

Memorandum 81-41

Subject: Study D-300 - Enforcement of Judgments (Release of Judgment Lien on Dwelling)

At the July meeting, the Commission directed the staff to prepare a procedure permitting the judgment debtor to remove judgment liens on a dwelling so that it may be sold. Attached to this memorandum is a draft statute intended to accomplish this goal. The procedure is summarized in the Comment to draft Section 704.910.

If the Commission approves this procedure, we will make any changes approved at the meeting and prepare the necessary amendments so that it can be added to Assembly Bill 707.

Respectfully submitted,

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Article 5. Release of Judgment Liens on Homestead

§ 704.910. Application of article

704.910. The judgment debtor may seek the release of any judgment liens on real property that constitutes a homestead (as defined in subdivision (c) of Section 704.710) as provided in this article.

Comment. Sections 704.910-704.995 provide a new procedure that enables the judgment debtor to sell a homestead without the loss of the homestead exemption. This continues the protection of former Civil Code Section 1265, though by means of a very different procedure. The judgment debtor initiates the procedure by serving each judgment creditor who has a judgment lien on a real property homestead (see Section 704.710(c)) with a "request for conditional release of the judgment lien." See Section 704.920. The request gives the judgment creditor necessary information, including a description of all other judgment liens and other liens on the property. The judgment creditor is afforded 60 days after service of the request to respond. See Section 704.930.

The judgment creditor may respond to the request in one of three ways: by giving a conditional release of the judgment lien, by causing the property to be levied upon under a writ of execution, or by filing and serving a notice of opposition to the homestead exemption. See Section 704.930(a).

If all the judgment creditors with judgment liens on the property give conditional releases, the judgment debtor may sell the homestead free of the judgment liens. See Section 704.940(b). The property must be sold while the releases are in effect and must be sold through escrow. See Section 704.970. The judgment liens then attach to the excess proceeds of sale. See Section 704.980.

If a judgment creditor elects to execute on the property, the issues are determined by the procedures set forth in Article 4 (commencing with Section 704.710). In this situation, if the property is ordered to be sold pursuant to Section 704.780, the proceeds will be distributed as provided in Section 701.810 and the conditional releases given by any other judgment lienholders will be ineffective.

If a judgment creditor disputes the judgment debtor's claim that the property is an exempt homestead but does not wish to execute on the property, the judgment creditor may apply for a court order to determine the exemption. See Section 704.950. If the property is exempt, the court may order the conditional release of the judgment creditor's judgment lien. See Section 704.950(g). If the property is determined not to be a homestead, any conditional releases are ineffective. See Section 704.940(c).

If the judgment creditor does not respond as provided, the judgment debtor may obtain a court order conditionally releasing the judgment creditor's lien. See Sections 704.930(b)(1), 704.960.

§ 704.920. Request for conditional release of judgment lien

704.920. (a) The judgment debtor shall personally serve on each judgment creditor having a judgment lien on the property a request for conditional release of the judgment lien.

(b) The request for conditional release shall be executed under oath and shall include all of the following:

(1) The title of the court where the judgment is entered and the cause and number of the action.

(2) The name and address of the original judgment creditor and the assignee of record, if any.

(3) The date of entry of the judgment and of any renewals of the judgment and where entered in the records of the court.

(4) The name and address of the judgment debtor.

(5) A description of the property that is subject to the judgment lien.

(6) A claim that the property is a homestead and the amount of the homestead exemption and a statement of facts supporting the claim.

(7) Information as to all other judgment liens on the property that satisfies the requirements of paragraphs (1) to (3), inclusive, and the amount of each judgment lien.

(8) The names and addresses of all other persons having liens on the property, the amount of each lien, and when it attached to the property.

(9) A request that within 60 days the judgment creditor give the judgment debtor a conditional release of the judgment lien in compliance with Section 704.940 or otherwise comply with Section 704.930.

(10) A statement that if the judgment creditor does not comply with the request the judgment debtor may obtain a court order conditionally releasing the judgment creditor's judgment lien and the judgment creditor may be liable for costs and reasonable attorney's fees of obtaining the court order.

Comment. See the Comment to Section 704.910.

§ 704.930. Response of judgment creditor

704.930. (a) Within 60 days after service of the request for conditional release pursuant to Section 704.920, the judgment creditor

served shall do one of the following:

(1) Give the judgment debtor a conditional release of the judgment lien on the homestead as provided in Section 704.940.

(2) Cause the property to be levied upon under a writ of execution.

(3) File and serve a notice of opposition to the homestead exemption claim as provided in Section 704.950.

(b) If the judgment creditor does not comply with subdivision (a) within the time allowed, the judgment debtor may apply pursuant to Section 704.960 for a court order conditionally releasing the judgment creditor's judgment lien.

Comment. See the Comment to Section 704.910.

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§ 704.940. Conditional release of judgment lien

704.940. (a) If the judgment creditor elects pursuant to Section 704.930 to give the judgment debtor a conditional release, the judgment creditor shall serve the conditional release on the judgment debtor within the time provided in Section 704.930. Service shall be made personally or by mail.

(b) The release shall satisfy the requirements of Section 697.370 and shall be conditioned upon the sale of the homestead at a private sale as provided in Section 704.970. The conditional release may provide that it expires if the property is not sold as provided in this subdivision within a time specified in the release, but not less than one year from the date the conditional release is executed.

(c) A conditional release given pursuant to this section is ineffective if the court determines that the judgment debtor's property described in the release is not a homestead.

Comment. See the Comment to Section 704.910. If one judgment creditor has given a conditional release but the property is sold at an execution sale pursuant to the levy of another judgment creditor (see Section 704.930(a)(2)), the conditional release has no effect and the rights of the judgment creditor who gave the conditional release are governed by the normal rules relating to priorities and distribution of proceeds upon an execution sale. See, e.g., Section 701.630 (junior liens extinguished upon sale), 701.640 (interest acquired by purchaser at execution sale), 701.680 (absolute sales), 701.810 (distribution of proceeds).

§ 704.950. Opposition to homestead claim

704.950. (a) If the judgment creditor opposes the judgment debtor's claim that the property is a homestead, the judgment creditor shall, within the time provided in Section 704.930, apply to the court for an order determining the homestead exemption.

(b) If the property is located in a county other than the county where the judgment was entered, the judgment creditor shall comply with subdivision (b) of Section 704.750.

(c) The judgment creditor's application shall satisfy the requirements of Section 704.760.

(d) Upon the filing of the application by the judgment creditor, the court shall set a time and place for the hearing. The time set for hearing shall be not later than 45 days after the application is filed or such later time as the court orders upon a showing of good cause.

(e) Not later than 30 days before the time set for hearing, the judgment creditor shall serve on the judgment debtor a copy of the application of the judgment creditor and a copy of the notice of hearing. Service shall be made personally or by mail.

(f) The burden of proof at the hearing is determined as provided in Section 704.780.

(g) The court shall determine whether the property is exempt and, if so, the amount of the homestead exemption. If the property is exempt, the court shall order the release of the judgment creditor's judgment lien on the conditions provided in Section 704.940, and the judgment creditor is liable for the costs of the hearing under this section.

Comment. See the Comment to Section 704.910. The procedure of Section 704.950 is drawn from Sections 704.750-704.780 (determination of homestead exemption after levy).

§ 704.960. Judgment debtor's application for court order conditionally releasing liens

704.960. (a) If all the persons having judgment liens on the judgment debtor's homestead have not given their conditional releases within the time provided in Section 704.930, the judgment debtor may apply to the court on noticed motion for an order releasing any unreleased

liens. The judgment debtor may not apply for an order under this section if the property has been levied upon under a writ of execution.

(b) If the property is located in a county other than the county where the judgment was entered under which the unreleased judgment lien was created:

(1) The judgment debtor shall apply to a court of similar jurisdiction in the county where the property is located or, if there is not a court of similar jurisdiction, to a court of higher jurisdiction in that county.

(2) The judgment debtor shall pay a filing fee of twelve dollars (\$12). No law library fee shall be charged.

(c) If the court determines that a judgment creditor having a judgment lien has not complied with the request for a conditional release, the court shall order the release of the judgment creditor's judgment lien on the conditions provided in Section 704.940.

(d) If the court orders the release of a judgment creditor's judgment lien, the judgment creditor is liable for the costs and reasonable attorney's fees of the hearing under this section.

(e) A hearing under this section may be consolidated with a hearing under Section 704.950. The issue of the qualification of the judgment debtor's property as a homestead may be raised only in a proceeding under Section 704.950.

Comment. See the Comment to Section 704.910.

405/435

§ 704.970. Effect of conditional release

704.970. A conditional release of a judgment lien on the judgment debtor's homestead under this article is not effective unless the following conditions are satisfied:

(a) The homestead is sold through an escrow licensed or excepted from license pursuant to the Escrow Law, Division 6 (commencing with Section 17000) of the Financial Code.

(b) The amount of the sale price in excess of the amount of the homestead exemption and the amount of superior liens to be satisfied by the sale is paid in cash.

(c) Title to the homestead is transferred not later than one year after the execution of the conditional release, or within such longer period as is specified in the conditional release.

Comment. See the Comment to Section 704.910.

405/442

§ 704.980. Attachment of lien to proceeds in escrow

704.980. (a) When a judgment lien on a homestead is released pursuant to a conditional release under this article, the lien attaches to the proceeds of the sale in escrow exceeding the total of the amount of the homestead exemption and the amount of any superior liens to be satisfied from the proceeds. The liens on proceeds attach in their respective order of priority.

(b) The escrow holder shall distribute the proceeds of sale in the manner prescribed in Section 701.810. If there are conflicting claims to the proceeds in escrow, the escrow holder may deposit with the court the proceeds that are the subject of the conflicting claims in the manner prescribed in Section 701.830 and Section 701.830 governs the disposition of the proceeds. For the purpose of this subdivision, the "court" is a court where judgment debtor could apply for an order pursuant to Section 704.960.

Comment. See the Comment to Section 704.910.

405/883

§ 704.990. Limitations on levy of execution

704.990. Unless the court determines that the property is not a homestead:

(a) If the judgment creditor gives a conditional release of the judgment lien on a homestead pursuant to Section 704.940, the judgment creditor may not thereafter cause the homestead to be levied upon under a writ of execution until the expiration of the conditional release.

(b) If the judgment creditor files and serves a notice of opposition to the homestead exemption claim pursuant to Section 704.950, the judgment creditor may not thereafter cause the homestead to be levied upon under

a writ of execution until the expiration of the conditional release ordered by the court.

(c) If the judgment creditor does not comply with the request of the judgment debtor for a conditional release and the judgment debtor applies for a court order conditionally releasing the lien, the judgment creditor may not thereafter cause the homestead to be levied upon under a writ of execution until the expiration of the conditional release ordered by the court.

Comment. See the Comment to Section 704.910.

404/284

§ 704.995. Fraudulent conveyances

704.995. Nothing in this article limits the right of a judgment creditor to resort to a remedy available under the Uniform Fraudulent Conveyance Act, Title 2 (commencing with Section 3439.01) of Part 2 of Division 4 of the Civil Code.

Comment. Section 704.995 makes clear that the procedure for releasing judgment liens on homestead property provided by this article does not deprive a judgment creditor of the right to attack a transfer of the property by the judgment debtor without fair consideration. See Civil Code §§ 3439.03 (fair consideration), 3439.04 (conveyances without fair consideration), 3439.07 (conveyance with intent to defraud), 3439.09 (remedies).