#D-300 8/29/79

First Supplement to Memorandum 79-45

Subject: Study D-300 - Enforcement of Judgments (Chapter 7--Homestead Exemption)

This memorandum analyzes Sections 707.810 through 707.850 of the tentative recommendation, which relate to the homestead exemption. Under existing law, a person may create an exemption for the family dwelling by recording a declaration of homestead; the declaration does not defeat prior recorded judgment liens, however. Under a more recent procedure enacted in 1976 and operative since July 1, 1977, the homestead exemption is made available to a person who does not have a declared homestead at the time the dwelling is sought to be levied upon, even though there may be prior recorded judgment liens; however, the homestead exemption is good only in execution proceedings and does not defeat a judgment lien where the person voluntarily sells the dwelling and seeks to purchase a new one.

The Commission has tentatively decided to replace these two major procedures for obtaining a homestead exemption with a single homestead exemption procedure based on the recently enacted procedure but combining the best features of both existing procedures. There are a number of problems with the draft of the newly proposed procedure.

One major problem is the burden the new "claimed" type homestead exemption imposes on the judgment debtor. Under the old declared homestead scheme, the judgment debtor who has recorded the homestead may thereafter rest assured that the property is exempt since it is on record as exempt. If the property is worth more than the exempt amount and is, therefore, sold to satisfy a judgment, the amount of the exemption is set aside out of sale proceeds for the debtor without further action required by the debtor. Civil Code § 1256. Under the homestead exemption procedure as drafted in our tentative recommendation, however, the judgment creditor must apply for a court order permitting sale of a dwelling and the judgment debtor has the burden of proof that the dwelling is exempt. The loss of the "automatic" feature in the new scheme is a serious drawback, and one that will draw substantial opposition in the Legislature from legal services groups. The staff proposes that the burden be reversed, and that it be presumed that the dwelling is exempt

unless the judgment creditor can show that it is not. In this way, the exemption will retain a semi-automatic character and, absent a showing by the creditor, the proceeds in the amount of the exemption will be set aside for the debtor.

§ 707.810. Dwelling

As drafted, the tentative recommendation permits a judgment debtor to have exempt more than one homestead. Section 707.810 defines the dwelling to mean the home in which the judgment debtor "or the family" of the judgment debtor actually resides. In cases where the judgment debtor owns two homes, one of which is the judgment debtor's residence and one of which is the residence of the spouse or "family," both homes may be exempt.

This anomaly should be corrected. California provides a very liberal homestead exemption already--$25,000 of equity for a single person and $40,000 of equity for the head of a family or person over 65. The homestead is quite controversial for this reason and is perhaps the most litigated and most amended of all the exemptions. To permit a judgment debtor to retain $40,000 of equity in a piece of property while the debts go unpaid is one thing; but to double the exemption and allow the judgment debtor to exempt two such assets from creditors is hardly defensible.

The staff recommends that the provisions be redrafted to permit the judgment debtor to exempt either the property on which the judgment debtor resides or the property on which the family of the judgment debtor resides, but to allow only one exemption to the judgment debtor. By claiming one dwelling as exempt, the exemption is waived as to other dwellings; by waiving an exemption as to one dwelling, the exemption is preserved for another dwelling. This scheme of allowing only one exempt dwelling for a judgment debtor and spouse would not preclude a spouse living separate and apart from the judgment debtor from having his or her separate property dwelling that is immune from claims against the judgment debtor; the one homestead limitation would apply only to property of the judgment debtor. Treatment of community property dwellings the staff suggests be deferred until receipt of the consultant's study of creditors' remedies in community property.

In this connection, it should be remembered that existing law permits a nonowning spouse to limit the ability of the owning spouse to

transfer or encumber the family dwelling that is the separate property of the owning spouse and to preserve it from the reach of creditors. The Commission in the past has wanted to keep some sort of protection for the nonowning spouse and family despite the repeal of the declared homestead. The Commission's concern was directed toward protecting the family against transfers by the owning spouse at or near the time of marriage dissolution. The Family Law Act permits temporary protection during pendency of nullification and dissolution proceedings. Civil Code Section 4359 provides in relevant part:

> 4359. During the pendency of any proceeding under Title 2 (commencing with Section 4400) or Title 3 (commencing with Section 4500) of this part, upon application of either party in the manner provided by Section 527 of the Code of Civil Procedure, the superior court may issue ex parte orders (1) restraining any person from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life . . . .

The staff recommends addition of a provision to cover transfers of the family dwelling near the time of commencement of the separation, nullification, or dissolution proceedings. This could be done either by permitting the spouses to obtain a temporary restraining order prior to commencement until the court has a chance to act or by giving recordation of the lis pendens the effect of a temporary restraining order until the court can act. A draft of both alternatives follows. The Commission should decide which, if any, it prefers.

> Civil Code § 5102. ~~Neither~~ (a) Except as provided in this section, neither husband nor wife has any interest in the separate property of the other ~~, but neither~~ .
>
> (b) Neither husband nor wife can be excluded from the other's dwelling except as provided in Section ~~4518 or, in proceedings under Chapter 1 (commencing with Section 4400) or Chapter 2 (commencing with Section 4425) of Title 2 of this part, or under Chapter 1 (commencing with Section 4500) of Title 3 of this part, 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 or from the dwelling of the other upon a showing that physical or emotional harm would otherwise result, until the final determination of the proceeding~~ 4359 .
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> (c) Upon application in the manner provided by Section 527 of the Code of Civil Procedure of either husband or wife who resides in a dwelling that is the separate property of the other, the

superior court of the county in which the dwelling is located may issue an ex parte order restraining the other from transferring, encumbering, hypothecating, or in any way disposing of the dwelling, voluntarily or involuntarily, until such time as a petition for legal separation or annulment or dissolution of marriage is filed and the court in which the petition is filed makes such orders affecting the dwelling as are appropriate. An order pursuant to this subdivision shall be made upon a showing by the husband or wife that the other is likely to transfer, encumber, or otherwise dispose of the dwelling and is unlikely to otherwise satisfy the obligation of support of husband and wife, and that a petition for legal separation or annulment or dissolution of marriage will promptly be filed.

[OR]

(c) If notice of the pendency of a proceeding for separation or annulment or dissolution of marriage is recorded in any county in which the husband or wife resides on real property that is the separate property of the other, the real property shall not for a period of three months thereafter be transferred, encumbered, or otherwise disposed of voluntarily or involuntarily without the joinder of both spouses, unless the court otherwise orders.

Comment. The reference in subdivision (b) of Section 5102 to former Section 4518 is corrected to refer to Section 4359 and language that is duplicated in Section 4359 is deleted.

Subdivision (c) is added to provide a means of restraining transfer or encumbrance of the dwelling that is the separate property of a spouse [prior to] [during] the pendency of separation, annulment, or dissolution proceedings. The restraint applies to involuntary as well as voluntary dispositions of the dwelling, such as pursuant to writ of execution. This supersedes former Civil Code Section 1238(c) which permitted a spouse to declare a homestead on the separate property of the other spouse. As to the authority of the court to restrain transfer during pendency of the proceedings, see Section 4359. A community property dwelling may not be transferred or encumbered without joinder or consent of both spouses. See Sections 5125 and 5127.

§ 707.820. Exempt interest in dwelling

Mr. Rick Schwartz states that the amount of the dwelling exemption is too high and suggests that it be lowered to $40,000 for heads of families and persons 65 and older and $20,000 for other persons. (Exhibit 12, p. 10.) Existing law provides exemptions of $40,000 and $25,000 respectively. Bills have been introduced this year to variously increase the exemption to $45,000 and $30,000 respectively (A.B. 1613), $80,000 and $50,000 respectively (A.B. 1720), and $100,000 for every homeowner (S.B. 1101). Although only A.B. 1613 is still alive, we do not think it is feasible to lower the exemption. The staff recommends that if A.B. 1613 is passed the proposed law adopt the levels set

therein; otherwise, the existing scheme of $40,000 and $25,000 should be retained.

It should be noted that the Commission's draft defines "dependents" for purposes of the higher homestead exemption as including lineal relatives of the judgment debtor and spouse and collateral relatives within the fourth degree. While such a definition may be adequate, <u>the staff</u> prefers the concrete listing of dependents in existing law, and <u>recommends</u> that the substance of existing law, with some drafting refinements, be restored. See Civil Code Section 1261:

> 1261. The phrase "head of a family," as used in this title, includes within its meaning:
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> 1. The husband or wife, when the claimant is a married person.
>
> 2. Every person who has residing on the premises with him or her, and under his or her care and maintenance, either:
>
> (a) His or her minor child, or minor grandchild, or the minor child of his or her deceased wife or husband;
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> (b) A minor brother or sister, or the minor child of a deceased brother or sister;
>
> (c) A father, mother, grandfather, or grandmother;
>
> (d) The father, mother, grandfather, or grandmother of a deceased husband or wife;
>
> (e) An unmarried sister or brother, or any other of the relatives mentioned in this section, who have attained the age of majority, and are unable to take care of or support themselves.

Mr. Rick Schwartz states that it is inequitable to favor homeowners while ignoring renters. The staff agrees that there is an inequity, but does not believe it can be remedied. Either lowering the homestead exemption or creating a new personal property exemption for renters, consistent with the new Bankruptcy Act which provides an exemption of $7,500 applicable to personal property to the extent that it is not applied to a dwelling, is not politically feasible. Moreover, a bankruptcy-type exemption of assets can only work if all assets of the judgment debtor are before the court and available to satisfy obligations to the extent not exempt. Such a situation is not possible in the case of the ordinary creditor seeking to enforce a judgment.

[illegible] states [illegible] tentative recommendation does not

Mr. Lynn Koller states that the tentative recommendation does not deal with the problem of applying the dwelling exemption to spouses' joint tenancy property where only one spouse is a judgment debtor. (Exhibit 18, pp. 6-7.) This problem is discussed in the text of the tentative recommendation at pages 77-78. As noted there, the proposed law provides a partial solution by eliminating the rule that liens and encumbrances on the dwelling must be satisfied before the property may be sold on execution. Professor Riesenfeld (Exhibit 23, p. 2) does not believe this solution is satisfactory; it leaves the judgment debtor personally liable for obligations secured by the property. Professor Riesenfeld recommends that when the homestead is levied upon, even if the judgment debtor is a joint tenant, that the whole property be sold and superior liens first paid off. Any remaining proceeds are apportioned among the joint tenants in proportion to their interests, and any exemption the judgment debtor may have is applied to the amount apportioned to the judgment debtor. This is the scheme also recommended by the Commission's consultant on this topic, Mr. Charles Adams, and has precedent in new Bankruptcy Act Section 363. The staff recommends adoption of this scheme for joint tenancy homestead property. Treatment of community property we plan to defer until we have received our consultant's study on this matter.

§§ 707.830, 707.840. Determination of nature of property

The Sheriffs' Association Committee expresses some concern about the responsibility and liability of a levying officer for determining whether a dwelling is to be levied upon as real or personal property. (Exhibit 8, pp. 10-14.) Serious consequences follow from this determination because personal property dwellings may be sold on 10 days' notice pursuant to Section 703.630, whereas real property dwellings are subject to the 120-day delay of Section 703.640(h). Distinct exemption procedures also apply in each situation, as provided in Sections 707.830 and 707.840. They are concerned that the levying officer will be required to determine the debtor's interest in the property (a leasehold interest of less than two years is treated as personal property), whether the property contains a dwelling (such as in a "mom and pop" business), and whether the debtor legally resides on the property.

Problems such as these are not new; they are not created by the tentative recommendation. Under existing law, the determination of the manner of levy turns on whether a dwelling is real or personal property. See Section 488.310 (real property), incorporated by Section 688(a); Section 688(c) (personal property used as dwelling). The Marshal's Manual at § 300.3 requires the creditor's instructions to indicate whether a leasehold interest is to be levied upon as real or personal property. The debtor's interest must also be determined so that the levying officer can decide whether to give notice of the right of redemption pursuant to Section 700a. This involves the question of whether the property is personal or real and whether the debtor's interest is a leasehold interest of greater or less than two years. The question of whether the property contains a dwelling occurs particularly in a case where the judgment creditor has not applied to the court for a writ of execution under Section 690.31 on the assumption that there is not a dwelling and the levying officer proceeds to levy on property pursuant to the creditor's instructions as if it were business property. This problem is noted in the Sheriffs' Association's Civil Procedural Manual at 4.10-4.11 and the Marshal's Manual at § 301.3. The Marshal's Manual requires the creditor's instructions to state whether the property contains a dwelling house. Additional related problems may occur, such as whether the real property to be levied upon is actually owned by a partnership of which the judgment debtor is a partner. In this case, levy is improper and the judgment creditor may reach the debtor's interest by way of a charging order. Under existing law, it must also be determined whether a mobile home is a certain size so that it may be known whether it is subject to the procedure set forth in Section 690.31 or in Section 690.3.

From the foregoing, it should be apparent that absolute certainty in the manner of levy is impossible because the nature of property is not always clear. The tentative recommendation eliminates some of the problems but some remain. The staff sees no way around the difficulty in determining whether a mobilehome is real or personal property or whether the debtor or some other person lives on premises that appear to be unoccupied. The staff recommends that the sections and the Comments thereto concerning the judgment creditor's instructions (Section

702.610) and the levying officer's liability (Section 702.650) be revised to make crystal clear that the creditor must provide sufficient information to satisfy and protect the levying officer. See Fifth Supplement to Memorandum 79-29.

§ 707.840. Exemption procedure for real property dwelling

Mr. Robert Sprague approves of the procedure provided by this section to require the creditor to obtain an order for sale before a dwelling may be sold, but would modify subdivision (c) to permit an extension of time for the hearing on the judgment creditor's application for an order permitting sale upon a showing of good cause. The reason for this suggestion is that the judgment creditor may not otherwise have time to obtain an appraisal report. The staff recommends that this change be made.

Several problems are raised with regard to subdivision (a). Mr. Rick Schwartz suggests that the time for the judgment creditor's application for an order permitting sale be increased from 10 to 20 days after notice of levy is mailed to the judgment debtor. (Exhibit 12, p. 10.) Lieutenant Bernard Morgan asks how the judgment creditor is to know when the notice of levy is mailed to the judgment debtor. (Exhibit 9, p. 6.) The Sheriffs' Association Committee proposes a detailed scheme whereby the judgment debtor would be served with a form at the time of levy which is to be completed and returned to the levying officer who then forwards it to the judgment creditor. Within 10 days after the completed form is mailed, the judgment creditor would have to apply for an order permitting sale or the property would be released. (Exhibit 8, pp. 10-14.) The staff agrees with Mr. Schwartz that more time should be provided, particularly in view of the possible delay in the mail. This provision should also provide a more certain manner of determining the commencement of the time for the judgment creditor's application for an order permitting sale, since the creditor will not know when notice of levy is mailed to the judgment debtor. While the proposal of the Sheriffs' Association Committee to provide for a form to be completed by the judgment debtor and returned to the levying officer and forwarded to the judgment creditor has some appeal, it would not work if the judgment debtor refuses or neglects to fill out and return the form. Accordingly, the staff recommends that Section 707.840 be

revised to provide that the levying officer is to give notice to the judgment creditor that the property has been levied upon and that the judgment creditor has 20 days after the notice is mailed or delivered within which to apply for an order permitting sale.

One matter that has continued to cause problems is the adequacy of notice to the judgment debtor that the dwelling will be sold. Under the present draft, the judgment debtor receives notice of levy on property and notice of sale of the property. In addition, where a dwelling is to be sold, the judgment debtor receives notice of the judgment creditor's application for an order permitting sale. In order to help ensure the adequacy of the notice, the staff recommends that the statute prescribe the form of notice of application for order of sale, based on the comparable notice presently prescribed by Section 690.31:

IMPORTANT LEGAL NOTICE TO HOMEOWNER AND RESIDENT

1. Your house is in danger of being sold to satisfy a judgment obtained in court. You may be able to protect the house and real property described in the accompanying application from execution and forced sale if you or your family now actually reside on the property and presently do not claim a homestead on any other property in the State of California. YOU OR YOUR SPOUSE MUST COME TO THE HEARING TO SHOW THESE FACTS.

2. If you or your spouse want to contest the forced sale of this property, you or your spouse must appear at ..... (location) on ..... (date and time) and be prepared to answer questions concerning the statements made in the attached application. THE ONLY PURPOSE OF THE HEARING WILL BE TO DETERMINE WHETHER THE PROPERTY CAN BE SOLD, NOT WHETHER YOU OWE THE MONEY.

3. FOR YOUR OWN PROTECTION, YOU SHOULD PROMPTLY SEEK THE ADVICE OF AN ATTORNEY IN THIS MATTER. IF YOU ARE A TENANT AND DO NOT CLAIM TO BE THE OWNER OR BUYER OF THIS PROPERTY OR A LEASE HAVING TWO OR MORE YEARS TO RUN, THIS NOTICE DOES NOT AFFECT YOU. PLEASE GIVE IT TO YOUR LANDLORD.

§ 707.850. Exemption of dwelling proceeds

Section 707.850 provides that the proceeds of sale of an exempt dwelling remain exempt for a period of six months, but there is no requirement that they be applied to purchase of another dwelling. The reason for exempting the proceeds is so that the judgment debtor will be able to purchase another dwelling. The staff recommends that where the property is sold on execution, the exempt proceeds should be deposited in court and held subject to court order for a period of six months.

Any proceeds not ordered disbursed by the court for the purchase of another dwelling within the six-month period should be used to satisfy the judgment.

Respectfully submitted,

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