#D-310 3/15/79

Memorandum 79-9

Subject: Study D-310 - Homesteads (Probate homestead and related matters)

The Commission has tentatively determined in its enforcement of judgments study to eliminate the declared homestead exemption in reliance on a claimed dwelling exemption made at the time execution is sought. In connection with this decision, the Commission is investigating the feasibility of eliminating the other aspects of the declared homestead--its effect on alienability of land and the survivorship right in homestead property. A copy of the draft statute to accomplish this is attached as Exhibit 1 (pink). A number of specific problems have arisen under the draft.

Alienability of Land

The Commission has found that the declared homestead protects the family dwelling from conveyance or encumbrance except with the consent of both spouses and that, if the declared homestead were eliminated, the same protection would be in effect provided as to a community property dwelling by the community property laws. See Civil Code § 5127. Where the family dwelling is on the separate property of one of the spouses, however, the question remains whether the homestead protection against conveyance or encumbrance should be retained.

The homestead laws in the past have limited the ability to declare a homestead on the separate property of a spouse. Where the spouses made a home on the separate property of the wife, the husband could not declare a homestead interest in the separate property without the consent of the wife. It was only where the home was on the separate property of the husband that the wife was allowed unilaterally to impose a homestead on the husband's separate property. This scheme derives from a time when the husband was the head of the household, had the management and control of the community property, and had a correspondingly greater duty to support the wife.

This scheme was reflected in the laws governing rights of spouses in community and separate property. At that time, a wife could convey her separate property without the consent of the husband, but not vice

versa. See former Civil Code §§ 162 and 163. The recent reforms in the law governing marital property have abandoned this protective scheme and allow either spouse to freely dispose of his or her own separate property. See, e.g., Civil Code §§ 5107 and 5108 (each spouse may, without the consent of the other spouse, convey his or her separate property).

After the community property laws were revised, the right to declare a homestead in the other spouse's separate property was made nondiscriminatory by permitting either spouse to declare a homestead in the separate property of the other without the other's consent. The discriminatory aspect could also have been eliminated by requiring that the owner of separate property, whether husband or wife, must join in its designation as a homestead. The staff has attempted to ascertain the intent of the revisors in making the choice that appears to conflict with present concepts of marital property rights by restricting a spouse's rights over his or her own separate property.

The legislation to equalize the rights of spouses was enacted in 1976. It originated in the Joint Committee on Legal Equality. As originally proposed, the legislation would have prevented either spouse from declaring a homestead on the separate property of the other spouse without the consent of the other spouse. This was proposed for consistency with the community property equalizing changes. The statement of the Joint Committee to the Assembly Judiciary Committee, where the bill was first presented, points out that the bill "amends these laws to reflect the recent changes in the community property laws. The bill provides that either spouse or both acting jointly have the right to select the homestead and that the separate property of either is subject to homestead selection with the consent of the owning spouse." An additional reason the Joint Committee initially recommended retention of the consent requirement was that the credit rating of the owning spouse is adversely affected by a homestead. The Joint Committee report states, "This policy should be preserved as the credit rating of a person can be affected by homesteading and the spouse owning the separate property should be duly notified of and participate in such action."

In the Assembly Judiciary Committee, concern was expressed that a spouse should be able to protect the dwelling from the claims of creditors even though the dwelling is the separate property of the other

spouse, according to the Joint Committee's consultant. So the bill was amended to provide that either spouse could declare a homestead on the separate property of the other spouse without the consent of the other spouse.

When the bill arrived in the Senate Judiciary Committee, concern was expressed that the amendment to permit a homestead for purposes of protection against creditors might also affect the rights of the spouses to deal with their own separate property and might affect survivorship rights in the property. So the bill was amended to provide that, "The declaration of a homestead shall not affect the property rights of spouses as between themselves other than as provided by this title." The Joint Committee consultant's report to Senator Rains, chairman of the Joint Committee, states, "we allow each party to homestead the separate property of the other spouse; this right does not change the nature of the property between the couple and does not make it community property. We so provided, but the bill was amended in Senate Judiciary: The language must provide that the homestead is for the benefit of the spouse who owns the property (and does not affect his property rights) as well as the other spouse against creditors."

One can question whether the amendments actually effectuate the apparent intent of the Legislature, and there was some concern expressed at the time about the meaning and effect of, and the ambiguities in, the language of the amendments. But the legislation was enacted nonetheless as Chapter 463 of the Statutes of 1978, and the relevant language was embodied in Civil Code Sections 1238 and 1263.

The policy of permitting one spouse to protect the separate property family dwelling of the other spouse from creditors can be achieved despite the repeal of the declared homestead by permitting either spouse to claim the dwelling exemption provided in the enforcement of judgments statute. A provision to permit this is not included in our present draft of the statute, pending receipt of our consultant's study on property and exemption rights of spouses on execution. The staff recommends that, regardless what policy we eventually adopt in this area generally, a provision should be included to permit a nondebtor spouse to claim the dwelling exemption when the dwelling is being levied on under execution.

The opportunity to unilaterally declare a homestead in the other spouse's property for purposes of affecting the ownership rights of the spouse should not be preserved, however. It is not only inconsistent with modern notions of interspousal rights and with the intent of the homestead revisors, but also seems divisive and implies spousal disagreement.

Protection of the rights of spouses and preservation of a family home can be achieved directly without the burdensome and rigid device of the homestead declaration. The spouses are mutually obligated to support each other, and a spouse must support the other spouse while they are living together out of the separate property of the spouse when there is no community property or quasi-community property. Civil Code §§ 5100, 5132; see also Section 5121 (separate property of spouse liable for debts of other spouse incurred for necessaries). The basic right of the spouses to preservation and occupation of the family home is stated in the Family Law Act:

> Civil Code § 5102. Neither husband nor wife has any interest in the separate property of the other, but neither can be excluded from the other's dwelling except as provided in [the provisions relating to annulment and dissolution], upon application of either party in the manner provided by Section 527 of the Code of Civil Procedure, the court may order the temporary exclusion of either party from the family dwelling of the other upon a showing that physical or emotional harm would otherwise result, until the final determination of the proceeding.

These provisions implement the same policy as the homestead laws--to further the security of the family home. The staff believes that the homestead declaration on the separate property of a nonconsenting spouse is unnecessary and that, as a matter of policy, a spouse should not be permitted to restrain the alienation of the other spouse's separate property. Thus, the obligation of the spouses mutually to support each other and provide a dwelling would not need to be satisfied out of particular property but would be a general charge upon all community and separate assets of the spouses. The staff believes this is a more satisfactory state of affairs.

Survivorship Right

The Commission has tentatively determined that the survivorship rights in a declared homestead should be supplanted by the probate

homestead, pursuant to which the probate court sets apart a dwelling for the surviving spouse and minor children even though no inter vivos homestead has previously been declared. This decision was also recommended in an early Commission report and by the Commission's homestead consultant, Mr. Charles Adams. We have received a letter from Mr. Adams, attached as Exhibit 2 (yellow), discussing three problems in the probate homestead. The letter is addressed to the version of the draft statute considered by the Commission at the February 1979 meeting.

Mr. Adams' first point relates to Probate Code Section 735, which requires liens and encumbrances on property set apart as a homestead to be satisfied out of estate assets. Section 735 currently applies to declared homesteads only and not to probate homesteads. Mr. Adams recommends that Section 735 be repealed and not be applied to probate homesteads. The Commission discussed this point at the February 1979 meeting and determined to recommend the repeal of Section 735. The draft statute includes a repealer for Section 735.

Mr. Adams' second point relates to the property out of which the probate homestead may be set aside. Existing Probate Code Section 661 requires that the homestead be selected out of the community or quasi-community property or property held in common by the decedent and the person entitled to the homestead; if there is no property of this type, the homestead may be selected out of the separate property of the decedent. Mr. Adams points out that, under the case law, the court may select the homestead out of separate property of the decedent notwithstanding the existence of suitable community property if the separate property is most appropriate for the surviving spouse. Mr. Adams suggests that the discretion of the court should be incorporated in the statute. The staff has revised the draft of Sections 661(b) and 664 to do this.

Mr. Adams' third point relates to the interest acquired by the probate homestead recipients. Under existing Probate Code Section 667, if the homestead is selected from community property, it vests in fee in the surviving spouse and minor children. But, under Section 661, if the homestead is selected from separate property of the decedent, the court can set it apart only for a limited period, not to exceed the lifetime of the surviving spouse or the minority of minor children. Mr. Adams

suggests that the surviving spouse and minor children should not be limited in the estate they acquire merely because the homestead is selected out of separate property. This point goes to the heart of the probate homestead policy and is analyzed separately below.

Revision of Probate Homestead?

The probate homestead serves the same policy as the survivor's right in the declared homestead--it provides a secure dwelling for the family and its surviving members. In fact, by statute a probate homestead may be set apart by the court only if there is no survivor's right in a declared homestead. Prob. Code § 661. A good analysis of the probate homestead and its policies, and a comparison of the probate homestead with the declared homestead, is found in Comment, The Probate Homestead in California, 53 Calif. L. Rev. 655 (1965), a copy of which is attached as Exhibit 3 (green).

The question arises, if the purpose of the homestead is to provide a secure dwelling for the survivors of the decedent, why should the quantum of interest taken by the survivors vary with the character of the property in the decedent's estate? Is not the interest of the survivors the same whether the homestead is selected out of community or separate property of the decedent? This is the question raised by Mr. Adams.

The easy answer is that the probate homestead developed as a substitute for the declared homestead. Since the survivor's right in the declared homestead applies where the homestead is on community property but not where the homestead is on separate property, the probate homestead law simply follows this rule. To trace the history of the rule is not necessarily to justify it, however.

It appears to the staff (as it does to the author of the attached article) that there are a number of disadvantages of giving the homestead recipients a fee interest in the property set aside, whether the property is community or separate property in the decedent's estate. As a general rule, the probate homestead operates to frustrate the estate plan of the decedent. The occasion for a probate homestead on community property does not arise where the property passes by intestate succession to the surviving spouse or where the decedent wills his or her interest in the community property to the surviving spouse. The homestead comes into play only where the decedent makes a testamentary disposition otherwise.

A common provision in a will is a trust for the lifetime of the surviving spouse with remainder to other beneficiaries, perhaps children of a previous marriage of the decedent. The probate homestead can effectively destroy this estate plan by giving the surviving spouse a fee interest and leaving the other beneficiaries nothing. This in effect substitutes the surviving spouse's ultimate disposition of the property for the decedent's. There are other adverse effects of the probate homestead in such a situation. The property may have to pass through probate twice--once through the decedent's estate and again through the surviving spouse's estate. And there are adverse tax consequences as well--a probate homestead that vests in fee will consume some or all of the marital deduction. And if it passes through two estates, it will be subject to death taxes twice.

Another curious feature of the probate homestead is the manner in which it treats surviving children. A community property homestead vests in the surviving minor children, but not in surviving adult children. Where the decedent leaves both minor and adult children, the probate homestead can not only treat the children inequitably by vesting some property in the minors and none in the adults, but can also frustrate the decedent's efforts to treat them equitably.

None of these problems occur where the probate homestead is set apart out of the decedent's separate property. The statute gives the court discretion, which the court in fact exercises, to set the homestead apart for a limited term; the term cannot exceed the lifetime of the surviving spouse or the minority of minor children.

Both the staff and the author of the attached article believe that the statutory treatment of the separate property homestead is more sensible than the treatment of the community property homestead. A term of years for the survivors satisfies the basic policy of providing a secure dwelling for the survivors during their time of need. It also effectuates to the greatest extent practical the basic policy of the state probate laws to permit a decedent full testamentary powers over the decedent's separate property and interest in community property. It does not have the adverse probate and tax features of a homestead set apart in fee.

The staff recommends that the Commission draft legislation to reform the probate homestead, as long as we are working in this area. The staff would like to see a scheme whereby the court has absolute discretion to set apart a homestead in accordance with the needs of the survivors, for a term not to exceed the lifetime of the surviving spouse or the minority of minor children. Factors the court would take into account in exercising its discretion would include the estate plan of the decedent and the needs of the frustrated heirs and devisees. Such a provision would look like Section 664 of our draft statute.

Other features of the revision would include: (1) The homestead could be set apart for the surviving spouse, minor children, or other dependents who the decedent had a legal obligation to support. (2) There would be no preference for community or separate property in selecting the homestead, but the court would select the most appropriate property in the decedent's estate under the circumstances. (3) The right of occupancy of the homestead would not be subject to claims of creditors during probate administration or the subsequent period of occupancy; the remainder interest would be subject to claims of creditors. (4) The court would have jurisdiction to modify the order setting apart a homestead in case of changed circumstances. (5) After termination of the homestead interest, the property would vest in accordance with the testamentary disposition of the decedent or the laws of intestate succession.

If the Commission approves this proposal, we will prepare a tentative recommendation relating to probate homesteads for consideration at the next Commission meeting. This proposal would be distributed for comment independently of the enforcement of judgments recommendation, out of which this proposal has grown.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

DECLARED HOMESTEAD

Civil Code §§ 1237-1304 (repealed). Homesteads

SEC. . Title 5 (commencing with Section 1237) of Part 4 of Division Second of the Civil Code is repealed.

Comment. Sections 1237 through 1304 relating to the declared homestead are not continued. As an exemption from execution (former Section 1240), the declared homestead is superseded by the claimed exemption for a dwelling. See Code Civ. Proc. §§ 707.810-707.860. As a right of survivorship (former Section 1265), the declared homestead is superseded by the probate homestead. See Prob. Code §§ 660-667. As a restraint on the ability to convey, encumber, or partition property (former Sections 1240 and 1242), the declared homestead is superseded by more general provisions governing conveyance, encumbrance, and partition of community and separate property and imposing obligations of spouses for mutual support and to provide a dwelling; the ability of one spouse to affect the separate property of the other spouse is not continued. See Civil Code §§ 5107 (wife may convey separate property without consent of husband), 5108 (husband may convey separate property without consent of wife), 5125 (spouse may not convey or encumber community personal property used as a dwelling without written consent of other spouse), 5127 (both spouses must join in conveyance or encumbrance of community real property), 5100 (spouses' obligation of mutual support), 5102 (right to occupy dwelling of spouse); Code Civ. Proc. § 872.210(b) (no partition of community property).

8382

DIVISION OF PROPERTY

Civil Code § 4800 (amended)

SEC. . Section 4800 of the Civil Code is amended to read:

4800. (a) Except upon the written agreement of the parties, or an oral stipulation of the parties in open court, the court shall, either in its interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties ~~, including any such property from which a homestead has been selected,~~ equally. For purposes of making such division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days' notice by the moving party

to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community property and the quasi-community property of the parties in an equitable manner.

(b) Notwithstanding subdivision (a), the court may divide the community property and quasi-community property of the parties as follows:

(1) Where economic circumstances warrant, the court may award any asset to one party on such conditions as it deems proper to effect a substantially equal division of the property.

(2) As an additional award or offset against existing property, the court may award, from a party's share, any sum it determines to have been deliberately misappropriated by such party to the exclusion of the community property or quasi-community property interest of the other party.

(3) If the net value of the community property and quasi-community property is less than five thousand dollars ($5,000) and one party cannot be located through the exercise of reasonable diligence, the court may award all such property to the other party on such conditions as it deems proper in its final judgment decreeing the dissolution of the marriage or in its judgment decreeing the legal separation of the parties.

(4) Educational loans shall be assigned to the spouse receiving the education in the absence of extraordinary circumstances rendering such an assignment unjust.

(c) Notwithstanding the provisions of subdivision (a), community property personal injury damages shall be assigned to the party who suffered the injuries unless the court, after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages, and all other facts of the case, determines that the interests of justice require another disposition. In such case, the community property personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just, except that at least one-half of such damages shall be assigned to the party who suffered the injuries. As used in this subdivision, "community property personal injury damages" means all

money or other property received by a married person as community property in satisfaction of a judgment for damages for his or her personal injuries or pursuant to an agreement for the settlement or compromise of a claim for such damages, unless such money or other property has been commingled with other community property.

(d) The court may make such orders as it deems necessary to carry out the pruposes of this section.

Comment. Section 4800 is amended to reflect the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

8384

Civil Code § 4810 (amended)

SEC. . Section 4810 of the Civil Code is amended to read:

4810. The disposition of the community and quasi-community property, ~~of the quasi-community property and of the homestead,~~ as above provided, is subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the court.

Comment. Section 4810 is amended to reflect the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

12/344

COMMUNITY PERSONAL PROPERTY

Civil Code § 5125 (amended)

SEC. . Section 5125 of the Civil Code is amended to read:

5125. (a) Except as provided in subdivisions (b), (c), and (d) and Sections 5113.5 and 5128, either spouse has the management and control of the community personal property, whether acquired prior to or on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.

(b) A spouse may not make a gift of community personal property or dispose of community personal property without a valuable consideration, without the written consent of the other spouse.

(c) A spouse may not sell, convey, or encumber community personal property used as a dwelling, the furniture, furnishings, or fittings of

the home, or the clothing or wearing apparel of the other spouse or minor children which is community personal property, without the written consent of the other spouse.

(d) A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest.

(e) Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property.

Comment. Section 5125 is amended to limit the disposition of personal property used as a dwelling, such as a mobilehome. Cf. Code Civ. Proc. § 707.810 ("dwelling"). This change accommodates the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

405/844

PARTNERSHIPS

Corporations Code § 15025 (amended)

SEC. . Section 15025 of the Corporations Code is amended to read:

15025. (1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment, or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the ~~homestead or~~ exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property

vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin, and is not community property.

Comment. Section 15025 is amended to delete the reference to rights under the homestead laws. The declared homestead is eliminated in favor of a claimed exemption. See Comment to former Civil Code §§ 1237 through 1304.

18/321

SUCCESSION

Probate Code § 228 (amended)

SEC. . Section 228 of the Probate Code is amended to read:

228. If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was community property of the decedent and a previously deceased spouse, and belonged or went to the decedent by virtue of its community character on the death of such spouse, or came to the decedent from said spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead prior to January 1, 1981 , or in a joint tenancy between such spouse and the decedent or was set aside as a probate homestead, such property goes in equal shares to the children of the deceased spouse and their descendants by right of representation, and if none, then one-half of such community property goes to the parents of the decedent in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and their descendants by right of representation, and the other half goes to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of said deceased spouse and to their descendants by right of representation.

If any of the property subject to the provisions of this section would otherwise escheat to this state because there is no relative, including next of kin, of one of the spouses to succeed to such portion of

the estate, such property shall be distributed in accordance with the provisions of Section 196.4 of this code.

Comment. Section 228 is amended to reflect the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

10/920

Probate Code § 229 (amended)

SEC. . Section 229 of the Probate Code is amended to read:

229. (a) If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead prior to January 1, 1981 or in a joint tenancy between such spouse and the decedent, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then to the parents of the deceased spouse, in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of the deceased spouse and to their descendants by right of representation.

(b) If the decedent leaves neither issue nor spouse, that portion of the estate created by gift, descent, devise, or bequest from the separate property of a parent or grandparent shall go to the parent or grandparent who made such gift, devise, or bequest or from whom the property descended, or if such parent or grandparent is dead, such property shall go in equal shares to the heirs of such deceased parent or grandparent.

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

Comment. Section 229 is amended to reflect the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

PROBATE HOMESTEAD

Probate Code § 660 (amended)

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

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

(b) Upon the filing of the inventory ~~Thereupon~~ , or at any subsequent time during the administration, the court, on petition therefor, may in its discretion set apart to the surviving spouse, or, in case of his or her death, to the minor child or children of the decedent, all or any part of the property of the decedent exempt from execution, and must select and set apart ~~the~~ a homestead ~~selected by the spouses, or either of them, and recorded while both were living, other than a married person's separate homestead,~~ in the manner provided in this article.

Comment. The provisions of Section 660 that related to the declared homestead are deleted in recognition of the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

10/916

Probate Code § 661 (amended)

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

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

(b) The homestead shall be suitable for use as a dwelling and shall be selected out of the community or quasi-community property or out of ~~real~~ property owned in common by the decedent and the person or persons entitled to have the homestead set apart, or ~~if there be no community~~

~~property or quasi-community property and no such property owned in common, then~~ , subject to Section 664, out of the separate property of the decedent.

(c) Notwithstanding Section 667, if ~~If~~ the property set apart is the separate property of the decedent, the court can set it apart only for a limited period, to be designated in the order, and in no case beyond the lifetime of the surviving spouse, or, as to a child, beyond its minority ~~; and, subject to such~~ . Subject to the homestead right, ~~the~~ such property remains subject to administration.

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

Comment. The provisions of Section 661 that related to the declared homestead are deleted in recognition of the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304. The provision of Section 661 that related to recordation is continued in Section 1222.

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

Subdivision (b) and Section 666, which continue the former last paragraph of Section 661, do not require that the homestead be selected out of real property. The homestead may be selected out of personal property such as a mobilehome. Cf. Code Civ. Proc. § 707.810 ("dwelling").

Subdivision (b) codifies the rule that the court may select a homestead out of separate property of the decedent despite the availability of community or tenancy-in-common property. See Estate of Raymond, 137 Cal. App.2d 134, 289 P.2d 890 (1935). However, the court must give first preference to community or jointly-held property. See Section 664.

405/331

Probate Code § 662 (no change)

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

Note. There is no change in this section; it is set out merely for completeness.

Probate Code § 663 (repealed)

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

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

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

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

Comment. Section 663 is repealed in recognition of the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

100/939

Probate Code § 663 (added)

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

663. (a) Except to the extent that the dwelling is exempt as provided in Article 4 (commencing with Section 707.810) of Chapter 7 of Title 9 of Part 2 of the Code of Civil Procedure, during administration of the estate the property set apart as a homestead is subject to claims against the estate and to liens and encumbrances on the property.

(b) After distribution, the property set apart as a homestead is subject to enforcement of a money judgment to the same extent as any other property of a similar character.

Comment. Section 663 codifies the rule that the probate homestead is liable for debts except to the extent of the homestead exemption. See, e.g., Estate of Huelsman, 127 Cal. 275, 59 P. 776 (1899) (probate homestead does not impair or destroy mortgage or other lien on property); Keyes v. Cyrus, 100 Cal. 322, 34 P. 722 (1893) (probate homestead exempt to the same extent and in the same manner as declared homestead); see also former Section 663. For purposes of the rights of creditors, this section implements the policy of treating uniformly property in probate and property not in probate.

100/968

Probate Code § 664 (repealed)

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

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

Comment. Section 664 is repealed in recognition of the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

Probate Code § 664 (added)

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

664. In selecting the homestead, the court shall consider the needs of the surviving spouse and minor children, the value of the property, the liens and encumbrances on the property, the financial condition of the decedent's estate, the claims of creditors, the estate plan of the decedent, and the needs of the heirs and devisees of the decedent. The property selected as a homestead shall be the most appropriate property available in light of the foregoing considerations and other relevant considerations, as determined by the court in its discretion, giving first preference to the community or quasi-community property or property owned in common by the decedent and the person entitled to have the homestead set apart.

Comment. Section 664 codifies the principle of existing law that the court has broad discretion in selecting the homestead and may take into account a wide variety of factors in exercising its discretion. See, e.g., Estate of Barkley, 91 Cal. App. 388, 267 P. 148 (1928); Estate of Claussenius, 96 Cal. App.2d 600, 216 P.2d 485 (1950). The court may select the homestead out of the separate property of the decedent but must give a preference to community or tenancy-in-common property. See Section 661 and Comment thereto.

Under Section 664, unlike former Sections 664-666, there is no appraisal and division procedure required. The court will have available the appraised value of all the property returned in the inventory, and may select accordingly. If property selected has an excess value above the dwelling exemption, it may be subject to creditors' claims. See Section 663 and Comment thereto.

Probate Code § 665 (repealed)

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

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

Comment. Section 665 is repealed in recognition of the elimination of the declared homestead law. See Comment to former Civil Code §§ 1237 through 1304.

Probate Code § 665 (added)

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

665. If property selected as a homestead was given by will to persons other than the residuary devisees or legatees, the court may make such provision out of the estate as it deems appropriate for such persons under the circumstances of the case, including, but not limited to, requiring proportionate contribution to such persons by the other devisees and legatees, conditioning the selection of the property upon assignment of other property to such persons by the surviving spouse and minor children, or adopting some other apportionment consistent with the intention of the testator.

Comment. Section 665 is added to authorize the court to attempt to minimize the disruptive effect on the decedent's estate plan of setting apart a homestead. The court is permitted, but not required, to make such an effort. Disruption of the estate plan is a more likely occurrence with the elimination of the survivor's right in a declared homestead and reliance on the probate homestead.

The court may take into account the decedent's estate plan in making the initial selection of property to set apart as the homestead. Section 664. Section 665 gives the court broad discretion in abating the shares of devisees and legatees, based on the statutory authority of Sections 91 (pretermitted heirs) and 753 (sale of asset of devisee). Although the court may condition the selection of particular property on the willingness of the homestead recipients to make offsetting assignments of property, the court does not have discretion to refuse to set apart a homestead altogether. See Section 660(b).

Probate Code § 666 (repealed)

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

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

Comment. Section 666 is repealed in recognition of the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

Probate Code § 666 (added)

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

666. As used in this article:

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

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

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

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

Comment. Section 666 continues the substance of the former last paragraph of Section 661, which incorporated by reference former Civil Code Section 1237.5. Unlike former Civil Code Section 1237.5, however, Section 666 applies to personal property as well as real property. The homestead may be selected out of personal property such as a mobilehome. Cf. Code Civ. Proc. § 707.810 ("dwelling").

Probate Code § 667 (amended)

SEC. . Section 667 of the Probate Code is amended to read:

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

Comment. The provisions of Section 667 that related to the declared homestead are deleted in recognition of the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

28/837

Probate Code § 668 (repealed)

SEC. Section 668 of the Probate Code is repealed.

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

Comment. Section 668 is repealed in recognition of the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

28/838 N/Z

Probate Code § 735 (repealed)

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

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

Comment. Former Section 735 was limited to the survivor's right in a declared homestead. See, e.g., McGahey v. Forrest, 109 Cal. 63, 41 P. 817 (1895) (predecessor statute). It is repealed in recognition of the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

28/839

Probate Code § 1200 (amended)

SEC. . Section 1200 of the Probate Code is amended to read:

1200. Upon the filing of the following petitions:

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

(2) A petition to set apart a homestead or exempt property;

(3) A petition relating to the family allowance filed after the return of the inventory;

(4) A petition for leave to settle or compromise a claim against a debtor of the decedent or a claim against the estate or a suit against the executor or administrator as such;

(5) A petition for the sale of stocks or bonds;

(6) A petition for confirmation of a sale or a petition to grant an option to purchase real property;

(7) A petition for leave to enter into an agreement to sell or give an option to purchase a mining claim or real property worked as a mine;

(8) A petition for leave to execute a promissory note or mortgage or deed of trust or give other security;

(9) A petition for leave to lease or to exchange property, or to institute an action for the partition of property;

(10) A petition for an order authorizing or directing the investment of money;

~~(11) A report of appraisers concerning a homestead;~~

~~(12)~~ (11) An account of an executor or administrator or trustee;

~~(13)~~ (12) A petition for partial or ratable or preliminary or final distribution;

~~(14)~~ (13) A petition for the delivery of the estate to a nonresident;

~~(15)~~ (14) A petition for determination of heirship or interests in an estate;

~~(16)~~ (15) A petition of a trustee for instructions;

~~(17)~~ (16) A petition for the appointment of a trustee;

~~(18)~~ (17) Any petition for letters of administration or for probate of will, or for letters of administration-with-will annexed, which is filed after letters of administration or letters testamentary have once been issued; and in all cases in which notice is required and no other time or method is prescribed by law or by court or judge, the clerk shall set the same for hearing by the court and shall give notice of the petition or application or report or account by causing a notice of the time and place of hearing thereof to be posted at the courthouse of the county where the proceedings are pending, at least 10 days before the day of hearing, giving the name of the estate, the name of the petitioner and the nature of the application, referring to the petition for further particulars, and stating the time at which the application will be heard.

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

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

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

28/843

Probate Code § 1240 (amended)

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

1240. An appeal may be taken from an order granting or revoking letters testamentary or of administration; removing or refusing to remove a trustee of a testamentary trust; admitting a will to probate or revoking the probate thereof; setting aside an estate claimed not to exceed twenty thousand dollars ($20,000) in value; setting apart property as a homestead or claimed to be exempt from execution ~~confirming a report of an appraiser or appraisers in setting apart a homestead~~ ; granting or modifying a family allowance; directing or authorizing the sale or conveyance or confirming the sale of property; directing or authorizing the granting of an option to purchase real property; adjudicating the merits of any claim under Sections 851.5, 852 or 853; allocating debts under Section 980; settling an account of an executor

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

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

28/844

INHERITANCE TAX

Revenue & Taxation Code § 13621 (repealed)

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

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

Comment. Section 13621 is repealed in recognition of the abolition of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

28/845

TRANSITIONAL PROVISION

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

(b) A homestead set apart by order of the court prior to the operative date of this act pursuant to Sections 660 through 668, inclusive, of the Probate Code remains vested as provided therein, but is subject to the claims of creditors to the extent provided in Section ____ of this act [Probate Code Section 663].

SEVERABILITY CLAUSE

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

EXHIBIT 2

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CABLE ADDRESS: COZILAW

OUR FILE NO.

February 7, 1979

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

Re: Study D-310 - Homestead Property

Dear Mr. Sterling:

I have reviewed Memorandum 79-1 and the draft of the proposed revisions to the probate homestead statutes which you prepared. I think that your proposal to remove the distinction between declared homesteads and probate homesteads makes a lot of sense. However, I am concerned about the following matters:

1. As I told you in our telephone conversation I do not think that the liens and encumbrances on the homestead should be paid out of the estate assets, because this could disrupt the estate. It is likely that in many cases the encumbered homestead will be the major asset of the estate and the surviving spouse and minor children would be the only heirs. In such circumstances it would work a hardship on the heirs to require them to use up all of the other assets to pay off the encumbrances on the homestead, when they may need these other assets to get back on their feet. Additionally, the exoneration provisions of Probate Code Section 735 might prevent other heirs or devisees, such as adult children, from receiving anything from the estate. Accordingly, I recommend that Probate Code Section 735 be repealed, particularly since it is unusual in today's economy that real property be owned free and clear.

2. There is the possibility of a conflict between Probate Code Sections 661(b) and 664 in the draft you prepared where the most appropriate property available for

selection of a homestead under the standards described in Probate Code Section 664 would be separate property of the decedent. This issue was raised in Estate of Raymond, 137 Cal. App. 2d 134, 289 P. 2d 890 (1955), and I believe that the court in that case made the correct decision by holding that the probate court should select the most suitable homestead rather than selecting a less suitable homestead out of property held by the decedent and his widow as tenants in common.

Perhaps Probate Code Section 661(b) could be written into your proposed Probate Code Section 664 so that the nature of the decedent's interest in the property could be one of the criteria used in Probate Code Section 664 for determining the most appropriate homestead. Because of the Raymond case, this may not really be necessary, but I feel that it would help to clarify the law.

3. Your proposed Probate Code Section 661(c) retains existing law that requires a homestead selected out of a decedent's separate property to be set apart for only a limited time and that such a homestead remain subject to administration during this time. I think that the surviving spouse and minor children should succeed to whatever interest the decedent had in the homestead whether the homestead was jointly held or was the decedent's separate property. Consider a case where the decedent had minor children living with him, but was unmarried; certainly the children's interest in the homestead should not be diminished because the decedent was not married. Also limiting the interest in a separate property homestead to a life estate interferes with the surviving spouse's and minor children's ability to sell the homestead and move elsewhere because a life estate may have only a small market value. Finally the setting apart of a separate property homestead may cause the decedent's estate to remain open for a long time and may therefore be unpleasant for all concerned. The elimination of the distinction between a probate homestead selected from separate property of the decedent and a probate homestead selected from property jointly held by the decedent and the surviving spouse was recommended in the Report of California Law Revision Commission, App. C, p. 52 (January 1, 1955); I agree with this recommendation.

Even though the probate homestead does not affect the procedure for enforcement of judgments very much, I believe that the revision of the probate homestead law should be handled carefully because the probate homestead law could have a significant impact on many estates.

Please continue to keep me advised of the revisions in the homestead law on which you are working. If I can be of any help, I would be glad to attend any further commission meetings where homesteads are to be discussed and I would also be happy to meet informally with the staff.

Very truly yours,

Charles W. Adams

CHARLES W. ADAMS

CWA:bb

EXHIBIT 3

THE PROBATE HOMESTEAD IN CALIFORNIA

The probate homestead in California was designed by the legislature ". . . to provide a place for the family and its surviving members where they may dwell in peace and serenity, conscious that it cannot be taken from them 'either by reason of their own necessity or improvidence or from the importunity of their creditors.' "[1] Property is set apart out of the decedent's estate to the surviving spouse[2] and minor children[3] free from liability for the debts of the estate. It is thereafter fully exempt from execution and sale in order to satisfy the claims of most of the creditors of the homestead owner as well.

The probate homestead should not be confused with the marital homestead which is declared by the husband and wife, or either of them, during coverture[4] and which, with two exceptions, vests, on the death of either spouse, absolutely in the survivor.[5] The differences between these two types of homesteads present the homeowner with the dilemma of having to weigh the advantages of homestead protection during his lifetime against the more liberal characteristics of the probate homestead which would be assigned to his widow if he should die without having declared a marital homestead.[6]

This Comment will review the law of probate homesteads as it exists in California today. It will also analyze the differences between

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[1] Estate of Claussenius, 96 Cal. App. 2d 600, 612, 216 P.2d 485, 494 (1950).

[2] Although the provisions apply equally to either the surviving husband or wife, the term "widow" will be used throughout this Comment to indicate the surviving spouse.

[3] For selection and designation of a homestead, see CAL. PROB. CODE § 661.

[4] For a discussion of the marital homestead see Comment, 26 CALIF. L. REV. 241, 466 (1938).

[5] CAL. PROB. CODE § 663. The marital homestead does not vest in the survivor if it was selected from the separate property of the decedent without his consent or if the surviving spouse has conveyed the homestead to the other spouse without expressly reserving her homestead rights.

Probate Code § 663 was amended in 1961 to provide that a marital homestead which is selected from the quasi-community property vests in the survivor in the same manner as a marital homestead selected from community property. If the statute is interpreted so as not to give effect to the quasi-community character of the property until after the death of the acquiring spouse, his vested rights have not been impaired. *Cf.* Addison v. Addison, 62 A.C. 584, — P.2d —, 43 Cal. Rptr. 97 (1965); Estate of Miller, 31 Cal. 2d 191, 187 P.2d 722 (1947); Estate of Thornton, 1 Cal. 2d 1, 5, 33 P.2d 1, 3 (1934) (Langdon, J., dissenting).

[6] The probate homestead must be assigned to the widow regardless of its value. Estate of Nelson, 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964). It is thereafter wholly exempt from the claims of most subsequent creditors. See text accompanying notes 96-103 *infra*. The marital homestead, on the other hand, may be sold if it exceeds the statutory exemption limit and an amount equal to that limit set apart to the survivor. CAL. PROB. CODE §§ 664-66. After the marital homestead has vested in the survivor, subsequent creditors may still reach any excess over the exemption limit. CAL. CIV. CODE §§ 1245-59.

the probate homestead and the marital homestead which has devolved upon the surviving spouse, with a view toward creating a unified system of homestead legislation.

I

CONDITIONS UNDER WHICH THE PROBATE HOMESTEAD MUST BE SET APART

The probate homestead in California is governed by section 661 of the Probate Code[7] which provides that, if no marital homestead has been selected or if the marital homestead was selected by the survivor out of the separate property of the decedent without his consent, the court must set apart a probate homestead for the use of the surviving spouse and minor children. When either of these conditions exists, it is mandatory that the court set the property aside,[8] even if the estate is insolvent.[9] The probate court can exercise its discretion only upon the questions of the selection of the precise property to be awarded and, when separate property of the decedent is selected, the duration of the assignment. Although the demands of the family are paramount, when selecting property the court should also consider the rights of creditors and the financial status of the estate.[10]

Because of the compulsory nature of the statute, the court cannot, in the exercise of its discretion, refuse to set aside a probate homestead on the grounds that the widow already has a place in which to live. An extreme case is *Estate of Firth*[11] in which the husband devised the family residence to his wife and another piece of residential property to his

[7] "If no homestead has been selected, designated and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court, must select, designate and set apart and cause to be recorded a homestead for the use of the surviving spouse and the minor children, or, if there be no surviving spouse, then for the use of the minor child or children, out of the community property or quasi-community property or out of real property owned in common by the decedent and the person or persons entitled to have the homestead set apart, or if there be no community property or quasi-community property and no such property owned in common, then out of the separate property of the decedent. If the property set apart is the separate property of the decedent, the court can set it apart only for a limited period, to be designated in the order, and in no case beyond the lifetime of the surviving spouse, or, as to a child, beyond its minority; and, subject to such homestead right, the property remains subject to administration.

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

[8] Estate of Firth, 145 Cal. 236, 78 Pac. 643 (1904).

[9] Estate of Adams, 128 Cal. 380, 57 Pac. 569 (1900).

[10] Estate of Nelson, 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964); Estate of Raymond, 137 Cal. App. 2d 134, 289 P.2d 890 (1955); Estate of Claussenius, 96 Cal. App. 2d 600, 216 P.2d 485 (1950); Estate of Hessler, 2 Coffey's Pro. Dec. 354 (1895).

[11] 145 Cal. 236, 78 Pac. 643 (1904).

adult children of a former marriage. On petition by the widow, the probate court set aside a homestead for her lifetime in the latter property. The children contended on appeal that the court's order was an abuse of discretion. The supreme court affirmed the order on the ground that the right to a probate homestead is independent of any other right or property that the widow may have.[12]

Thus it is clear that the decedent's testamentary power is subordinate to the authority of the probate court to appropriate the property for the use of the widow as a probate homestead.[13] However, if the testator's intent is clearly expressed in the will, the widow may be put to an election to assert her statutory rights or stand upon her inheritance.[14] As long as the testator can put his widow to an election by more careful drafting of the will, an occasional result such as that in *Estate of Firth*[15] is not too objectionable. A more difficult problem arises when the widow who owns substantial separate property petitions for a probate homestead in property which either is needed in order to satisfy the claims of creditors of the estate or has been devised to another. The testator cannot deprive the widow of her statutory right in this situation since there is no means of putting her to an election.

The current rule can be justified only on the basis of simplicity; it is not wholly responsive to the need to balance the interests of all of the persons who have a claim in the decedent's estate. In order to prevent a widow from successfully petitioning for a probate homestead solely for the purpose of keeping the property away from another, the probate court should be given some discretion to deny her petition where the circumstances would render such action more equitable. The scope of this discretion should be limited to cases in which the widow already has a place in which to live or could provide one for herself without having to substantially impair her separate estate. If a probate homestead is denied, the widow could still obtain protection from her subsequent creditors by declaring a homestead under the appropriate section of the Civil Code.[16]

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[12] The supreme court also indicated that a rule which makes the power of the probate court to set aside a probate homestead discretionary rather than mandatory must come from the legislature. See Estate of Firth, *supra* note 11. Since that time the legislature has re-codified the statutes dealing with probate matters into a probate code and has amended the basic statutes several times without changing the compulsory language by which the court felt bound.

[13] Sulzberger v. Sulzberger, 50 Cal. 385 (1875).

[14] Estate of Ettlinger, 56 Cal. App. 2d 603, 132 P.2d 895 (1943).

[15] 145 Cal. 236, 78 Pac. 643 (1904).

[16] Civil Code § 1260 provides that homesteads may be selected and claimed by any head of a family with an exemption limit of $15,000, or by any other person with an exemption limit of $7,500. If the widow does not qualify as a head of family as defined

II

PROPERTY SUBJECT TO THE PROBATE HOMESTEAD

Probate Code section 661 neither defines homestead property nor imposes a limitation upon the value of property which can be set aside as a probate homestead. The general rule which has been adopted by the courts is that property cannot be set aside to the widow unless the decedent could have declared it as a marital homestead prior to his death.[17] Civil Code section 1237—which defines the marital homestead as the dwelling house together with outbuildings and the land on which the same are situated—and the cases decided thereunder can be used as guidelines for a definition of suitable probate homestead property.

The courts have not been strict in limiting the character of property which may be set aside. It is not necessary that the entire building be used as the family residence; the homestead character is not destroyed if a portion of the property is used for business purposes,[18] or if the building is divided into flats[19] or apartments.[20] A recent case allowed the widow a probate homestead in a thirty unit apartment building worth almost a quarter of a million dollars when she lived in one unit.[21]

Where the estate does not contain any suitable homestead property, the courts have refused to set aside a sum of money in lieu of such property. In *Estate of Noah*[22] the only real property in the estate was a four story building, the separate property of the decedent, which was used solely for business purposes. The widow urged that the property be sold and that an amount equal to the marital homestead exemption be paid to her in lieu of a probate homestead. The court denied her request on the grounds that no provision of the statutes authorized such an order and that by strong implication such an order was prohibited. The court reasoned that the legislature, by providing for sale of the marital homestead where it exceeded the exemption limit and distribu-

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by Civil Code § 1261, where she has been denied a probate homestead she should nevertheless be entitled to the $15,000 exemption. *Cf.* text accompanying note 137 *infra*.

[17] See Estate of Carriger, 107 Cal. 618, 40 Pac. 1032 (1895); Kingsley v. Kingsley, 39 Cal. 665 (1870). The court created an exception to this rule in Estate of Henningsen, 199 Cal. 103, 247 Pac. 1082 (1926), when it held that if the property is otherwise suitable, a residence on it is not a prerequisite to assignment.

[18] See, *e.g.*, Estate of Ogburn, 105 Cal. 95, 38 Pac. 498 (1894) (tin shop); Coca Cola Bottling Co. v. Feliciano, 45 Cal. App. 2d 680, 114 P.2d 604 (1941) (liquor store, warehouse, and gasoline pump).

[19] See Estate of Levy, 141 Cal. 646, 75 Pac. 301 (1904).

[20] See Estate of Nelson, 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964).

[21] *Ibid.*

[22] 73 Cal. 590, 15 Pac. 290 (1887).

tion of an amount equal to the statutory exemption to the survivor,[23] impliedly prohibited the adoption of an analogous procedure with respect to other property in the estate. As an additional ground of decision the court said that since in this case the money sought would be the separate property of the decedent, the cash value of its use as a probate homestead could not be estimated.

Since the purpose of the probate homestead is to provide the widow with a place in which to live, a rule which does not allow the court to award a sum of money in lieu of property can perhaps be justified as consistent with a narrow interpretation of this purpose. However, if the widow would, in fact, buy a home with the money assigned to her, the court should alter its views on setting aside money in order to give the apartment dwelling widow the same measure of protection against creditors given to the widow whose husband was a homeowner. The following procedure would be consistent with the purpose of probate homestead legislation.

Since the probate homestead and the marital homestead which has devolved upon the surviving spouse serve the same purpose—providing a secure home for the surviving family of a decedent—the award ought to be limited to the amount of the exemption limit of the marital homestead.[24] If the estate consists of community property the money could be given to the widow outright, on condition that she buy a home with it. If the estate was the separate property of the decedent, the procedure would be more complex, but still feasible. The court could order the personal representative to purchase a home selected by the widow to be used as a probate homestead. At the expiration of the limited period of assignment the court could either put the home into the decedent's estate and subject it to administration or order a sale of the home with the proceeds to go back into the decedent's estate.[25]

A problem similar to the above was raised in *Estate of Galligher*[26] where the widow petitioned for a probate homestead in farmland. The court denied her request in spite of her offer to prove that she would move on to the land and erect a suitable home if the property were assigned to her. This decision will pose a problem to a widow in the event the family home is destroyed by fire or other catastrophe and her husband is either a victim of the event or dies before rebuilding can be completed. In

[23] CAL. PROB. CODE §§ 664-66. The former version of these sections, Code of Civil Procedure § 1476, enacted in 1872, was used as the basis for this decision.

[24] CAL. CIV. CODE § 1260. The $15,000 exemption limit should apply whether or not the widow qualifies as a head of family. *Cf.* text accompanying note 137 *infra*.

[25] Probate Code § 661 provides that when a probate homestead is set apart for a limited period of time the designated parcel remains subject to administration.

[26] 134 Cal. 96, 66 Pac. 70 (1901).

such a case, in order to protect the widow, the court should reverse its earlier holding and set aside the property on condition that she build a home thereon.

In addition to the nature of the property to be set aside, the court must also consider the adequacy of the decedent's property interest in the land. The statute explicitly allows a probate homestead to be set aside out of community property, quasi-community property,[27] property owned by the decedent and the homestead claimant as tenants in common, and the separate property of the decedent. Although there is no authority on this point, it is likely that property could not be set aside as a probate homestead if it was owned by the decedent in joint tenancy either with his widow or a third person. Property which is owned in joint tenancy passes to the survivor under the original instrument; it is not part of the decedent's estate.[28] Therefore the court probably has no jurisdiction to set it aside as a probate homestead.

If the joint tenancy was between the spouses, the survivorship feature would prevent the decedent from successfully devising the property to another. The property would go to the survivor free from the claims of creditors of the estate.[29] If the widow desired protection from her creditors she could declare a homestead on the property.[30]

In *Estate of Kachigian*[31] the supreme court affirmed the award of a probate homestead on land which the decedent and his brother owned as tenants in common. This was an easy case because there were two houses on the land, one of which had been the residence of decedent and his wife. If there had been only one house on the property the court would have been faced with a more difficult choice. In such a case a

[27] Prior to 1957, property which is now denominated quasi-community property as defined in Civil Code § 1237.5, was treated as separate property for the purpose of setting apart a probate homestead. Estate of Niccolls, 164 Cal. 368, 129 Pac. 278 (1912). In 1957, Probate Code § 661 was amended to provide that a probate homestead selected from quasi-community property is to be treated in the same manner as a probate homestead selected from community property. Since quasi-community property which is set apart as a probate homestead does not vest in the survivor until after the death of the spouse who originally acquired the property, the statute, as amended, does not unconstitutionally deprive the decedent of a vested property right. *Cf.* Addison v. Addison, 62 A.C. 584, — P.2d —, 43 Cal. Rptr. 97 (1965); Estate of Miller, 31 Cal. 2d 191, 187 P.2d 722 (1947); Estate of Thornton, 1 Cal. 2d 1, 5, 33 P.2d 1, 3 (1934) (Langdon, J., dissenting). The term "community property," as hereinafter used in discussing the characteristics of a probate homestead, includes the term quasi-community property.

[28] *E.g.*, Green v. Skinner, 185 Cal. 435, 197 Pac. 60 (1921); Estate of Harris, 169 Cal. 725, 147 Pac. 967 (1915).

[29] See, *e.g.*, Hamel v. Gootkin, 202 Cal. App. 2d 27, 20 Cal. Rptr. 372 (1962); People v. Nogarr, 164 Cal. App. 2d 591, 330 P.2d 858 (1958); King v. King, 107 Cal. App. 2d 257, 236 P.2d 912 (1951).

[30] For an analogous situation, see text accompanying note 16 *supra*.

[31] 20 Cal. 2d 787, 128 P.2d 865 (1942).

partition of the property might be the best solution. If the decedent had been living on the property, after partition the parcel with the home could be set aside to the widow. If the home were occupied by the cotenant of the decedent, the court could set aside the unimproved parcel to the widow on condition that she build a home thereon. If the property were not suitable for partition the court could order a sale of the property on condition that the widow invest her share of the proceeds in a home. However, in order to protect the widow in this fashion the court would have to alter its views on setting aside land or money in lieu of a homestead.[32]

Although the statute provides that community property or property held by the spouses as tenants in common must be resorted to before the separate property of the decedent, the court has held that this requirement applies only when there are two or more equally suitable properties in the estate. In *Estate of Raymond*,[33] the court awarded the widow the family home of seventeen and one-half years, the separate property of the decedent, instead of a bungalow which husband and wife had owned in common.

III

DURATION AND TERMINATION OF THE PROBATE HOMESTEAD

Since a probate homestead set apart out of community property cannot be limited in duration,[34] the widow and minor children take title to the property in fee simple. The homestead right continues in favor of the widow as long as she asserts it.[35] This effectively means that the property is impressed with homestead characteristics until she either sells the property or dies[36] since there is no statutory means of abandoning a probate homestead. The estate is unconditional and is not forfeited because of failure to reside continuously thereon or by holding possession through tenants.[37] The homestead characteristics terminate as to the children when they reach majority. In defining the nature of the rights of the children who have attained majority after having been assigned a probate homestead out of community property the supreme court has said, "When the children arrive at majority, their interest in the homestead, as a homestead, ceases, for they no longer constitute a part of the family, and whatever property rights

[32] See text accompanying notes 22-26 *supra*.

[33] 137 Cal. App. 2d 134, 289 P.2d 890 (1955).

[34] See, *e.g.*, Estate of Rogoff, 205 Cal. App. 2d 650, 23 Cal. Rptr. 334 (1962); Estate of Davis, 86 Cal. App. 2d 263, 194 P.2d 713 (1948).

[35] *E.g.*, Moore v. Hoffman, 125 Cal. 90, 57 Pac. 769 (1899).

[36] See, *e.g.*, Moore v. Hoffman, 125 Cal. 90, 57 Pac. 769 (1899).

[37] Krieg v. Crawford, 59 Cal. App. 309, 210 Pac. 636 (1922).

they thereafter have in the land covered by the homestead are in the nature of those of remaindermen or reversioners."[38] Since the "remainder" serves no homestead purpose, it gives the children who have attained majority an unfair advantage over the decedent's creditors and devisees. In order to eliminate this advantage the minor children should be given the same interest in a homestead from community property as they have in a homestead from separate property.[39]

If there are no minor children, the widow may terminate the probate homestead by a conveyance thereof.[40] The right to convey the property exists as soon as the order sets apart the homestead.[41] Since the probate court may direct a sale of the property in the interests of the minors,[42] it is probable that if the children were the sole owners of the property they could, with court approval, terminate the probate homestead by a conveyance through their guardian.

The duration of a probate homestead selected from the separate property of the decedent may not exceed the lifetime of the widow or the minority of the child.[43] In the discretion of the court, the homestead may be assigned for a more limited period of time;[44] the most important factor in determining the duration of a limited probate homestead is the needs of the family. Where the needs are slight, the appellate courts will uphold assignments of a year or less.[45] If the widow is young and likely to remarry an assignment during her widowhood will normally give her adequate protection. An assignment for her lifetime will, if she does remarry, give her more protection than the legislature intended.[46]

A probate homestead selected from property which the decedent and his wife owned as tenants in common must also be limited in duration if the decedent's undivided interest in the property was his separate property.[47] In a recent case on this point, the court, in answer to the widow's contention that the limited assignment divested her of her

[38] Moore v. Hoffman, 125 Cal. 90, 93, 57 Pac. 769, 770 (1899).

[39] See text accompanying note 43 *infra*.

[40] *Cf.* Otto v. Long, 144 Cal. 144, 77 Pac. 885 (1904); Estate of Hamilton, 120 Cal. 421, 52 Pac. 708 (1898).

[41] See McHarry v. Stewart, 35 Pac. 141 (1893).

[42] See, *e.g.*, Estate of Hamilton, 120 Cal. 421, 52 Pac. 708 (1898).

[43] CAL. PROB. CODE § 661.

[44] See, *e.g.*, Estate of Bonner, 222 Cal. App. 2d 426, 35 Cal. Rptr. 264 (1963).

[45] *E.g.*, Estate of Bonner, 222 A.C.A. 476, 35 Cal. Rptr. 264 (1963) (1 year); Estate of Somers, 84 Cal. App. 2d 726, 191 P.2d 776 (1948) (6 months); Estate of Ettlinger, 56 Cal. App. 2d 603, 132 P.2d 895 (1943) (5 months).

[46] If her second husband predeceased her she could claim a second probate homestead from his estate. Higgins v. Higgins, 46 Cal. 259 (1873).

[47] See Estate of Adams, 228 A.C.A. 299, 39 Cal. Rptr. 522 (1964); Estate of Maxwell, 7 Cal. App. 2d 641, 46 P.2d 777 (1935).

fee title to her undivided one-half interest, pointed out that the probate homestead was solely concerned with the decedent's interest.[48] If this holding means that only an undivided one-half of the property is impressed with homestead characteristics, then it may give too little protection to the widow, since her undivided interest might still be sold in order to satisfy the claims of subsequent creditors. It is unclear whether the buyer would be able to go into possession before the expiration of the homestead. An analogous situation arose in *Moore v. Hoffman*,[49] where the children, after attaining majority, conveyed a portion of their interest in the probate homestead to a third person. The court refused to allow the grantee to invade the widow's right to sole occupancy, thereby postponing the grantee's right to enjoyment of his interest until after the expiration of the homestead. The same result would be appropriate in the above situation in order to give the widow the maximum amount of protection.

IV

PERSONS ENTITLED TO THE PROBATE HOMESTEAD

Although the statute[50] seems clear in its mandate that the probate homestead must be set apart for the use of the surviving spouse and minor children, the question of who is to benefit by its provisions and who is excluded from enjoyment of the rights it confers has been the subject of extensive litigation.

Since the policy of the legislation places the welfare of the decedent's surviving family above the interests which others have in an estate, the court has made the right a personal one which abates on the death of the widow or the attaining of majority by a child[51] and which cannot be asserted by others holding by assignment or succession.[52]

A. Rights of the Widow

When there are no children, the widow is entitled to have the property set apart for her own use.[53] If there are minor children, the family is treated as a unit so that the court cannot set aside a probate homestead for the widow alone or the children alone.[54] In *Estate of Branam*,[55] the widow attempted to waive her right to a probate homestead by stipu-

[48] Estate of Adams, 228 A.C.A. 299, 39 Cal. Rptr. 522 (1964).
[49] 125 Cal. 90, 57 Pac. 769 (1899).
[50] CAL. PROB. CODE § 661.
[51] See, *e.g.*, Estate of Still, 117 Cal. 509, 49 Pac. 463 (1897).
[52] *E.g.*, Estate of Blair, 42 Cal. 2d 728, 269 P.2d 612 (1954).
[53] *E.g.*, Estate of Hessler, 2 Coffey's Pro. Dec. 354 (1895).
[54] Estate of Branam, 66 Cal. App. 2d 309, 152 P.2d 354 (1944).
[55] *Ibid.*

lation. When she later changed her mind and petitioned the court for a probate homestead for herself and the two minor children of her marriage with the decedent, the court set the property apart for the minor children only. The appellate court reversed on the grounds that it is contrary to the policy of the law that the children be provided a home from which they would have the right to exclude their parent. Since the widow could not forfeit the probate homestead rights of the minors, her attempted waiver of her own right was held ineffective. Although there are as yet no other cases on this point, the holding could, as will appear below, have significant import on the cases involving the rights of separated and divorced spouses.

Since the surviving spouse's right to a probate homestead is based upon the status of widowhood—the court being powerless unless such is established[56]—the marital status of the "widow" and the decedent is of primary importance. When a widow remarries she ceases to be the widow of her first husband and is no longer entitled to a probate homestead from his estate.[57] A husband may effectively deprive his wife of a probate homestead by securing a divorce. The divorce terminates the marital status[58] and when the husband thereafter dies, his ex-wife is not his widow.

Difficult problems of status arise when the spouses are separated or have obtained an interlocutory, but not a final, divorce decree.[59] In this area cases involving the right to a family allowance[60] are cited authoritatively in cases dealing with the right to a probate homestead.[61]

An analysis of the cases prior to 1946 shows that whenever the court denied the widow a probate homestead in the estate of her estranged husband it was either because she expressly waived her right to the probate homestead[62] or because she was at fault in causing the disruption of the marriage.[63] Whenever the court awarded a probate homestead the

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[56] *E.g.*, Estate of Goodale, 5 Coffey's Pro. Dec. 288 (1891).

[57] *Ibid.*

[58] *E.g.*, Williams v. North Carolina, 317 U.S. 287 (1942).

[59] The interlocutory decree of divorce does not dissolve the marriage. In Estate of Nelson, 224 A.C.A. 138, 36 Cal. Rptr. 352 (1964), the court held that it is no defense to a widow's petition that she at one time filed for divorce if she and decedent were living together as husband and wife at the time of his death.

[60] For a definition of the family allowance, see Probate Code § 680.

[61] See, *e.g.*, Estate of Brooks, 28 Cal. 2d 748, 171 P.2d 724 (1946).

[62] See Estate of Boeson, 201 Cal. 36, 255 Pac. 800 (1927); Estate of Sloan, 179 Cal. 393, 177 Pac. 150 (1918); Estate of Yoell, 164 Cal. 540, 129 Pac. 999 (1913); Wicksham v. Comerford, 96 Cal. 433, 31 Pac. 358 (1892).

[63] See Estate of Bose, 158 Cal. 428, 111 Pac. 258 (1910); Estate of Miller, 158 Cal. 420, 111 Pac. 255 (1910); Estate of Noah, 73 Cal. 583, 151 Pac. 287 (1887); Estate of Egeline, 53 Cal. App. 2d 368, 127 P.2d 948 (1942); Estate of Ruiz, 53 Cal. App. 2d 363,

marital difficulties were the fault of the decedent.[64] Although this distinction based on fault is the subject of much vague dictum it is never clearly articulated in the holdings. Hence, when the question was raised in 1946 in *Estate of Brooks*[65] as to whether a widow who had obtained an interlocutory decree was entitled to a family allowance and a probate homestead the court felt constrained to choose between what it called two different lines of authority. The opinion refers to the fault concept, but when it surveys the cases it concludes that one line of authority denied the widow any rights in her husband's estate if she was not entitled to support at the time of his death and the other line denied her these rights only if she had expressly waived them. In the face of this seeming contradiction the court said, "Our choice must be governed primarily by a consideration of what the legislature intended when it enacted the provisions for the 'support of the family' involved in all those cases . . . . The cases that do not insist upon the condition that the wife be entitled to support seem to lose sight of the purposes for which an allowance is granted."[66] Since the widow had been awarded an interlocutory decree which made no provision for her support, she was denied a family allowance. This determination was held decisive as to her right to a probate homestead.

The greatest virtue of the right-to-support test is its simplicity. If a widow has been legally entitled to receive support from her husband she is entitled to a probate homestead from his estate even if they have been living separately or if one spouse has obtained an interlocutory decree. However, in order for the wife to establish her right to support in a divorce action commenced by her, she must get personal jurisdiction over her husband.[67] Where she is unable to do so, the court could augment its sole criterion of right to support with its earlier concept of waiver. The wife could be held not to have waived her right to a probate homestead if she has made a bona fide effort to fulfill the requirements for an in personam action.[68]

127 P.2d 945 (1942); Estate of Fulton, 15 Cal. App. 2d 202, 59 P.2d 508 (1936); Estate of Cameto, Myrick's Pro. Dec. 42 (1873); Estate of Byrne, Myrick's Pro. Dec. 1 (1872).

[64] See Estate of Bidigare, 215 Cal. 28, 8 P.2d 122 (1932); Estate of Henningsen, 199 Cal. 103, 247 Pac. 1082 (1926); Estate of Parkinson, 193 Cal. 354, 224 Pac. 453 (1924); Estate of Gould, 181 Cal. 11, 183 Pac. 146 (1919); Eproson v. Wheat, 53 Cal. 715 (1879); Estate of Malouf, 67 Cal. App. 2d 589, 155 P.2d 121 (1945); Estate of Hale, 117 Cal. App. 545, 4 P.2d 263 (1931); Estate of Ehler, 115 Cal. App. 403, 1 P.2d 546 (1931); Estate of Breitter, 69 Cal. App. 424, 231 Pac. 351 (1924).

[65] 28 Cal. 2d 748, 171 P.2d 724 (1946).

[66] Estate of Brooks, *supra* note 65, at 755, 171 P.2d at 727.

[67] *E.g.*, Baker v. Baker, 136 Cal. 302, 68 Pac. 971 (1902); De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345 (1896).

[68] For service of process requirements for an in personam judgment, see Code of Civil Procedure §§ 412, 413, 417.

A problem about which no cases have arisen involves the effect of the presence of minor children on the widow's right to a probate homestead when the spouses are separated, or when one has obtained an interlocutory divorce decree. If the decree makes no provision for alimony, then the court must face a dilemma of its own making. The widow is not entitled to a probate homestead,[69] but she cannot by her actions deprive her minor children of their own right to have the property set aside.[70] However, as indicated earlier, neither can the court set apart to the children a home from which they would have the right to exclude their parent.[71] In keeping with the overriding policy of homestead legislation—to provide a shelter for the surviving family—a wise course would be to assign a homestead to the minor children and appoint the widow as guardian of the property with a right of occupancy until the youngest child has attained majority. If the homestead were assigned out of the separate property of the decedent the same arrangement could be made, with the property going to the children only until they reached majority rather than in fee. In either case the children would not be deprived of their probate homestead rights, the mother could not be excluded from the children's home, and the widow who was not entitled to support would get no property interest from the decedent's estate.

A third ramification of the adoption of the right to support test as a basis for the awarding of a probate homestead is its effect on the rights of the putative spouse. Upon the dissolution of a putative marriage, the wife is not entitled to alimony; her recovery is limited to the reasonable value of services rendered to the other spouse less the value of support and maintenance which he furnished her.[72] Since alimony is a continuation of the support to which a wife was entitled during the marriage, refusal to award alimony to the putative spouse must mean that she was not legally entitled to support. Therefore, upon the dissolution of the putative marriage by death, if the right to support test is applied, the putative spouse would not be entitled to a probate homestead. A putative widow's petition for a family allowance which was contested by the decedent's legal wife was denied on the basis of the above reasoning.[73] Although there have been no cases involving the right to a probate homestead, the position of the court that cases involving the two rights are authoritative each for the other[74] supports the conclusion of a probable denial of the right.

[69] *E.g.*, Estate of Brooks, 28 Cal. 2d 748, 171 P.2d 724 (1946).
[70] Estate of Blair, 42 Cal. 2d 728, 269 P.2d 612 (1954).
[71] *Ibid.*
[72] Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 69 P.2d 845 (1937).
[73] Estate of Cooper, 97 Cal. App. 2d 186, 217 P.2d 499 (1950).
[74] *E.g.*, Estate of Brooks, 28 Cal. 2d 748, 171 P.2d 724 (1946).

Since the children of a void marriage are legitimate,[75] those who are minors would be entitled to a probate homestead and the court would be faced with the same problem as in the separation cases. However, the solution proposed above, while equally workable here, is less fair. Although the putative spouse is not entitled to support, she does have many rights of a legal spouse.[76] A case involving the rights of the minor children of a putative marriage to a probate homestead would serve as an excellent vehicle for extending the probate homestead right to the putative widow as well.

B. Rights of the Minor Children

Most of the questions which deal with the rights of minor children to a probate homestead in the estate of their deceased parent are straightforward and can be answered by a reading of the statute. The words "minor children" refer to the children of the decedent and not to his grandchildren.[77] As with the rights of the widow, the minor's rights are superior to the claims of creditors of the estate[78] and as indicated above, the conduct of the widow cannot alter those rights.

If a parent survives, the minor children are entitled to one-half of the probate homestead in equal shares; if there is no surviving parent then the whole belongs to the minor child or children.[79]

The most difficult question which the court has faced in this area concerned the rights of a minor child of the decedent by a former marriage, when the decedent was survived by his second wife. In *Estate of Rosenaur*[80] the court treated the problem as one of statutory interpretation and concluded that "When a spouse survives a homestead cannot be set apart for a minor child alone but it must be for such spouse and the minor child or children. Hence since decedent left a spouse who still survives, the minor son of the former marriage is not entitled to have a homestead set apart for his use."[81] The court rejected the minor son's contention that since decedent had the duty to support him under the property settlement agreement his right to support was determinative of his right to a probate homestead. In so doing, the court limited the holding in *Estate of Brooks*[82] to situations involving the rights of the surviving widow.

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[75] CAL. CIV. CODE § 85.

[76] For a discussion of the rights of a putative spouse in California see Comment, 50 CALIF. L. REV. 866 (1962).

[77] Estate of Spinetti, 3 Coffey's Pro. Dec. 306 (1894).

[78] See, *e.g.*, Estate of Still, 117 Cal. 509, 49 Pac. 463 (1897).

[79] CAL. PROB. CODE § 667.

[80] 107 Cal. App. 2d 461, 237 P.2d 17 (1951).

[81] Estate of Rosenaur, *supra* note 80, at 462, 237 P.2d at 18.

[82] 28 Cal. 2d 748, 171 P.2d 724 (1946).

The result in this case is unfortunate since it makes the rights of the minor children of divorced parents wholly dependent upon the fortuitous circumstance of the remarriage of one or the other parent. It would not be doing violence to the language of the statute to read the words "surviving spouse and the minor children" to include the children of the decedent of a former marriage.[83] If the family home of the decedent and his widow is the only suitable homestead property in the estate, then priority should be given to the widow. However, if the estate has sufficient assets, the court should order the personal representative to purchase a home for the minor children. Since the property in this situation would not be the community property of the decedent and his ex-wife—the mother of the minor children—it could only be assigned for a period not to exceed the minority of the children.[84] Therefore the rights of others in the estate would only be postponed. Furthermore, if the court is given discretion to deny a probate homestead when it appears that the primary purpose of the petition is to keep the property from another,[85] the likelihood of a suit by the decedent's ex-wife on behalf of her children solely for its nuisance value will be significantly reduced.

C. Rights of the Heirs and Devisees of the Decedent

Since the property set apart as a probate homestead out of the community property of the decedent and the surviving spouse must be set apart in fee,[86] there is a definite limitation upon the testamentary power of the decedent. Any attempt to devise his share of the property[87] which is later assigned as a probate homestead is inoperative. Therefore with respect to community property the expectancies of the heirs and devisees of the decedent are subordinate to the policy of the probate homestead.

When the property set apart is the separate property of the decedent, it may only be set apart for a limited period, and subject to the home-

[83] In Estate of Goulart, 218 Cal. App. 2d 260, 32 Cal. Rptr. 229 (1963), the minor children of a previous marriage of decedent petitioned for a family allowance from the estate of their father. Their petition was opposed by the decedent's surviving widow on the basis of the decision in Estate of Rosenaur, 107 Cal. App. 2d 461, 237 P.2d 17 (1951). The court, again basing its reasoning on statutory interpretation, held that the family allowance, unlike the probate homestead, is not required by statute to be awarded to the surviving widow and minor children jointly. Hence the children were awarded a separate family allowance. This is the only deviation from the court's position that the rights to a probate homestead and a family allowance are based on the same criteria. See also Estate of Jameson, 224 Cal. App. 2d 517, 36 Cal. Rptr. 802 (1964).

[84] See text accompanying note 25 *supra*.

[85] See text accompanying notes 15-16 *supra*.

[86] See, *e.g.*, Estate of Rogoff, 205 Cal. App. 2d 650, 23 Cal. Rptr. 334 (1962); Estate of Davis, 86 Cal. App. 2d 263, 194 P.2d 713 (1948).

[87] Probate Code § 201 provides that one-half of the community property is subject to the testamentary power of the decedent.

stead right the property remains subject to administration.[88] For historical reasons, the precise meaning of this provision is open to question. In *Estate of Walkerly*,[89] a case decided under a predecessor statute[90] which provided that the title to the property vested in the heirs subject to the homestead order, the court held the word "heirs" could not be construed to mean "heirs or devisees."[91] The effect of this holding, which the court agreed seemed unusual,[92] was to completely remove the property later designated as a probate homestead from the testamentary power of the decedent.

The language of the statute[93] was amended in 1907 into the same form in which it was later incorporated into Probate Code section 661—keeping the assigned property subject to administration.[94] Although the Code Commissioner said[95] that the amendment would avoid the rule affirmed in *Estate of Walkerly*[96] this result is not inevitable. The phrase "subject to administration" does not necessarily include the phrase "subject to testation." If the legislature had intended to restore to the testator the power of testamentary disposition of the remainder, it should have made its intent unmistakably clear.[97]

The question of which reading to accord to the new language has importance not only for the potential heirs or devisees of the husband, but also for those who may later have an interest in the estate of the widow. The rule in *Estate of Walkerly*[98] effectively prevented the testator from completely disinheriting his wife, since she would, after the expiration of the limited period of assignment, take an intestate share of the property set aside as a probate homestead.[99]

The court is, however, fully able to protect the widow whose deceased husband's estate is comprised only of his separate property by assigning to her a probate homestead for life in a suitable piece of that property, even if the decedent has devised that parcel to another. There is no

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[88] CAL. PROB. CODE § 661.

[89] 108 Cal. 627, 41 Pac. 772 (1895).

[90] Formerly Code of Civil Procedure § 1468, enacted 1872.

[91] Estate of Walkerly, 108 Cal. 627, 41 Pac. 772 (1895).

[92] *Id.* at 655, 41 Pac. at 778.

[93] Formerly Code of Civil Procedure § 1468, enacted 1872.

[94] Cal. Stats. 1907, ch. 507, at 939.

[95] Quoted in DEERING, CODE OF CIVIL PROCEDURE 799 (1929).

[96] 108 Cal. 627, 41 Pac. 772 (1895).

[97] It could have done so by adopting the language of Civil Code § 1265. This section, which deals with the devolution of a marital homestead selected from the decedent's separate property without his consent, has provided since 1873 that the property shall go to the heirs or devisees, subject to the power of the court to assign it for a limited period to the family of the decedent.

[98] 108 Cal. 627, 41 Pac. 772 (1895).

[99] CAL. PROB. CODE §§ 221, 223-24.

policy which favors giving the remainder following the widow's estate to her devisees rather than to the devisees of the predeceased husband.[100] So long as the widow has been made secure during her lifetime, the predeceased husband's wishes as to the ultimate disposition of his separate property should be given effect, since ". . . it is unquestionably the general policy of our law to allow full power of testamentary disposition—saving as that power may be abridged by specific enactments."[101] Therefore, although the term "subject to administration" is not wholly free from ambiguity, the court should resolve the question in favor of restoring to the decedent the power of testation over the separate property assigned by the court as a probate homestead.

V

CREDITORS RIGHTS AGAINST THE PROBATE HOMESTEAD

The basis of existing problems in the area of creditors' rights against the probate homestead is a complete lack of a statutory definition of these rights. The probate homestead is not treated under Civil Code section 1241 which enumerates the conditions under which a marital homestead is subject to execution and forced sale, nor is it subject to the provisions of Civil Code sections 1245-59 which outline the procedure which creditors must follow in order to reach any excess over the exemption limit. Since no analogous statutes deal with the probate homestead, creditors must look to case law to determine their rights.

A. Creditors of the Estate

While the rights of the general creditors of the estate should be considered by the court when setting aside the homestead,[102] it may nevertheless be set apart irrespective of the claims of creditors even when it constitutes the whole estate.[103]

The order which sets apart the probate homestead does not impair or

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[100] Probate Code § 229, which provides for the distribution of former separate property of a previously deceased spouse where the decedent leaves no surviving spouse or issue, can be used as a basis for reasoning that the policy in California favors the opposite result. If the widow died intestate, the statute would govern since the remainder interest would have come to the widow by descent. However, in the event the widow died testate, the statute would not apply and the question of whether the husband's devisee or the wife's devisee should take would be squarely presented.

[101] Estate of Walkerly, 108 Cal. 627, 653, 41 Pac. 772, 778 (1895).

[102] Estate of Nelson, 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964).

[103] Estate of Wells, 3 Coffey's Pro. Dec. 229 (1905).

In Estate of Tittel, 139 Cal. 149, 72 Pac. 909 (1903), the court held that if the property is the separate property of the decedent, the remainder, which by the terms of the statute, is subject to administration, can be sold in order to satisfy the claims of the general creditors of the estate.

destroy any mortgage or other lien on the property.[104] The property is assigned subject to any liens existing thereon. The court has no power to order the personal representative to discharge an encumbrance on the probate homestead.[105] The widow is not protected by Probate Code section 750 which exempts specific devises from payment of the debts of an estate, since her title comes from the homestead order and not by devise.[106] Neither can she take advantage of Probate Code section 735 which provides that any claims secured by liens or encumbrances on the homestead must be paid out of the funds of the estate, since the section has been construed to cover only marital homesteads. In establishing this rule the supreme court said, "We have looked in vain to find any law authorizing the court to discharge liens upon such a homestead. Where a homestead has been selected and recorded prior to the death of one of the spouses . . . [the predecessor section of Probate Code section 735] makes provision for the extinguishment of liens and encumbrances upon it, but [the section] has to do exclusively with homesteads declared during the lifetime of the spouses. The law has not seen fit to make the same provision as to probate homesteads."[107]

A special situation exists with respect to the vendor's lien. In *Estate of Ried*,[108] the creditors had a vendor's lien as the result of a contract of sale with the decedent. The decedent was the equitable owner, subject only to divestment for breach of the contract. On the death of the purchaser, the obligation to pay the purchase price devolved upon the personal representative as a contract debt and the creditors had only a personal privilege to enforce the lien in an action on the contract; the lien was not an absolute charge on the land. Since the creditors had filed their claim on the estate, they had, the court held, waived their vendor's lien. Had they not done so, the court added, they could have brought suit to subject the homestead to the lien for the payment of the unpaid purchase price.

Where the administrator mortgaged the property before the probate homestead was set apart, the court held that the debt should be paid out of the general assets of the estate, or if these were not sufficient, non-homestead land covered by the same mortgage must be sold first and the proceeds applied against the encumbrance.[109] If the mortgage were not completely paid by the above process, the homestead would be assigned subject to the lien for the unpaid amount.

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104 Estate of McCauley, 50 Cal. 544 (1875).

105 Estate of Huelsman, 127 Cal. 275, 59 Pac. 776 (1899).

106 *Ibid.*

107 *Id.* at 277, 59 Pac. at 776.

108 26 Cal. App. 2d 362, 79 P.2d 451 (1938).

109 Estate of Shively, 145 Cal. 400, 78 Pac. 869 (1904).

B. Creditors of the Homestead Owner

Although the widow may mortgage her interest in the probate homestead, the mortgagee takes subject to the homestead rights of the minor children while they endure. Therefore, if the mortgage is foreclosed, the purchaser at the foreclosure sale would not have a right of entry as cotenant with the children until the termination of the homestead when the youngest child attained majority.[110] Reciprocally, if the children were to encumber their interest in the homestead after they have attained majority the widow's right of sole occupancy would be protected in the event of a forced sale.[111]

When the owner of a probate homestead contracts for improvements on the property and then fails to pay the contractor or materialman for such improvements, a mechanic's lien on the property may be foreclosed for the benefit of the lienholder. If the homestead is for a limited period only, the purchaser may enjoy the title until the homestead expires; the interest of the remainderman is not extinguished by the foreclosure of a mechanic's lien.[112]

Section 674 of the Code of Civil Procedure provides that, upon recordation of an abstract of a judgment, the judgment becomes a lien on all property of the judgment debtor not exempt from execution which is owned by him at the time. The cases uniformly confirm that a judgment lien cannot attach to a valid marital homestead.[113] Although there have been no cases which involve the specific question of whether a judgment lien can attach to a probate homestead, it is clear from the language of section 674 that it cannot. Therefore, the probate homestead property may

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[110] *E.g.*, Hodge v. Norton, 133 Cal. 99, 65 Pac. 123 (1901); Hoppe v. Hoppe, 104 Cal. 94, 37 Pac. 894 (1894).

[111] *E.g.*, Moore v. Hoffman, 125 Cal. 90, 57 Pac. 769 (1899).

[112] See MacQuiddy v. Rice, 47 Cal. App. 2d 755, 118 P.2d 853 (1941). The court indicated in this case that both the mechanic's lien and the probate homestead are favored in the law. However, since the owner of the homestead had contracted for the work the court felt that in all good conscience the lien should be foreclosed for the benefit of the lienholder. Therefore it does not necessarily follow from this case that had the homestead owner paid the general contractor who then failed to pay the lienholder the court would have reached the same result. Nor may the court reach this result if there are minor children involved, since the widow cannot forfeit their probate homestead rights. *Cf.* Estate of Branam, 66 Cal. App. 2d 309, 152 P.2d 354 (1944). Although the entire property is benefited the lien may only attach or be foreclosed against the interest of the widow. *Cf.* Hodge v. Norton, 133 Cal. 99, 65 Pac. 123 (1901); Hoppe v. Hoppe, 104 Cal. 94, 37 Pac. 894 (1894). In the instant case only the interest of the life tenant was foreclosed, although presumably the remainder interest also benefited from the improvements.

[113] *E.g.*, Boggs v. Dunn, 160 Cal. 283, 116 Pac. 743 (1911); Bowman v. Norton, 16 Cal. 213 (1860); Ackley v. Chamberlain, 16 Cal. 181 (1860); Claussenius v. Anderson, 216 Cal. App. 2d 171, 30 Cal. Rptr. 772 (1963); Coca Cola Bottling Co. v. Feliciano, 45 Cal. App. 2d 680, 114 P.2d 604 (1941).

not be sold in order to satisfy a judgment rendered against the homestead owner after the property is assigned.[114]

An unsecured creditor of the homestead owner has no recourse to the probate homestead for satisfaction of his claim since he is neither protected by statute nor named in the cases as one who may execute against the property. He cannot better his position by reducing his claim to judgment.

Even if the owner of the probate homestead is adjudicated a bankrupt, the unsecured creditor's claim cannot reach the homestead property. Section 6 of the Bankruptcy Act[115] provides that the provisions of the act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the law of the state of their domicile. Therefore where the state allows a homestead exemption to the debtor, the same exemption may be set apart to him in the bankruptcy proceeding.[116] Although all of the cases in which California law has been controlling have involved the marital homestead, a probate homestead should receive the same treatment since it is also an exemption under state law.[117]

VI

WHY A PROBATE HOMESTEAD?

The probate homestead serves two important purposes: It provides a home for the surviving family of a decedent regardless of the claims of creditors of the estate and devisees and it secures this home to the family against the demands of subsequent creditors. There are different considerations involved in evaluating each of these functions of the probate homestead in order to determine whether legislation which establishes such a property interest is desirable.

When the testator has carefully planned his estate and it is solvent,

[114] Code of Civil Procedure § 674 further provides that the lien of a recorded judgment attaches to after acquired property. Here the analogy to cases involving the marital homestead ceases. Since property cannot be acquired with marital homestead characteristics already impressed upon it, the anticipatory judgment lien would always be prior to the homestead declaration. On the other hand, the probate homestead is exempt from execution the moment it is assigned to the widow; the court held in Otto v. Long, 144 Cal. 144, 77 Pac. 885 (1904), that the order setting it apart need not be recorded in order to be effective against creditors. This means that if an anticipatory judgment lien has been filed against the person who later becomes the homestead owner, the after acquired probate homestead, which is never "property not exempt from execution" is beyond the reach of the judgment creditor.

[115] 11 U.S.C. § 24.

[116] *In re* Wilson, 123 Fed. 20 (9th Cir. 1903); *In re* Kossack, 113 F. Supp. 884 (S.D. Cal. 1953).

[117] A lien for federal income tax may be foreclosed against the probate homestead, since the "collector is not required to recognize or respect state notions of homestead exemptions in his search for property." Jones v. Kemp, 144 F.2d 478, 480 (10th Cir. 1944).

a probate homestead for the purpose of providing a home for the surviving family should not be necessary.[118] However, if these two conditions are not met, the family may have its security threatened or be left homeless.

The right to a probate homestead is the only property interest which a widow can assert in an estate which consists solely of the separate property of the decedent. It compensates to a degree for the lack of dower rights or a forced share in the estate; with one exception, neither of these rights are recognized in California.[119] By giving the probate court the power to set aside a probate homestead in the separate property of the decedent for a limited period which may not exceed the lifetime of the widow or the minority of a child, the legislature has achieved a balance among all of those persons who may have an interest in the estate. If the words "subject to administration" are interpreted to include "subject to testation," the widow's rights do not cut off the rights of the husband's devisees, but only postpone them until the expiration of the homestead.[120] Thus the property is ultimately disposed of according to the wishes of the testator. Creditors of the estate can receive at least partial satisfaction of their claims since the remainder is an asset of the estate which may be sold for this purpose.

Where the decedent has died intestate leaving only separate property, the reasons for allowing the court to set apart a probate homestead are less compelling but are nevertheless persuasive. Where the decedent is survived by his widow and minor children or by the minor children only, the entire estate descends to them in fee by intestate succession.[121] Unless the estate is insolvent, the surviving family is thus assured of a home from the estate. However, if the decedent leaves a surviving spouse and no issue, the surviving spouse would, in the absence of provisions for a probate homestead, be entitled to only one-half the estate. The other half would go to the other heirs.[122] A probate homestead under such circumstances prevents these heirs from interfering with the sole possession and occupation of the home by the widow. As with the rights of devisees, the rights of the heirs at law are postponed rather than eliminated.

If the home is the community property of the decedent and the surviving spouse there is a different balancing of interests. Since the decedent has the power of testamentary disposition over one-half of the community

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118 Unless the widow specifically renounces her right to a probate homestead in this situation, there may be gift tax consequences. For a discussion of this problem, see Brown, *A Tax Hazard: The Right to a Probate Homestead*, 36 CAL. S.B.J. 220 (1961).

119 Probate Code § 201.5 gives the surviving spouse a forced share of the quasi-community property.

120 See text accompanying notes 88-101 *supra*.

121 CAL. PROB. CODE §§ 221, 222.

122 CAL. PROB. CODE § 223.

property,[123] again the initial purpose of allowing the court to assign a probate homestead is to prevent third persons from disturbing the widow in her possession of the home. The minor children are given rights in the property which they otherwise would not have.[124] A probate homestead in community property cuts off the rights of all other persons who may have an interest in the particular property set apart, since it is assigned in fee. Thus the testamentary power of the decedent to dispose of his share of the home has been effectively limited. This is consistent with one of the theoretical bases of the community property system; it prevents the husband from disinheriting his widow as to property which she helped him to acquire. That general creditors, heirs, and devisees are completely deprived of the homestead property reflects the decision of the legislature that as to community property the rights of the surviving family are to be preferred. As with any attempt to balance the interests of various parties, the result reached by the legislature is one with which reasonable men could differ. The rule does have the advantages of relative simplicity and uniformity of application. Since the property is assigned subject to the liens and encumbrances existing thereon, secured creditors are not prejudiced by the assignment in fee.

If the probate homestead legislation existed only to provide the surviving family with a home from the estate of the decedent and did not also protect this home from the demands of subsequent creditors, it would still serve a necessary function. The latter form of protection is not unique to the probate homestead. It serves the same purpose as the protection afforded by the marital homestead and therefore an evaluation of this purpose must first turn on an appraisal of the entire framework of homestead legislation. Where the parties have declared a marital homestead, after the death of one spouse the property devolves upon the survivor with the marital homestead characteristics intact.[125] Since these characteristics differ somewhat from those of the probate homestead—although they serve the same purpose—a comparative analysis is necessary in order to complete the evaluation of the probate homestead.

Marital homestead legislation has been widespread throughout this country. Although such statutes differ in form, their purpose is the same—to secure to a family a place in which to live free from the demands of creditors. The California legislature has shown its continued support of the marital homestead by raising the exemption limits in order to make

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123 CAL. PROB. CODE § 201.

124 For a proposal to limit the rights given to the minor children, see text accompanying notes 38-39 *supra*.

125 CAL. CIV. CODE § 1265; CAL. PROB. CODE § 663.

them realistic.[126] Likewise, the California courts have shown their agreement with the theory of homestead protection by reiterating the necessity for construing marital homestead provisions generously in favor of the owner of the property.[127]

Since the existence of a marital homestead is a matter of public record, persons who extend credit to the owner have at least constructive notice that the property will be exempt from execution in order to satisfy their claims. If they want to protect themselves, they may do so by demanding a lien upon the property as security. When a tort creditor is involved, it is meaningless to talk in terms of prior notice, yet he is nevertheless prevented from satisfying his judgment out of the homestead property. However, where the value of the marital homestead exceeds the exemption limit, he can reach the excess by following a statutory procedure,[128] and a balancing of interests is thereby achieved.

However, with respect to a probate homestead, there is no exemption limit; the property is completely beyond the reach of subsequent unsecured creditors, regardless of its value. This is a major fault of the legislation which governs the probate homestead; it makes possible a result such as that in *Estate of Nelson*,[129] where property valued at 244,000 dollars was assigned to the widow. In that case the court pointed out that no other person had an interest in the estate. However, such a result cannot be justified on that basis alone. Since the probate homestead is of a dual nature, the value of the property which is set aside has importance with respect to future events which may bear no relation to the magnitude of its effect on the persons who are interested in the estate.

There is a solution to this problem which would not interfere with the creation of the probate homestead. After the property has been set apart to the surviving family, it could become impressed with the same exemption limit as the marital homestead.[130] The property could be subject to execution or forced sale under the same circumstances as the marital homestead. Civil Code section 1241, which enumerates the four classes of creditors who may be satisfied out of marital homestead property could be extended to cover the probate homestead as well. This step would be essentially a codification of the rights of creditors of the probate homestead owner as articulated by the California courts. In order to allow all other subsequent creditors to reach the excess value of the probate

[126] In 1953 the exemption limit was raised from $5,000 to $12,500. In 1963 it was raised again to $15,000.

[127] See, *e.g.*, Strangman v. Duke, 140 Cal. App. 2d 185, 295 P.2d 12 (1956); Parker v. Riddell, 41 Cal. App. 2d 908, 108 P.2d 88 (1941).

[128] CAL. CIV. CODE §§ 1245-59.

[129] 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964).

[130] CAL. CIV. CODE § 1260.

homestead above the exemption limit, Civil Code sections 1245-59 which establish a procedure for execution against the marital homestead could be extended to apply to the probate homestead as well. If the subsequent creditors can be protected in this manner, a better balance of interests will have been achieved.

VII

TOWARD MORE UNIFORM HOMESTEAD LEGISLATION

Most of the differences which exist between the probate homestead and the marital homestead which has devolved on the surviving spouse have no rational basis.[131] Since the two forms of homestead protection serve the same purpose—to provide a secure home for the surviving family of a decedent— and involve the same classes of interested parties, a uniform system of homestead legislation is desirable. The major problem in this area is the difference in the value of the property which is exempt from execution and forced sale in order to satisfy the claims of subsequent creditors. This problem, which was discussed above with respect to justification of the probate homestead, is in the most urgent need of solution. If the exemption limit is not equalized, no amount of uniformity in the other aspects of homestead legislation will make the marital homestead which has devolved on the survivor as desirable as the probate homestead.

The differences which pertain to the persons in whom the homestead vests, the value of the property which may be set apart, and the treatment of liens on the property are not explainable in terms of the nature and purpose of homestead legislation. They seem to be attributable to a combination of two factors: a failure by the legislature to consider both types of homesteads when enacting legislation with respect to

[131] At least one significant difference should be retained. When a marital homestead has been declared in the separate property of the decedent with his consent, the property vests in the survivor in fee. CAL. PROB. CODE § 663. On the other hand, where there is no marital homestead or the marital homestead was selected from the separate property of the decedent without his consent, the separate property of the decedent may only be assigned to the survivor for a limited period. CAL. PROB. CODE § 661. The results in these cases are reasonable when considered in their proper frame of reference. When a person joins in the declaration of a marital homestead on his separate property, he is voluntarily consenting to a transaction which has testamentary significance of which he is presumably aware. Therefore, when the property vests in his widow in fee, it has devolved upon the person whom he intended should receive the property. In the situation where no marital homestead has been declared or the marital homestead was selected from the decedent's separate property without his consent, the decedent may have devised the family home to a third person. In the first instance the interests of the decedent and his widow are the same; in the second the court has to balance the interests of the testator, his widow, and his devisees. It does so by assigning the probate homestead to the widow for a limited period with the remainder kept subject to administration.

either and an insistence by the courts that when the legislature has treated one type of homestead in a particular way it specifically intended not to do likewise for the other form of homestead.

A marital homestead vests in the survivor at the death of his spouse;[132] a probate homestead is assigned to the surviving spouse and minor children.[133] When the minor children are orphaned they are given a probate homestead protection in one of two ways: if the last spouse to survive had a probate homestead, the interests of the minor children in that homestead continues; if the last spouse to survive had no homestead, or had a marital homestead the property can be assigned to the minor children in its entirety as a probate homestead.[134] The real problem occurs when the interests of the widow and minor children do not coincide. In order to assure that the minor children will continue to have a home after the death of one parent the marital homestead should devolve upon the surviving spouse and minor children in the same manner a probate homestead would be assigned to these persons.

A second difference between the probate homestead and the marital homestead which has devolved upon the survivor is the value of the property which may be set apart. This problem exists apart from the problem of the exemption limits; it has its greatest effect upon the survivor and the creditors of the estate and has less relevance to the question of the rights of subsequent creditors. Although the court has discretion if the property is divisible or if there are two or more suitable properties, there is no limit to the value of property which may be set aside as a probate homestead.[135] On the other hand, when a marital homestead has been declared on property having greater value than the exemption limit at the time of declaration, on the death of the first spouse, if the property cannot be divided without injury, the court may order it sold and the proceeds divided.[136] This is a desirable procedure since the proceeds which are distributed to the widow are exempt from execution for a period of six months,[137] which is ample time for her to purchase a home. If the widow desires homestead protection against the demands of subsequent creditors she can execute a declaration of homestead on the newly purchased property. Under Civil Code section 1265a, when the newly purchased property is selected as a homestead such selection has the same effect as if the homestead had been created

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[132] CAL. CIV. CODE § 1265; CAL. PROB. CODE § 663.

[133] CAL. PROB. CODE § 661.

[134] See Estate of Wright, 98 Cal. App. 633, 277 Pac. 372 (1929).

[135] Estate of Nelson, 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964).

[136] CAL. PROB. CODE §§ 664-66.

[137] CAL. CIV. CODE § 1257.

at the time the prior declaration of homestead was recorded. Therefore, even if the widow is not a head of family as defined by section 1261 of the Civil Code, she would probably be allowed the benefit of the larger exemption limit afforded such persons[138] since her husband was alive at the time of the prior declaration of homestead. However, this result could be justified even without the statute. If her husband had declared a marital homestead on property which did not exceed the exemption limit it would devolve upon her with the amount of the exemption unchanged. There is no reason to penalize the widow if the marital homestead declared during the husband's lifetime exceeded the exemption limit. To reduce the exemption limit at the death of the husband would be a windfall to creditors who had extended credit with notice of the homestead, at the expense of the security of the surviving family.

The extension of the statutory procedure to the selection of a probate homestead would give the probate court more flexibility by allowing it some discretion over the value of the property to be set aside. If an exemption limit is imposed as suggested above, the goal of uniformity between the two forms of homesteads would be furthered.

The final problem which exists because of the failure of the legislature to declare a uniform homestead policy involves the treatment of claims which are secured by a lien on the homestead property. Both the probate homestead and the marital homestead are assigned to the survivor subject to any liens which exist on the property. In the case of the marital homestead, however, Probate Code section 735 provides that encumbrances on the property shall be paid from the funds of the estate. The California Supreme Court has held that this provision does not apply to encumbrances on the property which is assigned as a probate homestead.[139] This decision, which created a situation detrimental to the widow and the secured creditor,[140] is clearly contrary to the purpose of homestead legislation, which primarily considers the interests of these two persons. The only persons who stand to benefit from it are the heirs or devisees of the decedent, whose interests should not, in light of the homestead policy, be served at the expense of the surviving family and creditors of the decedent. This problem would be solved if the provision of Probate Code section 735 were expressly made to apply to the probate homestead property.

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[138] Civil Code § 1260 provides that the exemption limit for a head of family is $15,000. For all other persons it is $7,500.

[139] Estate of Huelsman, 127 Cal. 275, 59 Pac. 776 (1899).

[140] If the secured debt is not yet due the creditor may, in some instances, prefer to keep his lien in order to take advantage of a favorable interest rate. However, this would have to be weighed against the possibility of having to foreclose the lien in order to collect the principal debt.

The above discussion illustrates that most of the changes which are necessary in order to achieve a uniform system of homestead legislation can be accomplished by extending the statutes which apply to the marital homestead so that they govern the probate homestead as well. With respect to the marital homestead, the legislature has developed a fair and workable method of balancing the competing claims against the decedent's estate. The development of rules which govern the probate homestead has been principally left to the court which has hesitated to apply legislation governing the marital homestead by analogy to situations involving the probate homestead. Since the rights of the same persons are involved in both cases and since the two forms of homestead protection serve the same purpose, the legislature and the courts should adopt, wherever feasible, rules applicable to both homesteads equally.

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