

Memorandum 99-76

Homestead Issues (Comments on Tentative Recommendation)

This memorandum considers comments we have received on the Tentative Recommendation on the *Homestead Exemption*, which was distributed last April. Attached to this memorandum is a staff draft recommendation, which includes some technical revisions in response to cite-checking.

We received comments from two attorneys:

- | | <i>Exhibit p.</i> |
|---|-------------------|
| 1. Ronald H. Sargis, California Association of Collectors, Sacramento
(Sept. 14, 1999) | 1 |
| 2. Brian Holman, White & Case, Los Angeles (Email May 5, 1999) | 8 |

Overview

The proposed law would make three important changes: (1) it would repeal the homestead declaration procedure, (2) it would adopt in homestead sales the general rule that an enforcing lienholder need only satisfy senior liens and encumbrances, and (3) it would continue a limited form of the voluntary sale proceeds exemption in the “automatic” homestead procedure. Both writers agree with the first goal, as has every other commentator in staff memory. They also concur in the second revision, although Mr. Holman suggests some technical clarifications. Mr. Sargis, on behalf of the California Association of Collectors (CAC), disagrees with the need for or advisability of the third revision concerning continuation of a limited voluntary sale proceeds exemption.

The background of the homestead exemption is set out in a distilled form in the draft recommendation. Most of this material is the same as what appeared in the Commission’s 1996 recommendation on the homestead exemption. (While Mr. Sargis’s letter refers to the “Staff Recommendation” and the “renewed Staff Recommendation,” it should be clear that the Commission approved the recommendation submitted to the Legislature in 1996 and approved the tentative recommendation that is the subject of this memorandum.)

Automatic Homestead Exemption

Mr. Sargis expresses satisfaction with the “automatic” homestead exemption, “contrary to the conclusion” of the tentative recommendation. The staff thinks we are generally in agreement, however, that the automatic statutory exemption in Code of Civil Procedure Sections 704-710-704.850 operates successfully to protect judgment debtors from forced sale. It does this through a significant homestead exemption amount (\$50,000-\$125,000), procedural protections (or burdens, depending on one’s point of view), and the quirky requirement that “all liens and encumbrances” be satisfied, not just senior liens and encumbrances. We do not believe that the recommendation can be viewed as criticizing the utility of the automatic exemption — in fact, by recommending repeal of the homestead declaration, the recommendation relies on the continued vitality of the remaining exemption statute. The “illusory protection” that is criticized in the recommendation (see attached draft Recommendation, at 7) is the supposed voluntary sale proceeds exemption under the declaration procedure, discussed below.

Limited Voluntary Sale Proceeds Exemption

The crux of the CAC letter has to do with the six-month exemption for proceeds of a voluntary sale (in the amount of the applicable exemption, based on the law at the time the creditor’s lien attached). In recognition of the practicalities and the balance between debtors and creditors, the Commission has recommended merely continuing and generalizing the existing proceeds exemption in the homestead declaration statute. The recommendation continues the six month proceeds protection, which is consistent with other proceeds exemptions in California, limits it to purchase of another dwelling in California, and preserves existing lien priorities.

The CAC letter argues that the recommendation “destroys [the] balance of power that drives judgment debtors and judgment creditors to consensually resolve these obligations.” (Exhibit p. 3.) Apparently, the debtors are not recording homestead declarations — or creditors are able to ignore the law and the long-standing rights of debtors under the to a voluntary sale proceeds exemption. The staff has yet to discover one anecdote from any debtors’ or creditors’ attorney validating the effectiveness of the voluntary sale proceeds exemption under the homestead declaration law. On the other hand, we have been told there is no mechanism for its enforcement, since title companies merely

report recordations, and the lienholders can refuse to permit a sale to go forward without satisfaction, notwithstanding the language of Section 704.960.

The CAC clearly doesn't want to see an effective proceeds exemption, and one approach the Commission should consider is to repeal the homestead declaration statute *without* attempting to preserve (or resurrect?) a voluntary sale proceeds exemption. Since, as Mr. Sargis discusses, the hard-pressed debtor can use the threat of bankruptcy to negotiate with creditors, it is not as if debtors are left completely defenseless. And, we might add, since it appears the existing voluntary sale proceeds exemption is largely a dead letter, perhaps it is time the statute was amended to recognize the existing state of affairs.

Mr. Sargis argues that a voluntary sale proceeds exemption would also be an invitation to fraud. (Exhibit pp. 3-4.) The homeowner would sell to a friend or relative at a depressed price to thwart creditors, with money or promises passing under the table. The staff recognizes that this is a risk — it is a problem now, and is not particularly related to the proposed law. Note that the sale proceeds are not handed over to the debtor under the proposal. They are held for use in purchase of a new dwelling in California within six months. The far greater problem might be for a debtor to find financing and a sufficiently reckless lender to enable purchase of a new home with \$50,000 down. In addition, the creditor's lien and priority remain; it is not as if the lien is extinguished.

Mr. Sargis claims that the honest judgment debtor would be subject to an "insidious problem," since the proceeds would be tied up for as long as six months. The staff doesn't understand this point, since the proceeds would only be tied up if the creditors won't agree otherwise, and CAC has presented a model in which creditors routinely deal in good faith with debtors who need to move from one home to another.

Mr. Sargis argues that permitting the debtor to sell his dwelling and come out with \$50,000 puts him in far worse shape than if he comes out with little or nothing (as under the existing state of affairs). Apparently, the debtor will now be in a position where peddlers of reverse mortgages and equity loans will ensnare him. (Exhibit p. 4.) We can't disagree about the dangers of unscrupulous lenders and mortgage brokers, but the staff does not follow the argument if it is supposed to lead to the conclusion that the debtor is better off with no proceeds exemption.

Mr. Sargis also suggests that "exemption consultants" would spring up if there were an effective proceeds exemption, with a host of unsavory

consequences. The staff wonders why this and the other concerns expressed by CAC are not problems now, since we have had a voluntary sale proceeds exemption in California for many years — it just requires prior recordation of a piece of paper. Or is the truth of the matter that there is really no such exemption because creditors can and do routinely ignore it? The CAC should be directing its policy arguments against the existing proceeds exemption as well. (See, e.g., the public policy discussion at Exhibit pp. 5-6.) Neither the Commission nor the Commission staff invented this exemption. The question is what to do with two inconsistent, overlapping statutes, one of which is highly confusing, misunderstood, and the cause of a significant amount of litigation, particularly in the bankruptcy context.

The Commission needs to decide on this fundamental policy issue: whether to try to enact a limited and effective proceeds exemption, or to improve and simplify the law by eliminating the voluntary sale exemption along with the rest of the declaration procedure. The staff believes that the recommendation needs to be made to the Legislature so that some resolution of these issues can be achieved. Whether resulting legislation contains a voluntary sale proceeds exemption or not, or some other approach emerges from the process, the existing dual system should not continue.

Additional Protections

Mr. Sargis argues that the law should not impose additional court proceedings, but at the same time complains that there is nothing in the recommendation requiring the court to protect against depressed sales. (Exhibit pp. 6-7, point D.) It might be beneficial to specifically authorize the court to consider whether the sale is at fair market value, but the recommendation has not attempted to invent a completely new scheme. The approach is to modify the existing exemption procedures as needed to accommodate the proceeds exemption, without creating burdensome procedures. It is hoped that the existence of the procedure would act as an incentive to the parties to negotiate and work together, as recommended in the first part of the CAC letter.

Lien Priorities

Mr. Holman is concerned that, in an execution sale, “properly perfected lien creditors should not lose their place in line merely because they haven’t obtained or levied a writ.” (Exhibit p. 8, point 2.) This is not a subject addressed by this

recommendation. However, the general rule in execution sales, including sales of real property since repeal of the right of redemption, is that senior liens are satisfied (or the sale is conducted subject to such liens) and junior liens are extinguished following the sale. The remedy of sold-out juniors, as in foreclosure sales generally, is to bid at the sale or to redeem a senior lien. However, Section 701.810(g) provides that the levying officer is to distribute proceeds remaining after higher priorities are satisfied to judgment creditors who have delivered writs to the officer “or any other persons actually known by the levying officer to have a claim, lien, or other interest subordinate to the judgment creditor’s lien that is extinguished by the sale and that is not otherwise satisfied pursuant to this section.” This would appear to be close to what Mr. Holman is suggesting.

Mr. Holman also argues “for the same reason” that junior liens should attach to the proceeds of a voluntary or involuntary homestead sale, pending purchase of a new dwelling. (Exhibit p. 8, point 3.) If the proceeds are ever applied to the satisfaction of the judgment, then the rules in Section 701.810 apply, including the protection for junior lienholders just discussed. If they are not applied to satisfaction of the judgment, then it is because they were used to purchase the new dwelling.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary



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RONALD H. SARGIS

September 14, 1999

VIA OVERNIGHT DELIVERY

Mr. Stan Ulrich
Law Revision Commission
4000 Middlefield Rd., Rm. D-1
Palo Alto, CA 94303-4739

Law Revision Commission
RECEIVED

SEP 15 1999

Re: Homestead Exemption Recommendation, April 1999
Tentative Recommendation, Comment of the
California Association of Collectors, Inc.

File: _____

Dear Mr. Ulrich:

The California Association of Collectors, Inc. provides the following comments and analysis to the renewed Staff Recommendation for modifications of the California homestead exemption statutes. As an initial point, the California Association of Collectors, Inc. disagrees with the Staff's basic premise that while "[m]any reforms have been accomplished, [but] several critical proposals could not be achieved in 1982 and again in 1996, leaving the law in a sorry and confusing state. The homestead exemption statutes do not achieve their intended purposes in many cases, are misunderstood and misapplied in state debt collection proceedings, are ignored in self-help transactions, and contribute to a morass of confusion in the personal bankruptcy arena." Memorandum 99-5, January 27, 1999.

Other than one bankruptcy court decision out of the Northern District of California, which was reversed by the Ninth Circuit Court of Appeals and led to the pro-consumer debtor homestead exemption 1994 amendments to the Bankruptcy Code, the state of the California homestead exemption has not been in a sorry state of affairs. Rather, it has worked well to protect judgment debtors from having their homes sold by judgment creditors, and in those rare cases when a sale may have occurred because of a large equity in the property, the judgment creditor was required to pay the judgment debtor \$50,000, \$75,000 or \$125,000 cash homestead exemption from the sale proceeds. Since the 1982 amendments to the homestead law, there have been very few, especially in light of the number of judgment debtors statewide, appellate decisions addressing confusion or abuse of judgment debtors under the current law.

- I. The California Association of Collectors, Inc. concurs in the recommendation to eliminate the Declared Homestead exemption.

- II. The California Association of Collectors, Inc. concurs in the recommendation to amend the enforcement of judgments provisions to allow a judgment creditor to sell a homestead property so long as the senior liens and homestead exemption are paid from the sales proceeds.
- III. The California Association of Collectors, Inc. disagrees with the Recommendation to allow judgment debtors to voluntarily sell homestead property free and clear of judgment liens.

The current Staff Recommendation includes a recasting of Staff's prior recommendation to allow a judgment debtor to voluntarily sell homestead property free and clear of recorded judgment liens. This proposal has not been substantially changed from that presented two years ago and suffers from the same deficiencies. As discussed below, these deficiencies exist not only to the unfair detriment of judgment creditors, but also are adverse to the best interests of the consumer judgment debtors, the courts, and the consumer credit system as a whole.

A. The Current Automatic Homestead Exemption Protects both Judgment Debtors and Judgment Creditors.

Contrary to the conclusion cited in the Staff Recommendation, the automatic homestead exemption is regularly enforced to the benefit of judgment debtors both in state court and bankruptcy court. The cases addressing the rights of judgment creditors are few and no pressing problems negatively impacting judgment debtors has been cited in any of the past or present recommendations. No judgment debtors are being forced from their homes by judgment creditors.

Under the current system, a judgment creditor's ability to enforce a judgment is very limited. The ability to garnish wages is constrained by both federal and state law. A comprehensive series of exemptions exist for personal property, including retirement accounts. As required by the California Constitution, the current homestead exemption protects the judgment debtor's residence from a forced sale by a judgment creditor.¹

With respect to homestead exemption, a judgment creditor cannot sell the judgment debtor's residence without paying all of the liens against the property and paying, in cash, the debtor's homestead exemption of \$50,000, \$75,000, or \$125,000.² Clearly the system is so heavily weighted in favor of the judgment debtor that the average judgment creditor cannot force a sale of the judgment debtor's residence.

¹ California Constitution, Article XX, Sec. 1.5.

² California Association of Collectors, Inc. concurs with the recommendation to change this provision to require only the payment of senior liens and the homestead exemption.

The current automatic homestead exemption system promotes passive debt collection practices of recording a judicial lien against the judgment debtor's residence. By recording the judgment lien, the judgment creditor's potential rights in the property are protected against other creditors and the judgment debtor, without interfering with the judgment debtor's peaceful possession of the property.

It is only when the judgment debtor attempts to sell or refinance the property that the judgment creditor's lien rights come into play. The judgment debtor and judgment creditor must fairly negotiate for a payment of the outstanding judgment, often time a partial payment with release of the remaining judgment. This places the judgment debtor in a significant bargaining position with the judgment creditor.

The judgment debtor is required to negotiate because he/she must obtain a release of the judgment lien in order to complete the refinance or sale. The judgment creditor must negotiate in good faith or else the judgment debtor will not complete the sale, thereby resulting in no money for the judgment creditor. This balance of the homestead exemption and the judgment lien rights has clearing worked since the automatic homestead exemption was enacted.

In the event that the judgment debtor is under severe financial distress or the judgment is of significant size and the judgment creditor is unreasonable, the judgment debtor has the added leverage of (threatening) filing bankruptcy. Under the Bankruptcy Code, 11 U.S.C. section 522(f), the judgment debtor has the right to strip off any judgment lien for which there is no value in the homestead property above the senior liens and homestead exemption. This is a mechanical formula routinely applied by the bankruptcy courts. Often the mere reference (threat) of a possible bankruptcy that is sufficient incentive to bring even the unreasonable judgment creditor to a quick and fair agreement.

The Staff Recommendation destroys this balance of power that drives judgment debtors and judgment creditors to consensually resolve these obligations, and destroys the only mechanism by which a long standing judgment creditor has any reasonable expectation to be paid from the growing equity in a judgment debtor's residence.

B. The Proposal Would Encourage Fraud And Abuse Of The Exemption Provisions.

The proposal to allow a judgment debtor to sell, at whatever price, homestead property free and clear of the judgment liens is a clear recipe for abuse. In reviewing the limited number of homestead cases since enactment of the automatic homestead exemption, several of them relate to alleged fraudulent conveyances by a judgment debtor of the homestead property to a non-debtor spouse or child. If adopted, this free and clear sale Recommendation would soon result in sham sales and schemes to conduct "sales" at depressed prices to relatives and friends of the judgment debtors, and sham escrows with the debtors receiving money under the table or for "future services to be

rendered." The potential for abuse is limited only by the creativity of a judgment debtor attempting to evade a creditor or someone (debtor consultant) trying to make money from a judgment debtor.

On this point, one of the significant problems facing consumers in California, as identified by Consumers' Union, are the various reverse mortgages and equity loans being sold in California. Identified were the "High pressure home improvement salespeople, foreclosure "rescue" services, and unscrupulous lenders and mortgage brokers have ensnared victims into traps that rob them of their homes. The victims are manipulated and deceived into signing for loans with interest rates as high as 30 percent and fees of 20 or more points...Estimated losses due to home equity fraud and overpriced and unfairly induced loans in California run at least into the tens of millions of dollars and very possibly hundreds of millions. Law enforcement officials and lawyers for victims say the cases that are discovered and brought to court are just the tip of the iceberg. Nationally, home equity fraud and home repair fraud have stripped the value from the homes of an estimated 100,000 people in 20 states."³

Because of the consumer abuse occurring under the current declared homestead provisions, the Legislature enacted Business and Professions Code section 17537.6 to stop the "declared homestead exemption mills" that sprung up selling declared homesteads to consumers. These mills used mass mailing tactics and created the fear that the consumer would lose his/her home if the mill was not paid an exorbitant sum for preparing a declared homestead.

Creating the right to sell free and clear of a homestead exemption will be an invitation for a new wave of unscrupulous debtor consultants to start selling "homestead exemption sales services." These new "exemption consultants" who would counsel judgment debtors how to avoid paying judgment creditors, structuring exemption sales so that the sales price does not generate non-exempt sales proceeds, and scams to steal property from judgment debtors through judgment lien avoidance strawman escrows. Judgment debtors, misled into believing that it is better to avoid paying a judgment, will be lead into transactions intended to defraud creditors, cost the judgment debtor fees and costs, and ultimately result in their loss of the property.

³ October 1995, "Dirty Deeds: Abuses and Fraudulent Practices in California's Home Equity Market," by Norma Paz Garcia at the Consumers Union West Coast Regional Office.

See also: Press Release, July 28, 1998, Contact: Norma Garcia, (415) 431-6747, Consumers Union West Coast Regional Office; CALIFORNIA HOMEOWNERS AT RISK FOR LENDING FRAUD & ABUSE.

Articles obtained from Consumers' Union web page.

C. Public Policy Is Not Served And It Is Adverse To The General Interests of The Judgment Debtor To Encourage Further Deferring Payments To Judgment Lien Creditors.

Under the current automatic homestead exemption statute, judgment debtors are protected from being forced from their homes, but have to recognize a judgment debt when they chose to sell the property. The Staff Recommendation would be give a judgment debtor the illusion that he/she could indefinitely avoid paying the judgment debt, since it cannot be enforced even if the judgment debtor wants to trade-up homes and lifestyles. This would be true so long as the judgment debtor continues to maintain a large mortgage on the property. Such incentives are unfair and detrimental to the creditors.

As an initial point, it unfairly forces the judgment creditor to provide an involuntary "equity" loan to the judgment debtor. The judgment debtor may very well be continuing to make his/her mortgage payments with the monies that should have gone to repay the judgment creditor. The very creation of the homestead equity that the exemption is protecting is being "financed" by the judgment creditor. Under the current law, the judgment creditor is required to provide this involuntary financing until the judgment debtor sells the home. The Staff Recommendation would make this involuntary financing a long term commitment for the judgment creditor. While under the current statutes it may be fair to prohibit a judgment creditor from selling the debtor's house without first paying the judgment debtor \$50,000, \$75,000, or \$125,000 homestead exemption amount, it is patently unfair to turn an ordinary judgment creditor into an involuntary long term junior equity lender to finance the judgment debtor trading-up for a better home.

On a second point, there are no limitations on the judgment debtor for the new homestead property to be purchased under the Recommendation. There is no limit on the type of property, location, or amount of senior liens that the judgment debtor could place on the property. The Recommendation creates an incentive on the judgment debtor to increase the amount of the mortgage, allowing him/her in homes of increasing value, but maintain an equity within the homestead exemption. Even worse, it would only be a short time before an unscrupulous lender and enterprising debtor figure out that the debtor could purchase a more expensive house, increase the amount of the mortgage over what he originally held, and get monies back from the lender through or around the escrow. Through this very simple artifice, the judgment debtor could destroy the judgment creditor's lien rights.

The perpetual homestead exemption Recommendation by Staff also misleads the average consumer judgment debtor to his/her financial detriment. Under the current system, at the time of a sale or refinance, the judgment debtor negotiates a fair payment on the debt. Often times it results in a partial payment that resolves the debt in full. With that resolution of the debt, the judgment debtor has stopped incurring further 10 percent post judgment interest.

If, as Staff proposes, the judgment debtor can freely move the proceeds irrespective of the judgment liens, the average consumer debtor will not make provision for the payment of the debt. In such a case, interest will continue to accrue at 10 percent annually, compounding upon the renewal of the judgment. The average judgment debtor will not appreciate the real cost of delaying the payment on the judgment, but instead look to enhancing his/her short term lifestyle.⁴ While in the short run the judgment debtor may enjoy the luxury that he/she can freely move-up from house to house without regard to the creditor's claim, it is coming at a high price.

The Staff Recommendation also subjects the honest judgment debtor to a more insidious problem. Upon completion of the sale, the debtor would have the homestead exemption money deposited in a "controlled" account. The judgment debtor would then have six months in which to use the money to purchase a new house.

Presumably, the average consumer judgment debtor would have to obtain a mortgage for the new home. As a practical matter, outstanding judgments would disqualify the judgment debtor from conventional mortgage financing. If financing could be found at all, it would be in the sub-par market, which charges the borrowers higher interest and points.⁵ This would force the judgment debtor to pay additional amounts, reducing the amount of protected equity in the new homestead, and divert even more money from the judgment creditor.

An even worse case scenario for the judgment debtor is to have completed the sale and then be unable to qualify for a new loan. They would then be facing the loss of the exemption in its entirety. Consumer debtors, then desperate to save any portion of the homestead exemption, would be easy prey for third parties selling fraudulent schemes for strawman sales, lease/purchase options, and other devices to separate the consumer from the very asset, home ownership, that the current homestead exemption protects.

D. Any Amendments Should Be To Promote Consensual Creditor-Debtor Resolutions, Not Additional Court Proceedings.

Under the Staff Recommendations, a judgment debtor makes the unilateral determination of whether to sell the homestead property and the sales price. No provision is made for court

⁴ As an example, if a judgment creditor has a judgment in the amount of \$10,000, interest will accrue at the rate of \$1,000 a year. By the end of 5 years, the total amount owing will be \$15,000. At that point, if the judgment is renewed, the annual interest accrual is \$1,500. By the end of 10 years, the judgment debt has increased to \$22,500, at which point the judgment could again be renewed, and interest would increase to \$2,250 per year.

⁵ The specific problem identified by Consumers' Union.

supervision, determination if the sales price is fair, or that the sales proceeds are protected for the judgment creditor. Instead, merely upon the sale being made, the judgment lien is automatically released. The sales proceeds, if any, are then to be deposited into a "controlled account."

Not even under the bankruptcy laws, which are pro-consumer debtor with respect to exemptions, is the judgment debtor given the unilateral right to transfer property away from creditors. A bankruptcy trustee and court oversee the actions of the debtor. The bankruptcy debtor must come before the court to establish the value of the homestead property if he/she want to have the judgment liens stripped off as provided in 11 U.S.C. section 522(f).

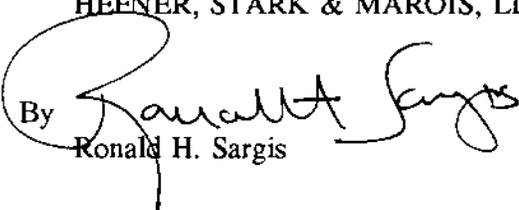
The Staff Recommendation would lead to more court proceedings with allegations of fraudulent transactions and diversion of exemption proceeds. Currently, the questions of whether the sales price is fair, the escrow valid, and the judgment debtors conduct honest, are worked out in advance by the judgment debtor and creditor without imposing on the court. Any amendments to the homestead exemption should enhance the ability of the parties to mutually resolve the disputes, not create the unilateral right of one party (the judgment debtor) to destroy the lien right of the judgment creditor.

The Staff Recommendation would force the judgment creditors to bring more post judgment enforcement litigation to enjoin proposed sales, when they learn of them in advance, or more likely, to commence additional fraudulent transfer actions. Litigation would arise over the "controlled account" and the disposition of its monies. No provision is made for who or what will control the account, how it will be disbursed, and how the monies will be deposited in the account. This equates to further burden on the court and utilization of court resources to address an area where no problem exists today.

Very truly yours,

HEFNER, STARK & MAROIS, LLP

By


Ronald H. Sargis

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Subject: Tentative Recommendation concerning the Homestead Exemption
Importance: Normal
X-SMF-Hop-Count: 2
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Gentlemen:

I am a lawyer frequently involved in debtor/creditor matters.

I have the following comments on the Tentative Recommendation concerning the Homestead Exemption (CLRC News Release April 30, 1999):

1. I concur in the Commission's recommendation that the declared homestead procedure be repealed and replaced by an automatic exemption for a portion of the proceeds of a voluntary sale of a homestead.
2. The proceeds of a judgment creditor's execution sale of a homestead in excess of the sum of the homestead exemption and the total of senior liens should be distributed first to the levying judgment creditor and then to junior lien creditors in the order of the priority of their liens, irrespective of whether any junior lien creditor has caused the levy of a writ of execution against the property or the proceeds of sale. Properly perfected lien creditors should not lose their place in line merely because they haven't obtained or levied a writ. Compare section 727 of the California Code of Civil Procedure.
3. For the same reason, all junior liens should attach to the exempt proceeds of a sale (voluntary or involuntary) of a homestead pending the use of such funds to purchase a replacement homestead. If the exempt proceeds of sale are later distributed because no replacement dwelling is purchased within six months, the proceeds should be distributed to the junior lien creditors in the order of the priority of their liens, irrespective of whether any junior lien creditor has caused the levy of a writ of execution against the property or the proceeds of sale. Again, properly perfected lien creditors should not lose their place in line merely because they haven't obtained or levied a writ. Compare section 727 of the California Code of Civil Procedure and subdivision (a)(3) of section 2924k of the California Civil Code.

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#D-354

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

RECOMMENDATION

Homestead Exemption

October 1999

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335 FAX: 650-494-1827

SUMMARY OF TENTATIVE RECOMMENDATION

The Commission proposes repealing the declared homestead procedure and amending the automatic homestead exemption to protect proceeds of a voluntary sale on the same basis as other homestead proceeds are protected. Dwelling proceeds would be exempt in the amount of the homestead exemption for which the debtor qualifies. The burden would be on the exemption claimant to prove qualification for the exemption and the amount. Proceeds would be held in an exempt account for six months for the purpose of purchasing another qualifying homestead or else applied to satisfaction of creditors' liens. Consistent with the general rule applicable to execution sales, the statute would be revised to require satisfaction of senior liens and encumbrances, rather than all liens and encumbrances on the property. Junior liens would be extinguished by an execution sale on a senior lien.

The proposed revisions are intended to simplify a confusing statute that debtors, creditors, lawyers, and both state courts and federal bankruptcy courts have trouble understanding and applying. In the process of revision, the Commission has sought to preserve the major benefit offered by the homestead declaration procedure and the balance between debtors and creditors reflected in the current statutory scheme.

This recommendation was prepared pursuant to Resolution Chapter 81 of the Statutes of 1999.

HOMESTEAD EXEMPTION

1 The Enforcement of Judgments Law¹ contains two procedures relating to home-
2 stead exemptions from enforcement of money judgments: the automatic home-
3 stead exemption and the homestead declaration.² This recommendation proposes
4 repealing the homestead declaration procedure and preserving its primary benefit,
5 the voluntary sale proceeds exemption, in the general automatic homestead exemp-
6 tion. Additional technical revisions are also proposed.

7 **Background**

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 But there is no requirement that the law provide a homestead *declara-*
11 *tion* procedure. The procedure for implementing this constitutional mandate is
12 determined by the Legislature.⁴

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

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

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). The Commission again recommended repeal in its recommendation on the *Homestead Exemption*, 26 Cal. L. Revision Comm'n Reports 37 (1996). This recommendation is a revision of the 1996 recommendation.

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 petition for issuance of a writ of execution directed against the dwelling and give
2 notice to the debtor who could then assert the exemption. This procedure was sub-
3 stantially revised in the Enforcement of Judgments Law, enacted in 1982, resulting
4 in the homestead exemption procedure in Code of Civil Procedure Sections
5 704.710-704.850. The probate homestead was put on an independent footing,
6 unrelated to the homestead declaration.⁸

7 **Automatic Homestead Exemption**

8 The “automatic” homestead exemption — or dwelling house exemption, as it is
9 also known — requires the judgment creditor to initiate court proceedings to
10 determine whether the property is exempt and the amount of the exemption. Gen-
11 erally where other property is levied on to enforce a money judgment, the debtor is
12 given notice of levy and must make an exemption claim within 10 days.⁹ A credi-
13 tor who levies on a “dwelling,”¹⁰ which may be an exempt homestead, may not
14 have it sold to enforce a money judgment without first obtaining a court order for
15 sale. The creditor must apply for the order for sale within 20 days after notice of
16 levy is served on the judgment debtor.¹¹ The judgment creditor’s application is not
17 simple: the creditor must determine whether the county tax assessor’s records
18 show a current homeowner’s exemption or disabled veteran’s exemption, must
19 state on information and belief whether the dwelling is a homestead, the amount of
20 the exemption, and whether there is a homestead declaration recorded, and must
21 state the amount of liens and encumbrances and the address of other lien creditors
22 and encumbrancers as shown in the recorder’s files.¹² The creditor must give
23 notice of the application, including personal service on any occupant, at least 30
24 days before the hearing.¹³

25 At the hearing, the creditor has the burden of showing the dwelling is not exempt
26 if there is a tax exemption on file in the tax assessor’s office; otherwise, the burden
27 is on the debtor to prove the exempt status.¹⁴ The property is appraised, and if it is
28 of sufficient value, it is ordered to be sold. Notice of the sale cannot be given until
29 at least 120 days after the notice of levy, thus affording an opportunity to avoid the
30 sale.¹⁵ Ultimately, the homestead cannot be sold unless the bid exceeds the amount
31 of the applicable homestead exemption plus the amount necessary to satisfy all
32 liens and encumbrances on the property, and the price must be 90 percent of the

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).

15. Section 701.545. This delay affords an opportunity for the debtor to redeem from the lien.

1 appraised value unless the court orders otherwise.¹⁶ Proceeds of a sale are dis-
2 tributed first to pay off “all liens and encumbrances,” second to the debtor in the
3 amount of the exemption, third to the levying officer for costs, and finally to the
4 judgment creditor to apply to the judgment.¹⁷

5 This procedure is highly protective of debtors’ homesteads. It provides for mul-
6 tiple notices, including personal service, built-in delays and a second-chance pro-
7 ceeding, significant procedural burdens, appraisals with presumptive minimum
8 bids, and evidentiary burden shifting. In light of these protections, there should be
9 no need for a separate homestead declaration procedure.

10 **Modern Declared Homestead**

11 The minimal homestead declaration procedure that has existed since 1982 is
12 largely a formality. A homeowner or spouse of a homeowner may record a home-
13 stead declaration describing the principal dwelling. The declaration must be
14 acknowledged in the manner of a conveyance of real property.¹⁸ Unlike its prede-
15 cessor, the modern homestead declaration has no effect on the right to convey or
16 encumber the property.¹⁹ Nor does it prevent creation of judgment liens,²⁰ attach-
17 ment liens,²¹ or state tax liens.²²

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

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

16. Section 704.800.

17. Section 704.850.

18. Sections 704.920-704.930.

19. Section 704.940 & Comment.

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.

Two California Courts of Appeal have grappled with this part of the homestead declaration statute, with contradictory results. In *Teaman v. Wilkinson*, 59 Cal. App. 4th 1259, 1262, 69 Cal. Rptr. 2d 705 (1997), the court interpreted Section 704.950 to mean that a judgment lien does not “attach” to the property until a surplus equity develops. The court in *Smith v. James A. Merrill, Inc.*, 64 Cal. App. 4th 94, 75 Cal. Rptr. 2d 108 (1998), correctly interpreted the statute, concluding that a judgment lien attached to the property under other law and that the homestead law governed the amount of the lien, not its priority in time.

1 This section presents a conceptual conundrum. How can it be determined
2 whether the judgment lien has attached? The amount of the homestead exemption
3 can change, as well as the amount of senior liens. A judgment lien attaches to any
4 property owned or acquired by a debtor in the county where the abstract of judg-
5 ment is recorded; it is a “dragnet” lien and is not directed at particular property.²⁴
6 How can it be determined when the lien attaches since the value of the property is
7 unknown in the absence of a sale or appraisal? Section 704.950(a) provides that
8 the lien does not attach, subject to the exception in subdivision (c). Subdivision (c)
9 provides that the lien attaches to the surplus value, but does not say *when* the lien
10 attaches. Arguably it attaches only when the surplus value exists. Section 704.965
11 locks in the exemption amount at the time when the lien attaches, but when is that?

12 This rule, then, does not appear to provide any clear advantage to the homestead
13 declaration. Theoretically, it might be easier to sell real property free of the judg-
14 ment lien if there were a prior homestead declaration recorded, assuming that the
15 debtor’s equity in the property was agreed by all parties to be less than the home-
16 stead exemption amount at the time of transfer. But this does not appear to be a
17 practical advantage, and does not justify continuing the cumbersome and confus-
18 ing homestead declaration procedure.

19 2. *Exemption of proceeds of voluntary sale.* Section 704.960(a) protects the pro-
20 ceeds of a voluntary sale of the homestead for six months after the date of sale.²⁵
21 The automatic homestead exemption protects proceeds of sale, but only where the
22 homestead is sold at an execution sale, is damaged or destroyed, or is acquired for
23 public use — in other words, not in the case of a voluntary sale.²⁶ The proceeds
24 exemption is limited, however, so that it does not include any increase in the
25 exemption occurring after a judgment lien attaches.²⁷ This is consistent with the

Until the law is clarified, this confusion can be expected to continue in state courts and federal bankruptcy courts. For bankruptcy cases, see, e.g., *City Nat’l Bank v. Chabot* (*In re Chabot*), 100 B.R. 18 (Bankr. C.D. Cal 1989, *aff’d*, 131 B.R. 720 (C.D. Cal. 1991), *aff’d*, 992 F.3d 891 (9th Cir. 1993); *In re Dodge*, 138 B.R. 602 (Bankr. E.D. Cal. 1992); *In re Mulch*, 182 B.R. 569 (Bankr. N.D. Cal. 1995); *Jones v. Heskett*, 180 B.R. 575 (B.A.P. 9th Cir. 1994), *rev’d*, 106 F.3d 923 (9th Cir. 1997).

24. See Section 697.340.

25. The voluntary sale proceeds exemption originated in 1911. See former Civ. Code § 1265, as amended by 1911 Cal. Stat. ch. 45, § 1. The proceeds exemption remained essentially unchanged until it was replaced by Section 704.960 in 1982. See 1982 Cal. Stat. ch. 497, § 8; 1982 Cal. Stat. ch. 1364, § 2.

26. See Section 704.720(b).

27. 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.

1 general rule that the amount of an exemption is determined according to the law in
2 effect when the creditor's lien attaches to the property.²⁸

3 Under existing law, a sufficiently sophisticated debtor would simply record a
4 homestead declaration before a voluntary sale of the home and thereby protect the
5 proceeds for six months in the amount applicable when the creditor's lien attached.
6 The Commission can envision no public policy that is served by the formality of
7 recording a declaration in such circumstances. The creditor cannot prevent the
8 recording of the declaration. The proceeds exemption follows mechanically from
9 the act of recording the piece of paper. The specific amount of the voluntary pro-
10 ceeds exemption depends on the fortuity of the order in which the debtor and the
11 creditor record their respective papers. The recording has no relation to any other
12 act. It is not reviewed and notice is not given. It is not subject to contest at the time
13 of recording. The protection of voluntary sale proceeds depends solely on the arbi-
14 trary factor of whether the debtor has remembered to record a paper, a paper which
15 will then clutter up the public records for years, since it describes as a homestead
16 property that the debtor intends to sell shortly after the declaration is recorded.

17 The justification for the reforms of the old homestead declaration, which resulted
18 in the modern automatic homestead exemption, apply as well to the exemption of
19 proceeds. Since a prior judgment lien does not prevent recording a homestead dec-
20 laration with its attendant voluntary sale proceeds exemption, the proceeds exemp-
21 tion should be incorporated into the automatic homestead exemption. The better
22 procedure is the general one — proceeds of a voluntary sale are exempt for six
23 months following sale and the burden is on the debtor to prove the exemption and
24 trace the proceeds.²⁹ Consistent with general principles,³⁰ the exemption amount
25 would be determined under the law in effect at the time the judgment creditor's
26 lien attached to the homestead.

27 An important limitation on the proceeds exemption should be codified. The pur-
28 pose of the proceeds exemption is to enable the judgment debtor to substitute one
29 home for another without losing the exemption.³¹

30 *3. Relation-back of homestead declaration.* Section 704.960(b) provides a
31 portability feature, permitting the debtor to record a homestead declaration on
32 property acquired with proceeds from a sale of a declared homestead and continue
33 the original recording priority in the new homestead. This applies to any exempt
34 homestead proceeds, whether from voluntary or forced sale, or reimbursement

28. 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).

29. 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).

30. See Section 703.100.

31. *Thorsby v. Babcock*, 36 Cal. 2d 202, 205, 222 P. 2d 863 (1950); *Ortale v. Mulhern*, 58 Cal. App. 3d. 861, 864, 130 Cal. Rptr. 277 (1976).

1 from insurance, so long as the new declaration is recorded within the six-month
2 period during which proceeds are protected.

3 This feature also permits the debtor to lock in the opportunity to take advantage
4 of later statutory increases in the homestead exemption amounts.³² A person who
5 records a homestead declaration before a creditor's lien attaches can preserve that
6 priority and receive the benefit of increased exemptions in proceeds and in a home
7 purchased with exempt proceeds.³³

8 The general rule is that the amount of an exemption is determined under the law
9 in effect when the creditor's lien attached to the property.³⁴ The general rule
10 should be applied to homesteads, independent of the fortuity of whether a home-
11 stead declaration may have been filed.

12 4. *Continuation of homestead after death.* Section 704.995 provides that the pro-
13 tection of the declared homestead from a creditor having an attachment lien, exe-
14 cution lien, or judgment lien continues after the death of the declared homestead
15 owner if the dwelling was the principal dwelling of the surviving spouse or a
16 member of the decedent's family to whom an interest in the dwelling passes. But
17 subdivision (c) provides that the amount of the exemption is determined under
18 Section 704.730 in the general procedure, depending on the circumstances of the
19 case at the time the amount is required to be determined.³⁵ Where special protec-
20 tion of the family home is appropriate, the probate homestead is the better proce-
21 dure.³⁶ The existing homestead declaration procedure provides no meaningful,
22 additional protection in the case of enforcement proceedings. Section 704.995
23 harks back to a time when the declared homestead created important rights in
24 homestead property that could descend to the survivors even contrary to a testa-
25 mentary disposition.

26 5. *Prima facie evidence.* Section 704.940 provides that the homestead declara-
27 tion is prima facie evidence of the matters stated, which would include the state-
28 ment that the property is the dwelling of the persons listed. Arguably, this provi-
29 sion may put some burden on the judgment creditor in proceedings to sell a

32. See Section 704.965.

33. 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 an exemption is fixed as of the time the creditor's lien is created on the property.

34. Section 703.050.

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

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

1 dwelling. However, the relevant procedural provisions do not shift the burden to
2 the creditor as in the case of a current homeowner's tax exemption or disabled vet-
3 eran's tax exemption.³⁷ While the creditor is required to determine and report
4 whether there is a homestead declaration³⁸ as part of the procedure for obtaining
5 an order for sale of a dwelling, no statutory duty results from the report.

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

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

9 1. *Uncertainty.* The one feature a declared homestead procedure based on filing
10 with the county recorder should have is certainty — yet no one can rely on the
11 validity of a homestead declaration. The filing sits in the records, but has little
12 meaning unless it is tested in execution proceedings. The debtor may have moved
13 to another residence or the debtor's marriage may be dissolved. A later declaration
14 as to different property acts as an abandonment *pro tanto* of the interest of the
15 declarant.³⁹ Thus, if spouses choose to live apart, and a second (or second and
16 third) declaration is recorded, the first declaration becomes meaningless.

17 2. *Illusory protection.* The homestead declaration provides little real protection
18 for the family home. The most important protections (other than the voluntary sale
19 proceeds exemption) are embodied in the automatic homestead. The homestead
20 declaration can only give a false sense of security. In any event, most homeowners
21 have no need for the protection, because most homeowners never become judg-
22 ment debtors. If they do become judgment debtors, the statute should provide
23 essential protections without regard to whether a paper may have been filed at
24 some time in the past.

25 3. *Opportunity for misleading homestead declaration mills.* Anyone who has
26 purchased a house in recent years has probably received one or more solicitations
27 from the homestead declaration mills.⁴⁰ Experience with these dubious operations,
28 whose broadsides typically misrepresent the law, impelled the Legislature to enact
29 a consumer protection statute governing homestead filing services.⁴¹ One operator
30 who ran afoul of the statute mailed approximately four million solicitations in a
31 four-year period *after* enactment of the regulatory statute.⁴² Repeal of the declared

37. See Section 704.780.

38. Section 704.760(b).

39. Section 704.990(a).

40. 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. The text of the solicitation is also set out in Appendix A to *In re Morse*, 11 Cal. 4th 184, 900 P.2d 1170, 44 Cal. Rptr. 2d 620, 637-39 (1995).

41. See Bus. & Prof. Code § 17537.6.

42. See *People v. Morse*, 21 Cal. App. 4th 259, 25 Cal. Rptr. 2d 816 (1993); see also *In re Morse*, 11 Cal. 4th 184, 900 P.2d 1170, 44 Cal. Rptr. 2d 620 (1995).

1 homestead would put an end to the opportunity to profit from causing undue alarm
2 and confusing homeowners throughout the state.

3 **Satisfaction of Other Liens and Encumbrances**

4 The minimum bid in the sale of a homestead must include an amount sufficient
5 to satisfy “all liens and encumbrances on the property.”⁴³ This language is a relic
6 surviving from the time when a judgment lien could not attach if there was a prior
7 homestead declaration on record.⁴⁴ The declaration acted as a complete shield
8 against attachment and judgment liens, but it did not protect against execution on
9 the homestead. Notwithstanding the prior homestead declaration, the creditor
10 could seek enforcement of the money judgment through levy of a writ of execu-
11 tion. If the property was sold on execution without a pre-existing judgment lien in
12 favor of the creditor, there would be no junior liens practically speaking, and *all*
13 the other liens on the property, whether mortgage liens, tax liens, other judgment
14 liens, would be superior to the creditor’s execution lien. If the creditor had won the
15 race to the recorder’s office and the judgment lien had attached first, then there
16 would be no application of the “all liens and encumbrances” language, since the
17 homestead exemption would not apply. Instead, the various lienors would have
18 had an opportunity to engage in several rounds of redemptions, with junior lien-
19 holders redeeming from their seniors and the debtor redeeming where possible.

20 Under existing law, the “all liens and encumbrances” language can act in an
21 arbitrary and unreasonable manner, benefiting the profligate or severely unlucky
22 debtor. If a debtor has enough liens on the property, no creditor can reach it
23 because any creditor would have to pay off all other liens, junior and senior, under
24 the literal terms of the statute. On the other side of the coin, the home of a more
25 responsible debtor would not be as hard to reach.

26 **Recommendations** ⁴⁵

27 *Continuation of voluntary sale proceeds exemption.* The Commission proposes
28 repealing the homestead declaration procedure and amending the automatic home-
29 stead exemption to protect proceeds of a voluntary sale for a six-month period.
30 Dwelling proceeds would be exempt to the extent traceable in deposit accounts
31 and cash or its equivalent, with the burden on the exemption claimant to prove the
32 exemption.

33 *Limitation on use of proceeds.* Exempt proceeds would be held as agreed by the
34 debtor and creditor or deposited in a controlled account, subject to the limitation
35 that the funds could be applied only to a new qualifying homestead or to satisfac-

43. Section 704.800.

44. 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).

45. Additional technical revisions would also be made. These changes are noted in the Comments to the sections in the proposed legislation, *infra*.

1 tion of the judgment. This rule is consistent with the purpose of the exemption to
2 protect a home for the debtor and the debtor’s family. During the six-month
3 period, the exempt fund would continue to be subject to unsatisfied liens on the
4 homestead.

5 *Priority treatment of support enforcement.* The proceeds from a voluntary sale of
6 a homestead should presumptively be subject to enforcement of judgments for
7 child, family, or spousal support. However, if a support obligor has other obliga-
8 tions for child, family, or spousal support, the support obligor should be able to
9 seek a court order on noticed motion for an equitable determination of the extent to
10 which the exemption should apply.⁴⁶

11 *Elimination of “all liens and encumbrances” rule.* The statute should be revised
12 to require satisfaction of *senior* liens and encumbrances, rather than *all* liens and
13 encumbrances on the property, and junior liens would be extinguished, consistent
14 with the general rule applicable to execution sales.

46. This proposal rectifies a confusing aspect of the existing statutes. Under general exemption rules provided in Section 703.070, exemptions apply to enforcement of child, family, or spousal support unless the support obligee obtains an order for the equitable determination of the extent to which the exemption can be applied to the support obligation. However, under Section 704.950(b), a homestead declaration does not apply to a judgment lien created by recording a support judgment. The full implications of this section are unclear, but it has been interpreted in practice to mean that there is no exemption of proceeds of a voluntary sale of a homestead.

PROPOSED LEGISLATION

1 **Bus. & Prof. Code § 17537.6 (repealed). Homestead filing service regulation**

2 SECTION 1. Section 17537.6 of the Business and Professions Code is repealed.

3 ~~17537.6. (a) It is unlawful for any person to make any untrue or misleading~~
4 ~~statements in any manner in connection with the offering or performance of a~~
5 ~~homestead filing service. For the purpose of this section, an “untrue or misleading~~
6 ~~statement” means and includes any representation that any of the following is true:~~

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

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

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

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

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

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

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

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

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

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

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

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

1 ~~THIS HOMESTEAD FILING SERVICE IS NOT ASSOCIATED WITH ANY~~
2 ~~GOVERNMENT AGENCY.~~

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

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

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

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

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

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

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

31 ~~(e) For the purposes of this section, the following definitions apply:~~

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

39 ~~(2) A “homestead declaration” has the meaning described in Article 5~~
40 ~~(commencing with Section 704.910) of Chapter 4 of Division 2 of Title 9 of Part 2~~
41 ~~of the Code of Civil Procedure.~~

1 **Comment.** Former Section 17537.6 is repealed because it is not necessary in view of the repeal
2 of the homestead declaration procedure. See also Code Civ. Proc. § 694.090 (effect of homestead
3 declaration under former law).

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

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

6 ~~487.025. (a) The recording of a homestead declaration (as defined in Section~~
7 ~~704.910) does not limit or affect the right of a plaintiff to attach the declared~~
8 ~~homestead described in the homestead declaration, whether the homestead~~
9 ~~declaration is recorded before or after the declared homestead is attached.~~

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

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

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

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

17 ~~(d) Notwithstanding subdivision (b), a homestead (as defined in Section~~
18 ~~704.710) is exempt from sale to the extent provided in Section 704.800 when it is~~
19 ~~sought to be sold to enforce the judgment obtained in the action in which the~~
20 ~~attachment was obtained.~~

21 **Comment.** Section 487.025 is repealed because it is not necessary in view of the repeal of the
22 homestead declaration procedure. See also Section 694.090 (effect of homestead declaration
23 under former law).

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

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

26 694.090. On and after the operative date January 1, 2001, a declaration of
27 homestead made under prior law pursuant to Title 5 (commencing with Section
28 1237) of Part 4 of Division 2 of the Civil Code ~~is effective only to the extent~~
29 ~~provided in or~~ Article 5 (commencing with Section 704.910) of Chapter 4 of
30 Division 2 of this code is ineffective.

31 **Comment.** Section 694.090 is amended to reflect the repeal of the homestead declaration
32 procedure in Sections 704.910-704.995. The homestead exemption is governed by Sections
33 704.710-704.860. The protection of voluntary sale proceeds under the former homestead
34 declaration procedure is continued in Section 704.720.

35 **Code Civ. Proc. § 703.145 (added). Homestead exemption in bankruptcy**

36 SEC. 4. Section 703.145 is added to the Code of Civil Procedure, to read:

37 703.145. For the purpose of subdivision (a) of Section 703.140, the amount of
38 and qualifications for the homestead exemption shall be determined under Article
39 4 (commencing with Section 704.710) without regard to the procedural rules, the
40 rules governing the rights of judgment creditors, and other limitations and
41 conditions provided by that article.

1 **Comment.** Section 703.145 is new. This section is intended to avoid problems in applying the
2 state homestead exemption in bankruptcy pursuant to Section 703.140. Substantive rules are
3 applied but not procedural rules, since the procedural rules are designed for use in state money
4 judgment enforcement proceedings. For bankruptcy purposes, only the substantive rules
5 governing the homestead exemption are borrowed. Thus, the amount of the exemption is
6 determined based on the bankrupt's personal circumstances under Section 704.730. If proceeds
7 are claimed as exempt in bankruptcy proceedings, the protection provided in Section 704.720
8 would apply, but is not limited to six months or for the purpose of purchasing another qualifying
9 homestead. Similarly, the rules concerning creditors' rights and agreements between debtors and
10 creditors should not apply in the bankruptcy context.

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

12 SEC. 5. Section 704.720 of the Code of Civil Procedure is amended to read:

13 704.720. (a) A homestead is exempt from enforcement of a money judgment as
14 provided in this article and is exempt from sale under this division to the extent
15 provided in Section 704.800.

16 (b) The proceeds from a disposition of a homestead are exempt for the purpose
17 of purchasing another qualifying homestead under the following conditions:

18 (1) If a homestead is sold under this division or is damaged or destroyed or is
19 acquired for public use, the proceeds of sale or of insurance or other
20 indemnification for damage or destruction of the homestead or the proceeds
21 received as compensation for a homestead acquired for public use are exempt in
22 the amount of the homestead exemption provided in Section 704.730. ~~The~~
23 ~~proceeds are exempt~~ for a period of six months after the ~~time~~ date the proceeds are
24 actually received by or become payable in an amount certain to the judgment
25 debtor, whichever is the earlier date except that, if a homestead exemption is
26 applied to other property of the judgment debtor or the judgment debtor's spouse
27 during that period, the proceeds thereafter are not exempt.

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

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

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

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

1 (e) Except as otherwise agreed by the judgment debtor and judgment creditor, if
2 an exemption is claimed for proceeds under this section, the proceeds shall be held
3 in a controlled deposit account, subject to the judgment creditor's lien, and the lien
4 on the dwelling shall be released. At any time during the applicable six-month
5 exemption period provided in subdivision (b), the court shall, on noticed motion of
6 the judgment debtor, make an order applying all or part of the proceeds to the
7 purchase of another dwelling that qualifies for a homestead exemption under this
8 article. Unless the judgment debtor purchases another dwelling that qualifies for a
9 homestead exemption under this article during the six-month exemption period,
10 the court, on noticed motion, shall order the proceeds applied to the satisfaction of
11 the judgment.

12 (f) The proper court for filing motions under this section is the court where an
13 application for an order of sale of the dwelling would be made under Section
14 704.750.

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

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

21 Subdivision (d) is a new provision that implements the application of the general rule on
22 equitable division of exemptions in Section 703.070 in a situation where the judgment debtor has
23 multiple support obligees. Unlike the general rule, however, subdivision (d) places the burden on
24 the judgment debtor to file the motion and seek the court order.

25 Subdivision (e) provides a new procedure for claiming the proceeds exemption and restricting
26 the availability of the funds to the purpose of acquiring a new homestead. Accordingly, during the
27 six-month period during which proceeds are exempt, the money is held in a controlled account for
28 the sole purpose of purchasing another homestead that qualifies under this article. The judgment
29 creditor's lien priority is preserved on the proceeds during the six-month period. If the proceeds
30 have been levied upon after they were received by the judgment debtor, such as in a case where
31 the debtor has deposited the proceeds in a deposit account, the general exemption procedure
32 following levy of execution is applicable. See Section 703.510 *et seq.* The tracing rules in Section
33 703.080 apply to determine the extent to which a fund contains the exempt proceeds from
34 disposition of a homestead.

35 Subdivision (f) specifies the proper court for proceedings under this section.

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

44 Subdivision (b)(1) provides an exemption for proceeds of an execution sale of a homestead, for
45 proceeds from insurance or indemnification for the damage or destruction of a homestead, and for
46 an eminent domain award or proceeds of a sale of the homestead for public use. Subdivision
47 (b)(1) supersedes portions of former Civil Code Sections 1256 and 1265 and of former Code of
48 Civil Procedure Sections 690.8 and 690.31(k). The exemption for insurance proceeds was not
49 found in former law. *But see* Houghton v. Lee, 50 Cal. 101, 103 (1875) (insurance proceeds for
50 destruction of declared homestead exempt).

1 Subdivision (c) is new. The spouses may select which of the homesteads is exempt. If the
2 spouses are unable to agree, the court determines which homestead is exempt. See Section
3 703.110 (application of exemptions to marital property). Note that a married person may, after a
4 decree of legal separation or an interlocutory judgment of dissolution of marriage, be entitled to a
5 homestead in his or her own right, and this right is not affected by subdivision (c). See Section
6 704.710(d) (“spouse” defined) & Comment.

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

8 SEC. 6. Section 704.760 of the Code of Civil Procedure is amended to read:

9 704.760. The judgment creditor’s application shall be made under oath, shall
10 describe the dwelling, and shall contain all of the following:

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

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

20 (c) A statement of the amount of any liens or encumbrances on the dwelling, the
21 name of each person having a lien or encumbrance on the dwelling, and the
22 ~~person’s address of such person~~ person’s address used by the county recorder for the return of the
23 instrument creating ~~such the~~ the person’s lien or encumbrance after recording.

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

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

28 SEC. 7. Section 704.780 of the Code of Civil Procedure is amended to read:

29 704.780. (a) The burden of proof at the hearing is determined in the following
30 manner:

31 (1) If the records of the county tax assessor indicate that there is a current
32 homeowner’s exemption or disabled veteran’s exemption for the dwelling claimed
33 by the judgment debtor or the judgment debtor’s spouse, the judgment creditor has
34 the burden of proof that the dwelling is not a homestead. If the records of the
35 county tax assessor indicate that there is not a current homeowner’s exemption or
36 disabled veteran’s exemption for the dwelling claimed by the judgment debtor or
37 the judgment debtor’s spouse, the burden of proof that the dwelling is a homestead
38 is on the person who claims that the dwelling is a homestead.

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

42 (b) The court shall determine whether the dwelling is exempt. If the court
43 determines that the dwelling is exempt, the court shall determine the amount of the

1 homestead exemption and the fair market value of the dwelling. The court shall
2 make an order for sale of the dwelling subject to the homestead exemption, unless
3 the court determines that the sale of the dwelling would not be likely to produce a
4 bid sufficient to satisfy any part of the amount due on the judgment pursuant to
5 Section 704.800. The order for sale of the dwelling subject to the homestead
6 exemption shall specify the amount of the proceeds of the sale that is to be
7 distributed pursuant to Section 704.850 to each person having a lien or
8 encumbrance on the dwelling that is superior to the judgment creditor's lien, and
9 shall include the name and address of each such person. Subject to the provisions
10 of this article, the sale is governed by Article 6 (commencing with Section
11 701.510) of Chapter 3. If the court determines that the dwelling is not exempt, the
12 court shall make an order for sale of the property in the manner provided in Article
13 6 (commencing with Section 701.510) of Chapter 3.

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

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

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

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

27 SEC. 8. Section 704.800 of the Code of Civil Procedure is amended to read:

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

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

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

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

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

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

6 SEC. 9. Section 704.840 of the Code of Civil Procedure is amended to read:

7 704.840. (a) Except as provided in subdivision (b), the judgment creditor is
8 entitled to recover reasonable costs incurred in a proceeding under this article.

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

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

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

16 SEC. 10. Section 704.850 of the Code of Civil Procedure is amended to read:

17 704.850. (a) The levying officer shall distribute the proceeds of sale of a
18 homestead in the following order:

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

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

23 (3) To the levying officer for the reimbursement of the levying officer’s costs for
24 which an advance has not been made.

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

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

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

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

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

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

36 **Comment.** Subdivision (a)(1) of Section 704.850 is amended for consistency with Section
37 704.800. The words “if any” are deleted as surplus. A new subdivision (a)(5) is added to permit
38 junior creditors whose liens will be extinguished pursuant to Section 704.860 to seek satisfaction
39 from any excess proceeds at the sale, by delivering a writ of execution and levy instructions to the
40 levying officer. This procedure is consistent with the general rule in Section 701.810(g)
41 (distribution of proceeds of sale or collection). Note that under the rule in Section 704.800(a) the
42 items listed in paragraphs (1) and (2) of subdivision (a) are of equal priority since the homestead

1 may not be sold unless all senior liens and encumbrances are satisfied and the judgment debtor
2 receives the full amount of the applicable exemption.

3 **Revised Background Comment (1982).** Subdivision (a) of Section 704.850 continues the
4 priority of distribution of proceeds provided by subdivision (j) of former Section 690.31 and of
5 former Civil Code Section 1255. This section is an exception to the general rules on distribution
6 of proceeds provided by Section 701.810. Liens and encumbrances required to be satisfied under
7 subdivision (a)(1) include not only preferred labor claims to be satisfied pursuant to Section 1206
8 and the amount of any state tax lien (as defined in Government Code Section 7162) but also any
9 other liens and encumbrances with priority over the judgment creditor's lien.

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

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

14 SEC. 11. Section 704.860 is added to the Code of Civil Procedure, to read:

15 704.860. If property is sold pursuant to this article, the lien under which it is sold
16 and any liens subordinate thereto on the property sold are extinguished.

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

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

20 SEC. 12. Article 5 (commencing with Section 704.910) of Chapter 4 of Division
21 2 of Title 9 of Part 2 of the Code of Civil Procedure is repealed.

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

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

25 SEC. 13. Section 7170 of the Government Code is amended to read:

26 7170. (a) Except as provided in subdivisions (b) and (c), a state tax lien attaches
27 to all property and rights to property whether real or personal, tangible or
28 intangible, including all after-acquired property and rights to property, belonging
29 to the taxpayer and located in this state. ~~A state tax lien attaches to a dwelling~~
30 ~~notwithstanding the prior recording of a homestead declaration (as defined in~~
31 ~~Section 704.910 of the Code of Civil Procedure).~~

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

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

38 (2) A holder of a security interest.

39 (3) A mechanic's lienor.

40 (4) A judgment lien creditor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

39 SEC. 14. Section 6528 of the Probate Code is repealed.

40 ~~6528. Nothing in this chapter terminates or otherwise affects a declaration of~~
41 ~~homestead by, or for the benefit of, a surviving spouse or minor child of the~~
42 ~~decedent with respect to the community, quasi-community, or common interest of~~

1 ~~the surviving spouse or minor child in property in the decedent's estate. This~~
2 ~~section is declaratory of, and does not constitute a change in, existing law.~~

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

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 declaration**

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.

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REVISED COMMENT

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

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

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

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

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

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