Re: Review of recommendations concerning the  
proposed revision of the Probate Homestead  
and Declared Homestead Survivorship Laws

Dear Colleen:

Thank you for including me on the special committee. Speaking as your rural area representative of the executive committee, I am convinced that this is currently an area of the law which needs review, as it is often overlooked both in estate planning and in probate administration.

The concept of eliminating the forced survivorship aspect of the declared homestead should be supported. Homesteads are not declared in order to alter passage of title upon death; such a result can easily be achieved by a number of other methods. The forced survivorship is a trap which can reduce the benefits of a well planned trust Will. How many laymen could be expected to realize that an act aimed at creditors would affect the results of their Will? Further, the protections of the present law, if needed at all, are amply achieved by the probate homestead provisions.

Further analysis, however, should be made of the philosophy supporting the retention of the probate homestead at all, either in its present or proposed form. Creditor protection is met under nonprobate homestead law. If it is deemed necessary to increase it, there is no reason not to increase it equally for nonprobate situations. The probate homestead provisions constitute a statement that the community property laws and the pretermitted heir statutes are not sufficient to protect families from loss of their home upon the death of a spouse. I submit that this is rarely the case, and that if those few situations must be solved by statute, the answer does not lie in the broad-brush probate homestead. Perhaps the availability of the homestead could be more narrowly limited to those few rare cases of real need. Perhaps the court could gain authority to divide an estate to trade a surviving spouses community property or pretermitted spouse rights

in other assets for ownership of the home. Any such solution would prevent the realization of a menace present in the existing or proposed legislation to wit: the danger that a spouse can obtain by probate homestead that which is not needed, and which is in opposition to the expressed Will of the deceased. It could now even be obtained by a surviving spouse in opposition to a greater need of adult children, who will lose their rights for the duration of the survivor's life even though their parent attempted to provide for them by Will.

Assuming for purposes of analysis, however, that the probate homestead should be retained, I would recommend revision of the proposed language in the following sections:

Probate Code §660(b): The old (b)(2) clearly related to declared homestead property. Now it does not. Subparagraph (b)(1) however, could include such property. It could even be construed to include property eligible for a declared homestead in light of present law which does not require a declaration prior to levy of execution. Does the combination of (b)(1) and (b)(2), then, permit the creation of more than one homestead on separate properties?

Probate Code §661(c)(1): This section also seems to permit the spouse to retain two homes - one by joint tenancy survivorship or by Will, and the other by probate homestead. How can this be necessary for family protection?

Probate Code §661(c)(2): The meaning of this section with respect to a co-tenant not presently in possession is unclear.

Probate Code §661(a): Here it might be a good idea to allow two homesteads which is not permitted by the proposed language. The situation arises when the surviving spouse is not the parent of minor children who return to live with their remaining parent.

Probate Code §661(b): Does this mean that selection from community property or jointly owned property is not subject to the guidelines of §664? How is this intended to interrelate to the discretion granted in §660(b)? Is a court supposed to be more likely to exercise its discretion under §660(b) to grant a homestead in a community property situation? How does that fact reflect on family need which is supposed to be the basis of the homestead?

Probate Code §663(c): It is intended to allow claims of creditors of remaindermen subject to the homestead right. There needs to be a statement added concerning the priority, if desired, of §663(a) debts to these debts.

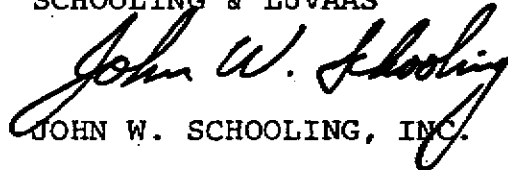
Ms. Colleen M. Claire  
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Probate Code §663(b): This section gives a larger exemption right than that which is available to a family without a deceased spouse. In light of the large equity in many homes, is it necessary to go this far? Why should a \$30,000 exemption suddenly be increased to full equity value?

Probate Code §664(b): This section stretches the homestead right to permit further encroachment upon the estate plan of the decedent. The remainder of the estate can be used to pay the encumbrance. Since many homes now carry large loans as well as large encumbrances, this could allow a serious depletion of the remainder of the estate. The meaning of the last sentence of this section concerning subrogation also raises a question. Surely the holder of the homestead is not required to pay the estate in the same manner as was required for the exonerated debt, yet that is the literal meaning. Just when and how is the estate to be subrogated?

Yours very truly,

PETERS, FULLER, RUSH,  
SCHOOLING & LUYAAS

  
JOHN W. SCHOOLING, INC.

JWS:cjg

cc: Mr. Timothy Abel  
Ms. Ann E. Stodden  
Ms. Bonnie Vail  
Ms. Joyce Parsons  
Mr. Matthew S. Rae  
Mr. Charles A. Collier



## EXHIBIT 5

PROBATE DEPARTMENT

**The Superior Court**111 NORTH HILL STREET  
LOS ANGELES, CALIFORNIA 90012TELEPHONE  
(213) 974-1234ANN E. STODDEN  
PROBATE COMMISSIONER

October 31, 1979

Ms. Colleen M. Claire  
Gibson, Dunn & Crutcher  
Attorneys at Law  
660 Newport Center Drive  
Newport Beach, California 92663

Dear Colleen:

Re: California Law Revision Commission's  
Tentative Proposal to Eliminate the  
Survivorship Aspects of the Declared  
Homestead and to Revise the Probate  
Homestead Laws

Pursuant to your request, I have reviewed the proposed legislation which you enclosed with your letter of October 10.

I think I started out with the feeling that the Law Revision Committee was very knowledgeable and aware of what it was doing, but upon review of proposed Section 661(c) I find myself confused by their language.

Obviously, real property vests in a devisee upon the death of a decedent, subject to administration only. In the section as it is presently drafted, it would appear to me that if the family home were devised to or inherited by a spouse it would remain subject to the claims of creditors while other property owned in the estate might well be the subject of a probate homestead. If there is other property suitable for a dwelling would the spouse then have the right to obtain one by inheritance or devise and the other by way of a probate homestead for a term of years? Conversely, would no probate homestead be available to the surviving spouse if the family homestead is property going to such spouse and is the only property suitable for a dwelling?

If Section 661(c)(2) is applied in connection with Section 661(c)(1), I would assume that unless there is residue in the

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estate there probably would be no property available for a probate homestead without consent.

Although the legislation goes beyond the standard definition of a homestead being the family home of the head of the household, no place in the proposed legislation defines homestead to consist of property which is suitable for a dwelling. As it presently exists, it would seem to me that the homestead could be selected out of any personal property and not just a mobile home or houseboat as suggested in the comments.

The comments in connection with the entire legislation imply that the purpose of the proposed legislation is to avoid disturbing the testator's estate plan and to give more protection to the surviving spouse and minor children.

However, it would seem that Section 664(b) allows the Court in its discretion to destroy completely any estate plan by determining at will from what source claims shall be paid. The proposed legislation contemplates the estate be subrogated to the liens and encumbrances as set out in the last sentence of Section 664. I am not clear as to what is intended by this statement.

I am not in agreement with the provisions of Section 665(a) as drafted, since I do not feel that the court should continue to retain jurisdiction beyond the closing of a probate and during the term of years a probate homestead is in existence. This would mean that the order setting aside the homestead would have no finality and would cause problems to all parties dealing with the estate, the holders of the remainder interests, and the holder of the probate homestead. Perhaps changes or modification of the probate homestead should be limited to the time of filing the order of final distribution in the probate proceeding or to the date that the order setting aside the homestead is final.

I believe that legislation such as is contemplated would be of benefit, but I seriously question the effect of these sections as they are presently drafted.

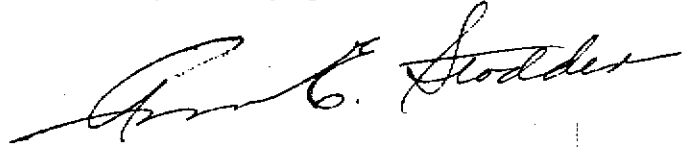
Thank you for giving me the opportunity to express my opinions at this time.

Ms. Colleen M. Claire  
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My personal phone at the office is 974-5489. I will answer that line if I am present in my office, or the girl on the switchboard will answer it and take a message if I am in court.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Ann E. Stodden". The signature is written in dark ink and is positioned above the typed name.

Ann E. Stodden

AES:eh

cc: Mr. Timothy Abel  
Mr. John W. Schooling

MARCUS MATTSO  
 REED A. STOUT  
 R. F. OUTCAULT, JR.  
 ROBERT HENIGSON  
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 WAYNE S. GRAJEWSKI  
 ARTIS C. GRANT, JR.  
 H. STEVEN DURRETT  
 PAUL M. MARRIGAN  
 ROBERT H. TANNER  
 STEVEN G. ROSS  
 STEPHANIE C. SILVERS  
 STEVEN J. MILLER

LAW OFFICES OF  
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 TELEX 874360  
 CABLE ADDRESS  
 "OSLAW"  
 TELECOPIER:  
 (213) 680-2605

October 31, 1979

WRITER'S DIRECT DIAL NO.

629-9369

California Law Revision Commission  
 Stanford Law School  
 Stanford, California 94305

Gentlemen:

I am in receipt of your Tentative Recommendation relating to The Probate Homestead. I concur in the views and the proposed legislation set forth therein.

Very truly yours,



## EXHIBIT 7

LAW OFFICES  
WALKER, McCLURE, BOHNEN & BREHMER

GEORGE R. WALKER  
GEORGE W. BREHMER, JR.  
C. MICHEAL McCLURE  
THOMAS P. BOHNEN  
ROBERT J. KOONTZ  
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POST OFFICE BOX LAW  
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CABLES LAW

OFFICES ALSO AT  
CARMEL, CALIFORNIA

9 November 1979

California Law Revision Commission  
Stanford Law School  
Stanford, CA 94305

Re: Tentative Recommendation Relating to  
The Probate Homestead

Gentlemen:

The Executive Committee of the Tax Section of the State Bar discussed the tentative recommendation relating to the probate homestead at its October meeting. At that time it was requested that the death and gift tax subcommittee review and respond to the recommendation.

In light of the purpose of the Homestead laws, the death and gift tax subcommittee supports the revision set forth in the tentative recommendation.

The only tax consequence of any significance is the fact that an estate for life or term certain in a residence to a surviving spouse will not qualify for a marital deduction. We do not view this as a serious detriment to the estate in light of the fact that the decedent had not planned for a marital deduction with respect to the residence and homestead provisions prior to death.

One member of the subcommittee raised the question of the compatibility of the recommendation with the set aside provisions of Section 640 of the Probate Code. The tentative recommendation eliminates a fee interest passing to a surviving spouse or children while Section 640 allows, effective January 1, 1980, up to \$30,000.00 to pass to a surviving spouse or children of the decedent.

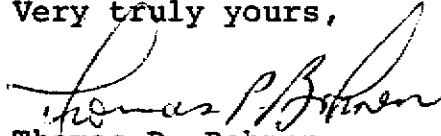
Given the social purpose of providing benefits for a surviving spouse and children and the small amount

California Law Revision Committee  
9 November 1979

Page 2

involved under Section 640, it was the consensus of  
the subcommittee that the Sections are compatible.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Thomas P. Bohnen".

Thomas P. Bohnen

TPB:DB

cc: Jerry H. Robinson  
James R. Birnberg  
Ferdinand Fernandez

To: Calif. Law Revision Commission

10-30-79

From: Wanda Underhill

Re: Tentative Recommendation relating to  
Probate Homestead

Comments:

A comparison of the "declared homestead" and the "probate homestead" indicates that the "probate homestead" is more advantageous to the survivors because it provides for:

1. flexibility of the court in selecting any property appropriate for the homestead,
2. absence of any value limitation on the homestead,
3. and vesting of title in minor children as well as surviving spouse.

The "declared homestead" provides for the exoneration of liens which is contrary to the modern trend.  
Approval.

Sincerely,

Wanda Underhill

WANDA UNDERHILL  
2079 Market Street, No. 27  
San Francisco, California 94114

## PACHT, ROSS, WARNE, BERNHARD &amp; SEARS, INC.

ATTORNEYS AT LAW

1800 AVENUE OF THE STARS-SUITE 500  
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LOS ANGELES, CALIFORNIA 90067  
(213) 277-1000

November 9, 1979

CLORE WARNE (1889-1973)

OF COUNSEL  
SIDNEY D. KRYSMAL  
HARRY J. MILLER

CABLES "PAWARB"  
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ROBERT A. BUDD  
L. DAVID COLE  
RICHARD W. CRAIGO  
MAURICE FREIS  
MARK A. GOLDSTEIN  
DEENA GOLDWATER  
PAUL R. HAMILTON  
DENNIS A. HARRIS  
RAYMOND S. KAPLAN  
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J. TERENCE LYONS  
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ISAAC PACHT  
N. JOSEPH ROSS  
HERBERT N. SAMUELS  
JOEL P. SCHIFF  
MARVIN SEARS  
JUDITH S. SHAPIRO  
TAMAR C. STEIN  
GARY M. STERN  
KENNETH S. WOLF  
SCOTT Z. ZIMMERMANN  
STEVEN L. ZIVEN

California Law Revision Commission  
Stanford Law School  
Stanford, California 94305

Gentlemen:

I have read your tentative recommendation having to do with the Probate Homestead Sections of the California Probate Code.

I believe your recommendation is sound and is, in fact, long overdue. I have seen many cases where the obvious intent of the testator has been thwarted by the granting of a probate homestead. In many of these situations there was no public policy which was advanced.

In sizable estates it is possible for a testator, who has proper advice, to avoid the pitfalls of the probate homestead provisions, provided he wishes to make provision for his wife and minor children. In a small estate, which in many instances consists only of the family residence, the probate homestead provisions serve to take away from the first spouse to die the right to leave his estate by Will.

If I can be of any help to you in this matter, please contact me.

Yours very truly,

  
IRA E. BILSON

IEB:aw



## EXHIBIT 10

The University of Tulsa  
3120 East Fourth Place  
Tulsa, Oklahoma 74104  
(918) 939-6351

College of Law

November 13, 1979

Mr. Nathaniel Sterling  
Assistant Executive Secretary  
California Law Revision Commission  
Stanford Law School  
Stanford, California 94305

Re: Tentative Recommendation Relating to the Probate Homestead  
(September 14, 1979).

Dear Mr. Sterling:

I have reviewed the above - referenced tentative recommendation as requested. I strongly approve of the Commission's tentative recommendation to replace the complicated rules on the succession of declared homesteads and probate homesteads with the extremely flexible system of homestead protection it proposes in which the probate court would have wide discretion in selecting a probate homestead in accordance with the needs of the surviving spouse and minor children of the decedent and the many other factors set out in proposed Probate Code §664 (a). Additionally, the tentative recommendation would eliminate the many arbitrary and complex distinctions between declared and probate homesteads. I have the following comments with respect to specific sections of the proposed Probate Code sections in the tentative recommendation:

1. Probate Code §660.

This section provides flexibility by giving the probate court broad discretion to determine whether or not to select a probate homestead. The probate court's discretionary powers ought to be increased even further, however, by allowing it to select a probate homestead sua sponte, instead of only upon petition of the surviving spouse or minor children.

2. Probate Code §661.

Sections 661 (b) and 664 (a) are redundant. I think §661 (b) should be omitted and the text of §664 (a) should be substituted in its place.

The limitations in §661 (c) are unnecessary inasmuch as the probate court has wide discretion under §660 to refuse to select a probate homestead. Accordingly, I think §661 (c) should be removed from the tentative recommendation. If §661 (c) is retained, then I think §661 (c)(2) should be revised to prohibit the selection of a homestead from property the right to possession of which was not in the decedent at the date of the decedent's death; otherwise, §661 (c)(2) might be interpreted too broadly.

3. Probate Code §663.

Section 663 (a) should be modified to expressly state that the dwelling exemption is applicable to a probate homestead. It should also provide that the estate of the decedent or the homestead claimant may claim the dwelling exemption and discharge any judgment liens on the homestead (see Paragraph 8 of Professor Countryman's letter dated May 21, 1979 attached as Exhibit 4 to Memorandum 79-29) if the decedent would have been eligible for the dwelling exemption at the date of his death. In other words, with respect to claims against the decedent's estate, the homestead should be protected to the same extent as it would have been had the decedent not died.

Likewise with respect to creditors of the homestead claimant, I believe that the homestead should be protected to the extent of the dwelling exemption. The homestead should not be exempt from certain traditionally favored claims against the homestead claimant, such as those secured by consensual liens, mechanics liens, or tax liens; thus I feel that the rule of MacQuiddy v. Rice, 47 Cal. App. 2d 755, 118 P. 2d 853 (1941), should be retained. However, the homestead should be exempt from the claims of unsecured creditors of the homestead claimant to the extent of the dwelling exemption, provided that the homestead claimant satisfies the requirements for entitlement to a dwelling exemption.

With respect to the testate or intestate successors of the decedent, I believe that their remainder interest in the homestead should be subject to the claims of their creditors since they would not ordinarily be eligible to claim a dwelling exemption with respect to their interest in the homestead.

4. Probate Code §664.

This section is very helpful as it not only gives the probate court broad discretion to decide whether and how to select a probate homestead and exonerate liens against the homestead out of the estate assets, but also it provides standards for the exercise of the probate court's discretion.

5. Probate Code §665.

This section and §661 (d) are closely related. Since the homestead is set apart for only a limited period and remains subject to administration, the probate court is given power to modify or terminate the homestead right. I am disappointed that the homestead claimant cannot transfer the homestead from one dwelling to another; however, I recognize this is a natural consequence of the Commission's decision to limit the probate homestead to a life estate in all cases.

Page Three  
November 13, 1979

Please continue to keep me advised of the progress you are making with respect to the probate homestead, and as to whether I may be of any further assistance.

Yours very truly,

A handwritten signature in cursive script that reads "Charles W. Adams".

Charles W. Adams  
Assistant Professor

/w



EXHIBIT 11  
**UNITED CALIFORNIA BANK**

TRUST DIVISION • 405 MONTGOMERY STREET • SAN FRANCISCO, CALIFORNIA

MAILING ADDRESS: BOX 7560 • SAN FRANCISCO, CALIFORNIA 94120

November 15, 1979

Mr. John DeMouly  
Executive Secretary  
California Law Revision Commission  
Stanford Law School  
Stanford, California 94305

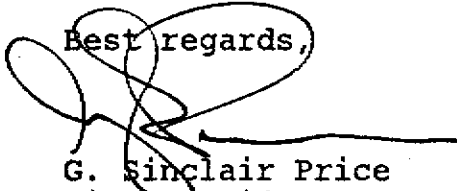
Dear John:

At a recent meeting of the Trust State Governmental Affairs Committee of the California Bankers Association, discussion was had concerning the tentative recommendation relating to the Probate Homestead and the Staff Draft relating to Enforcement of Obligations After Death.

Several comments were made by members of the committee concerning the Probate Homestead recommendation which I am relaying to you by way of the attached sheets. The committee expressed general approval of the Staff Draft on Enforcement of Obligations, but had no specific comments regarding same.

Again, we very much appreciate the opportunity to present our input for consideration.

Best regards,



G. Sinclair Price  
Vice President  
Regional Trust Counsel  
(415) 544-5641

GSP:fay4/1

## THE PROBATE HOMESTEAD

### PROBATE CODE SECTION 660

There appears to be a chronology problem posed by a combination of subsections (a) (b) of this section, in that the right to remain in possession terminates with the filing of the inventory. The act of filing is performed by counsel for the personal representative who may or may not also represent the Homestead claimants. There will be delay in the issuance of a Probate Court Order setting apart the Homestead, even if a Petition therefor has been filed awaiting the filing of the inventory. It is suggested that the 660 (a) period be extended by, say, 60 days with authorization for the Court to extend this period for good cause.

No provision is made for setting aside a Homestead for minor children of a decedent's prior marriage who were living with the decedent and their stepparent, the latter being decedent's surviving spouse. Do the commissioners wish to make provision for such children in the event that they are not continuing to reside with the surviving spouse?

### PROBATE CODE SECTION 663

Although Section 706 of the Probate Code provides for the filing of a claim based on a secured debt of the decedent, Section 716 makes it clear that such filing is not necessary unless the creditor wishes to preserve the possibility of a deficiency judgement and/or a claim for counsel fees. In practice, such claims are very rarely filed. It is therefore requested that the wording of proposed Section 663 be amended to provide that the Homestead right is subordinate to obligations that are, at the date of the decedent's death, secured by liens and encumbrances on the property. The Commission may wish to consider special treatment for those liens which were, as of the date of death, themselves junior or subordinate to a declared Homestead. The repeal of the survivorship right would presumably eliminate the limited protection currently afforded to the survivor.

PROBATE CODE SECTION 664 (a)

It is suggested that the Commission consider including among the listed considerations the general dispositive scheme of the testator expressed through both probate and the non-probate transfers such as life insurance proceeds and joint tenancy termination and also give due weight to any expressions of the decedent with respect to the property available to be set apart. This latter would allow a decedent, for instance, to indicate a preference not to have a specific parcel set apart as a Homestead.

PROBATE CODE SECTION 664 (b)

Under this proposed section the subrogation of the estate, and hence presumably the residual legatees, is limited to the extent of payment made to exonerate the lien. These legatees may, in some cases, not be the takers of the property subjected to the Homestead upon its termination. Should not the Court be empowered to set a rate of interest to which the subrogee would be entitled and to make provisions as to the time and manner of repayment?

PROBATE CODE SECTION 665 (a)(2)

This section should be reworded to make clear the presumed intent that the Court is not thereby given the power to transfer third party liens and encumbrances to the new property without the consent of the lienholder.

STATE OF CALIFORNIA  
CALIFORNIA LAW  
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

THE PROBATE HOMESTEAD

September 14, 1979

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN NOVEMBER 10, 1979.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION  
Stanford Law School  
Stanford, California 94305

## TENTATIVE RECOMMENDATION

relating to

## THE PROBATE HOMESTEAD\*

Introduction

One important purpose<sup>1</sup> of the homestead laws is to ensure that the surviving members of a family will have a home after the death of one spouse.<sup>2</sup> To achieve this purpose, the homestead laws limit the power of the deceased spouse to devise the family home and limit the right of a creditor to resort to the family home to satisfy a judgment.<sup>3</sup>

California has two separate sets of statutory provisions to protect the family home after the death of a spouse:<sup>4</sup>

- (1) The survivorship right in the declared homestead.
- (2) The probate homestead.

The two sets of provisions exhibit significant differences and are outlined briefly below.

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\* This tentative recommendation is made as one facet of the Commission's study of creditors' remedies and related matters, authorized by 1974 Cal. Stats., Res. ch. 45.

1. See, e.g., Taylor v. Madigan, 53 Cal. App.3d 943, 968, 126 Cal. Rptr. 376, \_\_\_ (1975) ("The objective of the probate homestead statutes is protection of the family, as a social unit in the home, against demands of creditors and heirs, against the family's own improvidence.").
2. The homestead laws serve two other major purposes:
  - (a) Exempting the family home from execution. See, e.g., Civil Code § 1240 ("The homestead is exempt from execution or forced sale.").
  - (b) Protecting a spouse from disposition or encumbrance of the family home without the spouse's consent. See, e.g., Civil Code § 1242 ("The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife.").
3. See Bayse, A Comparative Study of the Homestead Law and Probate Code Sections 640 to 646, 1 Cal. L. Revision Comm'n Reports 41 (1955).
4. See generally Wayne, Exempt and Homestead Property, in 1 California Decedent Estate Administration §§ 12.24-12.72 (Cal. Cont. Ed. Bar 1971).



If married persons have declared a homestead on property pursuant to Sections 1237 through 1304 of the Civil Code, upon the death of a spouse the survivor is entitled to have the homestead set apart unless it has been declared unilaterally by the survivor upon the separate property of the decedent.<sup>5</sup> The basic incidents of the survivorship right in the declared homestead are that title to the property vests in the surviving spouse and the homestead enjoys an exemption up to statutory limits from the claims of creditors.<sup>6</sup>

If no homestead has been declared or if it has been declared unilaterally by the survivor upon the separate property of the decedent, upon the death of a spouse the probate court must set apart property as a probate homestead for the use of the surviving spouse and minor children.<sup>7</sup> Title to the property may or may not vest in the survivors and may vest in different proportions depending upon the character of the property selected as a homestead and the status of the survivors; the homestead enjoys protection from the claims of creditors.<sup>8</sup>

This recommendation first analyzes the major differences between the survivorship right in the declared homestead and the probate homestead. The recommendation concludes that there is no justification for two separate bodies of law and proposes repeal of the survivorship right in the declared homestead. The recommendation then proposes a series of reforms and improvements in the probate homestead.

#### Comparison of Declared and Probate Homesteads

There are a number of basic differences between the survivorship right in the declared homestead and the probate homestead,<sup>9</sup> with the

- 
5. Civil Code § 1265; Prob. Code § 660.
  6. For a more detailed analysis of the operation of the survivorship right in the declared homestead, see, e.g., 7 B. Witkin, Summary of California Law Wills and Probate § 513 (8th ed. 1974).
  7. Prob. Code § 661.
  8. For a more detailed analysis of the operation of the probate homestead, see, e.g., 7 B. Witkin, Summary of California Law Wills and Probate § 514 (8th ed. 1974).
  9. The commentators have catalogued the numerous differences. See, e.g., Bayse, A Comparative Study of the Homestead Law and Probate Code Sections 640 to 646, 1 Cal. L. Revision Comm'n Reports 41, 45-46 (1955); Comment, The Probate Homestead in California, 53 Calif. L. Rev. 655, 677-79 (1965); Adams, Homestead Legislation in California, 9 Pac. L.J. 723, 751 (1978).

result that the rights created by them are considerably different.<sup>10</sup> The major differences involve the choice of property available for the homestead, the value of the property, the treatment of liens and encumbrances on the property, and the title to the property.

Choice of property. There is no choice available to the court in setting apart property by reason of a survivorship right in a declared homestead. Only the property upon which the homestead has been declared may be set apart.<sup>11</sup> The survivors may not waive the survivorship right and take a probate homestead instead.<sup>12</sup>

In contrast, the court has wide discretion in selecting appropriate property as a probate homestead.<sup>13</sup> Any property in the decedent's estate is available; the court is not limited to the property on which the spouses resided at the time of the decedent's death.<sup>14</sup>

Value of property. One major limitation on the survivorship right in the declared homestead is the value of the property that may be set apart. Section 664 of the Probate Code limits the value of the property to the amount of the homestead exemption in effect at the date of death of the decedent. If the value of the property exceeds the applicable homestead exemption, an inheritance tax referee must ascertain whether the premises can be divided without material injury. If so, the referee must determine the portion of the premises, including the dwelling house, equal in value to the amount of the exemption, which is then set apart to the surviving spouse.<sup>15</sup> If not, the court makes an order for sale of the property and the portion of the net proceeds equal to the applicable homestead exemption is set aside to the survivor and continues to retain exempt status.<sup>16</sup>

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10. Taylor v. Madigan, 53 Cal. App.3d 943, 968, 126 Cal. Rptr. 376, \_\_\_ (1975).

11. Prob. Code § 660.

12. Wayne, Exempt and Homestead Property, in 1 California Decedent Estate Administration § 12.51 (Cal. Cont. Ed. Bar 1971).

13. See, e.g., Estate of Nelson, 224 Cal. App.2d 138, 36 Cal. Rptr. 352 (1964).

14. See, e.g., Estate of Hennigsen, 199 Cal. 103, 247 P. 1082 (1926).

15. Prob. Code § 664.

16. Prob. Code § 665; Estate of Durham, 108 Cal. App.2d 148, 238 P. 1057 (1951).

There is no value limitation on property set apart as a probate homestead. Property valued in excess of the applicable homestead exemption may be set apart.<sup>17</sup>

Liens and encumbrances. The order setting apart a homestead does not impair or destroy liens and encumbrances on the property, which remains subject thereto.<sup>18</sup> Probate Code Section 735 provides for payment of claims secured by liens and encumbrances on homestead property from the funds of the estate if the funds are sufficient to pay all claims against the estate. Otherwise, the claims secured by liens and encumbrances are paid proportionately with other allowed claims; any deficiency continues to encumber the property.

Probate Code Section 735 applies to the survivorship right in the declared homestead but not to the probate homestead.<sup>19</sup> The result is that ordinarily liens and encumbrances on a declared homestead are exonerated from the funds of the estate, while a probate homestead passes to the surviving spouse and minor children subject to existing liens and encumbrances.<sup>20</sup>

Vesting of title. The right of survivorship in the declared homestead vests title generally in the surviving spouse alone. This is the case if the homestead was declared on community or quasi-community property or the separate property of the decedent in which the decedent joined; if the homestead was declared on the separate property of the decedent without the decedent's consent, title vests in the decedent's heirs or devisees, subject to the authority of the court to set a probate homestead apart for the surviving family for a limited time.<sup>21</sup>

Selection of a probate homestead vests title generally in the surviving spouse and minor children. If the homestead is selected out of property in the estate other than the separate property of the decedent, title vests one-half in the surviving spouse and one-half in the

---

17. See, e.g., Estate of Levy, 141 Cal. 646, 75 P. 301 (1904).

18. See, e.g., Estate of McCauley, 50 Cal. 544 (1875).

19. See, e.g., Estate of Huelsman, 127 Cal. 275, 59 P. 776 (1899).

20. Adams, Homestead Legislation in California, 9 Pac. L.J. 723, 751 (1978).

21. Civil Code § 1265; Prob. Code § 663.

minor children equally; if there is no surviving spouse, title vests in the minor children equally, and if there are no children, title vests in the surviving spouse.<sup>22</sup> If the homestead is selected out of the separate property of the decedent, it may be set apart for the survivors only for a limited period and then vests in the heirs or devisees.<sup>23</sup>

#### Repeal of Declared Homestead

The basic policy of the homestead laws to protect the family home for the survivors after the decedent's death is implemented in different ways by the survivorship right in the declared homestead and the probate homestead. The protection afforded the surviving family varies with the type of homestead, without apparent reason for the variation. Commentators who have reviewed this situation have been able to discern no justification for the disparity in treatment and have urged that the law be changed so that the disposition of the family home on the death of its owner is handled in the same manner regardless of the type of homestead applicable.<sup>24</sup>

A comparison of the survivorship right in the declared homestead with the probate homestead reveals that the probate homestead affords generally greater protection to the survivors.<sup>25</sup> The flexibility of the court in selecting any property appropriate for the homestead, the absence of any value limitation on the homestead, and the vesting of title in minor children as well as in the surviving spouse make the

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22. Prob. Code § 667.

23. Prob. Code § 661.

24. See, e.g., Adams, Homestead Legislation in California, 9 Pac. L.J. 723, 751 (1978); Comment, The Probate Homestead in California, 53 Calif. L. Rev. 665, 677 (1965) ("Most of the differences which exist between the probate homestead and the marital homestead which has devolved on the surviving spouse have no rational basis. [Footnote.] Since the two forms of homestead protection serve the same purpose--to provide a secure home for the surviving family of a decedent--and involve the same classes of interested parties, a uniform system of homestead legislation is desirable."). See also Recommendation Relating to Summary Distribution of Small Estates Under Probate Code Sections 640 to 646, 1 Cal. L. Revision Comm'n Reports 50, 52 (1955).

25. Taylor v. Madigan, 53 Cal. App.3d 943, 968, 126 Cal. Rptr. 376, \_\_\_ (1975).

probate homestead more advantageous from the viewpoint of the survivors. One aspect of the declared homestead that favors the survivors is the provision for exoneration of liens, although this provision is out of step with today's economy and opposed to the modern trend which disfavors exoneration.<sup>26</sup>

The probate homestead was designed by the Legislature expressly for the purpose of preserving the family home for the surviving members of the decedent's family.<sup>27</sup> It is probable that probate homesteads are set apart far more frequently than survivorship rights in declared homesteads.

By way of contrast, the fundamental purpose of the declared homestead is to provide an exemption for the family home from claims of creditors; the survivorship function is merely incidental.<sup>28</sup> It is likely that persons who declare homesteads do so primarily for the purpose of protection against creditors; the survivorship consequences of the homestead declaration may be subsidiary or unintended. Where survivorship consequences are in fact knowingly intended by the homestead declarant, they can be achieved much more simply, directly, and effectively by appropriate inter vivos instrument or by will.

For these reasons, the Law Revision Commission recommends that the survivorship right in the declared homestead be repealed. The surviving family of any decedent should be eligible for a probate homestead regardless of the existence of a declared homestead. This recommendation would not disturb existing survivorship rights that have been set apart by the court out of declared homesteads before repeal of the survivorship provisions, but would restrict any future survivors' protections to probate homesteads.

While the probate homestead is superior to the declared homestead as a survivors' protection device, it is not perfect. The Commission also recommends a number of improvements in the probate homestead.

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26. Adams, Homestead Legislation in California, 9 Pac. L.J. 723, 752 (1978).

27. See, e.g., Estate of Claussenius, 96 Cal. App.2d 600, 612, 216 P.2d 485, 494 (1950); Taylor v. Madigan, 53 Cal. App.3d 943, 968, 126 Cal. Rptr. 376 (1975).

28. Adams, Homestead Legislation in California, 9 Pac. L.J. 723, 751 (1978).

## Reform of Probate Homestead

Choice of property. Probate Code Section 661 permits the court to select the probate homestead out of community property or quasi-community property or out of real property owned in common by the decedent and the persons entitled to have the homestead set apart. If there is no such property, the court may select the homestead out of the separate property of the decedent.

The cases have held that, notwithstanding Section 661, the court may select the homestead out of the separate property of the decedent if the separate property is most suitable for use as a homestead, even though there may be other residential property in the estate.<sup>29</sup> This rule is sound; the probate homestead should be selected out of the most appropriate available property, regardless of its character. As between separate property and other forms of property, the other property should be preferred for the probate homestead. The statute should make clear the preference and should also codify the rule that separate property is eligible for selection as the homestead if it is most suitable.

The limitation of the probate homestead to real property is unduly restrictive. Families sometimes reside in personal property such as mobilehomes and water vessels. The general exemption laws have recognized that a mobilehome or water vessel may serve as a dwelling and have provided exemptions from claims of creditors.<sup>30</sup> Personal property should likewise be eligible for selection as a probate homestead.

Vesting of title. If the probate homestead is selected out of community or quasi-community property or property owned in common, fee title vests in the surviving spouse and minor children.<sup>31</sup> If the homestead is selected out of the separate property of the decedent, the court may set the homestead apart only for a limited time for the survivors, not to exceed the lifetime of the surviving spouse and the

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29. See, e.g., Estate of Raymond, 137 Cal. App.2d 134, 289 P.2d 890 (1955).

30. Code Civ. Proc. § 690.3.

31. Prob. Code § 667.

minority of minor children;<sup>32</sup> ultimately, the property goes to the decedent's heirs or devisees.<sup>33</sup>

Vesting of title in the surviving spouse and minor children creates a number of problems. As a general rule, the probate homestead operates to frustrate the estate plan of the decedent. The occasion for a probate homestead does not arise where the property passes by intestate succession to the survivors or where the decedent wills his or her interest in the property to the survivors. The homestead comes into play primarily where the decedent makes a testamentary disposition otherwise.

A common provision in a will is a trust for the lifetime of the surviving spouse with remainder to other beneficiaries, perhaps children of a previous marriage of the decedent. The probate homestead can effectively destroy this estate plan by giving the surviving spouse a fee interest and leaving the other beneficiaries nothing.

The title-vesting attribute of the probate homestead in effect substitutes the surviving spouse's ultimate disposition of the property for the decedent's. Besides abridging the decedent's right of testamentary disposition, this has a number of economic disadvantages for all persons concerned. The property may have to pass through probate twice--once through the decedent's estate and again through the surviving spouse's estate. There are also adverse tax consequences. A probate homestead that vests in fee will inevitably consume some or all of the marital deduction.<sup>34</sup> A probate homestead that vests in fee is also subject to full death taxes twice.<sup>35</sup>

The vesting characteristics of the probate homestead are also awkward in their treatment of surviving children. A probate homestead vests in the surviving minor children, but not in surviving adult children. Where the decedent leaves both minor and adult children, the

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32. Prob. Code § 661.

33. See discussion in Comment, The Probate Homestead in California, 53 Calif. L. Rev. 655, 668-70 (1965).

34. See discussion in Wayne, Exempt and Homestead Property, in 1 California Decedent Estate Administration § 12.73 (Cal. Cont. Ed. Bar 1971).

35. See Rev. & Tax. Code § 13622 (probate homestead a transfer subject to inheritance tax).

probate homestead may not only treat the children inequitably by vesting property in the minors but not in the adults, but may also frustrate the decedent's efforts to treat them equitably.

These problems are not present where the probate homestead is set apart out of the decedent's separate property. By statute, the homestead may be set apart only for a limited term, in the discretion of the court. This statutory treatment is more sensible than vesting title in fee. A term of years for the survivors satisfies the basic policy of providing a secure dwelling for the survivors during their time of need. It also effectuates to the greatest extent practical the basic policy of the state probate laws to permit a decedent full testamentary powers over the decedent's property.<sup>36</sup> It does not have the adverse probate and tax features of a homestead set apart in fee.

The existing title vesting attributes of the probate homestead should be replaced by the following new provisions:

(1) The decision whether to set apart a homestead at all should be in the discretion of the court, dependent upon need.<sup>37</sup>

(2) The homestead (consisting of the dwelling and a reasonable amount of adjoining property) should be set apart for the surviving spouse or minor children of the decedent only for a limited term (to be determined by the court) upon such conditions as the court deems proper, regardless of the character of the property from which the homestead is selected.

(3) The court should retain jurisdiction to modify the term and conditions of the homestead right to accommodate changes in circumstances. The court's authority to modify the homestead should include authority to order sale and investment of the proceeds in new homestead property, where appropriate.<sup>38</sup>

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36. Cf. Estate of Walkerly, 108 Cal. 627, 653, 41 P. 772, 778 (1895).

37. Probate Code Section 661 provides that the homestead "must" be set apart by the court. Since under the recommended scheme title will not pass, setting apart the homestead should not be mandatory.

38. The authority of the court to order sale of the homestead and investment in a new homestead should extend only to homesteads selected out of community or quasi-community property of or property owned in common by the decedent and homestead recipients. This is comparable to Probate Code Section 667, which vests such



(4) Ultimately, title should vest in accordance with the rules of testate and intestate succession.

These new provisions will make the probate homestead responsive to the basic needs it is intended to serve.

Creditors' rights. The primary cause of existing problems concerning creditors' rights in the probate homestead is a lack of statutory definition of these rights; creditors must look to case law to determine their rights.<sup>39</sup> The statute should clarify and codify the rights of creditors.

The rights of creditors may be viewed from three aspects:

- (1) Creditors of the decedent.
- (2) Creditors of the homestead recipient.
- (3) Creditors of the heirs or devisees who take the property subject to the probate homestead.

Under existing law, the extent to which creditors of the decedent may satisfy their claims out of property set apart as a probate homestead depends upon the nature of the claim and the character of the homestead. A homestead set apart in fee for the surviving spouse and minor children is removed from estate administration and is not liable for claims of unsecured creditors of the decedent.<sup>40</sup> A homestead set apart for a limited term for the surviving spouse and minor children remains subject to administration,<sup>41</sup> and claims of unsecured creditors of the decedent may be enforced against the property, subject to the homestead right, notwithstanding the interest of the heirs or devisees.<sup>42</sup> Setting apart a probate homestead, regardless of its character, does not affect rights of secured creditors; liens and encumbrances

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property in fee, thereby enabling the survivors to sell and move. The survivors are part owners of the homestead property in this situation and sale and reinvestment in case of changed circumstances is appropriate. This is not the case for separate property, which may have been specifically devised to another person, subject to the homestead right.

39. Comment, The Probate Homestead in California, 53 Calif. L. Rev. 655, 670 (1965).

40. See, e.g., Estate of Tompkins, 12 Cal. 114 (1859).

41. Prob. Code § 661.

42. See, e.g., Estate of Tittel, 139 Cal. 149, 72 P. 909 (1903).

continue to burden the homestead property and are enforceable against the property.<sup>43</sup>

The rules as to the liability of the probate homestead for claims against the decedent should be codified. Since the probate homestead will be set apart for the survivors only for a limited period in every case, the property will be subject to administration and to the claims of unsecured creditors in every case, subject to the homestead right. Where appropriate, the court should be authorized to order payment of liens and encumbrances on the homestead property out of general estate funds.<sup>44</sup>

Once the probate homestead has been set apart to the surviving spouse and minor children, the homestead right is subject to the claims of their creditors to the same extent a nonprobate homestead would be subject to claims of creditors.<sup>45</sup> This rule should be reversed. Under the recommended legislation, the homestead will be set apart only for a limited period and only dependent upon need of the survivors. The homestead will be subject to modification and termination upon changed circumstances. The homestead right should be exempt absolutely during the survivors' time of need; a right of occupancy that may be terminated at any time should not be subject to enforcement processes.

The rights of creditors of the ultimate heirs or devisees who will receive the property after termination of the probate homestead is not clear. The law should make it clear that creditors of the ultimate recipients of the homestead property are permitted to satisfy their claims out of the property to the same extent as out of any other property, subject to the homestead right.

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43. See, e.g., Estate of McCauley, 50 Cal. 544 (1875); Estate of Huelsman, 127 Cal. 275, 59 P. 776 (1899).

44. The court should have discretion to select the most appropriate property as the homestead, taking into account, among other factors, liens and encumbrances burdening the property. Cf. Estate of Shively, 145 Cal. 400, 78 P. 869 (1904); Estate of Nelson, 224 Cal. App.2d 138, 145, 36 Cal. Rptr. 352, 356 (1964). Where it is necessary to protect the probate homestead by payment of secured claims against the property out of estate funds, the court should have authority to order this. Cf. Prob. Code § 735 (exoneration of liens and encumbrances on survivorship right in declared homestead). However, the estate should be subrogated to the liens and encumbrances to the extent paid.

45. See, e.g., Keyes v. Cyrus, 100 Cal. 322, 34 P. 722 (1893); MacQuiddy v. Rice, 47 Cal. App.2d 755, 118 P.2d 853 (1941).

Proposed Legislation

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Section 1265 of the Civil Code, to amend Sections 228, 600, 660, 661, 662, 1200, 1202, and 1240 of, to repeal and add Sections 663, 664, 665, and 666 to, and to repeal Sections 667, 668, and 735 of, the Probate Code, and to repeal Section 13621 of the Revenue and Taxation Code, relating to the probate homestead.

The people of the State of California do enact as follows:

12347

DECLARED HOMESTEAD

Civil Code § 1265 (amended)

SECTION 1. Section 1265 of the Civil Code is amended to read:

1265. From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, or from the quasi/community property, or from the separate property of the spouse making the selection or joining therein, and if the surviving spouse has not conveyed the homestead to the other spouse by a recorded conveyance which failed to expressly reserve his homestead rights as provided by Section 1242 of the Civil Code, the land so selected, on the death of either of the spouses, vests in the survivor, except in the case of a married person's separate homestead, subject to no other liability than such as exists or has been created under the provisions of this title; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to the heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but ~~in~~ In no case shall ~~it~~, the homestead or the products, rents, issues or profits thereof be held liable for the debts of the owner, except as provided in this title; and should the homestead be sold by the owner, the proceeds arising from such sale to the extent of the value allowed for a homestead exemption as provided in this title shall be exempt to

the owner of the homestead for a period of six months next following such sale.

Comment. The survivorship right in the declared homestead formerly provided by Section 1265 is not continued. A probate homestead may be set apart for the surviving spouse or minor children pursuant to Probate Code Sections 660-666.

18/321

SUCCESSION

Probate Code § 228 (amended)

SEC. 2. Section 228 of the Probate Code, as amended by Cal. Stats. 1979, ch. 298, is amended to read:

228. (a) If the decedent leaves no living spouse or issue and there are issue of the decedent's predeceased spouse, the portion of the decedent's estate attributable to the decedent's predeceased spouse shall go in equal shares to the children of the predeceased spouse and their descendants by right of representation, and if none, then one-half of such portion goes to the parents of the decedent in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and their descendants by right of representation, and the other half goes to the parents of the predeceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of the predeceased spouse and to their descendants by right of representation.

(b) For the purposes of this section, the "portion of the decedent's estate attributable to the decedent's predeceased spouse" shall mean:

(1) One-half of the community property in existence at the time of the death of the predeceased spouse.

(2) One-half of any community property, in existence at the time of death of the predeceased spouse, which was given to the decedent by the predeceased spouse by way of gift, descent, devise, or bequest.

(3) That portion of any community property in which the predeceased spouse had any incident of ownership and which vested in the decedent upon the death of the predeceased spouse by right of survivorship.

(4) That portion of any property which, prior to January 1, 1981, because of the death of the predeceased spouse became vested in the decedent ~~and~~ by right of survivorship in a declared homestead or was set aside as a probate homestead.

(c) That portion of the decedent's estate not otherwise subject to this section shall be distributed pursuant to the provisions of this article, except that if a portion of the decedent's estate would otherwise escheat to the state because there is no relative, including next of kin, such portion of the estate shall be distributed in equal shares to the children of the predeceased spouse and to their descendants by right of representation.

(d) If any of the property subject to the provisions of this section would otherwise escheat to this state because there is no relative, including next of kin, of one of the spouses to succeed to such portion of the estate, such property shall be distributed in accordance with the provisions of Section 296.4 of this code.

Comment. Section 228 is amended to reflect the elimination of the survivorship right in the declared homestead and the fact that the probate homestead no longer vests title in the person for whom it is set apart. See Section 661(c) and Comment thereto and Comment to Civil Code Section 1265.

12348

#### INVENTORY AND APPRAISEMENT

##### Probate Code § 600 (amended)

SEC. 4. Section 600 of the Probate Code is amended to read:

600. Within three months after ~~his~~ appointment, or within such further time as the court or judge for reasonable cause may allow, the executor or administrator ~~must~~ shall file with the clerk of the court an inventory and appraisal of the estate of the decedent which has come to ~~his~~ the possession or knowledge of the executor or administrator . A copy of the ~~same~~ inventory and appraisal shall be transmitted by ~~such~~ the clerk to the county assessor if timely requested by ~~such~~ the assessor. The inventory ~~must~~ shall include ~~the homestead; if any, and~~ all the estate of the decedent, real and personal, particularly

specifying all debts, bonds, mortgages, deeds of trust, notes and other securities for the payment of money belonging to the decedent, with the name of each debtor, the date, the sum originally payable, the indorsements thereon, if any, with their dates, and a statement of the interest of the decedent in any partnership of which he the decedent was a member, to be appraised as a single item. It ~~must~~ shall include an account of all moneys belonging to the decedent. The inventory and appraisal shall be prepared in such form as to set down each item separately with the fair market value thereof at the time of the decedent's death in dollars and cents in figures opposite the respective items.

Comment. The provision of Section 600 that related to the declared homestead is deleted in recognition of the elimination of the survivorship right in the declared homestead. See Comment to Civil Code § 1265. The other changes in Section 600 are technical.

10/919

PROBATE HOMESTEAD

Probate Code § 660 (amended)

SEC. 5. Section 660 of the Probate Code is amended to read:

660. The (a) Until the inventory is filed, the decedent's surviving spouse and minor children are entitled to remain in possession of the homestead family dwelling, the wearing apparel of the family, the household furniture and other property of the decedent exempt from execution ~~;~~ until the inventory is filed . Thereupon ;

(b) Upon the filing of the inventory or at any subsequent time during the administration, the court, on petition therefor, may in its discretion ~~set :~~

(1) Set apart to the surviving spouse, or, in case of his or her death, to the minor ~~child or~~ children of the decedent, all or any part of the property of the decedent exempt from execution ~~;~~ and must .

(2) Select and set apart the a homestead selected by the spouses, or either of them, and recorded while both were living, other than a married person's separate homestead, in the manner provided in this article.

Comment. Section 660 is revised to make establishment of a probate homestead permissive rather than mandatory. The factors to be used in

guiding the court in the exercise of its discretion are prescribed in Section 664.

The provisions of Section 660 that related to the declared homestead are deleted in recognition of the elimination of the survivorship right in the declared homestead. See Comment to Civil Code § 1265.

10/916

Probate Code § 661 (amended)

SEC. 6. Section 661 of the Probate Code is amended to read:

661. If no homestead has been selected, designated and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court, in the manner hereinafter provided, must select, designate and set apart and cause to be recorded a homestead (a) The homestead shall be set apart for the use of the surviving spouse and the minor children, or, if there be no surviving spouse, then or for the use of the minor child or children, of the decedent.

(b) The homestead shall be selected out of the community or quasi-community property of or out of real property owned in common by the decedent and the person or persons entitled to have the homestead set apart, or if there be no community property or quasi-community property and no such property owned in common, then, subject to Section 664, out of the separate property of or property owned by the decedent.

(c) The homestead shall not be selected out of:

(1) Property title to which is vested by testate or intestate succession in the person for whose use the homestead is set apart.

(2) Property the right to possession of which is vested in a person other than the person for whose use the homestead is set apart, unless the person in whom the right to possession is vested consents thereto.

(d) If the property set apart is the separate property of the decedent, the court can The property set apart as a homestead shall be set it apart only for a limited period, to be designated in the order, and in no case beyond the lifetime of the surviving spouse, or, as to a child, beyond its minority; and, subject to such. Subject to the homestead right, the property of the decedent remains subject to administration including testate and intestate succession.

For the purposes of this section, the terms "quasi-community property" and "separate property" have the meanings given those terms in Section 1237.5 of the Civil Code.

Comment. The provisions of Section 661 that related to the declared homestead are deleted in recognition of the elimination of the survivorship right in the declared homestead. See Comment to Civil Code § 1265. The provision of Section 661 that related to recordation is continued in Section 1222. The substance of the provision of Section 661 that defined quasi-community and separate property is continued in Section 666.

Subdivision (a) permits the homestead to be set apart for minor children of a decedent even if there is a surviving spouse. This may occur, for example, where the minor children live apart from the surviving spouse or where the minor children are not children of the surviving spouse. Subdivision (a) does not preserve the provision of former Civil Code Section 1265 that permitted the court to assign the homestead for a limited period to the "family" of the head of a family other than the surviving spouse and minor children. The decedent is not ordinarily legally obligated for the support of such persons. A decedent who wishes to provide for such persons may do so by an inter vivos instrument other than the declared homestead or by a testamentary disposition.

Subdivision (b) does not require that the homestead be selected out of real property. The homestead may be selected out of personal property such as a mobilehome. Subdivision (b) also codifies the rule that the court may select a homestead out of separate property of the decedent despite the availability of community or quasi-community property or property held in common by the decedent and person for whose use the homestead is set apart. See Estate of Raymond, 137 Cal. App.2d 134, 289 P.2d 890 (1935). However, the court must give preference to property other than the separate property of the decedent for selection as a probate homestead. See Section 664.

Subdivision (c) provides two limitations on the property from which the homestead may be selected. A probate homestead may not be created on property the homestead petitioner receives by succession from the decedent. Such property is owned by the successor and is subject to the claims of creditors (except to the extent of the dwelling exemption) just as any other property. Nor may a probate homestead be created on property of which a third person has the right to possession, whether by partial ownership, lease, or otherwise, without the person's consent. The probate homestead can affect the possessory rights only of testate and intestate successors of the decedent.

Subdivision (d) requires that the homestead be set apart only for a limited period, regardless whether the homestead is selected out of the separate property of the decedent or otherwise. This changes the rule of former Section 667, which provided for vesting of the homestead property in fee. Under subdivision (d), the property remains subject to administration so that upon termination of the homestead right title to the property of the decedent set apart as a homestead vests in the heirs or devisees. Any portion of the homestead that is the property of the



person for whom the homestead was set apart remains vested in the person at the termination of the homestead right. As to the rights of creditors during and after administration, see Section 663.

405/331

Probate Code § 662 (technical amendment)

SEC. 7. Section 662 of the Probate Code is amended to read:

662. When such the petition is filed, the clerk ~~must~~ shall set it for hearing by the court and give notice thereof for the period and in the manner required by ~~section~~ Section 1200 of this code .

Comment. The changes in Section 662 are technical.

100/908

Probate Code § 663 (repealed)

SEC. 8. Section 663 of the Probate Code is repealed.

~~663. If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, other than a married person's separate homestead, was selected from the community property or quasi/community property, or from the separate property of the person selecting or joining in the selection of the same, and if the surviving spouse has not conveyed the homestead to the other spouse by a recorded conveyance which failed to expressly reserve his homestead rights as provided by Section 1242 of the Civil Code, the homestead vests, on the death of either spouse, absolutely in the survivor.~~

If the homestead was selected from the separate property of the decedent without his consent, or if the surviving spouse has conveyed the homestead to the other spouse by a conveyance which failed to expressly reserve homestead rights as provided by Section 1242 of the Civil Code, the homestead vests, on death, in his heirs or devisees, subject to the power of the court to set it apart for a limited period to the family of the decedent as hereinabove provided. In either case the homestead is not subject to the payment of any debt or liability existing against the spouses or either of them, at the time of death of either, except as provided in the Civil Code.

For the purposes of this section, the terms "quasi-community property" and "separate property" have the meanings given those terms in Section 1237.5 of the Civil Code.

Comment. Section 663 is repealed in recognition of the elimination of the survivorship right in the declared homestead. See Comment to Civil Code § 1265.

100/939

Probate Code § 663 (added)

SEC. 9. Section 663 is added to the Probate Code, to read:

663. (a) Property of the decedent set apart as a homestead is liable for claims against the estate of the decedent, subject to the homestead right. The homestead right in property of the decedent is liable for claims against the estate of the decedent that are secured by liens and encumbrances on the property.

(b) The homestead right in the property of the decedent is not liable for claims against the person for whose use the homestead is set apart.

(c) Property of the decedent set apart as a homestead is liable for claims against the testate or intestate successors of the decedent or other successors to the property after administration, subject to the homestead right.

Comment. Subdivision (a) of Section 663 states the rules governing liability of homestead property for debts of the decedent. The first sentence makes clear that such property may be used to satisfy debts of the decedent, but any sale is subject to the homestead right of occupancy by the person for whose use the homestead is set apart. This codifies the rule of Estate of Tittel, 139 Cal. 149, 72 P. 909 (1903). The second sentence recognizes the common law rule that the homestead does not affect prior liens and encumbrances. See, e.g., Estate of McCauley, 50 Cal. 544 (1875); Estate of Huelsman, 127 Cal. 275, 59 P. 776 (1899). However, the court may order exoneration of the homestead from prior liens and encumbrances by payment out of estate funds. See Section 664(b). The court may also select as a homestead property not subject to liens and encumbrances or property whose liens and encumbrances will be discharged in probate. See Section 664(a) (discretion of court).

Subdivision (b) states the rule governing liability of the homestead right for debts of the person for whose use the homestead is set apart. Subdivision (b) creates an absolute exemption for the homestead right, both as to prior and subsequently incurred debts, and regardless

of liens created on the homestead right. This reverses the rule of *MacQuiddy v. Rice*, 47 Cal. App.2d 755, 118 P.2d 853 (1941). Subdivision (b) does not preclude a creditor of the person for whose use the homestead is set apart from reaching any interest in the property he or she may have apart from the homestead right; this may occur where the homestead was selected out of community property of or property held in common by the decedent and person for whose use the homestead is set apart. In such a situation, the exemption from execution for a dwelling may be available to the person for whose use the homestead is set apart to protect his or her property interest.

Subdivision (c) states the rule governing liability of homestead property for debts of the heirs or devisees or other persons who may have acquired the property through administration. The homestead property is subject to administration and devolves as any other property, subject to the right of use of the homestead by the persons for whose use it is set apart. See Section 661(d). Under subdivision (c) of Section 663, the remainder interest but not the homestead right is subject to claims of creditors.

100/968

Probate Code § 664 (repealed)

SEC. 10. Section 664 of the Probate Code is repealed.

664. If the homestead so selected and recorded, as provided in Section 663, is returned in the inventory appraised at not over the amount of the homestead exemption, as provided in the Civil Code and in effect at the date of death of the decedent, or was previously appraised as provided in the Civil Code and such appraised value did not exceed that amount, the court shall order it set apart to the persons in whom title is vested by the preceding section. If it is returned in the inventory appraised at more than that amount, the inheritance tax referee must, before he makes his return, ascertain and appraise the value of the homestead at the time the same was selected, and if such value exceeds that amount, or if the homestead was appraised as provided in the Civil Code and such appraised value exceeded that amount, he must determine whether the premises can be divided without material injury, and if he finds that they can be thus divided, he must admeasure and set apart to the parties entitled thereto such portion of the premises, including the dwelling house, as will equal in value that amount, and make report thereof, giving an exact description of the portion set apart as a homestead.

Comment. Section 664 is repealed in recognition of the elimination of the survivorship right in the declared homestead. See Comment to Civil Code § 1265.

101/127

Probate Code § 664 (added)

SEC. 11. Section 664 is added to the Probate Code, to read:

664. (a) In selecting and setting apart the homestead, the court shall consider the suitability of the property for use as a dwelling, the needs of the surviving spouse and minor children, the liens and encumbrances on the property, the claims of creditors, and the needs of the heirs or devisees of the decedent. The court shall select as a homestead the most appropriate property available, giving first preference to the community or quasi-community property of or property owned in common by the decedent and the person entitled to have the homestead set apart, and shall set apart in addition to the dwelling such adjoining property as appears reasonable for such a term and upon such conditions as appear proper, in light of the foregoing and other relevant considerations as determined by the court in its discretion.

(b) The court may order that any claims secured by liens or encumbrances on the property set apart as a homestead shall be paid out of funds of the estate. In ordering payment of claims, the court shall consider the value of the property, the estate plan of the decedent, the financial condition of the decedent's estate, and other relevant considerations, as determined by the court in its discretion. The estate is subrogated to the liens and encumbrances to the extent of the payment.

Comment. Subdivision (a) of Section 664 codifies the principle that the court has broad discretion in selecting the homestead and may take into account a wide variety of factors in exercising its discretion. See, e.g., Estate of Barkley, 91 Cal. App. 388, 267 P. 148 (1928); Estate of Claussenius, 96 Cal. App.2d 600, 216 P.2d 485 (1950). The court may select the homestead out of the separate property of the decedent but must give a preference to community or quasi-community property of or other property held in common by the decedent and the person for whose use the homestead is set apart. See Section 661 and Comment thereto. The court may select any appropriate property as the homestead and is not limited to the existing dwelling. Under subdivision (a), unlike former Sections 664-666, there is no appraisal and division procedure required. The court will have available the appraised value of all the property returned in the inventory, and may

select accordingly. The court is not limited to existing lots or parcels, but must set apart only so much of the property as is reasonable under the circumstances of the case. This supersedes the authority under former Section 664 to partition declared homestead property having surplus value.

Subdivision (b) reverses the rule of Estate of Huelsman, 127 Cal. 275, 59 P. 776 (1889), that precluded payment of liens and encumbrances out of estate funds. It supersedes former Section 735 which required exoneration in the case of a survivorship right in a declared homestead but not in the case of a probate homestead. See, e.g., McGahey v. Forrest, 109 Cal. 63, 41 P. 817 (1895) (predecessor statute).

101/129

Probate Code § 665 (repealed)

SEC. 12. Section 665 of the Probate Code is repealed.

~~665. If the inheritance tax referee finds that the value of the premises at the time of their selection exceeded the amount referred to in Section 664, and that they cannot be divided without material injury, he must report such finding, and thereafter the court may make an order for the sale of the premises and the distribution of the proceeds to the parties entitled thereto.~~

Comment. Section 665 is repealed in recognition of the elimination of the survivorship right in the declared homestead. See Comment to Civil Code § 1265.

28/834

Probate Code § 665 (added)

SEC. 13. Section 665 is added to the Probate Code, to read:

665. (a) The court may by order do any of the following at any time prior to termination of the homestead right if in the court's discretion to do so appears appropriate under the circumstances of the case:

(1) Modify the term or conditions of the homestead right or terminate the homestead right.

(2) If the homestead was selected out of property other than the separate property of the decedent, direct sale of the property and investment of the proceeds in other suitable property which shall be subject to the same rights and liabilities of the parties as the property set apart as a homestead. Except to the extent provided in this paragraph, the homestead right is not transferable.

(b) A court order under this section shall be made upon motion of any of the following parties and notice to the others:

(1) The person for whose use the homestead is set apart.

(2) The testate or intestate successors of the decedent or other successors to the property set apart as a homestead.

(3) Persons having claims secured by liens or encumbrances on the property set apart as a homestead.

Comment. Section 665 gives the court continuing jurisdiction to modify the homestead in recognition of the possibility of changed circumstances. The court may order sale and investment in new homestead property only if the homestead was selected out of community or quasi-community property of or property owned in common by the decedent and the person for whose use the homestead is set apart. This is comparable to the provision of former Section 667 that vested such property in the homestead recipients in fee, thereby enabling subsequent transfer and reinvestment of the homestead property. The homestead right is not otherwise transferable, but may be subject to enforcement of liens and encumbrances pursuant to Section 663(a).

28/832

Probate Code § 666 (repealed)

SEC. 14. Section 666 of the Probate Code is repealed.

~~666. When the report of the inheritance tax referee is filed, the clerk shall set the same for hearing by the court and give notice thereof for the period and in the manner required by Section 1200 of this code. If the court is satisfied that the report is correct, it must be confirmed, otherwise rejected. In case the report is rejected, the court may appoint a new referee to examine and report upon the homestead, and similar proceedings may be had for the confirmation or rejection of his report, as upon the first report.~~

Comment. Section 666 is repealed in recognition of the elimination of the survivorship right in the declared homestead. See Comment to Civil Code § 1265.

28/835

Probate Code § 666 (added)

SEC. 15. Section 666 is added to the Probate Code, to read:

666. As used in this article:

(a) "Quasi-community property" means personal property, wherever situated, and real property situated in this state, heretofore or hereafter acquired in any of the following ways:

(1) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

(2) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

(b) "Separate property" does not include quasi-community property.

Comment. Section 666 continues the substance of the former last paragraph of Section 661, which incorporated by reference former Civil Code Section 1237.5. Unlike former Civil Code Section 1237.5, however, Section 666 applies to personal property as well as real property. The homestead may be selected out of personal property such as a mobilehome.

28/836

Probate Code § 667 (repealed)

SEC. 16. Section 667 of the Probate Code is repealed.

~~667. When property, other than a homestead selected and recorded during the lifetime of the decedent, is set apart to the use of the family, in accordance with the provisions of this article, such property, if the decedent left a surviving spouse and no minor child, is the property of such spouse; if the decedent left also a minor child or children, one-half of such property belongs to the surviving spouse and the remainder to the child or in equal shares to the children; if there is no surviving spouse, the whole belongs to the minor child or children.~~

Comment. Former Section 667 is superseded by Section 661(d), which permits the homestead to be set apart only for a limited period, regardless of the character of the property from which the homestead is selected. See also Section 665(b) (sale and investment of proceeds of homestead selected out of property other than separate property of the decedent).

Probate Code § 668 (repealed)

SEC. 17. Section 668 of the Probate Code is repealed.

~~668. A person succeeding by purchase or otherwise to the interest of a surviving spouse in a homestead which has been declared in the lifetime of the decedent, shall have the same right to apply for an order setting aside the homestead to him as is conferred by law on the person whose interest he has acquired.~~

Comment. Section 668 is repealed in recognition of the elimination of the survivorship right in the declared homestead. See Comment to Civil Code § 1265.

28/838 N/Z

PAYMENT OF CLAIMS

Probate Code § 735 (repealed)

SEC. 18. Section 735 of the Probate Code is repealed.

~~735. If there are subsisting liens or encumbrances on the homestead, and the funds of the estate are adequate to pay all claims against the estate, the claims secured by such liens and encumbrances, whether filed or presented or not, if known or made known to the executor or administrator, must be paid out of such funds. If the funds of the estate are not sufficient for that purpose, the claims so secured shall be paid proportionately with other claims allowed, and the liens or encumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment.~~

Comment. Former Section 735 is superseded by Section 664(b). See Comment to Section 664(b).

28/839

NOTICES

Probate Code § 1200 (amended)

SEC. 19. Section 1200 of the Probate Code, as amended by Cal. Stats. 1979, ch. 730, is amended to read:

1200. Upon the filing of the following petitions:

(1) A petition under Section 641 of this code for the setting aside of an estate;



- (2) A petition to set apart a homestead or exempt property;
- (3) A petition relating to the family allowance filed after the return of the inventory;
- (4) A petition for leave to settle or compromise a claim against a debtor of the decedent or a claim against the estate or a suit against the executor or administrator as such;
- (5) A petition for the sale of stocks or bonds;
- (6) A petition for confirmation of a sale or a petition to grant an option to purchase real property;
- (7) A petition for leave to enter into an agreement to sell or give an option to purchase a mining claim or real property worked as a mine;
- (8) A petition for leave to execute a promissory note or mortgage or deed of trust or give other security;
- (9) A petition for leave to lease or to exchange property, or to institute an action for the partition of property;
- (10) A petition for an order authorizing or directing the investment of money;
- ~~(11)~~ A report of appraisers concerning a homestead;
- ~~(12)~~ (11) An account of an executor or administrator or trustee;
- ~~(13)~~ (12) A petition for partial or ratable or preliminary or final distribution;
- ~~(14)~~ (13) A petition for the delivery of the estate of a nonresident;
- ~~(15)~~ (14) A petition for determination of heirship or interests in an estate;
- ~~(16)~~ (15) A petition of a trustee for instructions;
- ~~(17)~~ (16) A petition for the appointment of a trustee;
- ~~(18)~~ (17) Any petition for letters of administration or for probate of will, or for letters of administration-with-will annexed, which is filed after letters of administration or letters testamentary have once been issued; and in all cases in which notice is required and no other time or method is prescribed by law or by court or judge, the clerk shall set the same for hearing by the court and shall give notice of the petition or application ~~or report~~ or account by causing a notice of the time and place of hearing thereof to be posted at the courthouse of the

county where the proceedings are pending, at least 10 days before the day of hearing, giving the name of the estate, the name of the petitioner and the nature of the application, referring to the petition for further particulars, and stating the time at which the application will be heard.

At least 10 days before the time set for the hearing of such petition ~~;~~ or ~~account or report~~, the petitioner or person filing the ~~account or desiring the confirmation of a report of appraisers;~~ shall cause notice of the time and place of hearing thereof to be mailed to the executor or administrator, ~~when he is~~ if not the petitioner, to any coexecutor or coadministrator not petitioning, and to all persons (or to their attorneys, if they have appeared by attorney), who have requested notice or who have given notice of appearance in the estate in person or by attorney, as heir, devisee, legatee or creditor, or as otherwise interested, addressed to them at their respective post office addresses given in their requests for special notice, if any, otherwise at their respective offices or places of residence, if known, and if not, at the county seat of the county where the proceedings are pending, or to be personally served upon such person.

Proof of the giving of notice must be made at the hearing; and if it appears to the satisfaction of the court that ~~said~~ the notice has been regularly given, the court shall so find in its order, and ~~such~~ the order, when it becomes final, ~~shall be~~ is conclusive upon all persons.

This section does not apply to proceedings under Division 4 (commencing with Section 1400). When a provision of Division 4 applies the provisions of this code applicable to executors or administrators to proceedings under Division 4, a reference to this section in the provisions applicable to executors or administrators shall be deemed to be a reference to Chapter 3 (commencing with Section 1460) of Part 1 of Division 4.

Comment. Section 1200 is amended to reflect the repeal of former Sections 664 through 666 relating to the report of appraisal of homestead property.

Probate Code § 1202 (amended)

SEC. 20. Section 1202 of the Probate Code is amended to read:

1202. At any time after the issuance of letters testamentary or of administration, any person interested in the estate, whether as heir, devisee, legatee, creditor, beneficiary under a trust, or as otherwise interested, or the State Controller, may, in person or by attorney, serve upon the executor or administrator or trustee, or upon the attorney for ~~such~~ the executor, administrator, or trustee, and file with the clerk of the court where the proceedings are pending, with a written admission or proof of ~~such~~ service, a written request, stating that ~~he~~ the person desires special notice of the filing of any or all of the petitions ~~;~~ or ~~accounts or reports~~ mentioned in Section 1200 of ~~this code~~ , and giving the post office address of the person making the ~~same;~~ or his request or the person's attorney. Thereafter ~~such~~ the person ~~shall be~~ is entitled to notice as provided in ~~said~~ Section 1200.

Comment. Section 1202 is amended to reflect the repeal of former Sections 664 through 666 relating to the report of appraisal of homestead property.

28/843

## APPEALS

Probate Code § 1240 (amended)

SEC. 21. Section 1240 of the Probate Code is amended to read:

1240. An appeal may be taken from an order granting or revoking letters testamentary or of administration; removing or refusing to remove a trustee of a testamentary trust; admitting a will to probate or revoking the probate thereof; setting aside an estate claimed not to exceed twenty thousand dollars (\$20,000) in value; setting apart property as a homestead or claimed to be exempt from execution ~~confirming a report of an appraiser or appraisers in setting apart a homestead~~ ; granting or modifying a family allowance; directing or authorizing the sale or conveyance or confirming the sale of property; directing or authorizing the granting of an option to purchase real property; adjudicating the merits of any claim under Sections 851.5, 852 or 853;

allocating debts under Section 980; settling an account of an executor or administrator or trustee, or instructing or appointing a trustee; instructing or directing an executor or administrator; directing or allowing the payment of a debt, claim, legacy or attorney's fee; fixing, directing or allowing payment of a trustee's compensation; determining heirship or the persons to whom distribution should be made or trust property should pass; distributing property; determining that property is community property passing or belonging to the surviving spouse pursuant to Section 655; refusing to make any order heretofore mentioned in this section; fixing an inheritance tax or determining that none is due; or authorizing a personal representative to invest or reinvest any surplus moneys pursuant to Section 584.5.

Comment. Section 1240 is amended to reflect the repeal of former Sections 664 through 666 relating to the report of appraisal of homestead property.

28/844

## INHERITANCE TAX

Revenue & Taxation Code § 13621 (repealed)

SEC. 22. Section 13621 of the Revenue and Taxation Code is repealed.

~~13621. The vesting in the surviving spouse or any other person of any property constituting a homestead created pursuant to the Civil Code is a transfer subject to this part.~~

Comment. Section 13621 is repealed in recognition of the elimination of the survivorship right in the declared homestead. See Comment to Civil Code § 1265.

28/845

## TRANSITIONAL PROVISION

SEC. 23. (a) A homestead declared and recorded prior to the effective date of this act pursuant to Sections 1237 through 1304, inclusive, of the Civil Code shall, on the effective date, cease to have effect for the purpose of survivorship rights.

SEC. 24.

(b) A homestead set apart by order of the court prior to the effective date of this act pursuant to Sections 660 through 668, inclusive, of the Probate Code remains vested as provided therein and is a transfer subject to Part 8 (commencing with Section 13301) of the Revenue and Taxation Code.

32/576

SEVERABILITY CLAUSE

SEC. 24. If any provision of this act or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.