

Memorandum 95-64

Homestead Exemption: Comments on Tentative Recommendation

This memorandum considers comments we have received on the tentative recommendation relating to the *Homestead Exemption* which was circulated for comment following the July meeting. The tentative recommendation proposes to repeal the procedure for recording a homestead declaration, preserve any important features of the repealed statute in the general homestead statute, and provide for satisfaction of only senior liens and encumbrances when a homestead is sold. (Another copy of the tentative recommendation is attached for Commissioners.)

After reviewing the comments on the tentative recommendation, the Commission should consider approving the recommendation for printing and submission to the Legislature. If more drafting needs to be done for Commission review, a revised recommendation can be considered at the December meeting.

Attached to this memorandum are two letters commenting on the tentative recommendation. The letters are reproduced in the Exhibit:

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|---|------------|
| | <i>pp.</i> |
| 1. Noanne J. St. Jean, President, California Family Support Council | 1 |
| 2. Dean D. Flippo, Monterey County District Attorney | 5 |

The tentative recommendation has been available on the Internet in two formats — one for downloading and the other for reading online. To date, well over 400 persons have accessed these computer files. However, we have not received a single comment as a result of all this apparent activity.

EXEMPTION OF PROCEEDS FROM VOLUNTARY SALE OF HOMESTEAD

The only comments we have received are from district attorneys engaged in collecting child support who oppose preserving and generalizing the voluntary sale proceeds exemption as proposed in Section 704.720(b). The general (automatic) homestead provides a proceeds exemption only as to involuntary dispositions of the homestead, as where it is sold on execution, is destroyed, or taken in eminent domain. Existing Section 704.960(a) in the declared homestead

statute protects proceeds of a voluntary sale in the exempt amount, except that increases in the exempt amount enacted after a creditor's judgment lien attaches to the declared homestead do not apply.

The voluntary sale proceeds exemption is not out of the reach of a debtor who is generally relying on the "automatic" homestead exemption since, as noted in the tentative recommendation,

a sufficiently sophisticated debtor would simply record a homestead declaration before a voluntary sale of the home and thereby protect the proceeds for six months in the amount applicable when the creditor's lien attached.... The creditor cannot prevent the declaration. The proceeds exemption follows mechanically from the act of recording a piece of paper. The specific amount of the voluntary proceeds exemption depends on the fortuity of the order in which the debtor and the creditor record their respective papers. The recording has no relation to any other act. It is not reviewed and notice is not given. It is not subject to contest at the time of recording. The protection of voluntary sale proceeds depends solely on the arbitrary factor of whether the debtor has remembered to record a paper, a paper which will then clutter up the public records for years, since it describes as a homestead property that the debtor intends to sell shortly after the declaration is recorded.

The letters from Noanne J. St. Jean, President of the Family Support Council, and Dean D. Flippo, Monterey County District Attorney make a number of arguments in opposition to the proposal:

Adverse Impact on Child Support Collections

Ms. St. Jean states that "all of the teeth of the real property liens for collection of child support would be removed" and Mr. Flippo writes that the proposal would have a "substantial adverse impact on the collection of child and spousal support by means of judgment liens recorded against real property." (See Exhibit pp. 3, 5.)

The staff is attempting to get some more accurate numbers from the Family Support Council; we doubt that 100% of lien collections come through satisfaction of liens out of escrow in voluntary sales of exempt dwellings. Furthermore, the dire consequences alleged by the district attorneys require that in every case the equity in the home, after satisfaction of prior liens, is less than the applicable homestead exemption (\$50,000-\$100,000).

In any event, regardless of the exact amount or percentage of collections, or the proper characterization of the effect of the broader proceeds exemption, the total amount of child (and spousal) support collections would be affected. Under the proposed law, collections would be affected in the amount of the applicable homestead exemption in any case where the debtor qualifies for the exemption and the support creditor cannot invade the exemption under Section 703.070. (This section provides that any exemption — not just the homestead exemption — is subject to invasion to enforce child, family, or spousal support if the court so orders, taking into account the needs of the support creditor, the debtor, and the persons the debtor is required to support.)

Another question that arises in considering the comments from the district attorneys is how the collections come about. The letters do not recognize any issue with regard to the *existing* voluntary sales proceeds exemption under the declared homestead. Some of the delinquent support obligors must have had declared homesteads and been entitled to an exemption. The staff wonders whether the law is being ignored, either because it has been overlooked or is not understood. We are seeking additional details on how the district attorneys collect in voluntary sales cases and whether there is any opportunity for recognition of the proceeds exemption provided by Section 704.960.

Notwithstanding the confusion concerning the applicable law and the doubt surrounding the potential effect of the proposed law on support collections, the staff believes that some adjustment will need to be made in the statute to meet the district attorneys' concern, as discussed below.

Lack of Compliance with Federal Regulations

Both letters note the need to comply with federal standards for collection of child support in order to qualify for federal AFDC funds. Federal regulations require the state to “have in effect and use procedures which require that a lien will be imposed against the real and personal property of an absent parent who owes overdue support and who resides or owns property in the State.” (See Exhibit pp. 3, 5.) Mr. Flippo writes that the proposal would “render inoperative” the federal statutes and regulations. (See Exhibit p. 6.)

From the language quoted and the arguments made by the writers, the staff is not convinced that the exemption would be out of compliance. The lien imposition requirements would still be in place. All of the existing statutes concerning judgment liens would remain unchanged, along with all of the

enforcement procedures. The only change proposed is to continue as a general rule the voluntary sale proceeds exemption that already exists in the declared homestead. If California would be out of compliance due to this change in the law, it is unclear how California can be in compliance under existing law which provides exemptions applicable to collection of support judgments as a general rule (see Section 703.070(a)), including the exemption applicable to homesteads in forced sales under writs of execution and the declared homestead voluntary sale proceeds exemption. Nor is the scope of the quoted regulation clear, since it refers to “absent” parents. Unless this term has a special meaning in the context of the Code of Federal Regulations, it is difficult to see how it could apply to all cases where a support debtor in California seeks to sell a home in one location and buy a new home in another location in California.

ALTERNATIVES

There are a number of alternative responses to the concerns expressed by the district attorneys.

1. Rely on Equitable Division under Section 703.070.

As noted above, Section 703.070 permits invasion of any exemption as needed to enforce support obligations. This rule does not presume that the support creditor seeking enforcement is necessarily the most needy. Implicit in the letters from the district attorneys is the assumption that there is only one family, the ex-spouse and children, who are seeking support, and that the debtor does not have a need for assets to support a current family (ignoring the need to support oneself). While the most common cases may be where the children of a former marriage are needy and the debtor lives alone or the current spouse and children are better off financially, this is not necessarily the case. A second or third family may be equally or more needy than the first. Or the most recent ex-spouse may be seeking enforcement of support at the expense of a less sophisticated, less well-informed but more needy first family. Any number of complications may occur and Section 703.070 is designed to deal with them.

Neither letter from the district attorneys mentions Section 703.070. The argument is made that the proceeds protection is “not limited” so that it “has the effect of defeating claims for child and spousal support.” (See Exhibit p. 1.) But Section 703.070 clearly does limit this exemption, and all others, by permitting support creditors to invade any exemption the debtor the qualifies for.

The staff assumes that in the context of efficient support collection programs, such as through satisfying liens in the escrow process, the issue of equitable division never arises. The procedure in Section 703.070 may not be used because it is inefficient in comparison to other collection procedures used by district attorneys. This does not diminish the important policy implemented in Section 703.070.

Despite the staff's admiration for the scheme of the Enforcement of Judgments Law, we must conclude that relying on equitable division under Section 703.070 will not satisfy the objections received from the district attorneys.

2. Abandon Voluntary Sale Proceeds Exemption Entirely

Since the district attorneys are objecting to the generalized voluntary sale proceeds exemption, the Commission could decide not to continue the exemption and the objection disappears. We do not know if anyone would object to losing the proceeds exemption in the existing declared homestead. No doubt some people know of it and have taken advantage of it.

The general dwelling proceeds exemption is sound policy. The distinction in the current statute between voluntary and forced sale is arbitrary. A debtor who stays in the home is protected by the exemption. In the unlikely event that the creditor would actually attempt a levy and sale under execution, the debtor would receive the exempt amount out of the proceeds of sale. But if the debtor needs to move and sell the home, such as where the debtor's employer relocates, the proceeds exemption is lost.

However, regardless of how sound the policy is, existing law does not provide a voluntary sale proceeds exemption under the general homestead exemption. Although a sophisticated debtor could take advantage of the exemption by recording a homestead declaration immediately before selling, we gather that this is not likely, nor do we know whether it has even been tried. Thus, generalizing the exemption will be seen as a change in the law, and probably a major one that harms the self-interest of creditors. The Commission should consider whether to propose the proceeds exemption in the final recommendation or drop it.

3. Abandon Voluntary Sale Proceeds Exemption as to Support Enforcement

The objections of the district attorneys would be moot if an exception to the proceeds exemption were made for support enforcement. This is a more limited version of alternative 2.

The Commission should also consider whether to distinguish between enforcement of child and family support, on one hand, and spousal support, on the other. The staff believes that over the years the law has tended to make fewer distinctions between child and spousal support (family support being undifferentiated support that includes child support). But in some areas, child support is still given a special status over spousal support, as reflected in the federal rules cited in the letters from the district attorneys.

The staff would recommend carving out a support enforcement exception to the voluntary sale proceeds exemption as most responsive to the objections received. We would not attempt to distinguish between child and spousal support. The effect of this blanket exception is that a former spouse will be able to satisfy past due support out of voluntary sale proceeds and effectively deprive the debtor and current family of the ability to get a new home. But that is probably the current state of the law, in practice, so the result would be much the same.

This alternative could be implemented by adding subdivision (d) to Section 704.720, as it is proposed to be amended in the tentative recommendation:

Code Civ. Proc. § 704.720 (amended). Homestead exemption

SEC. 4. Section 704.720 of the Code of Civil Procedure is amended to read:

704.720. (a) A homestead is exempt from enforcement of a money judgment as provided in this article and is exempt from sale under this division to the extent provided in Section 704.800.

(b) The proceeds from a disposition of a homestead are exempt under the following conditions:

(1) If a homestead is sold under this division or is damaged or destroyed or is acquired for public use, the proceeds of sale or of insurance or other indemnification for damage or destruction of the homestead or the proceeds received as compensation for a homestead acquired for public use are exempt in the amount of the homestead exemption provided in Section 704.730. ~~The proceeds are exempt for a period of six months after the time date the proceeds are actually received by the judgment debtor, except that, if a homestead exemption is applied to other property of the judgment~~

~~debtor or the judgment debtor's spouse during that period, the proceeds thereafter are not exempt.~~

(2) If a homestead is voluntarily sold, or otherwise sold in a manner not described in paragraph (1), the proceeds of sale are exempt in the amount of the homestead exemption provided in Section 704.730 for a period of six months after the date of the sale.

(3) If a homestead exemption is applied to other property of the judgment debtor or the judgment debtor's spouse during the six-month period provided in paragraph (1) or (2), the proceeds exemption terminates.

(c) If the judgment debtor and spouse of the judgment debtor reside in separate homesteads, only the homestead of one of the spouses is exempt and only the proceeds of the exempt homestead are exempt.

(d) The exemption of proceeds provided in paragraph (2) of subdivision (b) does not apply the enforcement of a judgment for child, family, or spousal support.

4. Permit Debtor To Petition for Equitable Exemption

Section 703.070 envisions a situation where the property has been found to be exempt but the support creditor asks the court to invade the exemption and make a determination of the extent to which it should be applied taking into account all of the debtor's dependents. If the Commission decides to abandon the voluntary sale proceeds exemption completely or as applied to support enforcement, the procedure in Section 703.070 could be broadened to permit the debtor to apply for an equitable application of all or part of the exemption for proceeds of the voluntary sale of a dwelling. This would provide a remedy in the type of case where the debtor has two families to support and needs to sell the dwelling, but by placing the burden on the debtor, it does not interfere with the collection programs of the district attorneys.

This procedure could be implemented in proposed Section 704.720 by further revising subdivision (d):

(d) The exemption of proceeds provided in paragraph (2) of subdivision (b) does not apply the enforcement of a judgment for child, family, or spousal support, unless the judgment debtor obtains an order, on noticed motion, that the proceeds are exempt in all or part. In making this determination, the court shall apply the standards provided in subdivision (c) of Section 703.070.

5. Add Protective Rules on Proceeds

Existing law does not contain any detail on what happens with the exempt proceeds during the six-month exemption period. If the Commission decides to retain all or part of the voluntary sale proceeds exemption, the exemption could be made less objectionable to creditors if the proceeds were held in escrow for the six-month period pending investment in another dwelling in California. This would serve the purpose of the exemption which is to protect a family home.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary



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October 5, 1995

California Law Revision Commission
 4000 Middlefield Road, Suite D-2
 Palo Alto, California 94303-4739

Re: Tentative Recommendation - Homestead Exemption

To the members and staff of the Commission:

The California Family Support Council is extremely concerned about the proposed amendment to Code of Civil Procedure section 704.720(b) which would automatically protect the proceeds of a voluntary sale of homestead property for six months. As the protection is not limited, it has the effect of defeating claims for child and spousal support.

This protection extends beyond the Constitutionally required protection from Forced sale (Cal. Const. Art. XX, §1.5), and as applied against spousal and child support defeats the purposes of the homestead. The constitutional mandate to the Legislature was to provide for heads of families in an era when divorce was not common. The purpose of the law was a preservation of a homestead for the family. See, e.g., Southwick v. Davis (1889) 78 Cal. 504, 506-507.

The purpose of the original Homestead exemption was further discussed in Taylor v. Madigan (1975) 53 Cal. App. 3d 943 at 954 n.8:

"... [Y]our committee recognize [sic] the importance of an exemption law for the benefit of wives and children, who certainly should not be punished either for the crimes or improvidence of husbands or fathers;...." (Journal of the Senate & Assembly, Second Session, 1851, p. 1444)."

In *Breedlove v. Breedlove* (1984) 100 Nev. 606, 691 P.2d 426, the Supreme Court of Nevada was faced with the following facts: Dr. and Mrs. Breedlove had five children before their divorce in 1968. Dr. Breedlove defaulted in his child support payments and his ex-wife obtained a \$90,000 judgment for child support arrears, thereafter duly recording the judgment. Dr. Breedlove failed to pay any of the support due and did his best to avoid payment:

"In one instance respondent, after being notified of the judgment against him, placed his major attachable asset, his home in Las Vegas, into a family trust. The trust, however, was later ordered set aside primarily because the district court found that it had been created for the sole purpose of defrauding appellant in her attempt to execute on the judgment." 691 P.2d 426.

Dr. Breedlove then claimed a homestead exemption and Mrs. Breedlove challenged the applicability of the exemption to her claim; the court denied Dr. Breedlove's claim, stating:

"Homestead laws in this country were designed for the purpose of protecting families and making families secure in their homes from creditors they are unable to pay [citations omitted]. As such, when an ex-wife or child attempts to enforce court-ordered support payments, the rationale behind upholding the homestead exemption can no longer be said to apply since the policy of protecting the family would no longer be served by such an application [citations omitted]. A former-family member attempting to enforce a support judgment can hardly be said to be a creditor of the sort against which the legislature sought to protect the homesteader, and it would be extremely unfair to permit the homestead to be used as a shield under these circumstances to insulate a father from being forced to pay the support that is owed to his own children [citations omitted]." 691 P.2d at 427.

The Nevada court cited *Yager v. Yager* (1936) 7 Cal.2d 213, as expressing a contrary view as to forced sale. It is unjustified to extend *Yager* to a voluntary sale under the "automatic" homestead exemption.

In 1982 the California Legislature adopted the Enforcement of Judgments Act which recodified portions of the Homestead Law as well as rewrote entire sections concerning the collection of judgments. As a part of this massive piece of legislation, Code of Civil Procedure §704.950 was added. Subdivision (b) of Section 704.950 provided "[t]his section does not apply to a judgment lien created under §697.320 by recording a certified copy of a judgment for child or spousal support."

The essence of this modification was to eliminate the superiority of a declared homestead over the collection of a child or spousal support recorded judgment. In 1993 the Legislature added "family support" to child or spousal support. Aside from this amendment in 1993 which was effective January 1, 1994, there have been no changes to this important section.

Title IV-D of the Social Security Act (42 United States Code section 651 ff.) has caused every state to set up an agency for the collection of child support. In addition to this, the Federal Government has mandated all States to enact legislation to facilitate the collection of child support. One of these mandates is that all States must use real property liens to collect arrearages on child support.

Title 45 CFR §303.103 (a) provides "The State shall have in effect and use procedures which require that a lien will be imposed against the real and personal property of an absent parent who owes overdue support and who resides or owns property in the State."

If the proposals which you have made to the homestead exemption were adopted, all of the teeth of the real property liens for collection of child support would be removed. For fiscal year 1994 - 1995 child support agencies in California collected \$14,423,771.89 from real property liens. It would be an extremely unfortunate event if these collections were lost due to a change in the homestead exemption.

As President of the California Family Support Council, I would like to be notified of any further action taken on this proposal. I would also appreciate it if the concerns addressed by this letter were discussed with, and any correspondence also sent to John S. Higgins, Jr., Deputy District Attorney, Family Support Division, 8040 Doe Avenue, Visalia, California 93291, (209) 733-6917.

Very truly yours,

CALIFORNIA FAMILY SUPPORT COUNCIL



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MONTEREY COUNTY



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Law Revision Commission
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OCT 18 1995

Telephone: 408-755-3200
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File: _____

October 10, 1995

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

re: Tentative Recommendation regarding Homestead Exemption

Dear Sir/Madam:

As a publicly elected official who is responsible for the child support program in Monterey County, I am opposed to your tentative recommendation to protect the proceeds of voluntary sales of real property, because it would have a substantial adverse impact on the collection of child and spousal support by means of judgment liens recorded against real property. Further, it may cause California to be out of compliance with federal regulations and thereby cause the loss of a substantial amount of federal funds in the Aid to Families with Dependent Children (AFDC) program.

The federal Office of Child Support Enforcement has issued regulations under the authority of Title IV-D of the Social Security Act at 45 CFR 303 which establish standards for the operation of child support programs in the states. Failure to adhere to these standards can result in penalties of one to five percent of the federal AFDC funds paid to the state.

45 CFR 303.103(a) provides "(t)he State shall have in effect and use procedures which require that a lien will be imposed against the real and personal property of an absent parent who owes overdue support and who resides or owns property in the State." California Code of Civil Procedure 697.320 provides for the establishment of a judgment lien for support by the recording of either an abstract or a certified copy of the support order. It also gives support judgments a preferred status by exempting them from the requirement that judgments must be periodically renewed.

Regulations issued by the California Department of Social Services in the Manual of Policies and Procedures implement the child support program in California, and provide at section 12-602.1, "(e)ach district attorney shall record all support orders/judgments to create liens against real property." In Monterey County alone, this results in annual collections

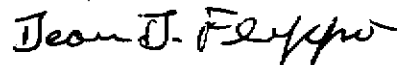
California Law Revision Commission
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of several hundred thousand dollars which goes to families for their support, or to the county, state and federal government as reimbursement for AFDC payments to families.

In addition, attorneys practicing domestic relations law often record support orders and judgments to secure delinquent payments for their clients.

Your proposal, unless it exempts all support orders and judgments from its effects, would render inoperative the above cited statutes and regulations. In doing so, it would adversely affect families for whom a real property lien is the only effective means of collecting support, county, state, and federal governments who share in recoveries under these liens, and the child support and AFDC programs in California by putting in jeopardy millions of dollars of federal financial participation.

Sincerely,



DEAN D. FLIPPO
DISTRICT ATTORNEY

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Homestead Exemption

August 1995

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 a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the 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 believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN October 16, 1995.

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
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SUMMARY OF TENTATIVE RECOMMENDATION

The Commission proposes repealing the declared homestead exemption and amending the automatic homestead exemption to protect proceeds of a voluntary sale on the same basis as other proceeds are protected. Dwelling proceeds would be exempt to the extent traceable in deposit accounts and cash or its equivalent, with the burden on the exemption claimant to prove the exemption. The statute should be revised to require satisfaction of senior liens and encumbrances, rather than all liens and encumbrances on the property, and junior liens would be extinguished, consistent with the general rule applicable to execution sales.

This recommendation was prepared pursuant to Resolution Chapter 40 of the Statutes of 1983, continued in Resolution Chapter 81 of the Statutes of 1994.

HOMESTEAD EXEMPTION

1 The Enforcement of Judgments Law¹ contains two procedures relating to
2 homestead exemptions from enforcement of money judgments: the automatic
3 homestead exemption and the homestead declaration.² This recommendation
4 proposes repealing the homestead declaration procedure and preserving its
5 beneficial aspects in the general automatic homestead exemption.

6 Background

7 There is no requirement that the law provide a homestead *declaration* procedure.
8 The California Constitution requires the Legislature to “protect, by law, from
9 forced sale a certain portion of the homestead and other property of all heads of
10 families.”³ The procedure for implementing this constitutional mandate is
11 determined by the Legislature.⁴

12 California has not always had a homestead declaration procedure. A claimed
13 homestead procedure existed from 1851 until it was superseded by the declared
14 homestead in the early 1860's.⁵ For over a century, the homestead was protected
15 against money judgment liens only if the homestead declaration was recorded
16 before the judgment lien. The principle of first in time, first in right was applied
17 with drastic consequences to the tardy debtor. To protect families of debtors who
18 failed to record the exemption before death, the probate homestead procedure was
19 developed, permitting the court to declare an exemption.⁶

20 In 1974, the Legislature enacted a second procedure enabling a debtor who had
21 not recorded a homestead declaration to claim an exemption when the dwelling
22 was levied on under a writ of execution.⁷ The judgment creditor was required to
23 petition for issuance of a writ of execution directed against a dwelling and give

1. See 1982 Cal. Stat. ch. 1364, operative July 1, 1983. The Enforcement of Judgments Law was enacted on recommendation of the Commission. See *1982 Creditors' Remedies Legislation*, 16 Cal. L. Revision Comm'n Reports 1001, 1009 (1982).

2. See Code Civ. Proc. §§ 704.710-704.850 (“automatic” homestead exemption), 704.910-704.995 (declared homesteads). (All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.) The homestead declaration procedure is not complete, incorporating many substantive provisions of the automatic homestead exemption. See Sections 704.910(c) & (e), 704.950(c)(2), 704.960((a), 704.965, 704.970(b), 704.995(c). The Commission recommended repeal of the declared homestead in favor of the automatic homestead in its 1980 report. See *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001, 2090-93, 2611-12 (1980).

3. Cal. Const. Art. XX, § 1.5.

4. See, e.g., *Noble v. Hook*, 24 Cal. 638 (1864).

5. For detailed background on the history of the exemption, see *Taylor v. Madigan*, 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1975); Adams, *Homestead Legislation in California*, 9 Pac. L.J. 723 (1978) (prepared by Commission consultant).

6. See *Taylor v. Madigan*, 53 Cal. App. 3d 943, 968, 126 Cal. Rptr. 376 (1975).

7. See 1974 Cal. Stat. ch. 1251, superseded by a revised but similar procedure, 1976 Cal. Stat. ch. 1000.

1 notice to the debtor who could then assert the exemption. This procedure was
2 substantially revised in the Enforcement of Judgments Law enacted in 1982,
3 resulting in the homestead exemption procedure in Code of Civil Procedure
4 Sections 704.710-704.850. The probate homestead was put on an independent
5 footing, unrelated to the homestead declaration.⁸

6 **Automatic Homestead Exemption (Code Civ. Proc. §§ 704.710-704.850)**

7 The “automatic” homestead exemption — or dwelling house exemption, as it is
8 also known — requires the judgment creditor to initiate court proceedings to
9 determine whether the property is exempt and the amount of the exemption.
10 Generally where property is levied on to enforce a money judgment, the debtor is
11 given notice of levy and must make an exemption claim within 10 days.⁹ A
12 creditor who levies on a “dwelling,”¹⁰ which may be an exempt homestead, may
13 not have it sold to enforce a money judgment without first obtaining a court order
14 for sale. The creditor must apply for the order for sale within 20 days after notice
15 of levy is served on the judgment debtor.¹¹ The judgment creditor’s application is
16 not simple: the creditor must determine whether the county tax assessor’s records
17 show a current homeowner’s exemption or disabled veteran’s exemption, must
18 state on information and belief whether the dwelling is a homestead, the amount of
19 the exemption, and whether there is a homestead declaration recorded, and must
20 state the amount of liens and encumbrances and the address of other lien creditors
21 and encumbrancers as shown in the recorder’s files.¹² The creditor must give
22 notice of the application, including personal service on any occupant, at least 30
23 days before the hearing.¹³ At the hearing, the creditor has the burden of showing
24 the dwelling is not exempt if there is a tax exemption on file in the tax assessor’s
25 office; otherwise, the burden is on the debtor to prove the exempt status.¹⁴ The
26 property is appraised, and if it is of sufficient value, it is ordered to be sold. Notice
27 of the sale cannot be given until at least 120 days after the notice of levy.¹⁵
28 Ultimately, the homestead cannot be sold unless the bid exceeds the amount of the
29 applicable homestead exemption plus the amount necessary to satisfy all liens and
30 encumbrances on the property, and the price must be 90 percent of the appraised
31 value unless the court orders otherwise.¹⁶ Proceeds of a sale are distributed first to

8. See Prob. Code §§ 60, 6520-6528; *Recommendation Relating to Probate Homestead*, 15 Cal. L. Revision Comm’n Reports 401 (1980).

9. Section 703.520.

10. A detailed definition of “dwelling” is set out in Section 704.710.

11. Sections 704.740-704.750.

12. Section 704.760.

13. Section 704.770.

14. Section 704.780(a). This delay affords an opportunity for the debtor to redeem from the lien.

15. Section 701.545.

16. Section 704.800.

1 pay off "all liens and encumbrances," second to the debtor in the amount of the
2 exemption, third to the levying officer for costs, and finally to the judgment
3 creditor to apply to the judgment.¹⁷

4 This procedure is highly protective of debtors' homesteads. There are multiple
5 notices, including personal service, built-in delays and a second chance
6 proceeding, significant procedural burdens, appraisals with presumptive minimum
7 bids, and burden shifting. In light of these protections, there is no need for a
8 separate homestead declaration procedure.

9 **Modern Declared Homestead Exemption (Sections 704.910-704.995)**

10 The minimal declared homestead procedure that has existed since 1982 is largely
11 a formality. A homeowner or spouse of a homeowner may record a homestead
12 declaration describing the principal dwelling. The declaration must be
13 acknowledged in the manner of a conveyance of real property.¹⁸ Unlike its
14 predecessor, the modern homestead declaration has no effect on the right to
15 convey or encumber the property.¹⁹ Nor does it prevent creation of judgment
16 liens.²⁰ It does not prevent attachment liens²¹ or state tax liens.²²

17 While the real homestead protection lies in the automatic exemption statute, the
18 homestead declaration provides several distinct features that must be evaluated
19 before the procedure can be repealed:

20 1. *Judgment lien attaches only to surplus value.* Section 704.950 is a major
21 source of confusion. Subdivision (a) provides that judgment liens do not attach to
22 property subject to a prior homestead declaration, seemingly preserving the old
23 shield rule. However, subdivision (a) is subject to the exception provided in
24 subdivision (c), which provides that a judgment lien *does* attach to the surplus
25 value of the property over all senior liens and encumbrances plus the homestead
26 exemption amount. Thus, the exception in subdivision (c) eats up the rule in
27 subdivision (a).²³

28 This section presents a conceptual conundrum. How can it be determined
29 whether the judgment lien has attached? The amount of the homestead exemption
30 can change, as well as the amount of senior liens. A judgment lien attaches to any
31 property owned or acquired by a debtor in the county where the abstract of
32 judgment is recorded; it is a "dragnet" lien and is not directed at particular

17. Section 704.850.

18. Sections 704.920-704.930.

19. Section 704.940.

20. Section 704.950(c).

21. Section 487.025.

22. Gov't Code § 7170(a).

23. Subdivision (c) was added to Section 704.950 at the last opportunity when the bill was before the Legislature, as is evident from the Comment which was not revised to reflect the final statutory language.

1 property.²⁴ How can it be determined when the lien attaches since the value of the
2 property is unknown in the absence of a sale or appraisal? Section 704.950(a)
3 provides that the lien does not attach, subject to the exception in subdivision (c).
4 Subdivision (c) provides that the lien attaches to the surplus value, but does not
5 say when the lien attaches. Arguably it attaches only when the surplus value exists.
6 Section 704.965 locks in the exemption amount at the time when the lien attaches,
7 but when is that?

8 This rule, then, does not appear to provide any clear advantage to the homestead
9 declaration. Theoretically, it might be easier to sell real property free of the
10 judgment lien if there were a prior homestead declaration recorded, assuming that
11 the debtor's equity in the property was agreed by all parties to be less than the
12 homestead exemption amount at the time of transfer. But this does not appear to be
13 a practical advantage, and does not justify continuing the cumbersome homestead
14 declaration procedure.

15 2. *Exemption of proceeds of voluntary sale.* Section 704.960(a) protects the
16 proceeds of a voluntary sale of the homestead for six months after the date of sale.
17 The automatic homestead exemption protects proceeds of sale, but only where the
18 homestead is sold at an execution sale, is damaged or destroyed, or is acquired for
19 public use — in other words, not in the case of a voluntary sale.²⁵ The proceeds
20 exemption is limited, however, so that it does not include any increase in the
21 exemption occurring after a judgment lien attaches.²⁶ This is consistent with the
22 general rule that the amount of an exemption is determined according to the law in
23 effect when the creditor's lien attaches to the property.²⁷

24 Under the existing scheme, a sufficiently sophisticated debtor would simply
25 record a homestead declaration before a voluntary sale of the home and thereby
26 protect the proceeds for six months in the amount applicable when the creditor's
27 lien attached. The Commission can envision no public policy that is served by this
28 formality. The creditor cannot prevent the declaration. The proceeds exemption
29 follows mechanically from the act of recording a piece of paper. The specific
30 amount of the voluntary proceeds exemption depends on the fortuity of the order
31 in which the debtor and the creditor record their respective papers. The recording
32 has no relation to any other act. It is not reviewed and notice is not given. It is not

24. See Section 697.340.

25. See Section 704.720(b).

26. Section 704.965. This rule was added to the law in conjunction with a bill increasing the amount of the homestead exemption. See 1984 Cal. Stat. ch. 454. The limitation in Section 704.965 is irrelevant to the homestead exemption as applied in a forced sale by the judgment creditor. See Section 704.970(b). If a second homestead is purchased with exempt proceeds limited by the rule in Section 704.965, it appears that the exemption of voluntary sale proceeds from the second homestead would also be limited to the level locked in by the order of recording the judgment lien and initial homestead declaration. Similarly, if the homestead declaration had been recorded before any attachment or judgment lien, the debtor would have the benefit of any increased exemption amounts based solely on order of recording.

27. Section 703.050. See also Section 703.060 (liens deemed granted by statute in recognition of power of state to repeal, alter, or add to exemptions).

1 subject to contest at the time of recording. The protection of voluntary sale
2 proceeds depends solely on the arbitrary factor of whether the debtor has
3 remembered to record a paper, a paper which will then clutter up the public
4 records for years, since it describes as a homestead property that the debtor intends
5 to sell shortly after the declaration is recorded.

6 The justification for the reforms of the old homestead declaration, which resulted
7 in the modern automatic homestead exemption, apply as well to the exemption of
8 proceeds. Since a prior judgment lien does not prevent recording a homestead
9 declaration with its attendant voluntary sale proceeds exemption, the proceeds
10 exemption should be incorporated into the automatic homestead exemption. The
11 better procedure is the general one — proceeds of a voluntary sale are exempt for
12 six months following sale and the burden is on the debtor to claim the exemption
13 and trace the proceeds.²⁸

14 3. *Relation-back of declared homestead.* Section 704.960(b) provides a
15 portability feature, permitting the debtor to record a homestead declaration on
16 property acquired with proceeds from a sale of a declared homestead and continue
17 the original recording priority in the new homestead. This applies to any exempt
18 homestead proceeds, whether from voluntary or forced sale, or reimbursement
19 from insurance, so long as the new declaration is recorded within six-month period
20 during which proceeds are protected.

21 This feature also permits the debtor to lock in the opportunity to take advantage
22 of later statutory increases in the homestead exemption amounts.²⁹ A person who
23 records a homestead declaration before a creditor's lien attaches can preserve that
24 priority and receive the benefit of increased exemptions in proceeds and in a home
25 purchased with exempt proceeds.³⁰

26 The general rule is that the amount of an exemption is determined under the law
27 in effect when the creditor's lien attached to the property.³¹ The general rule
28 should be applied to homesteads, independent of the fortuity of whether a
29 homestead declaration may have been filed.

28. For the general rules applicable to proceeds exemptions, see, e.g., Sections 703.030 (manner of claiming exemptions; effect of failure to claim), 703.080 (tracing exempt funds).

29. See Section 704.965.

30. The exact outcome depends on the interpretation given Section 704.965. If the creditor's judgment lien attaches as of the time it is recorded, notwithstanding the language of Section 704.950(c) concerning what amount the lien attaches to (surplus over senior liens and homestead exemption amount under Section 704.730), then the problem is a simple one of comparing dates of recording. But if the creditor "obtains" a lien only at the instant that the value of the homestead actually exceeds the value of liens senior to the judgment lien at the time it was recorded plus the value of the homestead exemption — then the increased exemption, by relation back, would have the effect of forestalling the time when the judgment lien could attach to any surplus value. It is also assumed that Section 704.965 serves as an exception to the general rule in Section 703.050 that the amount of exemptions is fixed as of the time the creditor's lien is created on the property.

31. Section 703.050.

1 4. *Continuation of homestead after death.* Section 704.995 provides that the
2 protection of the declared homestead from a creditor having an attachment lien,
3 execution lien, or judgment lien continues after the death of the declared
4 homestead owner if the dwelling was the principal dwelling of the surviving
5 spouse or a member of the decedent's family to whom an interest in the dwelling
6 passes. But subdivision (c) provides that the amount of the exemption is
7 determined under Section 704.730 in the general procedure depending on the
8 circumstances of the case at the time the amount is required to be determined.³²
9 Where special protection of the family home is appropriate, the probate homestead
10 is the better procedure.³³ The existing homestead declaration procedure provides
11 no meaningful, additional protection in the case of enforcement proceedings.
12 Section 704.995 harks back to a time when the declared homestead created
13 important rights in homestead property that could descend to the survivors even
14 contrary to a testamentary disposition.

15 5. *Prima facie evidence.* Section 704.940 provides that the homestead
16 declaration is prima facie evidence of the matters stated, which would include the
17 statement that the property is the dwelling of the persons listed. Arguably, this
18 provision may put some burden on the judgment creditor in proceedings to sell a
19 dwelling. However, the relevant procedural provisions do not shift the burden to
20 the creditor as in the case of a current homeowner's tax exemption or disabled
21 veteran's tax exemption.³⁴ While the creditor is required to determine and report
22 whether there is homestead declaration³⁵ as part of the procedure for obtaining an
23 order for sale of a dwelling, no statutory duty results from the report.

24 **Problems Created by Separate Homestead Declaration Procedure**

25 The declared homestead provisions present a number of problems which should
26 be weighed against any claimed advantages:

27 1. *Uncertainty.* The one feature a declared homestead procedure based on filing
28 with the county recorder should have is certainty — yet no one can rely on the
29 validity of a homestead declaration. The filing sits in the records, but has little
30 meaning unless it is tested in execution proceedings. The debtor may have moved
31 to another residence or the debtor's marriage may be dissolved. A later declaration
32 as to different property acts as an abandonment *pro tanto* of the interest of the
33 declarant.³⁶ Thus, if spouses choose to live apart, and a second (or second and
34 third) declaration is recorded, the first declaration becomes meaningless.

32. This is in apparent conflict with the rule in Section 704.965.

33. See Prob. Code §§ 60, 6520-6528; *Recommendation Relating to Probate Homestead*, 15 Cal. L. Revision Comm'n Reports 401 (1980).

34. See Section 704.780.

35. Section 704.760(b).

36. Section 704.990(b).

1 2. *Illusory protection.* The homestead declaration provides little real protection
2 for the family home. The most important protections (other than the voluntary sale
3 proceeds exemption) are embodied in the automatic homestead. The homestead
4 declaration can only give a false sense of security. In any event, most homeowners
5 have no need for the protection, because most homeowners never become
6 judgment debtors. If they do become debtors, the statute should provide essential
7 protections without regard to whether a paper may have been filed at some time in
8 the past.

9 3. *Opportunity for misleading homestead declaration mills.* Anyone who has
10 purchased a house in recent years has probably received one or more solicitations
11 from the homestead declaration mills.³⁷ Experience with these dubious operations,
12 whose broadsides typically misrepresent the law, impelled the Legislature to enact
13 a consumer protection statute governing homestead filing services.³⁸ One operator
14 who ran afoul of the statute mailed approximately four million solicitations in a
15 four-year period *after* enactment of the regulatory statute.³⁹ Repeal of the declared
16 homestead would put an end to the opportunity to profit from causing undue alarm
17 and confusing homeowners throughout the state.

18 **Satisfaction of Other Liens and Encumbrances**

19 The minimum bid in the sale of a homestead must include an amount sufficient
20 to satisfy "all liens and encumbrances on the property."⁴⁰ This language is an
21 artifact surviving from the time when a judgment lien could not attach if there was
22 a prior homestead declaration on record.⁴¹ Notwithstanding the prior homestead
23 declaration, however, the creditor could seek enforcement of the money judgment
24 by writ of execution. If the property was sold on execution without a pre-existing
25 judgment lien in favor of the creditor, there would be no junior liens practically
26 speaking, and *all* the other liens on the property, whether mortgage liens, tax liens,
27 other judgment liens, would be superior to the creditor's execution lien. If the
28 creditor had won the race to the recorder's office and the judgment lien had
29 attached first, then there would be no application of the "all liens and
30 encumbrances" language since the homestead exemption would not apply. Instead,
31 the various lienors would have had an opportunity to engage in several rounds of
32 redemptions, with junior lienholders redeeming from their seniors and the debtor
33 redeeming where possible.

37. See Arthur M. Louis, *Homesteading Scam Targets Unwary Homeowners*, San Francisco Chronicle, Sept. 19, 1994, at B1, B3. For a sample solicitation from Morse & Associates, see Memorandum 95-22, Exhibit pp. 22-24, on file with California Law Revision Commission.

38. See Bus. & Prof. Code § 17537.6.

39. See *People v Morse*, 21 Cal. App. 4th 259, 25 Cal. Rptr. 2d 816 (1993).

40. Section 704.800.

41. See discussions of prior law in *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001, 2094 (1980); Adams, *Homestead Legislation in California*, 9 Pac. L.J. 723 (1978); Taylor v. Madigan, 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1975).

1 Under existing law, the “all liens and encumbrances” language can act in an
2 arbitrary manner and benefit the profligate or severely unlucky debtor. If a debtor
3 has enough liens on the property, no creditor can reach it because any creditor
4 would have to pay off all other liens, junior and senior, under the terms of the
5 statute. On the other side of the coin, the home of a more responsible debtor would
6 not be as hard to reach.

7 **Commission Recommendations**

8 In summary, the Commission proposes repealing the declared homestead
9 exemption and amending the automatic homestead exemption to protect proceeds
10 of a voluntary sale on the same basis as other proceeds are protected. Dwelling
11 proceeds would be exempt to the extent traceable in deposit accounts and cash or
12 its equivalent, with the burden on the exemption claimant to prove the exemption.
13 The statute should be revised to require satisfaction of *senior* liens and
14 encumbrances, rather than *all* liens and encumbrances on the property, and junior
15 liens would be extinguished, consistent with the general rule applicable to
16 execution sales.

PROPOSED LEGISLATION

1 **Bus. & Prof. Code § 17537.6 (amended). Unlawful to offer homestead filing service**

2 SECTION. 1. Section 17537.6 of the Business and Professions Code is amended
3 to read:

4 17537.6. (a) ~~It~~ On and after January 1, 1997, it is unlawful for any person to
5 ~~make any untrue or misleading statements in any manner in connection with the~~
6 ~~offering or performance of~~ offer a homestead filing service. ~~For the purpose of this~~
7 ~~section, an "untrue or misleading statement" means and includes any~~
8 ~~representation that any of the following is true:~~

9 (1) ~~The preparation or recordation of a homestead declaration will in any manner~~
10 ~~prevent the forced sale of a judgment debtor's dwelling.~~

11 (2) ~~The preparation or recordation of a homestead declaration will prevent the~~
12 ~~foreclosure of a mortgage, deed of trust, or mechanic's lien.~~

13 (3) ~~Any of the provisions relating to the homestead exemption set forth in~~
14 ~~Article 4 (commencing with Section 704.710) of Chapter 4 of Division 2 of Title 9~~
15 ~~of Part 2 of the Code of Civil Procedure are available only to persons who prepare~~
16 ~~or record a homestead declaration.~~

17 (4) ~~A homestead declaration is in any way related to the obtaining of any~~
18 ~~applicable homeowner's exemption to real property taxes.~~

19 (5) ~~The preparation or recordation of a homestead declaration is required by law~~
20 ~~in any manner.~~

21 (6) ~~The offeror of the homestead filing service has a file or record covering a~~
22 ~~person to whom a solicitation is made.~~

23 (7) ~~The offeror of the homestead filing service is, or is affiliated with, any~~
24 ~~charitable or public service entity unless the offeror is, or is affiliated with, a~~
25 ~~charitable organization which has qualified for a tax exemption under Section~~
26 ~~501(c)(3) of the Internal Revenue Code.~~

27 (8) ~~The offeror of the homestead filing service is, or is affiliated with, any~~
28 ~~governmental entity. A violation of this paragraph includes, but is not limited to,~~
29 ~~the following:~~

30 (A) ~~The misleading use of any governmental seal, emblem, or other similar~~
31 ~~symbol.~~

32 (B) ~~The use of a business name including the word "homestead" and the word~~
33 ~~"agency," "bureau," "department," "division," "federal," "state," "county," "city,"~~
34 ~~"municipal," "California," or "United States," or the name of any city, county, city~~
35 ~~and county, or any governmental entity.~~

36 (C) ~~The use of an envelope that simulates an envelope containing a government~~
37 ~~check, tax bill, or government notice or an envelope which otherwise has the~~
38 ~~capacity to be confused with, or mistaken for, an envelope sent by a governmental~~
39 ~~entity.~~

1 ~~(b)(1) It is unlawful to offer to perform a homestead filing service without~~
2 ~~making the following disclosure:~~

3 ~~THIS HOMESTEAD FILING SERVICE IS NOT ASSOCIATED WITH ANY~~
4 ~~GOVERNMENT AGENCY.~~

5 ~~YOU DO NOT HAVE TO RECORD A HOMESTEAD DECLARATION.~~

6 ~~RECORDING A HOMESTEAD DECLARATION DOES NOT PROTECT~~
7 ~~YOUR HOME AGAINST FORCED SALE BY A CREDITOR. YOU MAY~~
8 ~~WISH TO CONSULT A LAWYER ABOUT THE BENEFITS OF RECORDING~~
9 ~~A HOMESTEAD DECLARATION.~~

10 ~~IF YOU WANT TO RECORD A HOMESTEAD, YOU CAN FILL OUT A~~
11 ~~HOMESTEAD DECLARATION FORM BY YOURSELF, HAVE YOUR~~
12 ~~SIGNATURE NOTARIZED, AND HAVE THE FORM RECORDED BY THE~~
13 ~~COUNTY RECORDER.~~

14 ~~(2) The disclosure specified in paragraph (1) shall be placed at the top of each~~
15 ~~page of every advertisement or promotional material disseminated by an offeror of~~
16 ~~a homestead filing service and shall be printed in 12-point boldface type enclosed~~
17 ~~in a box formed by a heavy line.~~

18 ~~(3) The disclosure specified in paragraph (1) shall be recited at the beginning of~~
19 ~~every oral solicitation and every broadcast advertisement and shall be delivered in~~
20 ~~printed form as prescribed by paragraph (2) before the time each person who~~
21 ~~responds to the oral solicitation or broadcast advertisement is obligated to pay for~~
22 ~~any service.~~

23 ~~(c) In addition to any other service, every offeror of a homestead filing service~~
24 ~~shall deliver each notarized homestead declaration to the appropriate county~~
25 ~~recorder for recordation as soon as needed or required by a homestead declarant,~~
26 ~~but no later than 10 days after the homestead declaration is notarized. The offeror~~
27 ~~of the homestead filing service shall pay all fees charged in connection with the~~
28 ~~notarization and recordation of the homestead declaration.~~

29 ~~(d) No offeror of a homestead filing service shall charge, demand, or collect any~~
30 ~~money until after the homestead declaration is recorded. The total amount charged,~~
31 ~~demanded, or collected by an offeror of a homestead filing service, including all~~
32 ~~fees for notarization and recordation, shall not exceed twenty-five dollars (\$25).~~

33 ~~(e)~~

34 ~~(b) For the purposes of this section, the following definitions apply:~~

35 ~~(1) "Homestead filing service" means any service performed or offered to be~~
36 ~~performed for compensation in connection with the preparation or completion of a~~
37 ~~homestead declaration or in connection with the assistance in any manner of~~
38 ~~another person to prepare or complete a homestead declaration. "Homestead filing~~
39 ~~service" does not include any service performed by an attorney at law authorized~~
40 ~~to practice in this state for a client who has retained that attorney or an employee~~
41 ~~of that attorney acting under the attorney's direction and supervision.~~

1 (2) A "homestead declaration" has the meaning described provided in former
2 Article 5 (commencing with Section 704.910) of Chapter 4 of Division 2 of Title 9
3 of Part 2 of the Code of Civil Procedure.

4 **Comment.** Section 6528 is amended to reflect the repeal of the homestead declaration
5 procedure. See also Code Civ. Proc. § 694.090 (effect of homestead declaration under former
6 law).

7 **Code Civ. Proc. § 487.025 (repealed). Right to attach declared homestead**

8 SEC. 2. Section 487.025 of the Code of Civil Procedure is repealed:

9 ~~487.025. (a) The recording of a homestead declaration (as defined in Section~~
10 ~~704.910) does not limit or affect the right of a plaintiff to attach the declared~~
11 ~~homestead described in the homestead declaration, whether the homestead~~
12 ~~declaration is recorded before or after the declared homestead is attached.~~

13 ~~(b) An attachment lien attaches to a homestead (as defined in Section 704.710)~~
14 ~~in the amount of any surplus over the total of the following:~~

15 ~~(1) All liens and encumbrances on the homestead at the time the attachment lien~~
16 ~~is created.~~

17 ~~(2) The homestead exemption set forth in Section 704.730.~~

18 ~~(c) Nothing in subdivision (a) or (b) limits the right of the defendant to an~~
19 ~~exemption under subdivision (b) of Section 487.020.~~

20 ~~(d) Notwithstanding subdivision (b), a homestead (as defined in Section~~
21 ~~704.710) is exempt from sale to the extent provided in Section 704.800 when it is~~
22 ~~sought to be sold to enforce the judgment obtained in the action in which the~~
23 ~~attachment was obtained.~~

24 **Comment.** Section 6528 is repealed because it is not necessary in view of the repeal of the
25 homestead declaration procedure. See also Code Civ. Proc. § 694.090 (effect of homestead
26 declaration under former law).

27 **Code Civ. Proc. § 694.090 (amended). Effect of homestead declaration**

28 SEC. 3. Section 694.090 of the Code of Civil Procedure is amended to read:

29 694.090. On and after the operative date January 1, 1997, a declaration of
30 homestead made under prior law pursuant to Title 5 (commencing with Section
31 1237) of Part 4 of Division 2 of the Civil Code ~~is effective only to the extent~~
32 ~~provided in or~~ Article 5 (commencing with Section 704.910) of Chapter 4 of
33 Division 2 of this code is ineffective.

34 **Comment.** Section 694.090 is amended to reflect the repeal of the homestead declaration
35 procedure in Sections 704.910-704.995. The homestead exemption is governed by Sections
36 704.710-704.860. The protection of voluntary sale proceeds under the former homestead
37 declaration procedure is continued in Section 704.720.

38 **Code Civ. Proc. § 704.720 (amended). Homestead exemption**

39 SEC. 4. Section 704.720 of the Code of Civil Procedure is amended to read:

40 704.720. (a) A homestead is exempt from enforcement of a money judgment as
41 provided in this article and is exempt from sale under this division to the extent
42 provided in Section 704.800.

1 **(b) The proceeds from a disposition of a homestead are exempt under the**
2 **following conditions:**

3 **(1) If a homestead is sold under this division or is damaged or destroyed or is**
4 **acquired for public use, the proceeds of sale or of insurance or other**
5 **indemnification for damage or destruction of the homestead or the proceeds**
6 **received as compensation for a homestead acquired for public use are exempt in**
7 **the amount of the homestead exemption provided in Section 704.730. The**
8 **proceeds are exempt for a period of six months after the time date the proceeds are**
9 **actually received by the judgment debtor, except that, if a homestead exemption is**
10 **applied to other property of the judgment debtor or the judgment debtor's spouse**
11 **during that period, the proceeds thereafter are not exempt.**

12 **(2) If a homestead is voluntarily sold, or otherwise sold in a manner not**
13 **described in paragraph (1), the proceeds of sale are exempt in the amount of the**
14 **homestead exemption provided in Section 704.730 for a period of six months after**
15 **the date of the sale.**

16 **(3) If a homestead exemption is applied to other property of the judgment debtor**
17 **or the judgment debtor's spouse during the six-month period provided in**
18 **paragraph (1) or (2), the proceeds exemption terminates.**

19 **(c) If the judgment debtor and spouse of the judgment debtor reside in separate**
20 **homesteads, only the homestead of one of the spouses is exempt and only the**
21 **proceeds of the exempt homestead are exempt.**

22 **Comment.** Subdivision (a) of Section 704.720 is revised for clarity and for consistency with
23 other exemption provisions. See, e.g., Sections 703.010, 704.010, 704.020.

24 Subdivision (b) is amended to adopt as a general rule the exemption for proceeds of voluntary
25 sales under former Section 704.960 (homestead declaration). Subdivision (b)(3) is generalized
26 from the last clause of former subdivision (b) of this section. See also Section 703.080 (tracing
27 exempt funds).

28 **Revised Background Comment (1982).** Subdivision (a) of Section 704.720 supersedes former
29 Civil Code Section 1240 (providing for a declared homestead) and former Code of Civil
30 Procedure Sections 690.3 and 690.31(a) (providing for a claimed dwelling exemption). Unlike the
31 former provisions, Section 704.720 does not specify the interest that is protected and does not
32 limit the homestead in a leasehold to a long-term lease; any interest sought to be reached by the
33 judgment creditor in the homestead may be entitled to the exemption. The homestead exemption
34 does not apply where a lien on the property other than an enforcement lien is being foreclosed.
35 See Section 703.010.

36 Subdivision (b)(1) provides an exemption for proceeds of an execution sale of a homestead, for
37 proceeds from insurance or indemnification for the damage or destruction of a homestead, and for
38 an eminent domain award or proceeds of a sale of the homestead for public use. Subdivision
39 (b)(1) supersedes portions of former Civil Code Sections 1256 and 1265 and of former Code of
40 Civil Procedure Sections 690.8 and 690.31(k). The exemption for insurance proceeds was not
41 found in former law. *But see* Houghton v. Lee, 50 Cal. 101, 103 (insurance proceeds for
42 destruction of declared homestead exempt).

43 Subdivision (c) is new. The spouses may select which of the homesteads is exempt. If the
44 spouses are unable to agree, the court determines which homestead is exempt. See Section
45 703.110 (application of exemptions to marital property). Note that a married person may, after a
46 decree of legal separation or an interlocutory judgment of dissolution of marriage, be entitled to a
47 homestead in his or her own right, and this right is not affected by subdivision (c). See Section
48 704.710(d) ("spouse" defined) & Comment.

1 **Code Civ. Proc. § 704.760 (amended). Contents of application for sale of dwelling**

2 SEC. 5. Section 704.760 of the Code of Civil Procedure is amended to read:

3 704.760. The judgment creditor's application shall be made under oath, shall
4 describe the dwelling, and shall contain all of the following:

5 (a) A statement whether or not the records of the county tax assessor indicate
6 that there is a current homeowner's exemption or disabled veteran's exemption for
7 the dwelling and the person or persons who claimed ~~any such~~ the exemption.

8 (b) A statement, which may be based on information and belief, whether the
9 dwelling is a homestead and the amount of the homestead exemption, if any, ~~and a~~
10 ~~statement whether or not the records of the county recorder indicate that a~~
11 ~~homestead declaration under Article 5 (commencing with Section 704.910) that~~
12 ~~describes the dwelling has been recorded by the judgment debtor or the spouse of~~
13 ~~the judgment debtor.~~

14 (c) A statement of the amount of any liens or encumbrances on the dwelling, the
15 name of each person having a lien or encumbrance on the dwelling, and the
16 person's address ~~of such person~~ used by the county recorder for the return of the
17 instrument creating ~~such~~ the person's lien or encumbrance after recording.

18 **Comment.** Subdivision (b) of Section 704.760 is amended to delete the obsolete reference to
19 the repealed homestead declaration procedure. See also Section 694.090 (effect of homestead
20 declarations under prior law). The other changes are technical, nonsubstantive revisions.

21 **Code Civ. Proc. § 704.780 (amended). Hearing**

22 SEC. 6. Section 704.780 of the Code of Civil Procedure [as amended by 1995
23 Cal. Stat. ch. 196, § 8, effective July 31, 1995] is amended to read:

24 704.780. (a) The burden of proof at the hearing is determined in the following
25 manner:

26 (1) If the records of the county tax assessor indicate that there is a current
27 homeowner's exemption or disabled veteran's exemption for the dwelling claimed
28 by the judgment debtor or the judgment debtor's spouse, the judgment creditor has
29 the burden of proof that the dwelling is not a homestead. If the records of the
30 county tax assessor indicate that there is not a current homeowner's exemption or
31 disabled veteran's exemption for the dwelling claimed by the judgment debtor or
32 the judgment debtor's spouse, the burden of proof that the dwelling is a homestead
33 is on the person who claims that the dwelling is a homestead.

34 (2) If the application states the amount of the homestead exemption, the person
35 claiming the homestead exemption has the burden of proof that the amount of the
36 exemption is other than the amount stated in the application.

37 (b) The court shall determine whether the dwelling is exempt. If the court
38 determines that the dwelling is exempt, the court shall determine the amount of the
39 homestead exemption and the fair market value of the dwelling. The court shall
40 make an order for sale of the dwelling subject to the homestead exemption, unless
41 the court determines that the sale of the dwelling would not be likely to produce a
42 bid sufficient to satisfy any part of the amount due on the judgment pursuant to

1 Section 704.800. The order for sale of the dwelling subject to the homestead
2 exemption shall specify the amount of the proceeds of the sale that is to be
3 distributed pursuant to Section 704.850 to each person having a lien or
4 encumbrance on the dwelling that is superior to the judgment creditor's lien, and
5 shall include the name and address of each such person. Subject to the provisions
6 of this article, the sale is governed by Article 6 (commencing with Section
7 701.510) of Chapter 3. If the court determines that the dwelling is not exempt, the
8 court shall make an order for sale of the property in the manner provided in Article
9 6 (commencing with Section 701.510) of Chapter 3.

10 (c) The court clerk shall transmit a certified copy of the court order (1) to the
11 levying officer and (2) if the court making the order is not the court in which the
12 judgment was entered, to the clerk of the court in which the judgment was entered.

13 (d) The court may appoint a qualified appraiser to assist the court in determining
14 the fair market value of the dwelling. If the court appoints an appraiser, the court
15 shall fix the compensation of the appraiser in an amount determined by the court to
16 be reasonable, not to exceed similar fees for similar services in the community
17 where the dwelling is located.

18 **Comment.** Subdivision (b) of Section 704.780 is amended to make clear that only liens with
19 priority over the judgment creditor's lien, upon which the property is to be sold, are entitled to
20 satisfaction from the proceeds of sale. See also Sections 704.800 (minimum bid), 704.850
21 (distribution of proceeds).

22 **Code Civ. Proc. § 704.800 (amended). Minimum bid at sale of homestead**

23 **SEC. 7.** Section 704.800 of the Code of Civil Procedure is amended to read:

24 704.800. (a) If no bid is received at a sale of a homestead pursuant to a court
25 order for sale that exceeds the amount of the homestead exemption plus any
26 additional amount necessary to satisfy all liens and encumbrances on the property,
27 including but not limited to any attachment or judgment lien, that are superior to
28 the judgment creditor's lien, the homestead shall not be sold and shall be released
29 and is not thereafter subject to a court order for sale upon subsequent application
30 by the same judgment creditor for a period of one year after the date set for the
31 sale.

32 (b) If no bid is received at the sale of a homestead pursuant to a court order for
33 sale that is 90 percent or more of the fair market value determined pursuant to
34 Section 704.780, the homestead shall not be sold unless the court, upon motion of
35 the judgment creditor, does one of the following:

36 (1) Grants permission to accept the highest bid that exceeds the amount of the
37 minimum bid required by subdivision (a).

38 (2) Makes a new order for sale of the homestead.

39 **Comment.** Subdivision (a) of Section 704.800 is amended to provide that only liens senior to
40 the judgment creditor's lien, taking into account any relation back, are entitled to satisfaction out
41 of the proceeds from the sale of a dwelling under this article. See also Sections 704.780 (hearing),
42 704.850 (distribution of proceeds).

1 **Code Civ. Proc. § 704.840 (amended). Costs incurred in sale proceedings**

2 SEC. 8. Section 704.840 of the Code of Civil Procedure is amended to read:

3 704.840. (a) Except as provided in subdivision (b), the judgment creditor is
4 entitled to recover reasonable costs incurred in a proceeding under this article.

5 (b) If no bid is received at a sale of a homestead pursuant to a court order for sale
6 that exceeds the amount of the homestead exemption plus any additional amount
7 necessary to satisfy all liens and encumbrances on the property that are superior to
8 the judgment creditor's lien, the judgment creditor is not entitled to recover costs
9 incurred in a proceeding under this article or costs of sale.

10 **Comment.** Section 704.840 is amended for consistency with Section 704.800.

11 **Code Civ. Proc. § 704.850 (amended). Distribution of proceeds of sale of homestead**

12 SEC. 9. Section 704.850 of the Code of Civil Procedure is amended to read:

13 704.850. (a) The levying officer shall distribute the proceeds of sale of a
14 homestead in the following order:

15 (1) To the discharge of all liens and encumbrances, ~~if any~~, on the property that
16 are superior to the judgment creditor's lien.

17 (2) To the judgment debtor in the amount of any applicable exemption of
18 proceeds pursuant to Section 704.720.

19 (3) To the levying officer for the reimbursement of the levying officer's costs for
20 which an advance has not been made.

21 (4) To the judgment creditor to satisfy the following:

22 (A) First, costs and interest accruing after issuance of the writ pursuant to which
23 the sale is conducted.

24 (B) Second, the amount due on the judgment with costs and interest, as entered
25 on the writ.

26 (5) To any other judgment creditors who have delivered writs of execution to the
27 levying officer, accompanied by instructions to levy on the proceeds of sale, in the
28 amounts to which the persons are entitled in order of their respective priorities.

29 (6) To the judgment debtor in the amount remaining.

30 (b) Sections 701.820 and 701.830 apply to distribution of proceeds under this
31 section.

32 **Comment.** Subdivision (a)(1) of Section 704.850 is amended for consistency with Section
33 704.800. The words "if any" are deleted as surplus. A new subdivision (a)(5) is added to permit
34 junior creditors whose liens will be extinguished pursuant to Section 704.860 to seek satisfaction
35 from any excess proceeds at the sale, by delivering a writ of execution and levy instructions to the
36 levying officer. This procedure is consistent with the general rule in Section 701.810(g)
37 (distribution of proceeds of sale or collection). Note that under the rule in Section 704.800(a) the
38 items listed in paragraphs (1) and (2) of subdivision (a) are of equal priority since the homestead
39 may not be sold unless all senior liens and encumbrances are satisfied and the judgment debtor
40 receives the full amount of the applicable exemption.

41 **Revised Background Comment (1982).** Subdivision (a) of Section 704.850 continues the
42 priority of distribution of proceeds provided by subdivision (j) of former Section 690.31 and of
43 former Civil Code Section 1255. This section is an exception to the general rules on distribution
44 of proceeds provided by Section 701.810. Liens and encumbrances required to be satisfied under

1 subdivision (a)(1) include not only preferred labor claims to be satisfied pursuant to Section 1206
2 and the amount of any state tax lien (as defined in Government Code Section 7162) but also any
3 other liens and encumbrances with priority over the judgment creditor's lien.

4 Subdivision (b) makes clear that the general provisions governing the time for distributing
5 proceeds (Section 701.820) and the resolution of conflicting claims to proceeds (Section 701.830)
6 apply to the distribution of proceeds from the sale of a homestead.

7 **Code Civ. Proc. § 704.860 (added). Extinction of liens upon sale**

8 SEC. 10. Section 704.860 is added to the Code of Civil Procedure, to read:

9 704.860. If property is sold pursuant to this article, the lien under which it is sold
10 and any liens subordinate thereto on the property sold are extinguished.

11 **Comment.** Section 704.860 is new. The rule in this section applicable to homestead sales is
12 consistent with the general rule under Section 701.630.

13 **Code Civ. Proc. §§ 704.910-704.995 (repealed). Declared homestead**

14 SEC. 11. Article 5 (commencing with Section 704.910) of Chapter 4 of Division
15 2 of Title 9 of Part 2 of the Code of Civil Procedure is repealed.

16 **Note.** The text of Sections 704.910-704.995 is set out *infra*. See material under "Comments to
17 Repealed Sections."

18 **Gov't Code § 7170 (technical amendment). Attachment of tax lien**

19 SEC. 12. Section 7170 of the Government Code is amended to read:

20 7170. (a) Except as provided in subdivisions (b) and (c), a state tax lien attaches
21 to all property and rights to property whether real or personal, tangible or
22 intangible, including all after-acquired property and rights to property, belonging
23 to the taxpayer and located in this state. ~~A state tax lien attaches to a dwelling~~
24 ~~notwithstanding the prior recording of a homestead declaration (as defined in~~
25 ~~Section 704.910 of the Code of Civil Procedure).~~

26 (b) A state tax lien is not valid as to real property against the right, title, or
27 interest of any of the following persons where the person's right, title, or interest
28 was acquired or perfected prior to recording of the notice of state tax lien in the
29 office of the county recorder of the county in which the real property is located
30 pursuant to Section 7171:

31 (1) A successor in interest of the taxpayer without knowledge of the lien.

32 (2) A holder of a security interest.

33 (3) A mechanic's lienor.

34 (4) A judgment lien creditor.

35 (c) A state tax lien is not valid as to personal property against:

36 (1) The holder of a security interest in the property whose interest is perfected
37 pursuant to Section 9303 of the Commercial Code prior to the time the notice of
38 the state tax lien is filed with the Secretary of State pursuant to Section 7171.

39 (2) Any person (other than the taxpayer) who acquires an interest in the property
40 under the law of this state without knowledge of the lien or who perfects an
41 interest in accordance with the law of this state prior to the time that the notice of
42 state tax lien is filed with the Secretary of State pursuant to Section 7171.

1 (3) A buyer in ordinary course of business who, under Section 9307 of the
2 Commercial Code, would take free of a security interest created by the seller.

3 (4) Any person (other than the taxpayer) who, notwithstanding the prior filing of
4 the notice of the state tax lien:

5 (A) Is a holder in due course of a negotiable instrument.

6 (B) Is a holder to whom a negotiable document of title has been duly negotiated.

7 (C) Is a bona fide purchaser of a security.

8 (D) Is a purchaser of chattel paper or an instrument who gives new value and
9 takes possession of the chattel paper or instrument in the ordinary course of
10 business.

11 (E) Is a holder of a purchase money security interest.

12 (F) Is a collecting bank holding a security interest in items being collected,
13 accompanying documents and proceeds, pursuant to Section 4210 of the
14 Commercial Code.

15 (G) Acquires a security interest in a deposit account or in the beneficial interest
16 in a trust or estate.

17 (H) Acquires any right or interest in letters of credit, advices of credit, or money.

18 (I) Acquires without actual knowledge of the state tax lien a security interest in
19 or a claim in or under any policy of insurance including unearned premiums.

20 (J) Acquires any right or interest in property subject to a certificate of title statute
21 of another jurisdiction under the law of which indication of a security interest on
22 the certificate of title is required as a condition of perfection of the security
23 interest.

24 (5) A judgment lien creditor whose lien was created by the filing of a notice of
25 judgment lien on personal property with the Secretary of State prior to the time the
26 notice of state tax lien is filed with the Secretary of State pursuant to Section 7171.

27 **Comment.** The second sentence of Section 7170(a) is deleted in view of the repeal of the
28 homestead declaration procedure. See also Code Civ. Proc. §§ 688.030 (exemptions from
29 enforcement of tax), 694.090 (effect of homestead declaration under former law), 704.850
30 (satisfaction of liens upon execution sale of homestead).

31 **Prob. Code § 6528 (repealed). Declared homestead**

32 **SEC. 13.** Section 6528 of the Probate Code is repealed.

33 ~~6528. Nothing in this chapter terminates or otherwise affects a declaration of~~
34 ~~homestead by, or for the benefit of, a surviving spouse or minor child of the~~
35 ~~decedent with respect to the community, quasi-community, or common interest of~~
36 ~~the surviving spouse or minor child in property in the decedent's estate. This~~
37 ~~section is declaratory of, and does not constitute a change in, existing law.~~

38 **Comment.** Section 6528 is repealed because it has no purpose in view of the repeal of the
39 homestead declaration procedure. See also Code Civ. Proc. § 694.090 (effect of homestead
40 declaration under former law). Repeal of this section has no effect on the ability of a surviving
41 judgment debtor to take advantage of the homestead exemption provided in Code of Civil
42 Procedure Sections 704.710-704.860.

1 COMMENTS TO REPEALED SECTIONS

2 **Code Civ. Proc. §§ 704.910-704.995 (repealed). Declared homestead**

3 **Note.** Sections 704.910-704.995 are set out below for reference purposes. A Comment to each
4 section indicates its proposed disposition in the revised statute or its relation to the general
5 homestead exemption provisions that supersede the homestead declaration procedure.

6 **Article 5. Declared Homesteads**

7 **§ 704.910 (repealed). Definitions**

8 704.910. As used in this article:

9 (a) "Declared homestead" means the dwelling described in a homestead
10 declaration.

11 (b) "Declared homestead owner" includes both of the following:

12 (1) The owner of an interest in the declared homestead who is named as a
13 declared homestead owner in a homestead declaration recorded pursuant to this
14 article.

15 (2) The declarant named in a declaration of homestead recorded prior to July 1,
16 1983, pursuant to former Title 5 (commencing with Section 1237) of Part 4 of
17 Division 2 of the Civil Code and the spouse of such declarant.

18 (c) "Dwelling" means any interest in real property (whether present or future,
19 vested or contingent, legal or equitable) that is a "dwelling" as defined in Section
20 704.710, but does not include a leasehold estate with an unexpired term of less
21 than two years or the interest of the beneficiary of a trust.

22 (d) "Homestead declaration" includes both of the following:

23 (1) A homestead declaration recorded pursuant to this article.

24 (2) A declaration of homestead recorded prior to July 1, 1983, pursuant to
25 former Title 5 (commencing with former Section 1237) of Part 4 of Division 2 of
26 the Civil Code.

27 (e) "Spouse" means a "spouse" as defined in Section 704.710.

28 **Comment.** Former Section 704.910 is superseded by Section 704.710.

29 **§ 704.920 (repealed). Manner of selection of homestead**

30 704.920. A dwelling in which an owner or spouse of an owner resides may be
31 selected as a declared homestead pursuant to this article by recording a homestead
32 declaration in the office of the county recorder of the county where the dwelling is
33 located. From and after the time of recording, the dwelling is a declared homestead
34 for the purposes of this article.

35 **Comment.** Former Section 704.920 is superseded by the homestead exemption procedure in
36 Sections 704.710-704.860. See also Sections 694.090 (effect of homestead declaration under prior
37 law), 704.710 (definitions).

1 **§ 704.930 (repealed). Execution and contents of homestead declaration**

2 704.930. (a) A homestead declaration recorded pursuant to this article shall
3 contain all of the following:

4 (1) The name of the declared homestead owner. A husband and wife both may
5 be named as declared homestead owners in the same homestead declaration if each
6 owns an interest in the dwelling selected as the declared homestead.

7 (2) A description of the declared homestead.

8 (3) A statement that the declared homestead is the principal dwelling of the
9 declared homestead owner or such person's spouse, and that the declared
10 homestead owner or such person's spouse resides in the declared homestead on the
11 date the homestead declaration is recorded.

12 (b) The homestead declaration shall be executed and acknowledged in the
13 manner of an acknowledgment of a conveyance of real property by at least one of
14 the following persons:

15 (1) The declared homestead owner.

16 (2) The spouse of the declared homestead owner.

17 (3) The guardian or conservator of the person or estate of either of the persons
18 listed in paragraph (1) or (2). The guardian or conservator may execute,
19 acknowledge, and record a homestead declaration without the need to obtain court
20 authorization.

21 (4) A person acting under a power of attorney or otherwise authorized to act on
22 behalf of a person listed in paragraph (1) or (2).

23 (c) The homestead declaration shall include a statement that the facts stated in
24 the homestead declaration are known to be true as of the personal knowledge of
25 the person executing and acknowledging the homestead declaration. If the
26 homestead declaration is executed and acknowledged by a person listed in
27 paragraph (3) or (4) of subdivision (b), it shall also contain a statement that the
28 person has authority to so act on behalf of the declared homestead owner or the
29 spouse of the declared homestead owner and the source of the person's authority.

30 **Comment.** Former Section 704.930 is superseded by the homestead exemption procedure in
31 Sections 704.710-704.860.

32 **§ 704.940 (repealed). Right to convey or encumber not limited; Evidentiary effect of**
33 **homestead**

34 704.940. A homestead declaration does not restrict or limit any right to convey
35 or encumber the declared homestead. A homestead declaration, when properly
36 recorded, is prima facie evidence of the facts therein stated, and conclusive
37 evidence thereof in favor of a purchaser or encumbrancer in good faith and for a
38 valuable consideration.

39 **Comment.** Former Section 704.940 is superseded by the homestead exemption procedure in
40 Sections 704.710-704.860. See also Section 704.780 (burden of proof in hearing on homestead
41 exemption).

1 **§ 704.950 (repealed). Attachment of judgment lien to homestead**

2 704.950. (a) Except as provided in subdivisions (b) and (c), a judgment lien on
3 real property created pursuant to Article 2 (commencing with Section 697.310) of
4 Chapter 2 does not attach to a declared homestead if both of the following
5 requirements are satisfied:

6 (1) A homestead declaration describing the declared homestead was recorded
7 prior to the time the abstract or certified copy of the judgment was recorded to
8 create the judgment lien.

9 (2) The homestead declaration names the judgment debtor or the spouse of the
10 judgment debtor as a declared homestead owner.

11 (b) This section does not apply to a judgment lien created under Section 697.320
12 by recording a certified copy of a judgment for child , family, or spousal support.

13 (c) A judgment lien attaches to a declared homestead in the amount of any
14 surplus over the total of the following:

15 (1) All liens and encumbrances on the declared homestead at the time the
16 abstract of judgment or certified copy of the judgment is recorded to create the
17 judgment lien.

18 (2) The homestead exemption set forth in Section 704.730.

19 **Comment.** Former Section 704.950 is superseded by the homestead exemption procedure in
20 Sections 704.710-704.860.

21 **§ 704.960 (repealed). Proceeds exemption after voluntary sale; Reinvestment of proceeds of**
22 **voluntary or involuntary sale and effect of new declaration**

23 704.960. (a) If a declared homestead is voluntarily sold, the proceeds of sale are
24 exempt in the amount provided by Section 704.730 for a period of six months after
25 the date of sale.

26 (b) If the proceeds of a declared homestead are invested in a new dwelling
27 within six months after the date of a voluntary sale or within six months after
28 proceeds of an execution sale or of insurance or other indemnification for damage
29 or destruction are received, the new dwelling may be selected as a declared
30 homestead by recording a homestead declaration within the applicable six-month
31 period. In such case, the homestead declaration has the same effect as if it had
32 been recorded at the time the prior homestead declaration was recorded.

33 **Comment.** Former Section 704.960 is superseded by the homestead exemption procedure in
34 Sections 704.710-704.860. The proceeds exemption is continued in Section 704.720(b).

35 **§ 704.965 (repealed). Determination of amount of exemption**

36 704.965. If a homestead declaration is recorded prior to the operative date of an
37 amendment to Section 704.730 which increases the amount of the homestead
38 exemption, the amount of the exemption for the purposes of subdivision (c) of
39 Section 704.950 and Section 704.960 is the increased amount, except that, if the
40 judgment creditor obtained a lien on the declared homestead prior to the operative
41 date of the amendment to Section 704.730, the exemption for the purposes of

1 subdivision (c) of Section 704.950 and Section 704.960 shall be determined as if
2 that amendment to Section 704.730 had not been enacted.

3 **Comment.** Former Section 704.965 is superseded by the homestead exemption procedure in
4 Sections 704.710-704.860. The principle in former Section 704.965 is applicable under the
5 general rule in Section 703.050 (exemptions in effect at time of lien govern).

6 **§ 704.970 (repealed). Effect of article on rights after levy of execution**

7 704.970. Whether or not a homestead declaration has been recorded:

8 (a) Nothing in this article affects the right of levy pursuant to a writ of execution.

9 (b) Any levy pursuant to a writ of execution on a dwelling (as defined in Section
10 704.710) and the sale pursuant thereto shall be made in compliance with Article 4
11 (commencing with Section 704.710) and the judgment debtor and the judgment
12 creditor shall have all the rights and benefits provided by that article.

13 **Comment.** Section 704.970 is repealed as unnecessary following repeal of the homestead
14 declaration procedure. The homestead exemption is now governed exclusively by Article 4
15 (commencing with Section 704.710) and related rules.

16 **§ 704.980 (repealed). Declaration of abandonment**

17 704.980.(a) A declared homestead may be abandoned by a declaration of
18 abandonment under this section, whether the homestead declaration was recorded
19 pursuant to this article or pursuant to former Title 5 (commencing with former
20 Section 1237) of Part 4 of Division 2 of the Civil Code.

21 (b) A declaration of abandonment shall be executed and acknowledged in the
22 manner of an acknowledgment of a conveyance of real property. It shall be
23 executed and acknowledged by a declared homestead owner or by a person
24 authorized to act on behalf of a declared homestead owner. If it is executed and
25 acknowledged by a person authorized to act on behalf of a declared homestead
26 owner, the declaration shall contain a statement that the person has authority to act
27 on behalf of the declared homestead owner and the source of the person's
28 authority.

29 (c) The declaration of abandonment does not affect the declared homestead of
30 any person other than the declared homestead owner named in the declaration of
31 abandonment.

32 **Comment.** The procedure for abandonment in former Section 704.980 is obsolete in view of
33 the repeal of the homestead declaration procedure. See also Section 694.090 (effect of homestead
34 declarations under prior law).

35 **§ 704.990 (repealed). Abandonment of homestead by recording homestead declaration for**
36 **different property**

37 704.990. (a) A declared homestead is abandoned by operation of law as to a
38 declared homestead owner if the declared homestead owner or a person authorized
39 to act on behalf of the declared homestead owner executes, acknowledges, and
40 records a new homestead declaration for the declared homestead owner on
41 different property. An abandonment under this subdivision does not affect the

1 declared homestead of any person other than the declared homestead owner named
2 in the new homestead declaration.

3 (b) Notwithstanding subdivision (a), if a homestead declaration is recorded
4 which includes property described in a previously recorded homestead declaration,
5 to the extent that the prior homestead declaration is still valid, the new homestead
6 declaration shall not be considered an abandonment of the prior declared
7 homestead.

8 **Comment.** Former Section 704.990 relating to abandonment is obsolete in view of the repeal
9 of the homestead declaration procedure. See also Section 694.090 (effect of homestead
10 declarations under prior law).

11 **§ 704.995 (repealed). Continuation of protection after death of declared homestead owner**

12 704.995. (a) The protection of the declared homestead from any creditor having
13 an attachment lien, execution lien, or judgment lien on the dwelling continues after
14 the death of the declared homestead owner if, at the time of the death, the dwelling
15 was the principal dwelling of one or more of the following persons to whom all or
16 part of the interest of the deceased declared homestead owner passes:

17 (1) The surviving spouse of the decedent.

18 (2) A member of the family of the decedent.

19 (b) The protection of the declared homestead provided by subdivision (a)
20 continues regardless of whether the decedent was the sole owner of the declared
21 homestead or owned the declared homestead with the surviving spouse or a
22 member of the decedent's family and regardless of whether the surviving spouse
23 or the member of the decedent's family was a declared homestead owner at the
24 time of the decedent's death.

25 (c) The amount of the homestead exemption is determined pursuant to Section
26 704.730 depending on the circumstances of the case at the time the amount is
27 required to be determined.

28 **Comment.** Former Section 704.995 is superseded by the homestead exemption procedure in
29 Sections 704.710-704.860. The general homestead exemption applies with full force to the
30 interest of the survivor, consistent with the rule in subdivision (c). Additional protection is
31 provided by the probate homestead procedure. See Prob. Code §§ 6520-6527.

REVISED COMMENTS

32 **Code Civ. Proc. § 704.710 (revised comment). Definitions**

33 **Revised Background Comment (1982).** Subdivision (a) of Section 704.710 supersedes the
34 provisions of former law pertaining to the property that could be exempt as a homestead or
35 dwelling. See former Civ. Code § 1237 (declared homestead); former Code Civ. Proc. §§ 690.3
36 (house trailer, mobilehome, houseboat, boat, or other waterborne vessel), 690.31(a) (dwelling
37 house). Subdivision (a) is intended to include all forms of property for which an exemption could
38 be claimed under former law and any other property in which the judgment debtor or the
39 judgment debtor's spouse actually resides.

40 Subdivision (b) continues the substance of former Civil Code Section 1261(2) except that the
41 minor grandchild of a deceased spouse and a child or grandchild of a former spouse are included
42 in the listing.

1 Subdivision (c) is intended to preclude a judgment debtor from moving into a dwelling after
2 creation of a judgment lien or after levy in order to create an exemption. Subdivision (c) also
3 makes clear that, even though an abstract of judgment has been recorded to create a judgment
4 lien, the existence of the lien does not prevent a homestead exemption on after-acquired property
5 that is acquired as the principal dwelling using exempt proceeds. Subdivision (c) is an exception
6 to the rule of Section 703.100 (time for determination of exemption).

7 Subdivision (d) preserves the effect of former Civil Code Sections 1300-1304 (married
8 person's separate homestead). The effect of subdivision (d) is to permit each spouse to claim a
9 separate homestead after entry of a judgment decreeing legal separation or of an interlocutory
10 judgment of dissolution of the marriage, because subdivision (c) of Section 704.720 is not
11 applicable.

12 **Revised Background Comment (1983).** Section 704.710 is amended to delete "actually"
13 which appeared before "resides" or "resided" in various provisions. The word "actually" is
14 deleted to avoid a possible construction that a person temporarily absent (such as a person on
15 vacation or in the hospital) could not claim a homestead exemption for the principal dwelling
16 merely because the person is temporarily absent, even though the dwelling is the person's
17 principal dwelling and residence.
