

Memorandum 79-52

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

Attached to this memorandum are redrafted provisions relating to the dwelling exemption, embodying decisions made at the September 1979 Commission meeting. Exhibit 2 contains the basic dwelling exemption scheme. Exhibit 3 contains conforming amendments; it does not include the numerous revisions that will be necessary in the guardianship-conservatorship statute enacted this past legislative session on Commission recommendation. See Prob. Code §§ 3000-3154 (as enacted 1979 Cal. Stats. ch. 726, operative January 1, 1981) (management or disposition of community or homestead property where spouse lacks legal capacity).

The basic dwelling exemption procedure in the draft follows existing law, with a few exceptions. The scheme is discussed in the text of the preliminary part of the recommendation, which we have revised and which is attached as Exhibit 1. The discussion should be self-explanatory.

One issue the Commission requested the staff to investigate was whether the exempt proceeds of the sale of a dwelling could be restricted to purchase of another dwelling "in this state." It is appropriate to limit the use of the proceeds to a purchase in the state in order to prevent the dispersal of assets and their removal beyond the process of the court. The state has a legitimate interest in this, and it is proper to condition a proceeds exemption on retention of the proceeds in the jurisdiction. Whether this conflicts with the constitutional "right to travel" is doubtful. The right to travel is not extensively developed. It reached its peak under the Warren Court and has focused primarily on visa and passport cases and other direct restraints on the right to travel. Indirect restraints, such as residence requirements and waiting periods, have been invalidated only where they have the effect of penalizing a class of migrants. See generally Comment, A Strict Scrutiny of the Right to Travel, 22 U.C.L.A. L. Rev. 1129 (1975). It is difficult to see how the state's grant of a dwelling proceeds exemption on condition that the proceeds remain in the state would be construed as penal-

izing a class of migrants. The staff believes it is fair and legitimate to impose this condition, and has drafted the dwelling exemption provisions accordingly.

If the attached text of the preliminary portion of the recommendation and draft statutes relating to the dwelling exemption are satisfactory, we will incorporate them into our comprehensive statute. Please make any editorial changes you may have on your copy and return it to the staff at the October meeting.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

Dwelling Exemption

California law provides a substantial dwelling exemption for the purpose of promoting the security of the home and protecting it from the consequences of the owner's economic misfortune.¹ Under existing law there are three separate dwelling exemption statutes: the declared homestead,² the dwelling house exemption for persons who have failed to declare a homestead,³ and the claimed exemption for a mobilehome or vessel.⁴ Each statute provides a dwelling exemption if an exemption has not been obtained pursuant to the other statutes.⁵ The amount of the dwelling exemption provided by each statute is the same—\$40,000 if the judgment debtor is married, the head of a family, or over 65 years old, and \$25,000 in other cases.⁶ And each statute protects the dwelling from sale to satisfy a judgment if the judgment debtor's equity is less than the dwelling exemption; if the judgment debtor's equity exceeds the dwelling exemption, the dwelling may be sold to satisfy the judgment and the statute preserves the sale proceeds for the judgment debtor in the amount of the dwelling exemption.⁷ The dwelling exemption statutes display unnecessary differences, however.

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1. The California Constitution requires the Legislature to provide for the protection of a portion of the homesteads of heads of families. Cal. Const. art. 20, § 1.5. For a discussion of the development of the homestead provisions, see *Taylor v. Madigan*, 53 Cal. App.3d 943, 955-61, 126 Cal. Rptr. 376, 384-88 (1975).
 2. See Civil Code §§ 1237-1304.
 3. See Section 690.31.
 4. See Sections 690.3, 690.50.
 5. Sections 690.3(b) and 690.31(b); but see Civil Code § 1259.2.
 6. Civil Code § 1260; Code Civ. Proc. §§ 690.3(a), 690.31(a).
 7. Civil Code §§ 1245-1256; Code Civ. Proc. §§ 690.31(c)-(k), 690.3, 690.50(i).

Declared homestead. The judgment debtor may exempt a real property dwelling by filing a homestead declaration with the county recorder.⁸ The declaration is ineffective if the judgment creditor earlier obtained a judgment lien;⁹ but once an effective declaration is recorded a subsequent judgment lien will not attach to the property, even if the property has excess value.¹⁰ The result of this scheme is a race to the recorder's office. If the judgment creditor wins the race, the judgment debtor may still assert the dwelling house exemption in a court hearing on the judgment creditor's application for a writ of execution.¹¹ If the judgment debtor wins the race, nothing is settled since the declaration may in fact be invalid; a hearing on entitlement to the exemption is still necessary.¹² The effect of a declared homestead is that judgment creditors are precluded from securing payment of the judgment by means of the relatively benign judgment lien on the excess value of the property over the exempt amount. In consequence a second race ensues among judgment creditors who seek immediate execution in order to reach the excess value, since the creditor who first levies obtains a priority.¹³ The declared homestead is also inefficient because it permits the recording of a declaration at a time when it is not needed for protection against the claims of creditors.

Automatic dwelling exemption. Before the judgment creditor may obtain a writ of execution against a dwelling, the judgment creditor

8. See Civil Code §§ 1262-1265, 1266-1269, 1300-1303.

9. See Civil Code § 1241. A homestead declaration may relate back to the time of an earlier declaration, however, as provided in Civil Code Section 1265a.

10. See *Boggs v. Dunn*, 160 Cal. 283, 285-87, 116 P. 743, 744-75 (1911); *Swearingen v. Byrne*, 67 Cal. App.3d 580, 585, 136 Cal. Rptr. 736, 739 (1977).

11. Section 690.31(b).

12. Civil Code § 1245.

13. See *Adams, Homestead Legislation in California*, 9 Pac. L.J. 723, 728 (1978).

must apply to a court in the county where the dwelling is located.¹⁴ This requirement applies whether or not the judgment debtor has recorded an effective homestead declaration on the dwelling. A judgment debtor who has not recorded a prior homestead declaration may nonetheless assert the dwelling house exemption at this time.¹⁵ This manner of asserting the dwelling exemption is preferable to the declared homestead because it comes into play only when the exemption is needed--when the judgment creditor seeks to apply the property to the satisfaction of the judgment. It is defective, however, in that the judgment lien for the full amount of the judgment remains on the property when it is sold voluntarily, even if it has no excess value, and the purchase price will be reduced accordingly.¹⁶

Mobilehome and vessel exemption. Under existing law, the judgment debtor may claim an exemption for a housetrailer, mobilehome, houseboat, boat, or other waterborne vessel pursuant to the general procedure for claiming exemptions for personal property levied upon under execution.¹⁷ The exemption claim must be made within 10 days after the property is levied upon.¹⁸

Exemption procedure under proposed law. The proposed law would unify these varying procedures and make them consistent to the extent practicable. The declared homestead would be eliminated as being unduly rigid and cumbersome. Under the proposed law, if the dwelling is personal property (a mobilehome not affixed to land or a vessel) or a leasehold estate with an unexpired term of less than two years at the

14. Civil Code § 1245; Code Civ. Proc. § 690.31(c).

15. Section 690.31(a)-(b).

16. See the discussion under "Judgment Liens" supra.

17. Section 690.3.

18. Section 690.50(a). See the discussion under "Procedure for Claiming Exemptions After Levy" infra.

time of levy, the general procedure for claiming exemptions for personal property would apply and the judgment debtor would be required to file a claim of exemption with the levying officer not later than 10 days after notice of levy is mailed or delivered.¹⁹ If the dwelling is real property other than a leasehold estate with an unexpired term of less than two years at the time of levy, a procedure patterned after the existing real property dwelling exemptions would apply, subject to the following important differences:

(1) As under existing law, the proposed law would require the judgment creditor to initiate court proceedings to determine whether the property is exempt or whether it has an excess value. However, instead of the judgment creditor applying to the court for a writ of execution in the county where the dwelling is located, the judgment creditor would have the property levied upon under a writ issued out of the county in which the judgment was entered and would then apply to the court in the county where the dwelling is located for an order permitting sale of the property. The proposed law thus avoids the issuance of writs of execution for different purposes and out of different courts for the enforcement of the same judgment.

(2) Under the proposed law, the judgment creditor must apply to the court for an order permitting sale of the dwelling within 10 days after the levy. This provision is intended to provide a resolution of the exemption question early in the 120-day period during which²⁰ the sale of real property is delayed under the proposed law. Of course, the judgment creditor decides when the levy is to occur, subject to the general provisions on the time during which a judgment may be enforced.

(3) Under existing law, if the judgment creditor alleges that the dwelling is not exempt, the judgment debtor has the burden of proof on the exempt status of the dwelling.²¹ The proposed law

19. This continues the aspect of existing law that requires the debtor to initiate exemption proceedings as to personal property. It eliminates the overlap between Sections 690.3 and 690.31 insofar as certain mobilehomes are concerned.

20. See the discussion under "Repeal of Statutory Redemption From Judicial Sales" supra.

21. Section 690.31(e); Civil Code § 1247.

creates a presumption in favor of exempt status if the judgment debtor has claimed a homeowner's property tax exemption for the dwelling. Such a claim of exemption requires an affidavit by the claimant that he or she owned and occupied the property as the principal place of residence and intends to occupy the property as the principal place of residence at the same time the following year.²² Such an affidavit is sufficient to meet the judgment debtor's burden of proof.

(4) Before a dwelling may be sold on execution, it must be determined whether a portion of the land on which it is located can be divided without material injury to the dwelling and sold to satisfy the judgment.²³ This procedure is time-consuming, costly, and burdensome, and results in few partitions in kind. It dates from an era when dwellings were commonly located on larger tracts. Today most dwellings are located on standard lots that cannot be divided. The proposed law does not require a determination whether the property can be divided without material injury to the dwelling. A judgment debtor living on a larger tract who desires to save the dwelling from forced sale may voluntarily divide the property and sell the remainder to satisfy the judgment.

Nature of interest subject to exemption. In addition to the basic dwelling exemption procedures, there are a number of substantive aspects of the dwelling exemption that require revision. To qualify for an exemption under existing law, the judgment debtor must have "freehold title, interest, or estate which vests . . . the immediate right of possession" in a dwelling house or hold it under a long-term lease of at least 30 years,²⁴ have "ownership rights" (including a leasehold or subleasehold) in a condominium, planned development, stock cooperative, or community apartment project,²⁵ or have a leviable interest in a mobilehome or vessel.²⁶ The interest of the judgment debtor need not be

22. Rev. & Tax. Code § 253.5.

23. Civil Code § 1248; Code Civ. Proc. § 690.31(c).

24. See Civil Code §§ 1237, 1238.

25. See Civil Code § 1238.

26. See Sections 690.3(a), 690.31(a)(2).

exclusive.²⁷ The proposed law would expand the protection of the dwelling exemption by eliminating the long-term lease restriction²⁸ and by making clear that any interest in a dwelling that the judgment creditor may seek to apply to the satisfaction of a money judgment may be protected. There is no apparent reason why, for example, short term leasehold interests in condominiums should be protected, but not such interests in single family dwellings.

Protection of exempt proceeds. Under existing law, if the dwelling is sold on execution, the amount of the proceeds representing the dwelling exemption is exempt for six months from the date the proceeds are received.²⁹ The proposed law would continue this protection and would extend it to cover the proceeds of a voluntary sale for six months from the date of sale, and the proceeds of insurance or other indemnification for the damage or destruction of the dwelling for six months from the date of receipt of the proceeds. However, the proceeds of an execution sale would be held subject to court order for the sole purpose of purchase of a new dwelling in the state. This will limit the exemption to its intended purpose and preclude dispersal of the judgment debtor's assets and their removal from the power of the court.

27. See Civil Code § 1238; Estate of Kachigian, 20 Cal.2d 787, 790-91, 128 P.2d 865, 867 (1942) (joint tenancy); Bradley v. Scully, 255 Cal. App.2d 101, 105, 62 Cal. Rptr 834, 837 (1967) (tenancy in common); Alexander v. Jackson, 92 Cal. 514, 519, 28 P. 593, 594 (1891) (equitable title, vendee in possession under contract of sale).

28. This proposal would return the law to its pre-1929 state. A homestead could be declared on a mere tenancy until 1929 when the word "property" was defined as "freehold title, interest, or estate." See Brooks v. Hyde, 37 Cal. 366, 372-73 (1869) (dictum); 1929 Cal. Stats. ch. 184, § 1. From 1929 until 1970, homesteads could not be declared on leasehold interests. The long-term lease restriction and the provisions concerning homesteads in condominiums, etc., were added in 1970. See 1970 Cal. Stats. ch. 687, §§ 1, 2. It appears that at least 18 states permit homestead rights in leases, even in oral month-to-month tenancies. See Annot., 89 A.L.R. 555 (1934); Annot., 74 A.L.R.2d 1378 (1960).

29. Civil Code §§ 1256, 1265; Code Civ. Proc. § 690.31(k). Code of Civil Procedure Section 690.3 (mobilehomes and vessels) omits this provision.

Application of dwelling exemption to joint tenancy and tenancy in common property. If there are co-owners of a dwelling and the judgment debtor's interest in the dwelling is sold to satisfy the judgment, the proceeds of sale are used to pay all liens and encumbrances jointly burdening the property before setting apart the amount of the exempt proceeds for the judgment debtor.³⁰ When this occurs, the buyer at the execution sale becomes a co-owner in the judgment debtor's place and has an equitable claim against the other co-owners for their proportionate share of the liens and encumbrances paid off; in the ordinary course of events the parties ultimately partition the property. The proposed law simplifies this complex procedure by selling all interests of the co-owners in the property at the execution sale, paying off the joint liens and encumbrances out of the proceeds of sale, and apportioning the proceeds remaining; the co-owners are given the right of first refusal at the sale.³¹ The execution sale is treated in effect as a partition sale. Treatment of community property is deferred.³²

Junior liens on the dwelling. The treatment of voluntary encumbrances subordinate to the judgment creditor's lien, including such preferred encumbrances as mechanics' and contractors' liens, is unclear under existing law. Existing law grants an exemption over and above

30. Schoenfeld v. Norberg, 11 Cal. App.3d 755, 762-67, 90 Cal. Rptr. 47, ___ (1970). The holding in Schoenfeld is the result of the application of two rules: (1) that a joint encumbrance burdens both cotenants' interests to the full amount and must be satisfied in an execution sale of either interest and (2) that a co-owner may claim the entire exemption as to his or her interest.

31. This approach is drawn from the bankruptcy act, 11 U.S.C. § 363 (Pub. L. No. 95-598).

32. The problem of applying exemptions to married debtors' property is currently under study by a Commission consultant. See the discussion under "Exemption Rights of Married Debtors" infra.

"all" liens and encumbrances³³ and provides for distribution of proceeds first to the discharge of "all" liens and encumbrances³⁴ with no distinction being made between those that are superior to the judgment creditor's lien and those that are inferior.³⁵ The judgment debtor should not be able to defeat the collection efforts of the judgment creditor by further encumbering the property after the judgment creditor has obtained a judgment lien or execution lien on the property. Under the proposed law, voluntary liens and encumbrances subordinate to the judgment creditor's lien would be satisfied out of the proceeds representing the dwelling exemption.³⁶ If such proceeds are insufficient, subordinate voluntary liens and encumbrances would be satisfied along with subordinate involuntary liens in their order or priority out of any surplus remaining after satisfaction of the judgment creditor's lien.

33. Civil Code § 1260.

34. Civil Code § 1255; Code Civ. Proc. § 690.31(j).

35. The relevant language was amended in 1945 to require satisfaction of all liens and encumbrances. Pre-1945 cases indicate that the lien of the judgment creditor had priority over subsequent liens and encumbrances. See *Marelli v. Keating*, 208 Cal. 528, 530, 282 P. 793, 794 (1929) (dictum); *Lean v. Givens*, 146 Cal. 739, 743, 81 P. 128, 129 (1905). In practice, the language requiring satisfaction of all liens and encumbrances appears to be ignored. See 3 H. Miller & M. Starr, *Current Law of California Real Estate* § 16:32, at 61 n.19 (rev. ed. 1977). There is no provision in existing law requiring the satisfaction of liens and encumbrances on non-homestead property, except where the judgment creditor has satisfied the claim of a conditional seller or chattel mortgagee, in which case the proceeds go first to compensate the subrogated creditor. See Section 689c.

36. This provision is consistent with the principle that exemptions are ineffective against judgments for the purchase price of exempt property or against judgments foreclosing a mortgage or other lien on the property. See Section 690.52.

Collateral effects of homestead declaration. Besides shielding the home from general creditors, the declaration of a homestead under existing law prevents the conveyance or encumbrance of the homestead property without the acknowledged written consent of both spouses and creates a right of survivorship in certain cases that vests title to the homestead in the surviving spouse despite the will of the deceased spouse.³⁷

Under the proposed law, the declared homestead system would be repealed, thereby eliminating these results. The probate homestead provisions would be revised and used in place of the declared homestead survivorship right.³⁸ The general rules limiting the ability of spouses to convey or encumber community property and requiring the spouses to support each other out of separate property would replace the comparable feature of the declared homestead.³⁹

37. See Civil Code §§ 1242, 1265.

38. See Recommendation Relating to the Probate Homestead, 15 Cal. L. Revision Comm'n Reports ____ (1979).

39. See, e.g., Civil Code §§ 5100, 5102, 5125, 5127 (Family Law Act). The proposed law would revise these provisions to make clear that a community personal property dwelling could not be conveyed or encumbered without the consent of the spouse and to permit a spouse to record a lis pendens in an dissolution proceeding thereby restraining alienation of a separate property dwelling for a period of three months.

EXHIBIT 2

Article 4. Dwelling Exemption§ 703.700. Definitions

703.700. As used in this article:

(a) "Dwelling" includes but is not limited to the following:

(1) A house together with the outbuildings and the land upon which they are situated.

(2) A mobilehome together with the outbuildings and the land upon which they are situated.

(3) A waterborne vessel.

(4) A condominium, as defined in Section 783 of the Civil Code.

(5) A planned development, as defined in Section 11003 of the Business and Professions Code.

(6) A stock cooperative, as defined in Section 11003.1 of the Business and Professions Code.

(7) A community apartment project, as defined in Section 11004 of the Business and Professions Code.

(b) "Equity" means the fair market value of an interest in a dwelling over and above all liens and encumbrances on the interest superior to the judgment creditor's lien.

Comment. Subdivision (a) of Section 703.700 supersedes the provisions of former law pertaining to the property that could be exempt as a homestead or dwelling. See former Civil Code § 1237 (declared homestead); former Code Civ. Proc. §§ 690.3 (housetrailer, mobilehome, houseboat, boat, or other waterborne vessel), 690.31(a) (dwelling house). Subdivision (a) is intended to include all forms of property for which an exemption could be claimed under former law and any other property in which the judgment debtor or the judgment debtor's spouse actually resides.

Subdivision (b) supersedes provisions of former Civil Code Sections 1245-1255 and former Code of Civil Procedure Section 690.31 that implied that "all" liens and encumbrances were considered in determining the judgment debtor's equity. Subdivision (b) makes clear that the judgment creditor's lien and junior liens are excluded in such a determination.

CROSS-REFERENCES

Defined terms

Judgment creditor § _____

§ 703.710. Dwelling exemption

703.710. (a) One dwelling in which the judgment debtor or the spouse of the judgment debtor actually resides on the date of levy is exempt in the amount provided in this section.

(b) The amount of the dwelling exemption is the judgment debtor's equity not exceeding:

(1) Forty thousand dollars (\$40,000) if the judgment debtor or spouse of the judgment debtor residing in the dwelling is the head of a family or is 65 years of age or older.

(2) Twenty-five thousand dollars (\$25,000) if the judgment debtor or spouse of the judgment debtor residing in the dwelling is a person other than a person described in paragraph (1).

(c) As used in this section, "head of a family" means:

(1) A person who resides in a dwelling with his or her spouse.

(2) A person who cares for or supports any of the following persons in a dwelling:

(A) A minor child or minor grandchild of the person or of the person's deceased spouse.

(B) A minor brother or minor sister of the person or a minor child of the person's deceased brother or sister.

(C) The father, mother, grandfather, or grandmother of the person or the person's deceased spouse.

(D) An unmarried person described in this paragraph who has attained the age of majority and is unable to care for or support himself or herself.

Comment. Subdivision (a) of Section 703.710 supersedes Civil Code Sections 1238 and 1240 (providing for a declared homestead) and Code of Civil Procedure Sections 690.3 and 690.31(a) (providing for a claimed homestead). Unlike the former provisions, subdivision (a) does not specify the interest of the judgment debtor that is protected and does not limit the homestead in a leasehold to a long-term lease; any interest of the judgment debtor sought to be reached by the judgment creditor in the judgment debtor's dwelling is subject to the exemption. Subdivision (a) makes clear that a judgment debtor may exempt only one dwelling even though the judgment debtor's family may live in more than one dwelling. The dwelling exemption does not apply where a lien on the property other than an enforcement lien is being foreclosed. See Section 703.140.

Subdivision (b) continues the substance of former Civil Code Section 1260 and former Code of Civil Procedure Sections 690.3(a) and 690.31(a).

Subdivision (c) continues the substance of former Civil Code Section 1261, making clear that a minor grandchild of a deceased spouse is included as a dependent of the head of a family.

Note. The question whether a dwelling exemption may be obtained in more than one dwelling in the case of community property is reserved.

CROSS-REFERENCES

Defined terms

Dwelling § 703.700(a)

Equity § 703.700(b)

Judgment debtor § _____

21991

§ 703.720. Exemption of dwelling proceeds

703.720. If an exempt dwelling is sold pursuant to this title or is otherwise voluntarily or involuntarily sold or is damaged or destroyed, the judgment debtor's interest in the proceeds of sale or of insurance or other indemnification are exempt in the amount of the dwelling exemption for a period of six months from the date of receipt of the proceeds.

Comment. Section 703.720 supersedes the first sentences of former Civil Code Section 1256 and former Code of Civil Procedure Section 690.31(k), and broadens them to include voluntary sales and other dispositions of the dwelling. See the last portion of former Civil Code Section 1265.

CROSS-REFERENCES

Defined terms

Dwelling § 703.700(a)

21994

§ 703.730. Limitation on sale of dwelling

703.730. (a) Except as provided in subdivision (b), a dwelling may be sold under this title to enforce a money judgment only pursuant to a court order for sale upon a finding of either of the following:

(1) The dwelling is not exempt.

(2) The dwelling is exempt and the judgment debtor's equity exceeds the amount of the exemption.

(b) If the dwelling is personal property or is real property in which the judgment debtor has a leasehold estate with an unexpired term of less than two years at the time of levy:

(1) A court order for sale is not required and the procedures provided in this article do not apply.

(2) Any exemption claim shall be made and determined as provided in Article 2 (commencing with Section 703.210).

Comment. Subdivision (a) of Section 703.730 supersedes portions of former Civil Code Sections 1245, 1249, and 1250 and former Code of Civil Procedure Section 690.31(c) and (f). Under subdivision (a), unlike the former provisions, the value of the dwelling need only exceed the amount of the exemption and superior liens and encumbrances on the property, rather than "all" (including junior) liens and encumbrances. See Section 703.700(b) and Comment thereto (defining "equity").

Subdivision (b) incorporates the general procedures for claiming an exemption where the dwelling levied upon is not subject to the delay of sale provision of Section [703.640(h)] (120-day delay of notice of sale of an interest in real property other than a leasehold estate with an unexpired term of less than two years). Under former law, a house-trailer, mobilehome, houseboat, boat, or other waterborne vessel in which the judgment debtor or the judgment debtor's family actually resided could be claimed as exempt in a similar manner. See former Sections 690(a), 690.3, 690.50. This section also applies to claims of exemption for certain mobilehomes that under former law would have been determined as provided in former Section 690.31(a)(2) (judgment creditor's application for writ of execution on dwelling, including a mobilehome as defined by Health & Safety Code § 18008).

CROSS-REFERENCES

Defined terms

Dwelling § 703.700(a)

Equity § 703.700(b)

21996

§ 703.740. Application for order for sale

703.740. (a) When a dwelling is levied upon, the levying officer shall serve notice of levy personally or by mail on the judgment creditor. Within 20 days after service of the notice of levy, the judgment creditor shall apply to the court for an order for sale of the dwelling and shall notify the levying officer of the application. If the judgment creditor does not apply for an order for sale of the dwelling within the time prescribed in this section, the dwelling shall be released in the manner prescribed in Section ____.

(b) If the dwelling is located in a county other than the county where the judgment was entered:

(1) The judgment creditor shall apply to a court of similar jurisdiction in the other county or, if there is no court of similar jurisdiction, to a court of higher jurisdiction.

(2) The judgment creditor shall file with the application an abstract of judgment in the form prescribed by Section 674.

(3) The judgment creditor shall pay a filing fee of four dollars (\$4) in a justice court and six dollars (\$6) in a superior or municipal court.

Comment. Section 703.740 supersedes the introductory portion and the last two paragraphs of former Civil Code Section 1245 and former Code of Civil Procedure Section 690.31(c). Unlike the former provisions which required the judgment creditor to apply for issuance of a writ of execution, Section 703.740 requires the judgment creditor to apply for an order for sale after levy of execution. This ensures that all writs will be issued out of the court in which the judgment is entered. Notice of the application for an order for sale of the property must be given the levying officer, or the dwelling will be released. This requirement applies only to real property dwellings and not to personal property dwellings or to dwellings with less than a two-year leasehold. See Section 703.739(b).

Note. Whether the spouse of the judgment debtor may claim a community or separate property exemption is reserved.

CROSS-REFERENCES

Defined terms

Court § _____
Dwelling § 703.700(a)
Judgment creditor § _____
Levy on real property § _____
Service of notices § 684.010-684.070

21997

§ 703.750. Contents of application

703.750. The judgment creditor's application shall be verified, shall describe the dwelling, and shall contain one or both of the following:

(1) A statement that the dwelling is not exempt and the reasons therefor. If the application states that the dwelling is not exempt, the application shall also state whether the records of the county tax assessor indicate that there is a current homeowner's exemption for the dwelling claimed by the judgment debtor [or the spouse of the judgment debtor].

(2) A statement that, if the dwelling is exempt, the judgment debtor's equity exceeds the amount of the exemption.

Comment. Section 703.750 supersedes subdivisions (a)-(c) of former Civil Code Section 1245 and subdivisions (1)-(2) of former Code of Civil Procedure Section 690.31(c).

CROSS-REFERENCES

Applicable exemption § 703.710

Defined terms

Dwelling § 703.700(a)

Equity § 703.700(b)

Judgment creditor § _____

Judgment debtor § _____

Homeowner's exemption Rev. & Tax. Code § 253.5

21999

§ 703.760. Notice of hearing

703.760. (a) Upon the filing of the application by the judgment creditor, the court shall set a time and place for hearing and order the judgment debtor to show cause why an order for sale should not be made. The time set for hearing shall be not later than 20 days after the application is filed or such later time as the court selects upon a showing of good cause.

(b) Not later than 10 days before the time set for hearing, the judgment creditor shall do both of the following:

(1) Serve on the judgment debtor personally or by mail a copy of the order to show cause, a copy of the application of the judgment creditor, and a copy of the notice of the hearing in the form prescribed in Section 693.050.

(2) Serve personally a copy of each document listed in paragraph (1) on an occupant of the dwelling or, if there is no occupant present at the time service is attempted, post a copy of each document in a conspicuous place at the dwelling.

(c) The judgment creditor shall file proof of service and any posting with the court.

Comment. Subdivision (a) of Section 703.760 supersedes the introductory portions of former Civil Code Section 1246 and Code of Civil Procedure Section 690.31(d).

Subdivisions (b) and (c) supersede former Civil Code Section 1257 and Code of Civil Procedure Section 690.31(1). Co-owners of the property receive notice of the hearing pursuant to Section 703.830.

CROSS-REFERENCES

Defined terms

Dwelling § 703.700(a)

Judgment creditor § _____

Judgment debtor §
Manner of service of notice § 684.010-684.070

26256

§ 703.770. Hearing

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

(1) If the application states that the dwelling is not exempt and the records of the county tax assessor indicate that there is a current homeowner's exemption for the dwelling claimed by the judgment debtor [or the spouse of the judgment debtor], the judgment creditor has the burden of proof that the dwelling is not exempt. If the records of the county tax assessor indicate that there is not a current homeowner's exemption for the dwelling claimed by the judgment debtor [or the spouse of the judgment debtor], the judgment debtor has the burden of proof that the dwelling is exempt.

(2) If the application of the judgment creditor states that the judgment debtor's equity exceeds the amount of the exemption, the judgment creditor has the burden of proof that the judgment debtor's equity exceeds the amount of the exemption.

(b) The court may appoint a qualified appraiser to assist the court in determining the fair market value of the dwelling and the judgment debtor's equity. The appraiser shall view the dwelling and, within 10 days after appointment, file with the court a written declaration under penalty of perjury stating an opinion of the fair market value of the dwelling and of the judgment debtor's equity. The court shall fix the compensation of the appraiser in an amount determined by the court to be reasonable, not to exceed similar fees for similar services in the community where the services are rendered.

(c) The court shall determine the issues raised in the judgment creditor's application and shall make an order for sale of the dwelling or denying an order for sale.

(d) The clerk of the court shall transmit a copy of the court order to:

(1) The levying officer; and

(2) If the court making the order is not the court in which the judgment was entered, to the clerk of the court in which the judgment was entered.

Comment. Section 703.770 supersedes former Civil Code Section 1247 and Code of Civil Procedure Section 690.31(c) (second paragraph) and (e).

CROSS-REFERENCES

Defined terms

Dwelling § 703.700(a)

Equity § 703.700(b)

Judgment creditor § _____

Judgment debtor § _____

Homeowner's exemption Rev. & Tax. Code § 253.5

101/167

§ 703.780. Order for sale

703.780. (a) If the court determines that the dwelling is not exempt or that the dwelling is exempt and the judgment debtor's equity exceeds the amount of the exemption, the court shall make an order for sale of the dwelling. If the dwelling is exempt, the order for sale shall state the amount of the exemption and the fair market value of the dwelling.

(b) If the court makes an order for sale upon a hearing at which neither the judgment debtor nor the attorney of the judgment debtor appeared:

(1) The judgment creditor shall, not later than 10 days after the date of the order, serve personally or by mail a copy of the order and a notice of the order in the form prescribed in Section 693.060 on the judgment debtor and shall serve personally a copy of each on an occupant of the dwelling or, if there is no occupant present at the time service is attempted, post a copy in a conspicuous place at the dwelling. The judgment creditor shall file proof of service and any posting with the court.

(2) If, within 10 days after service of notice of the order, the judgment debtor files with the levying officer a declaration that the absence of the judgment debtor or the judgment debtor's attorney from the hearing was due to mistake, inadvertence, surprise, or excusable neglect and that the judgment debtor wishes to assert the dwelling exemption, the levying officer shall not sell the dwelling pending further orders of the court and shall transmit the declaration forthwith to the court. Upon receipt of the declaration, the court shall set a time and place for hearing to determine whether the order for sale

should be modified or rescinded. The time set for hearing shall be not later than 20 days after receipt of the declaration. The clerk of the court shall promptly give notice of the hearing to the parties.

Comment. Subdivision (a) of Section 703.780 supersedes former Civil Code Sections 1248-1250 and former Code of Civil Procedure Section 690.31(f). Unlike the former provisions, subdivision (a) does not provide for a determination whether the property can be divided without material injury. Nor does subdivision (a) require that the court specify the amounts for distribution, including names and addresses of persons having encumbrances; this is done following sale pursuant to Sections 700.920 and 700.930. In the case of co-owners of the dwelling, see Section 703.830.

Subdivision (b)(1) supersedes former Civil Code Sections 1251 and 1257 and former Code of Civil Procedure Section 690.31(g) and (1). Unlike the former provisions, co-owners receive only notice of sale, and not notice of default.

Subdivision (b)(2) supersedes former Civil Code Section 1252 and former Code of Civil Procedure Section 690.31(h).

Note. The question whether the spouse of a judgment debtor may claim the dwelling exemption on separate or community property is reserved.

CROSS-REFERENCES

Defined terms

Dwelling § 703.700(a)

Equity § 703.700(b)

Manner of service of notice § 684.010-684.070

101/151

§ 703.790. Denial of order

703.790. (a) If the court determines that the dwelling is exempt and the judgment debtor's equity does not exceed the amount of the exemption, the court shall deny the order for sale.

(b) Upon receipt of a copy of the court order denying an order for sale, the levying officer shall release the dwelling in the manner prescribed in Section _____.

(c) A subsequent application by the judgment creditor within 12 months after the denial of an order for sale shall be supported by a statement under oath alleging that there is a material change in circumstances affecting the exemption, and setting forth facts supporting the claimed material change of circumstances.

Comment. Subdivision (b) of Section 703.790 supersedes portions of former Civil Code Section 1258 and former Code of Civil Procedure Section 690.31(m) (incorporating former Section 690.50(j)).

Subdivision (c) supersedes former Civil Code Section 1253 and former Code of Civil Procedure Section 690.31(1), which required supporting allegations by any judgment creditor. Subdivision (b) requires supporting allegations only by the judgment creditor who was denied the order for sale.

CROSS-REFERENCES

Defined terms

Dwelling § 703.700(a)

Equity § 703.700(b)

998/832

§ 703.800. Sale of exempt dwelling

703.800. (a) If an exempt dwelling is sold pursuant to court order for sale, no bid shall be received unless it exceeds the aggregate amount of all liens and encumbrances on the judgment debtor's interest in the dwelling superior to the judgment creditor's lien plus the dwelling exemption and is at least 90 percent of the fair market value of the dwelling as determined by the court pursuant to Section 703.780.

(b) If no bid is received that is 90 percent or more of the fair market value of the dwelling as determined by the court pursuant to Section 703.780, the court, upon motion of the judgment creditor, shall do one of the following:

(1) Authorize sale at the highest bid that exceeds the aggregate amount of all liens and encumbrances on the judgment debtor's interest in the dwelling superior to the judgment creditor's lien plus the dwelling exemption.

(2) Make an order for a new sale of the dwelling.

(c) Any sale pursuant to an order for sale made under this chapter shall be conducted within six months of the date of the order or such longer period as is agreed to by the judgment debtor. If the sale is not made within six months after the order is made or such longer period as is agreed to by the judgment debtor, the order is void, the levying officer shall release the dwelling in the manner prescribed in Section _____, and the dwelling is not thereafter subject to a court order for sale to satisfy the same judgment.

Comment. Section 703.800 supersedes former Section 1254.

CROSS-REFERENCES

Defined terms

Dwelling § 700.703(a)

Judgment creditor § _____

998/833

§ 703.810. Distribution of proceeds of exempt dwelling

703.810. If a dwelling is sold pursuant to court order for sale, the proceeds of sale shall be distributed in the order prescribed in Section 700.910, except that prior to any distribution of proceeds to the judgment debtor in the amount of the dwelling exemption the proceeds shall be applied to the satisfaction of all liens and encumbrances on the judgment debtor's interest in the dwelling superior to the judgment creditor's lien.

Comment. Section 703.810 supersedes former Civil Code Section 1255.

CROSS-REFERENCES

Defined terms

Dwelling § 703.700(a)

Judgment debtor § _____

998/834

§ 703.820. Disposition of exempt proceeds

703.820. If a dwelling is sold pursuant to this title, any exempt proceeds shall be deposited in court and held for a period not to exceed six months subject to court order for the purchase of another dwelling in this state. If another dwelling in this state is not purchased within the six-month period, the proceeds shall be applied to the satisfaction of the judgment or, if the judgment is already satisfied, released to the judgment debtor. If another dwelling in this state is purchased within the six-month period, the dwelling is not subject to a court order for sale pursuant to this title until the expiration of the six-month period if the judgment debtor or the spouse of the judgment debtor actually resides in the dwelling.

Comment. Section 703.820 supersedes the last two sentences of former Civil Code Section 1256 and former Code of Civil Procedure Section 690.31(k). For the general proceeds exemption for a dwelling, see Section 703.720. Unlike the former provisions, Section 703.820 limits the use of the sale proceeds to acquisition of another dwelling in this state.

CROSS-REFERENCES

Defined terms

Dwelling § 703.700(a)

Judgment debtor § _____

§ 703.830. Procedure where there are co-owners of the dwelling

703.830. If the dwelling is owned by the judgment debtor as a joint tenant, tenant in common, or otherwise as a co-owner of an undivided interest in the dwelling, the following rules govern, notwithstanding any other provision of this article:

(a) The co-owners shall be served with notice of the hearing in the manner prescribed in Section 703.760. The notice shall state that a court order for sale of the dwelling will include the interest of the co-owners.

(b) The court shall determine and the order for sale shall state the proportionate interests of the co-owners in the dwelling.

(c) The sale of the dwelling shall be the sale of the interests of the judgment debtor and the co-owners in the dwelling.

(d) If the dwelling is exempt, the minimum bid at the sale shall be the aggregate amount of all liens and encumbrances on the interests of the judgment debtor and co-owners superior to the judgment creditor's lien plus an amount that, when apportioned among the judgment debtor and the co-owners, will yield an amount for the share of the judgment debtor that exceeds the dwelling exemption.

(e) The co-owners shall have the right to purchase the dwelling at the sale price.

(f) The proceeds of sale remaining after the satisfaction of all liens and encumbrances on the interests of the judgment debtor and the co-owners superior to the judgment creditor's lien, shall be apportioned among the judgment debtor and the co-owners in their proportionate shares. The shares apportioned to the judgment debtor and the co-owners shall be distributed, to the extent applicable, in the order prescribed in Section 700.910.

Comment. Section 703.830 is drawn from 11 U.S.C. § 363(h) and (i) (bankruptcy). It adopts the principal that the dwelling is to be sold free of the interests of co-owners, but gives the co-owners the right of first refusal. Proceeds of sale are distributed to co-owners in their proportionate shares. This amounts in essence to a partition sale of the dwelling.

Note. The rules governing a community property dwelling are reserved.

§ 703.860. Costs

703.860. Notwithstanding any other provision of this title, the judgment creditor is entitled to recover reasonable costs incurred in a proceeding under this article including attorney's fees, appraisal fees, and expert witness fees necessary to prove the fair market value of the dwelling and the judgment debtor's equity, but shall not recover the costs if the court denies or rescinds the order for sale.

Comment. Section 703.860 supersedes former Civil Code Section 1259.

CROSS-REFERENCES

Costs § 685.010-685.080

§ 703.870. Saving provision

703.870. (a) It is the intent of the Legislature that this article be applied to all judgments enforced on or after the operative date of this act, regardless whether based upon tort, contract, or other legal theory or cause of action that arose before or after the operative date of this act, regardless whether the judgment was entered before or after the operative date of this act, and regardless whether any liens based on the judgment have been imposed on the dwelling before or after the operative date of this act.

(b) The repeal of former Sections 1237 to 1304, inclusive of the Civil Code and former Sections 690.3 and 690.31 of the Code of Civil Procedure and the enactment of this article are intended as procedural only and do not affect any exemption rights the owner of a dwelling may have acquired prior to the repeal of the prior provisions. For purposes of acquisition of exemption rights only, all persons who would have been eligible to declare a homestead under the prior provisions as in effect on the date before the operative date of this act are deemed to have declared a homestead on the day before the operative date of this act.

(c) The Legislature finds and declares that generally persons who enter into contracts do not do so in reliance on an assumption that the dwelling exemption in effect at the time of the contract will govern enforcement of any judgment based on the contract, that liens imposed on

Note. The question whether this section should apply to all real property sales, not merely to sales of dwellings, is reserved.

CROSS-REFERENCES

Defined terms

Dwelling § 703.700(a)

Judgment debtor § _____

17019

§ 703.840. Procedure where the interest of the judgment debtor is less than a fee

703.840. If the interest of the judgment debtor in the dwelling is a leasehold or other interest less than an ownership interest, notwithstanding any other provision of this article:

(a) The interest of the judgment debtor in the dwelling, and not the ownership interest, shall be sold.

(b) All references in this article to the "dwelling" are deemed to be references to the judgment debtor's interest in the dwelling.

Comment. Section 703.840 implements the intent of this article not to restrict the interest of the judgment debtor for which a dwelling exemption is available. A dwelling exemption is available to a judgment debtor regardless whether the judgment debtor's interest is a fee, leasehold, or lesser interest. See Comment to Section 703.710.

CROSS-REFERENCES

Defined terms

Dwelling § 703.700(a)

Judgment debtor § _____

17017

§ 703.850. Extensions of time and appeals

703.850. The provisions of Sections 703.390 and 703.400 apply to proceedings under this article.

Comment. Section 703.850 continues the substance of former Civil Code Sections 1258 (portion incorporating Code of Civil Procedure Section 690.50(1)) and 1259.1, and former Code of Civil Procedure Section 690.31(m) (portion incorporating Code of Civil Procedure Section 690.50(1)) and (n). It incorporates the provisions in the general exemption procedure pertaining to extensions of time and appeals.

dwellingings are imposed not as a matter of right but as a matter of privilege granted by state statute and no vested rights with respect to exemptions are created by imposition of a lien, that application of exemptions and exemption procedures in effect at the time of enforcement of a judgment is essential to the proper balance between the rights of judgment debtors and judgment creditors and has a minimal effect on the economic stability essential for the maintenance of private and public faith in commercial matters, and that it is the policy of the state to treat all judgment debtors equally with respect to exemptions and exemption procedures in effect at the time of enforcement of a money judgment. To this end the Legislature reserves the right to alter the dwelling exemption and the procedures therefore at any time and intends that any alterations apply upon their operative date to enforcement of all money judgments, regardless whether based upon tort, contract, or other legal theory or cause of action that arose before or after the operative date of the alterations, regardless whether the judgment was entered before or after the operative date of the alterations, and regardless whether any liens based on the judgment have been imposed on the dwelling before or after the operative date of the alterations.

Comment. Subdivision (a) of Section 703.870 declares the intent of retroactive application of the dwelling exemption provisions, including the amount of the dwelling exemption. This is consistent with the decision in *San Diego White Truck Co. v. Swift*, 96 Cal. App.3d 88, ___ Cal. Rptr. ___ (1979), and reverses cases holding that retroactive changes in the dwelling exemption violate the contract clause of the United States and California Constitutions. See, e.g., *In re Rauer's Collection Co.*, 87 Cal. App.2d 248, 253-54, 196 P.2d 803, ___ (1948); *Daylin Medical & Surgical Supply, Inc. v. Thomas*, 69 Cal. App.3d Supp. 37, 41-42, 137 Cal. Rptr. 826, ___ (1977). See also Comment, The Contract Clause and the Constitutionality of Retroactive Application of Exemption Statutes: A Reconsideration, 9 Pac. L.J. 889 (1978).

Subdivision (b) recognizes that prior to repeal of the declared homestead provisions a person could have been able to preserve homestead rights and provides for preservation of such rights. This provision, along with the provision of subdivision (b) declaring the changes made by this act to be procedural, are designed to preserve the greatest possible retroactive application of the new law in the event that the courts fail to give full retroactive application pursuant to subdivision (a).

Subdivision (c) makes clear that the intent of the Legislature, for future, as well as for present and past, changes in the dwelling exemption, to give the changes the greatest possible effect.

Note. The question whether this section should apply to all exemptions, not merely to the dwelling exemption, is reserved.

CROSS-REFERENCES

Defined terms

Dwelling § 703.700(a)

Operative date § _____

992/940

§ 693.050. Notice of hearing for sale of dwelling

693.050. The notice of the hearing required by Section 703.760 shall be in both English and Spanish, in at least 10-point bold type, and in the following form:

"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 forced sale if you or your family now actually reside on the property. YOU [OR YOUR SPOUSE] SHOULD COME TO THE HEARING TO SHOW THIS FACT.

2. If you [or your spouse] want to contest the forced sale of this property, you [or your spouse] must appear at

_____ on _____
(Location set forth in OSC) (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 RESIDENT OF THIS PROPERTY AND ARE NOT THE DEBTOR, THIS NOTICE DOES NOT AFFECT YOU. PLEASE GIVE IT TO YOUR LANDLORD."

"IMPORTANTE AVISO LEGAL AL PROPIETARIO DE CASA Y
RESIDENTE

1. Su casa está en peligro de ser vendida para cumplir con una orden judicial obtenida en la corte. Usted podría proteger la casa y los bienes raíces descritos en la solicitud adjunta de la venta forzosa si usted o su familia actualmente residen en la propiedad. USTED [O SU ESPOSO(A)] DEBEN VENIR A LA AUDIENCIA PARA DEMONSTRAR ESTE PUNTO.

2. Si usted [o su esposo(a)] quieren disputar la venta forzosa de esta propiedad, usted [o su esposo(a)] deberán presentarse a

_____ el _____
(Location set forth in O.S.C.) (Date and time)

y estar preparados para contestar las preguntas acerca de las declaraciones puestas en la solicitud adjunta. EL ÚNICO PROPÓSITO DE ESTA AUDIENCIA SERÁ EL DE DETERMINAR SI LA PROPIEDAD PUEDE SER VENDIDA, Y NO SI USTED DEBE DINERO.

3. PARA SU PROPIA PROTECCIÓN, USTED DEBERÍA PRONTAMENTE DE BUSCAR EL CONSEJO DE UN ABOGADO EN ESTE ASUNTO. SI USTED ES UN RESIDENTE DE ESTA PROPIEDAD Y NO ES EL DEUDOR(A), ESTE AVISO NO LE AFECTA A USTED. POR FAVOR DESELO A SU ARRENDADOR."

Comment. Section 693.050 continues the substance of former Civil Code Section 1246 and former Code of Civil Procedure Section 690.31(d) and (o).

Note. The question whether the spouse of a judgment debtor may claim an exemption in the separate or community property dwelling is reserved.

26259

§ 693.060. Notice of order for sale

693.060. (a) The notice of order for sale required by Section 703.790 shall be in both English and Spanish, in at least 10-point bold type, and in the following form:

"IMPORTANT LEGAL NOTICE TO HOMEOWNER AND RESIDENT

1. You were recently served with a court order requiring your presence at a hearing to determine why the court should not issue an order for the forced sale of your home. YOU [AND YOUR SPOUSE] FAILED TO APPEAR AT THE HEARING AND THE COURT HAS ORDERED THAT YOUR HOME BE SOLD TO SATISFY A JUDGMENT AGAINST YOU.

2. Your absence at the hearing has contributed to the issuance of the accompanying order for sale. If the absence of you or your attorney at the hearing was legally excusable and you believe in good faith that your home may be entitled to an exemption from execution, you should complete the form below and date, sign, and return the form below no later than _____. (Insert date no later than 10 days after date of service or 15 days if service is by mail.)

3. FOR YOUR OWN PROTECTION, YOU SHOULD IMMEDIATELY SEEK THE ADVICE OF AN ATTORNEY. IF YOU ARE A RESIDENT OF THIS PROPERTY AND ARE NOT THE DEBTOR, THIS NOTICE DOES NOT AFFECT YOU. PLEASE GIVE IT TO YOUR LANDLORD.

.....(Cut Out and Return This Form to).....

(Name and title of levying officer)

(Street address and city)

(Area code and telephone number of levying officer)

I declare that my absence from the previous hearing on whether or not this property should be sold was legally excusable. I, or my spouse, currently reside in this property and I wish a further hearing so that I may assert my dwelling exemption and contest the sale of my home. I understand that the clerk of the court will notify me of the date and place for this hearing if I return this form immediately and that I must attend this hearing.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ at _____, California
(Date) (City or county)

(Signature of debtor [or debtor's spouse])

"IMPORTANTE AVISO LEGAL AL PROPIETARIO DE CASA Y RESIDENTE

1. Recientemente se le entregó una orden de la corte pidiendo su presencia para una audiencia para determinar el porqué la corte no debería de extenderle una orden para la venta forzosa de su casa. USTED [Y SU ESPOSA] NO VINIERON A LA AUDIENCIA Y LA CORTE HA ORDENADO QUE SU CASA SEA VENDIDA PARA SATISFACER EL JUICIO EN CONTRA DE USTEDES.

2. Su ausencia a la audiencia ha contribuido para la emisión de la orden de venta. Si la ausencia de ustedes o de su abogado en la audiencia es excusable legalmente y creen de buena fe que su casa puede tener derecho a estar exonerada de ejecución, debería de completar el formato que está debajo y fecharlo, firmarlo, y devolverlo no a mas tardar del _____. (Insert date no later than 10 days after date of service or 15 days if service is by mail.)

3. PARA SU PROPIA PROTECCIÓN, USTED DEBERÍA INMEDIATAMENTE BUSCAR EL CONSEJO DE UN ABOGADO. SI USTED ES UN RESIDENTE DE ESTA PROPIEDAD Y NO ES EL DEUDOR, ESTE AVISO NO LE AFECTA A USTED. POR FAVOR DÉSELO A SU ARRENDADOR.

.....(Corte y Devuelva Este Formato a).....

(Name and title of levying officer)

(Street address and city)

(Area code and telephone number of levying officer)

Declaro que mi ausencia en la pasada audiencia sobre si esta propiedad debería de ser vendida o no fue legalmente excusable. Yo, o mi esposo(a), actualmente residimos en esta propiedad y deseo una audiencia adicional para hacer valer mis derechos de heredad bajo el Primer Capítulo (comensando con la sección 1237) del Quinto Rótulo de la Cuarta Parte de la Segunda División del Código Civil y disputar la venta de mi casa. Entiendo que el oficial de la corte me notificará de la fecha y del lugar de esta audiencia si devuelvo este formato inmediatamente y que debo asistir a esta audiencia.

Declaro bajo pena de perjurio que lo anterior es verdadero y está correcto.

Firmado el _____ en _____, California
 (Fecha) (Ciudad o condado)

(Firma del Deudor(a) [o de la Esposa(o) del Deudor(a)])

(b) Timely completion and return of the return portion of the Spanish language form has the same force and effect as timely completion and return of the English language form.

Comment. Section 693.060 continues the substance of former Civil Code Section 1251 and former Code of Civil Procedure Section 690.31(g) and (p).

Note. The question whether the spouse of a judgment debtor may claim an exemption in the separate or community property dwelling is reserved.

EXHIBIT 3

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 dwelling exemption. See Code Civ. Proc. §§ 703.700-703.870. [As a right of survivorship (former Section 1265), the declared homestead is superseded by the probate homestead. See Prob. Code §§ 660-667. See Recommendation Relating to the Probate Homestead, 15 Cal. L. Revision Comm'n Reports (1979).] 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 except as provided in Section 5102 of the Civil Code. 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 and restraint on alienation of dwelling); Code Civ. Proc. § 872.210(b) (no partition of community property).

4445

DISSOLUTION PROCEDURE

Civil Code § 4359 (amended)

SEC. . Section 4359 of the Civil Code is amended to read:

4359. During the pendency of or in 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, and if such order is directed against a party, requiring ~~him~~ the party

to notify the other party of any proposed extraordinary expenditures and to account to the court for all such extraordinary expenditures; (2) enjoining any party from molesting or disturbing the peace of the other party or any person under the care, custody, or control of the other party; (3) temporarily excluding either party from the family dwelling or from the dwelling of the other upon a showing that physical or emotional harm would otherwise result, ~~as provided in Section 5102~~ until the final determination of the proceeding ; and (4) determining the temporary custody of any minor children of the marriage.

Comment. The introductory phrase of Section 4359 is amended to make clear that an order under the section is authorized at any time after proceedings are commenced and not just in the period after filing and prior to service and response.

Paragraph (3) is amended to incorporate provisions formerly found in Section 5102.

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 purposes 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.

404/097

SEPARATE PROPERTY

Civil Code § 5102 (amended)

SEC. . Section 5102 of the Civil Code is amended to read:

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 .

(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 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.

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 the family 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 the family 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.

26757

APPEALS

Code of Civil Procedure § 917.7 (amended)

SEC. . Section 917.7 of the Code of Civil Procedure is amended to read:

917.7. The perfecting of an appeal shall not stay proceedings as to those provisions of a judgment or order which award, change or otherwise affect the custody, including the right of visitation, of a minor child in any civil action, in an action filed under the Juvenile Court Law, or in a special proceeding, or the provisions of a judgment or order for the temporary exclusion of a party from the family dwelling or the dwelling of the other party, as provided in Section ~~5102~~ 4359 of the Civil Code; provided, the trial court may in its discretion stay execution of such provisions pending review on appeal or for such other period or periods as to it may appear appropriate; provided further, that in the absence of a writ or order of a reviewing court providing otherwise, the provisions of such judgment or order allowing, or eliminating restrictions against, removal of the minor child from the state are stayed by operation of law for a period of 30 days from the entry of the judgment or order and are subject to any further stays ordered by the trial court, as herein provided.

Comment. Section 917.7 is amended to reflect the transfer of provisions from Section 5102 to Section 4359 of the Civil Code.

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 dwelling exemption. See Comment to former Civil Code §§ 1237 through 1304.