

Memorandum 80-64

Subject: Study D-300 - Creditors' Remedies (Exemptions Generally)

Attached to this memorandum is a draft of the exemption chapter of the comprehensive statute with a preliminary portion explaining the exemption scheme. This material is the same as that attached to Memorandum 80-52 which was sent to you for the June meeting. At the May 1980 meeting, some of the Commissioners expressed an interest in reviewing the policy decisions on the exemptions. This should be done at the September meeting.

The staff has only one issue to discuss, which was raised but not resolved at the May meeting: whether the \$7,500 homestead proceeds exemption should be effective against voluntary encumbrances on the property and against involuntary encumbrances such as mechanics liens. The relevant portion of Memorandum 80-42, which was discussed at the May meeting, is set out below. At the meeting, there was also some discussion of whether the draft scheme should be replaced by a scheme based on existing law--\$30,000 for a single person and \$45,000 for a head of household.

Homestead Exemption

The scheme of the Commission's current homestead draft is to protect the debtor in the family home until the debtor sells the home or until the equity becomes so great (\$100,000) that it should be forcibly sold on execution. The amount of the exemption is substantially increased over existing law so the ordinary debtor cannot be involuntarily evicted from his or her home. When sale occurs, the debtor is given a relatively small amount of the proceeds--\$7,500--which the debtor can use for housing or for any other purpose the debtor desires.

Under the Commission's scheme, the \$7,500 proceeds exemption is available without regard to any security interests creditors may have in the home. Thus, if a person has a second trust deed on a dwelling and the dwelling is sold on execution or is voluntarily sold by the debtor, the judgment debtor will get his or her \$7,500 even though this means that the note secured by the second trust deed will not be satisfied in full. The effect of the provision is that the security for the second trust deed is reduced by \$7,500. This provision would be significant if there were a general decline in the market value of houses.

The general rule for other exemptions is that an exemption is not good as against a security interest in the exempt property. The Commission departed from the general rule in the case of the homestead exemption because of the unique nature of the homestead right and because the amount of the homestead exemption on sale of the dwelling would be substantially reduced under the Commission's recommendation.

One drawback to this homestead exemption scheme is that lenders may be less willing to loan money based on the security of the family home, and sellers may be less willing to carry secondary financing for home buyers, than they would if the security interest were not subject to a \$7,500 exemption in the property that secures the loan. This presents a basic policy issue--whether the possibly adverse effect on the ability to obtain credit is outweighed by the needs of the dispossessed debtor. The staff is divided on this issue and believes that the Commission should review it.

Respectfully submitted,

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EXEMPTIONS FROM ENFORCEMENT OF MONEY JUDGMENTS

Introduction

Since 1851 California law has provided that certain property of judgment debtors is exempt from enforcement of a money judgment.¹ These exemptions are among the most generous in the United States.² In general, exemption laws are intended to reserve an amount of property sufficient to support the judgment debtor and the judgment debtor's family and to facilitate the financial rehabilitation of the judgment debtor.³ They also serve to shift the cost of social welfare from the community to judgment creditors.⁴

The substantive exemptions were extensively revised in 1970 in response to a 1967 report by the State Bar Committee on Debtor and Creditor.⁵ Both the substantive exemptions and the procedural provisions are in need of further revision. Important factors prompting the proposals in this recommendation include the dramatic inflation occurring over the past several years, the enactment of the Bankruptcy Reform

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1. 1851 Cal. Stats. ch. 123, § 219.
 2. D. Cowans, Bankruptcy Law and Practice § 589, at 326 (1963); Committee on Debtor and Creditor of State Bar of California, Modernization of Statutory Exemptions, 42 Cal. St. B.J. 869, 873 (1967).
 3. Bailey v. Superior Court, 215 Cal. 548, 554, 11 P.2d 865, 867 (1932); see generally Vukowich, Debtors' Exemption Rights, 62 Geo. L.J. 779, 782-88 (1974). It has also been suggested that early exemptions were enacted to attract settlers in newly admitted states. See Haskins, Homestead Exemptions, 63 Harv. L. Rev. 1289, 1290 (1950).
 4. See Comment, Bankruptcy Exemptions: Critique and Suggestions, 68 Yale L.J. 1459, 1497-1502 (1959). Although it has been suggested that no property should be exempt and that insolvent debtors should rely on social welfare legislation, this alternative is undesirable because of the cost to the community of providing welfare and the low level of available benefits, because most creditors are in a position to control their extension of credit, and because the lack of exemptions would drive greater numbers of debtors into bankruptcy. See id.
 5. See Committee on Debtor and Creditor of State Bar of California, Modernization of Statutory Exemptions, 42 Cal. St. B.J. 869 (1967).

Act of 1978 containing new exemption provisions⁶ and the approval of a Uniform Exemptions Act by the National Conference of Commissioners on Uniform State Laws in 1976.

Exempt Property

The substantive exemption provisions should accommodate both the interest of the judgment debtor in maintaining a basic standard of living and the interest of the judgment creditor in satisfying a money judgment. Accordingly, the general approach of the proposed law is to protect income and property needed for the subsistence of the judgment debtor and his or her family, such as a dwelling, household furnishings, clothes, provisions, a motor vehicle, tools of a trade, wages, insurance benefits, retirement benefits, unemployment benefits, and aid. The Commission's recommendations are also tempered with the knowledge that exemption laws are controversial.⁷

A matter of particular concern in the formulation of exemptions is the treatment of property of a married judgment debtor and spouse. As a general rule, all the community property as well as the separate property of a married judgment debtor is available to satisfy the judgment.⁸ Because the interest in community property of the judgment debtor's spouse is vulnerable to the judgment creditor, the exemption rights of the spouse must be recognized as well as the exemption rights of the judgment debtor.⁹ The proposed law treats a married judgment debtor and spouse as a marital unit for purposes of exemptions. Some of the exemptions are increased to accommodate the needs of the marital unit

6. See Pub. L. No. 95-598, codified in 11 U.S.C. § 522. See also Report of the Commission on the Bankruptcy Laws of the United States, House Doc. No. 93-137, Part I, 93d Cong., 1st Sess. (1973).

7. The Advisory Committee in charge of the revision of New York laws on enforcement of money judgments gave as a reason for declining to recommend changes in exemption provisions "that they are the result of legislative compromise; that they reflect the diverse pulls of various groups within the state." 6 J. Weinstein, H. Korn, & A. Miller, New York Civil Practice ¶ 5205.01 (1976).

8. See discussion in Recommendation Relating to Liability of Marital Property for Debts, 15 Cal. L. Revision Comm'n Reports ____ (1980).

9. Cf. White v. Gobey, 130 Cal. App. Supp. 789, 791, 19 P.2d 876, ____ (1933).

and others are shared between the spouses, depending on the nature of the particular exemption.¹⁰ Exemptions based on need or based on the availability of other property of the same character are determined by taking into account all the marital property, whether or not all the property would be liable to satisfy the judgment. The fact that one or both spouses are debtors under the judgment does not affect the availability or the amount of their exemptions.

In drafting the proposed exemptions, the Commission has sought to strike a balance between designating specific items as exempt (such as a table, refrigerator, or stove) and creating general categories of exempt property (such as household furnishings).¹¹ Specific exemptions result in more certainty but can be overly restrictive and are more likely to be rendered obsolete over time. General exemptions provide greater flexibility and equality of treatment but are more difficult to administer.

The following material discusses the major statutory exemptions of existing law and the more important revisions proposed by the Commission.¹²

Household Furnishings, Wearing Apparel, and Personal Effects

Existing law provides a general exemption for necessary household furnishings, appliances, and wearing apparel, and a specific exemption for a piano, radio, television receiver, shotgun, rifle, provisions and fuel for three months, and works of art by the debtor or the judgment

10. See discussion below.

11. See generally Joslin, Debtors' Exemption Laws; Time for Modernization, 34 Ind. L.J. 355, 356-57 (1959); Note, Debtor Exemptions in Personal Property--Proposals for Modernization, 52 Kent. L.J. 456, 457-58, 465 (1964); Rombauer, Debtors' Exemption Statutes--Revision Ideas, 36 Wash. L. Rev. 484, 490-95 (1961).

12. The more technical revisions are discussed in the Comments sections in the Proposed Legislation infra and in the Comments to the repealed sections in the Appendix infra.

debtor's resident family.¹³ Under this provision, the courts have applied a "station-in-life" test resulting in the exemption of substantial amounts of personal property.¹⁴

The proposed law provides a more restrictive exemption for this type of property. It would protect household furnishings, appliances, wearing apparel, provisions, and other personal effects reasonably necessary for an average household and personally used or procured for use by the judgment debtor and members of the debtor's household at their principal residence. The limitation to goods reasonably necessary for an "average" household will ensure that the judgment debtor protects a basic living standard. If the judgment debtor and spouse live separate and apart, each household would be entitled to an "average" exemption for a household of that size.

A limited exemption, not subject to the necessity standard, is provided for jewelry, heirlooms, works of art, and other items of special sentimental or psychological value to the judgment debtor if the court determines that their reasonable value for this purpose outweighs the needs of the judgment creditor to such an extent that it would be inequitable to subject them to enforcement of the judgment. This exemption is intended to protect a few special items regardless of their value and regardless of their necessity.

Motor Vehicle

Existing law provides an exemption for one motor vehicle with a value, over all liens and encumbrances on the vehicle, not exceeding \$500.¹⁵ The value of the vehicle is required to be determined from used car price guides customarily used by California automobile dealers or,

13. Section 690.1.

14. See *Independence Bank v. Heller*, 275 Cal. App. 84, 79 Cal. Rptr. 868 (1969) (furniture worth over \$22,000 held exempt); *Newport Nat'l Bank v. Adair*, 2 Cal. App.3d 1043, 83 Cal. Rptr. 1 (1969) (furniture for 14-room apartment held exempt); Comment, California's New Household Goods Exemption and the Problem of Personal Accountability, 12 Santa Clara Law. 155 (1972).

15. Section 690.2. Section 690.4 also provides an exemption for a commercial motor vehicle used in the judgment debtor's trade, calling, or profession.

if not listed, by fair market value. If the judgment debtor's equity in the motor vehicle exceeds \$500, it may be sold at an execution sale, but the proceeds remaining after satisfaction of liens and encumbrances are exempt in the amount of \$500 for a period of 90 days.

The proposed law increases the motor vehicle exemption to \$1,000 in light of the increased value of motor vehicles generally. In the case of a married judgment debtor, a second motor vehicle is exempt only if that vehicle is necessary to enable both spouses to work. The exemption for proceeds is extended to proceeds from a voluntary sale or from insurance or other indemnification received for the damage or destruction of the vehicle;¹⁶ this fills a gap in existing law.

Tools of a Trade

Existing law provides an exemption for tools and other items, including one commercial fishing boat and one commercial motor vehicle, ordinarily and reasonably necessary for the use of the judgment debtor in the exercise of the trade, calling, or profession by which the judgment debtor earns a livelihood, to the maximum aggregate actual cash value of \$2,500 in excess of liens and encumbrances on such items.¹⁷ The proposed law continues this exemption and includes building materials for which existing law provides a separate exemption in the amount of \$1,000.¹⁸ The tools of a trade exemption is available to each spouse if the judgment debtor is married, and the spouses may aggregate their exemptions if they work together. The proposed law would also exempt proceeds from the sale or indemnification for the loss, damage, or

16. Section 9(a) of the Uniform Exemptions Act (1976) provides a similar exemption traceable for 18 months.

17. Section 690.4.

18. Section 690.17. The proposed law also exempts building materials that are not a tool of trade where they have been purchased by a homeowner for the repair or improvement of the home. In the case of a married judgment debtor living separate and apart from the spouse, each spouse is entitled to this exemption.

destruction of such items in the amount of \$2,500 for a period of 90 days after a voluntary sale or, in other cases, after receipt of the proceeds or indemnification.¹⁹

Health Aids

Existing law provides an exemption for prosthetic and orthopedic appliances personally used by the debtor.²⁰ This exemption is too narrow²¹ and should be expanded to include health aids reasonably necessary to enable the judgment debtor or the spouse or dependents of the judgment debtor to work or sustain health.²² This provision would permit the exemption of items such as a wheel chair for a person unable to walk to work, an air conditioner for a person afflicted with asthma, or an elevator for a person unable to climb stairs, but would not exempt a swimming pool, sauna, bicycle, golf clubs, or gymnastic equipment merely because their use is conducive to good health.

Deposit Accounts

Existing law provides exemptions for \$1,000 in a savings and loan association account²³ and \$1,500 in a credit union account.²⁴ An account into which social security benefits are directly deposited is protected from levy to the extent of \$500 if there is one recipient and

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19. Section 9(a) of the Uniform Exemptions Act (1976) provides a similar exemption traceable for 18 months. The 90 day limitation on the protection of proceeds is the same as that provided by Section 690.2(e) in the case of a motor vehicle.
 20. Section 690.5.
 21. "Prosthesis" is defined as the "addition to the human body of some artificial part, as a leg, eye, or tooth." Webster's New Collegiate Dictionary 678 (1956). "Orthopedics" is defined as the "correction or prevention of deformities, esp. in children." Id. at 593.
 22. This provision is derived from Section 5(2) of the Uniform Exemptions Act (1976).
 23. Section 690.7.
 24. Fin. Code § 15406.

\$750 if there are two or more recipients, and is exempt to the extent that additional amounts consist of social security payments.²⁵ There is no specific exemption for savings or checking accounts in banks.²⁶

There is no justification for discriminating against judgment debtors who happen to have bank accounts rather than savings and loan or credit union accounts. Under the proposed law, the exemptions for savings and loan and credit union accounts are halved, and a new exemption is created for deposit accounts in banks in the aggregate amount of \$250. If the judgment debtor is married, each spouse is entitled to the exemptions. The bank, savings and loan, and credit union exemptions would be reduced to the extent there are other exempt funds from exempt sources in the accounts. This scheme will ensure that a judgment debtor or spouse having a bank account receives the exemption, but will preclude judgment debtors and spouses from accumulating substantial exempt amounts to the detriment of judgment creditors. Although the Commission believes that a uniform exemption for deposit accounts of all types is preferable to exemptions that vary with the type of account, the Commission recognizes that for historical and political reasons it may be impossible either to increase further the amount of the bank account exemption or to decrease further the amount of the savings and loan and credit union exemptions, and therefore does not recommend a uniform deposit account exemption at this time.

25. Section 690.30. Section 690.30 requires the judgment creditor to initiate the exemption proceedings to determine whether nonexempt amounts reside in the account. At the hearing, however, the judgment debtor has the burden of proof. This provision, enacted by 1976 Cal. Stats. ch. 810, § 1, limits the application of the rule in *Phillips v. Bartholomie*, 46 Cal. App.3d 346, 121 Cal. Rptr. 56 (1975), which held that a judgment debtor is not entitled to a hearing before social security, AFDC, county welfare, and veterans' benefits in a bank account could be levied upon. Of course, such benefits are exempt when a claim is made under general principles regarding tracing of exempt benefits. See *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 416-17 (1973) (disability benefits in bank account); *Kruger v. Wells Fargo Bank*, 11 Cal.2d 352, 367, 521 P.2d 441, ___, 113 Cal. Rptr. 449, ___ (1974) (unemployment benefits in checking account). Section 690.30 provides an additional protection since it shields a certain portion of the account from the reach of creditors without the necessity of making a claim of exemption.

26. Exempt amounts may be traced into bank accounts under existing law. See the discussion under "Tracing Exempt Amounts" infra.

Life Insurance

Existing law exempts benefits growing out of life insurance in an amount resulting from payment of a \$500 annual premium and provides an additional exemption in the same amount in favor of the insured's spouse or minor children.²⁷ Certain types of group life insurance are completely exempt.²⁸ The life insurance exemption shields benefits from the reach of judgment creditors of the insured and of the beneficiary.²⁹ The exemption also protects a beneficiary under a credit insurance policy.³⁰

Consistent with the policy of protecting a minimal amount of property necessary to support the judgment debtor and the judgment debtor's family, the proposed law would substantially revise these exemptions. A judgment creditor would not be able to reach the cash surrender value of a policy. The proposed law would, however, permit the creditor to reach the loan value of the policy to the extent it exceeds \$4,000. In the case of a married judgment debtor, each spouse would be entitled to this exemption. The judgment debtor and spouse should not be forced to surrender their policies since they may be uninsurable or insurable only at a prohibitive premium.

The proposed law provides an exemption of benefits from a matured life insurance, endowment, or annuity policy in an amount reasonably necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor. The proposed law would eliminate the

27. Section 690.9. The exemption also applies to endowment and annuity policies. See *Hing v. Lee*, 37 Cal. App. 313, 318, 174 P. 356, ___ (1918). Where there are multiple beneficiaries entitled to claim the exemption, each beneficiary is entitled to assert an exemption in proportion to the total proceeds of the policy. *Jackson v. Fisher*, 56 Cal.2d 196, 201, 363 P.2d 479, ___, 14 Cal. Rptr. 439, ___ (1961).

28. Section 690.10; Ins. Code § 10213. This exemption does not apply in certain cases. See Ins. Code §§ 10203.5 (borrower and installment purchaser groups), 10203.6 (credit union groups), 10203.8 (savings account depositors).

29. *Holmes v. Marshall*, 145 Cal. 777, 779-82, 79 P.2d 534, ___ (1905).

30. *Jackson v. Fisher*, 56 Cal.2d 196, 199, 363 P.2d 479, ___, 14 Cal. Rptr. 439, ___ (1961).

arbitrary feature of existing law which exempts benefits to the extent represented by a \$500 annual premium.³¹ The existing standard can result in widely varying exempt amounts depending upon the type of policy (e.g., straight life, endowment, or annuity), the type of insurer (e.g., private, group, industrial, government), the age of the insured when the policy was taken out, and the length of coverage.³²

Public and Private Retirement and Death Benefits

Existing law exempts public retirement plan benefits both before payment (when no claim is required to be made) and after payment (when the exemption must be claimed).³³ The law governing private retirement plans is not clear but appears to be that funds held by the retirement plan are completely exempt before payment to the judgment debtor,³⁴ that contributions and interest returned to the judgment debtor are exempt if the exemption is claimed,³⁵ and that periodic payments to the judgment debtor from the plan are exempt to the same extent as wages.^{35.1} The

31. This standard dates from 1868 when the life insurance exemption was enacted. 1868 Cal. Stats. ch. 404, § 1. The first life insurance exemption provision, the Verplanck Act enacted in New York in 1840, also based the exemption upon the amount of the annual premium. See Riesenfeld, Life Insurance and Creditors' Remedies in the United States, 4 U.C.L.A. L. Rev. 583, 589 (1957). At the time such exemptions were first enacted, life insurance was used to provide support for the family of the deceased. Today, a majority of payments under life insurance policies are made to policyholders. See Institute of Life Insurance, Life Insurance Fact Book '77, at 49-50 (1977); Vukowich, Debtors' Exemption Rights, 62 Geo. L.J. 779, 810 & n.183 (1974).

32. For example, the exempt benefits deriving from a \$500 premium amounted to \$113,200 in *Jackson v. Fisher*, 56 Cal.2d 196, 363 P.2d 479, 14 Cal. Rptr. 439 (1961) (\$883 annual premium on \$100,000 policy with double indemnity clause), and \$8,900 in *California United States Bond & Mort. Corp. v. Grodzins*, 139 Cal. App. 240, 34 P.2d 193 (1934) (\$558 annual premium on \$10,000 policy).

33. Section 690.18(a)-(b). This exemption covers pensions, annuities, and retirement, disability, death, or other benefits, and return of contributions and interest, from a public entity and public employee vacation credits.

34. Section 690.18(c).

35. Section 690.18(c).

35.1. 15 U.S.C. §§ 1672-1673.

exemptions do not apply, however, against a judgment for child or spousal support.^{35.2} The proposed law would continue the substance of the exemptions, but the funds should be available to satisfy judgments for child and spousal support to the extent the court determines is equitable.^{35.3}

Disability and Health Benefits

Existing law provides several exemptions for benefits from a disability or health insurance policy or program. Disability or health insurance benefits are exempt to the extent represented by a \$500 annual premium.³⁶ Money of a fraternal organization used to pay sick benefits to members of the organization is exempt in the amount of \$500.³⁷ Money paid by a fraternal benefit society is exempt before and after payment.³⁸ Disability benefits under a retirement plan are exempt to the same extent as other retirement benefits.³⁹

The proposed law consolidates these provisions. Under the proposed law, disability and health benefits, before payment, are exempt without the requirement of making a claim and, after payment, are exempt upon a claim therefore. This exemption would not apply where the judgment creditor provided health care concerning the condition for which the benefits are collected.

Damages for Personal Injury

Existing law provides an exemption for insurance benefits for injury⁴⁰ or death⁴¹ but does not exempt settlements or awards for the personal injury of the judgment debtor. The proposed law provides an exemption for a settlement or award arising out of the personal injury

35.2. Section 690.18(a), (c).

35.3. See discussion under "Judgments for Spousal or Child Support," infra.

36. Section 690.11. For a discussion of tying the exemption of insurance benefits to the amount of the premium, see the discussion under "Life Insurance" supra.

37. Section 690.13.

38. Section 690.14.

39. Section 690.18. See the discussion under "Public and Private Retirement and Death Benefits" supra.

40. Section 690.11 (disability and health insurance).

41. Sections 690.9 (life insurance), 690.10 (group life insurance).

of the judgment debtor to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor.⁴² This exemption would not apply when the judgment creditor provided health care for the personal injury for which the settlement or award was made.

Wrongful Death Awards

Existing law does not exempt wrongful death settlements or awards. The proposed law would exempt settlements and awards arising out of the wrongful death of a person of whom the judgment debtor was a spouse or a dependent to the extent reasonably necessary for support.⁴³

Unemployment Benefits and Contributions, Strike Benefits

Under existing law, contributions of employees and employers to unemployment programs, and benefits from such programs, prior to payment, are exempt without making a claim.⁴⁴ After payment, these benefits are exempt if a claim is made.⁴⁵ The proposed law would continue the substance of this exemption and would also provide a similar exemption for strike benefits paid to a union member.

Public Assistance and Similar Private Programs

Existing law provides a complete exemption for aid given under a public assistance program⁴⁶ and for aid from a fraternal benefit society.⁴⁷ Under the proposed law, these exemptions are combined and the

42. Section 6(a)(3) of the Uniform Exemptions Act (1976) provides a similar exemption.

43. Section 6(a)(3) of the Uniform Exemptions Act (1976) provides a similar exemption.

44. Sections 690.13 (\$500 used by fraternal organization as unemployment benefits for members), 690.16 (contributions to the Unemployment Compensation Disability Fund and the Unemployment Fund), 690.175 (state and federal-state benefits and payments under a plan or system established by an employer for employees generally or for a class or group of employees for the purpose of supplementing unemployment compensation benefits), 690.18(b) (contributions and reimbursement for benefits received under Unemployment Insurance Code by government employees); Unemp. Ins. Code §§ 988 (incorporating Section 690.16), 1342 (incorporating Sections 690.175, 690.18).

45. See Sections 690.13, 690.175.

46. Section 690.19. Before payment, the aid is exempt without making a claim; after payment, a claim of exemption must be made.

47. Section 690.14. This exemption must be claimed.

protection is extended to aid of the same nature given by a charitable organization.

Relocation Benefits

Under existing law, relocation benefits for displacement from a dwelling owned or rented by the judgment debtor are exempt without filing a claim.⁴⁸ Under the proposed law, once the benefits have been paid, an exemption claim must be made since it is necessary for the judgment debtor to trace the funds to their source in order to qualify for the exemption.

Cemetery Plot

Existing law exempts a judgment debtor's cemetery lot, not exceeding one-quarter of an acre and, in the case of a religious or benevolent association or corporation, not exceeding five acres.⁴⁹ The proposed exemption provision includes graves, crypts, vaults, and niches,⁵⁰ whereas existing law specifically applies only to land to be used for burial purposes and fixtures. The proposed law exempts a cemetery plot for the judgment debtor and spouse. The proposed law also protects a family plot⁵¹ from enforcement of a money judgment. Land which is held for the purpose of sale as cemetery plots would be nonexempt as under existing law.⁵² The five-acre limitation on the exemption for religious or benevolent associations or corporations is unnecessary and is not continued in the proposed law.

Prisoners' Trust Fund

A prison inmate's trust fund is exempt in the amount of \$40.⁵³ The proposed law raises this exemption to \$1,000 so that a prisoner who is released will have some funds on which to live. If the judgment debtor is married, each spouse is entitled to a separate \$1,000 exemption.

48. Section 690.8a.

49. Section 690.24.

50. See Health & Safety Code § 7022.

51. For provisions concerning family plots, see Health & Safety Code §§ 8650-8653.

52. Section 690.24. The proposed law would also continue portions of Section 690.24 which provide that property dedicated as a cemetery is not subject to enforcement of a debt due from an individual owner of a plot and that money from the sale of unused cemetery lands is not subject to enforcement of a money judgment if used for the purposes specified in Health and Safety Code Section 7925.

53. Section 690.21.

Church Pews

Existing law exempts pews in churches and meetinghouses used for religious purposes and owned by the debtor.⁵⁴ The proposed law does not continue this exemption because it is obsolete, the practice of member ownership of pews having generally ceased.⁵⁵

Homestead Exemption

Introduction

California law provides a substantial homestead exemption for the purpose of promoting the security of the home and protecting it from the consequences of the owner's economic misfortune.⁵⁶ Under existing law there are three separate homestead exemption statutes: the declared homestead,⁵⁷ the dwelling house exemption for persons who have failed to declare a homestead,⁵⁸ and the claimed exemption for a mobilehome or vessel.⁵⁹ Each statute provides a homestead exemption if an exemption has not been obtained pursuant to the other statutes.⁶⁰ The amount of the exemption provided by each statute is the same--\$45,000 if the judgment debtor is married, the head of a family, or over 65 years old, and \$30,000 in other cases.⁶¹ Each statute protects the dwelling from sale to satisfy a judgment if the judgment debtor's equity is less than the exempt amount; if the judgment debtor's equity exceeds the exempt

54. Section 690.25.

55. See 6 J. Weinstein, H. Korn, & A. Miller, New York Civil Practice ¶ 5205.15 (rev. 1976).

56. 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).

57. See Civil Code §§ 1237-1304.

58. See Section 690.31.

59. See Sections 690.3, 690.50.

60. Sections 690.3(b) and 690.31(b); but see Civil Code § 1259.2.

61. Civil Code § 1260; Code Civ. Proc. §§ 690.3(a), 690.31(a). See 1980 Cal. Stats. ch. 15.

amount, 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 exemption.⁶²

Amount of Exemption

The \$45,000 maximum dwelling exemption fails to accomplish the intent of the exemption laws to protect the judgment debtor from forced dispossession of the family home. In California's current inflationary economy, housing costs are high and are rapidly rising. If a judgment debtor has owned a home for any significant length of time, the equity will exceed the \$45,000 exemption and the home will be subject to forced sale. Moreover, the \$45,000 exemption of sale proceeds will not ordinarily enable the judgment debtor to purchase replacement housing, since the judgment debtor may be unable to obtain credit. And if replacement housing is obtained, its rapid inflationary increase will subject it also to forced sale within a short period.

The \$45,000 exemption of sale proceeds, in addition to being of little value to the judgment debtor in purchasing replacement housing, is also unfair to judgment creditors. To require judgment creditors to go unpaid in order to protect \$45,000 cash which the judgment debtor is free to spend at will⁶³ is not sound policy. A judgment creditor has a legitimate interest in collecting the debt out of the judgment debtor's assets that are not necessary for the support and maintenance of the judgment debtor and dependents.

The dwelling exemption should be revised to provide greater security for the judgment debtor's home and greater assurance that the judgment creditor is paid when the home is sold. The Commission recommends:

(1) The home of the judgment debtor not be subject to forced sale unless the judgment debtor's equity exceeds \$100,000. This amount will protect the great majority of ordinary residences, but will not permit

62. Civil Code §§ 1245-1256; Code Civ. Proc. §§ 690.31(c)-(k), 690.3, 690.50(i).

63. Civil Code Section 1265 protects the proceeds of sale of a homestead for a period of six months without the requirement that the proceeds be applied to purchase of another dwelling or for any other purpose.

the judgment debtor to accumulate substantial wealth in a residence at the expense of the judgment creditor. If the judgment debtor is married but lives separate and apart from the spouse, each should be entitled to an exemption in half the amount or, if they both agree, they should be permitted to combine their exemptions in a single dwelling.

(2) The exemption should apply as long as the judgment debtor or spouse continues to own and reside in the dwelling, but a judgment creditor should be permitted to obtain a judgment lien on the dwelling that facilitates collection from proceeds in case of a future sale of the dwelling or in case the dwelling appreciates in value to the point where it is subject to forced sale.

(3) When the dwelling is sold, whether voluntarily or involuntarily, judgment creditors having judgment liens on the property should receive the amounts due them before the sale proceeds are paid to the judgment debtor.

(4) Of the sale proceeds, \$7,500 each for the judgment debtor and spouse residing in the dwelling should be exempt for use for any purpose, including rental housing. The modest amount of the proceeds exemption recognizes the fact that a larger exemption would not ordinarily enable the purchase of a replacement dwelling nor, if a replacement dwelling is purchased, preserve it from forced sale. It also takes into account the right of the creditor to have the judgment eventually paid. The \$7,500 proceeds exemption is the same as the amount of the dwelling exemption provided in bankruptcy.⁶⁴

Exemption Procedure

The three dwelling exemption procedures provided by existing law display unnecessary differences and complexities. They should be simplified and unified.

Declared homestead. The judgment debtor may exempt a real property dwelling by filing a homestead declaration with the county recorder⁶⁵ if the judgment creditor has not earlier obtained a judgment lien.⁶⁶

64. 11 U.S.C. § 522 (d)(1) (bankruptcy).

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

66. See Civil Code § 1241.

Once an effective declaration is recorded, the judgment debtor cannot obtain a subsequent judgment lien, even if the judgment debtor's equity in the property exceeds the amount of the exemption.⁶⁷ This results in a race to the recorder's office. If the judgment creditor wins the race, the judgment debtor may still assert a dwelling house exemption in a court hearing on the judgment creditor's application for a writ of execution.⁶⁸ If the judgment debtor wins the race, the exemption is not secure since the declaration may in fact be invalid; a hearing on entitlement to the exemption is necessary.⁶⁹ The practical effect of a declared homestead is simply that judgment creditors are precluded from securing payment of the judgment by means of the relatively benign judgment lien. It also results in a second race among judgment creditors who seek immediate execution in order to reach any equity the judgment debtor may have in excess of the dwelling exemption, since the creditor who first levies has priority.⁷⁰ The declared homestead is inefficient because it permits the recording of a declaration at a time when it is not needed for protection against the claims of creditors.

Dwelling house exemption. Before a judgment creditor may obtain a writ of execution against a dwelling, the judgment creditor must apply to a court in the county where the dwelling is located.⁷¹ This requirement applies whether or not the judgment debtor has recorded an effective homestead declaration on the dwelling. A judgment debtor who has

67. 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).

68. Section 690.31(b).

69. Civil Code § 1245.

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

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

not recorded a prior homestead declaration may nonetheless assert the dwelling house exemption at this time.⁷² This manner of asserting the 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 it fails to protect any proceeds of sale of the dwelling against a judgment lien when the dwelling is sold voluntarily.⁷³

Mobilehome and vessel exemption. Under existing law, the judgment debtor may, within 10 days after the property is levied upon, claim a dwelling 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.⁷⁴

Exemption procedure under proposed law. The proposed law would unify these varying procedures and make them consistent to the extent practicable. 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 time of levy, the general procedure for claiming exemptions for personal property would apply.⁷⁵

The declared homestead would be eliminated as unnecessary. 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 declared homestead and dwelling house exemptions would apply, subject to the following important differences:

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

73. Section 674(c).

74. Sections 690.3, 690.50(a). See the discussion under "Procedure for Claiming Exemptions After Levy" infra.

75. 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.

(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 the judgment debtor's equity exceeds the dwelling exemption. However, instead of the judgment creditor applying for a writ of execution, the judgment creditor would have the property levied upon and would then apply for an order permitting sale of the property. The writ will be issued by the court clerk where the judgment is entered; the order for sale will be made by the court where the dwelling is located. This will eliminate the confusion caused by 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 20 days after notice of the levy. This provision is intended to provide a resolution of the exemption question early in the period during which the sale of real property is delayed under the proposed law.⁷⁶ It also enables prompt clearing of title where property is levied upon but an order for sale is not diligently pursued.

(3) Under existing law, if the judgment creditor alleges the dwelling is not exempt, the judgment debtor has the burden of proof on the exempt status of the dwelling.⁷⁷ The proposed law 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 owns and occupies 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.⁷⁸

(4) Before a dwelling on which a homestead has been declared 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

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

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

78. Rev. & Tax. Code § 253.5.

dwelling and sold to satisfy the judgment.⁷⁹ This requirement 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.

(5) Existing law requires that a dwelling be sold at 90 percent of its fair market value, or less upon court order.⁸⁰ This requirement is intended to protect the judgment debtor against sacrifice sales of the dwelling, but necessitates the added expense of an appraisal and a court determination of market value. The Commission believes that a more effective means of protecting the interest of the judgment debtor is to defer the execution sale for a period of four months during which time the judgment debtor may sell the dwelling at a price that is satisfactory. The judgment debtor will receive the proceeds exemption and the rest of the equity will be available to satisfy the judgment. The 90 percent value limitation, with its attendant expenses, should be eliminated in favor of such a scheme.

Other Improvements

In addition to the amount of the dwelling exemption and the basic exemption procedures, there are a number of other features of the dwelling exemption that require revision.

Junior liens on the dwelling. To what extent can the judgment debtor defeat the efforts of the judgment creditor by lowering the judgment debtor's equity in the dwelling through creation of voluntary encumbrances subordinate to the judgment creditor's lien, such as mechanics' and contractors' liens? Existing law is unclear. The dwelling exemption is an amount over and above "all" liens and encumbrances⁸¹ and

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

80. Civil Code § 1254.

81. Civil Code § 1260.

proceeds of sale are applied first to the discharge of "all" liens and encumbrances;⁸² existing law does not distinguish between liens that are superior to the judgment creditor's lien and those that are inferior.⁸³ 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. In practice, language requiring satisfaction of "all" liens and encumbrances appears to be ignored.⁸⁴ Under the proposed law, voluntary liens and encumbrances subordinate to the judgment creditor's lien would not be satisfied out of the proceeds representing the dwelling exemption.⁸⁵ Subordinate voluntary liens and encumbrances would, however, 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.

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.⁸⁶

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

83. 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).

84. See 3 H. Miller & M. Starr, *Current Law of California Real Estate* § 16:32, at 61 n.19 (rev. ed. 1977).

85. This protection of the reduced proceeds exemption is an exception to the general 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.

86. *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.

When this occurs, the buyer at the execution sale becomes a co-owner in place of the judgment debtor 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 arrangement 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.⁸⁷ This in effect transforms the execution sale into a partition sale.

Joint judgment debtors. If judgment debtors are jointly obligated on a judgment, the question arises whether each judgment debtor is entitled to a separate dwelling exemption or whether the judgment debtors must share the dwelling exemption. If the joint judgment debtors live apart, each is entitled to a dwelling exemption. If the joint judgment debtors share a dwelling, the proposed law adopts a dual approach. To determine whether the dwelling is subject to forced sale, the equities of the joint judgment debtors are aggregated; if their equities exceed the \$100,000 dwelling exemption, the dwelling is subject to forced sale. After sale, each joint judgment debtor is entitled to an independent \$7,500 proceeds exemption. It is necessary to aggregate equities for purposes of the \$100,000 forced sale threshold to preclude exemption of property of unduly high value, which would otherwise occur. In addition, it is appropriate that the judgment creditor be able to force sale where the combined equities of the joint debtors exceed \$100,000--this amount should be available to satisfy the judgment. On the other hand, each judgment debtor should not be required to share the already modest \$7,500 proceeds exemption; the full amount of the exemption is necessary to each joint judgment debtor.

Collateral Effect of Homestead Declaration

In addition to 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

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

consent of both spouses.⁸⁸ Under the proposed law, the declared homestead system would be repealed, thereby eliminating this aspect of the law. 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.⁸⁹

Exemptions in Bankruptcy

A debtor in bankruptcy is entitled to select either the applicable state exemptions or the federal exemptions provided by the Bankruptcy Act.⁹⁰ The California exemptions are more favorable to a debtor who is a homeowner since California law provides a liberal dwelling exemption,⁹¹ while the federal exemptions are more favorable to a debtor who is a renter since the bankruptcy law provides a liberal "blanket" exemption if a dwelling exemption is not claimed.⁹²

Each state is permitted to preclude use of the federal exemptions in bankruptcy and to require that a debtor in bankruptcy be subject to the state exemptions. The Law Revision Commission has considered whether California should exercise its option to bar use of the federal exemptions by a debtor. To the extent that the federal exemptions are more favorable to debtors than the state exemptions, the debtor will be inclined to undergo voluntary bankruptcy, to the possible detriment of creditors. However, the federal exemptions are advantageous to renters, who do not receive the same protection under California law that homeowners receive. The Commission believes that as a matter of fairness, the federal exemptions should be available to debtors as a remedy for

88. See Civil Code § 1242.

89. 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 a dissolution proceeding thereby restraining alienation of a separate property dwelling for a period of three months.

90. 11 U.S.C. § 522(b).

91. See discussion of "Homestead Exemption," supra.

92. 11 U.S.C. § 522(d)(5).

the discrimination inherent in the California exemption scheme. The Commission recommends that California take no action to preclude use of the federal exemptions.

Applicability of Exemptions

It is implicit under existing law that property which is exempt from execution is also exempt from other procedures for the enforcement of a money judgment.⁹³ This principle is made explicit in the proposed law, and provisions for the determination of exemption claims are included in the special procedures for enforcement of money judgments where appropriate.⁹⁴

The principle that exemptions do not apply where the judgment is for the foreclosure of a lien on the property⁹⁵ (other than a lien created in the course of enforcing a general money judgment) is continued in the proposed law. However, the principle that exemptions do not apply where the judgment is for the purchase price of the property⁹⁶

93. Section 690(a) provides that the property mentioned in Sections 690.1-690.29 is "exempt from execution." Section 690.31 exempts a dwelling house from "execution" and Civil Code Section 1240 provides that a homestead is "exempt from execution or forced sale." Section 690.50(i) provides that the judgment rendered in exemption proceedings thereunder is "determinative as to the right of the creditor . . . to subject the property to payment or other satisfaction of his judgment." Section 710(c) incorporates Section 690.50 for the determination of exemption claims concerning money owed to the debtor by a public entity. Section 719 provides that the court in supplementary proceedings may order the application of property "not exempt from execution" toward the satisfaction of the judgment. Section 690.51 incorporates Section 690.50 for the determination of exemption claims when property is levied upon pursuant to certain warrants or notices of levy for the collection of tax liability. Section 302(c) of the Consumer Credit Protection Act, 15 U.S.C. § 1672(c) (1970), defines garnishment to mean "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt."

94. See the discussion under "Special Procedures for the Enforcement of Money Judgments" infra.

95. See Civil Code § 1241; Code Civ. Proc. §§ 690.28, 690.31, 690.52; Willen v. Willen, 121 Cal. App. 351, 353, 8 P.2d 942, ____ (1932) (lien on insurance policies created by court order in proceedings to enforce alimony award foreclosed by execution).

96. Civil Code § 690.52.

is not continued. This rule is not enforceable in practice since a levying officer will not levy on property that appears to be exempt. Moreover, the purchase money creditor can obtain more direct protection by taking a security interest in the property.

The proposed law also makes clear that exemptions are to be determined and applied under the circumstances existing at the time of levy upon the property for which the exemption claim is made. This provision is intended to reject the holding in California United States Bond & Mortgage Corp. v. Grodzins⁹⁷ which held that the portion of life insurance benefits which exceeded the exempt amount at the time they were received was "earmarked" for creditors even though the amount of benefits remaining at the time they were levied upon was less than the amount protected by statute.⁹⁸ Exemption laws are intended to protect an amount of property sufficient for the support of the debtor and the debtor's family at the time it is needed, i.e., when the creditor attempts to enforce the judgment. The question of exemption of property does not arise until the creditor seeks to reach the property and apply it toward the satisfaction of a judgment.⁹⁹

97. 139 Cal. App. 240, 34 P.2d 193 (1934).

98. In Grodzins, the surviving wife received \$10,000 in life insurance benefits, deposited \$5,000 in a savings and loan account, and spent the remainder for the support of herself and her minor children. Under the exemption in effect at the time, approximately \$8,900 of the \$10,000 would have been exempt if the creditor had levied upon the funds immediately. The creditor was permitted to reach \$1,100 of the remaining \$5,000. The result could have been more detrimental since, if the lump-sum originally received at some remote time before levy had been \$18,000, for example, and the wife had spent \$9,000 of it before levy, the creditor would have been able to apply the remaining \$9,000 to the judgment.

99. Medical Fin. Ass'n v. Rambo, 33 Cal. App.2d Supp. 756, 758-60, 86 P.2d 159, ____ (1939). This case involved the garnishment of wages at a time when one-half of the earnings received during a 30-day period were exempt. The debtor had already received some earnings and the creditor argued that those earnings should be counted toward the exemption, leaving the remainder earned during the 30-day period subject to levy in the amount of one-half of the total. The court held that only one-half of the particular paycheck could be garnished.

Retroactive Application of Exemptions

Decisions of state and federal courts in California have consistently held that the grant of a new or increased exemption for property sought to be applied to the satisfaction of a contractual obligation incurred before the change in the exemption would violate the Contract Clause of Article 1, Section 10, of the United States Constitution and of Article 1, Section 9, of the California Constitution.¹⁰⁰ This rule is also applied in bankruptcy cases with the result that the debtor is restricted to the exemptions in effect at the time of the earliest of the scheduled debts.¹⁰¹

Decisions in this area during the last forty years have almost completely ignored the gradual erosion of the rigid application of the Contract Clause by the United States Supreme Court.¹⁰² California decisions concerning the retroactive application of statutory provisions in other areas of the law, such as community property and sovereign immunity, have engaged in a modern and more sophisticated analysis of the constitutional issues and found no constitutional impediment to retroactive application.¹⁰³ Recent decisions in at least two other states

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100. See In re Rauer's Collection Co., 87 Cal. App.2d 248, 253-54, 196 P.2d 803, ____ (1948) (increase in homestead exemption); Daylin Medical & Surgical Supply, Inc. v. Thomas, 69 Cal. App.3d Supp. 37, 41-42, 137 Cal. Rptr. 826, ____ (1977) (extension of time for claiming homestead exemption); Smith v. Hume, 29 Cal. App.2d Supp. 747, 749, 74 P.2d 566, ____ (1937) (new motor vehicle exemption); Medical Fin. Ass'n v. Wood, 20 Cal. App.2d Supp. 749, 751, 63 P.2d 1219, ____ (1936) (new motor vehicle exemption); In re Fox, 16 F. Supp. 320, ____ (S.D. Cal. 1936) (motor vehicle exemption); The Queen 93 F. 834, ____ (N.D. Cal. 1899) (seamen's earnings exemption).
101. See England v. Sanderson, 236 F.2d 641, 643 (9th Cir. 1956), rev'g In re Sanderson, 134 F. Supp. 484, 485 (N.D. Cal. 1955); In re Towers, 146 F. Supp. 882, 885-86, aff'd sub nom. Towers v. Curry, 247 F.2d 738, 739 (9th Cir. 1957).
102. See Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, ____ (1934) (upholding the Minnesota Mortgage Moratorium Law); City of El Paso v. Simmons, 379 U.S. 497, ____ (1965).
103. See, e.g., Robertson v. Willis, 77 Cal. App.3d 358, 367-69, ____ Cal. Rptr. ____, ____ (1978) (community property); In re Marriage of Bouquet, 16 Cal.3d 583, 592-94, 546 P.2d 1371, ____, 128 Cal. Rptr. 427, ____ (1976) (community property); Flournoy v. State, 230 Cal. App.2d 520, 530-37, 41 Cal. Rptr. 190, ____ (1964) (sovereign immunity). These cases have applied a balancing approach, relying heavily on the analysis developed in Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960). See also Reppy, Retroactivity of the 1975 California Community Property Reforms, 48 So. Cal. L. Rev. 977 (1975).

have recognized the erosion of the Contract Clause and upheld retroactive application of increased exemption to preexisting debts.¹⁰⁴ Most commentators also urge the views set forth in these recent decisions.¹⁰⁵

The proposed law would determine an exemption under the law in effect at the time the property claimed to be exempt is levied on.¹⁰⁶ This principle furthers the policy of the exemption laws--to provide the debtor with sufficient assets to remain self supporting and to avoid making the debtor a charge upon the state. Increased or new exemptions are generally enacted to take account of inflation or to recognize the importance of new forms of assets. This intention is defeated if the fortuity of the time of contract or tort liability determines the applicable exemption. Tort creditors clearly do not have any reliance interest in exemptions in effect at the time liability arises. It is highly doubtful that general contract creditors have a significant vested interest in exemptions in effect when the contract is executed. The debtor's financial status at the time a contract is executed is certainly an important consideration to the creditor, but there is no guarantee that the assets listed in the statement will not be transferred or exhausted before a default occurs. The creditor may also be protected by insisting on security for the obligation.

The incremental increase of the amount of exemptions is necessary to take account of inflation.¹⁰⁷ Under current economic conditions,

104. See *Wilkinson v. Carpenter*, 277 Or. 557, ___, 561 P.2d 607, 609-12 (1977) (application of homestead exemption in effect at time of sale); *Hooter v. Wilson*, 273 So.2d 516, 521-22 (La. 1973) (wage garnishment exemption); *Ouachita Nat'l Bank v. Rowan*, 345 So.2d 1014, 1016-17 (La. Ct. App. 1977) (homestead exemption); see also *Natchitoches Collections, Inc. v. Gorum*, 274 So.2d 449, 450 (La. Ct. App. 1973) (homestead exemption).

105. See, e.g., Countryman, *For a New Exemption Policy in Bankruptcy*, 14 Rutgers L. Rev. 678, 726-32 (1960); Reppy, *Retroactivity of the 1975 California Community Property Reforms*, 48 So. Cal. L. Rev. 977, 1120 n.470 (1975); Comment, *The Contract Clause and the Constitutionality of Retroactive Application of Exemption Statutes: A Reconsideration*, 9 Pac. L.J. 889 (1978); Note, *Bankruptcy Exemptions: Critique and Suggestions*, 68 Yale L.J. 1459, 1471-72 (1959); Comment, *Contract Clause Prevents Exemption Change*, 1 Stan. L. Rev. 350 (1949). Similarly, Section 23(b) of the Uniform Exemptions Act (1976) would apply exemptions retroactively. See also *In re Towers*, 146 F. Supp. 882, 885 n.2 (N.D. Cal. 1956).

106. The proposed law would also provide that contracts are made in recognition of the power of the state to alter or make additions to exemptions. See *Wilkinson v. Carpenter*, 277 Or. 557, ___, 561 P.2d 607, 610-11 (1977); *Hooter v. Wilson* 273, So.2d 516, 521-22 (La. 1973).

107. See the discussion under "Continuing Review of Exemptions" *infra*.

inflation is much more a certainty than the expectation that the debtor will have nonexempt assets that were listed in a financial statement. To the extent that exemptions are increased to take account of inflation, creditors should not be heard to complain that vested rights are being abrogated so long as the remedies for enforcement of judgments remain in force and debtors as a class may not protect any significantly different proportion of their assets.

Judgments for Spousal or Child Support

Under existing law, the standard exemptions from enforcement of money judgments apply where the judgment is for child or spousal support unless there is a specific statutory exemption.^{107.1} Two exceptions are now provided by statute: A support creditor can reach one-half of a debtor's earnings (instead of the usual one-quarter standard), subject to the power of the court to increase or decrease the exemption in the interest of equity.^{107.2} Retirement benefits are not exempt in support cases.^{107.3} It also appears that a court may avoid the potential application of an exemption by imposing a lien on specific property to secure the payment of a support obligation by exercise of its powers under Civil Code Section 4380.^{107.4}

The exceptions are unduly restrictive. The court should have authority to apply any otherwise exempt property to the satisfaction of the support obligation to the extent the court determines to be equitable. This change will encourage the judgment creditor to levy on nonexempt property in preference to levying on property that is exempt. It will provide reasonable protection to the judgment debtor and at the same time recognize the unique character of a support obligation.

107.1. See *Miller v. Superior Court*, 69 Cal.2d 14, 442 P.2d 663, 69 Cal. Rptr. 583 (1968) (retirement funds); *Yager v. Yager*, 7 Cal.2d 213, 218, 60 P.2d 422 (1936) (homestead).

107.2. Section 723.052.

107.3. Section 690.18.

107.4. See *Willen v. Willen*, 121 Cal. App. 351, 6 P.2d 554 (1932) (no exemption where lien created on money payable under husband's insurance policies and enforced by execution).

Exception for Welfare Payment Reimbursement

Existing law provides that the judgment debtor is entitled to a more limited set of exemptions against a claim by a county for reimbursement for county aid used to support the judgment debtor than is available against claims of judgment creditors generally.¹⁰⁸ This exception to the standard exemptions is not continued in the proposed law because it is constitutionally suspect under the equal protection clause.¹⁰⁹

Tracing Exempt Amounts

An exemption for money derived from a particular source, such as retirement or life insurance benefits, is illusory if the exemption is lost when the benefits are deposited in a bank or held in the form of a check or cash. Present case law and, to a limited extent, statutory law recognize the right of a debtor to trace exempt amounts through a change in form.¹¹⁰ The proposed law contains a general provision that would permit the judgment debtor to trace exempt amounts through deposit accounts and in the form of cash and the equivalent of cash, including cashier's checks, certified checks, and money orders. This tracing

108. See Section 690.19; Welf. & Inst. Code § 17409. Welfare and Institutions Code Section 17409 provides the following exemptions in such cases: \$50 in cash, personal effects and household furniture with a value of \$500, a cemetery plot, \$500 placed in trust for funeral expenses, insurance policies with a cash surrender value of \$500, and relocation assistance benefits.

109. Cf. *James v. Strange*, 407 U.S. 128 (1972) (Kansas statute imposing liability on indigent defendant for costs of counsel provided the defendant and denying exemptions available to other judgment debtors held unconstitutional).

110. See, e.g., Sections 690.18(a) (pension benefits exempt in debtor's possession and when deposited), 690.30 (direct deposit of social security payments); *Kruger v. Wells Fargo Bank*, 11 Cal.3d 352, 367, 521 P.2d 441, ___, 113 Cal. Rptr. 449, ___ (1974) (unemployment benefits in checking account); *Holmes v. Marshall*, 145 Cal. 777, 782-83, 79 P. 534, ___ (1905) (life insurance benefits deposited in bank account); *Bowman v. Wilkinson*, 153 Cal App.2d 391, 395-96, 314 P.2d 574, ___ (1957) (life insurance check converted to cashier's check and deposited in attorney's trust account); *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 416-17 (1973) (disability benefits in bank account); *Porter v. Aetna Cas. & Sur. Co.*, 370 U.S. 159, 162 (1962) (veterans' benefits in savings and loan account).

provision would apply to relocation, life insurance, retirement, unemployment, disability, health, social security, and veteran's benefits, worker's compensation, aid, and proceeds from the sale of or indemnification for a homestead, a motor vehicle, and tools of a trade.¹¹¹ Consistent with the general burden on the judgment debtor to claim exemptions,¹¹² the judgment debtor would have the burden of tracing the exempt amount. Tracing would be accomplished by the lowest intermediate balance principle¹¹³ unless the judgment debtor could show that some other method would be more appropriate under the circumstances of the case.

Continuing Review of Exemptions

Exemptions subject to dollar amount limitations have the virtue of certainty and prevent the abuse that arises where specific items are exempt without value limits. Legislatures have typically been slow to adjust exemptions in response to changes in the value of the dollar.¹¹⁴ For example, the exemption for an account in a savings and loan association¹¹⁵ was set at \$1,000 in 1901.¹¹⁶ The dollar was worth approximately seven times as much in 1901 as it is now,¹¹⁷ yet the amount of the

111. The opportunity to trace exempt proceeds from the sale of a motor vehicle or tools would be limited to 90 days.

112. See Section 690.50(1).

113. See *Republic Supply Co. v. Richfield Oil Co.*, 79 F.2d 375, 379 (9th Cir. 1935) (determination of lowest intermediate balance).

114. See Countryman, For a New Exemption Policy in Bankruptcy, 14 Rutgers L. Rev. 678, 683 (1960); Joslin, Debtors' Exemption Laws: Time for Modernization, 34 Ind. L.J. 355, 356 (1959).

115. Section 690.7.

116. 1901 Cal. Stats. ch. 28, § 1 (then building and loan associations).

117. See Bureau of Census, *Historical Statistics of the United States*, Table E-183, at 212, (1975) [hereinafter cited as *Historical Statistics*]. Bureau of Census, *Statistical Abstract of the United States: 1976*, Table No. 708, at 439 [hereinafter cited as *Statistical Abstract*].

exemption remains unchanged. The credit union account exemption¹¹⁸ was raised to \$1,500 in 1939¹¹⁹ when the dollar was worth approximately four times as much.¹²⁰ The life insurance exemption¹²¹ was set at the amount of benefits represented by a \$500 annual premium in 1868¹²² when the dollar was worth approximately six times what it is today.¹²³ Less dramatic but still significant disparities have occurred in exemptions such as the motor vehicle exemption which has been frequently amended since its original enactment in 1935.¹²⁴ The protection of a motor vehicle in which the debtor has no more than \$500 equity, established in 1972, has been significantly eroded because by 1976 the average price of new cars had risen over 20% and the average price of used cars had risen over 40 percent.¹²⁵

The proposed law provides a means for periodic and continuing review of the exemptions and exempt amounts. The California Law Revision Commission is charged with the responsibility to review the exemptions every five years, and more frequently if desirable, and make any necessary recommendations to the Legislature. This will enable modernization of the exemptions without mandating automatic increases tied to inflation.

118. Fin. Code § 15406.

119. 1939 Cal. Stats. ch. 965, § 2.

120. See Historical Statistics, supra note 410, Table E-135, at 210; Statistical Abstract, supra note 410, Table No. 708, at 439.

121. Section 690.9.

122. 1868 Cal. Stats. ch. 404, § 1.

123. Historical Statistics, supra note 410, Table E-183, at 212; Statistical Abstract, supra note 410, Table No. 708, at 439.

124. 1935 Cal. Stats. ch. 723, § 24. The motor vehicle exemption at first protected a vehicle valued at \$100, regardless of the extent of the debtor's equity. This limit was raised to \$250 in 1949 and to \$350 in 1959. In 1967 the debtor's equity was protected in the amount of \$350 so long as the vehicle was not worth more than \$1,000. The equity exemption was raised to \$500 in 1972 and in 1976 the value limitation was repealed. See 1949 Cal. Stats. ch. 628, § 1; 1959 Cal. Stats. ch. 1474, § 1; 1967 Cal. Stats. ch. 1241, § 1; 1972 Cal. Stats. ch. 744, § 1; 1976 Cal. Stats. ch. 1210, § 2.

125. Statistical Abstract, supra note 410, Table No. 709, at 440.

Procedure for Claiming Exemptions After Levy

Existing law provides a detailed procedure through which exemptions may be claimed and determined.¹²⁶ The judgment debtor or the judgment debtor's agent may, within 10 days after property has been levied upon, claim an exemption by filing an affidavit with the levying officer; otherwise the exemption is waived and the property will be applied toward the satisfaction of the judgment.¹²⁷ If the judgment debtor files an affidavit, the levying officer immediately serves it on the judgment creditor along with a notice that the property will be released unless the judgment creditor files a counteraffidavit with the levying officer within five days after the judgment debtor's affidavit is served. The judgment creditor is also required to serve a copy of this counteraffidavit on the judgment debtor and file proof of service with the levying officer. Once the counteraffidavit is filed, either party is permitted to make a motion for an order determining the exemption claim within five days after the filing of the counteraffidavit. The hearing is required to be held within 15 days after the motion is made unless a continuance is granted. The moving party must give at least five days' notice of the hearing to the other party and to the levying officer. If no motion is made within five days after the counteraffidavit is filed or if the levying officer is not served with notice of the hearing within 10 days after such filing, the property is required to be released to the debtor. At the hearing the judgment debtor has the burden of proof. The affidavit and counteraffidavit are filed with the court by the levying officer and constitute the pleadings of the parties, subject to the power of the court to permit amendments. The court may

126. Section 690.50; see generally 5 B. Witkin, California Procedure Enforcement of Judgment §§ 88-92 (2d ed. 1971 & Supp. 1977). Special procedures are provided for determining certain exemptions. See Sections 690.30 (deposit account into which social security benefits directly deposited), 690.31 (dwelling exemption).

127. Section 690(a). Some exemptions are not subject to waiver. See, e.g., Section 690.6(b) (portion of earnings not subject to garnishment), 690.15 (worker's compensation benefits prior to payment), 690.19 (aid under public assistance program prior to payment), Smith v. Rhea, 72 Cal. App.3d 361, 370-72, 140 Cal. Rptr. 116, ____ (1977) (exempt portion of proceeds from execution sale of motor vehicle).

also permit the production of other evidence. At the conclusion of the hearing, the court determines the exemption and makes any necessary orders for the disposition of the property.

The proposed law would make several changes in this procedure.¹²⁸ Since the judgment debtor may not receive notice of levy for some time after levy has occurred,¹²⁹ the 10-day period within which the claim of exemption must be filed with the levying officer runs from the date notice of levy is served on the judgment debtor. The five-day period for filing the counteraffidavit should be increased to 10 days, where the claim of exemption is served on the judgment creditor by mail.¹³⁰ As a condition of claiming an exemption for a motor vehicle or tools of a trade, the judgment debtor should be required to describe other property of the same type for which an exemption is not claimed. Similarly, where the judgment debtor claims an exemption for deposit accounts and money or for the loan value of an insurance policy, the judgment debtor should describe all other such funds. This will enable the judgment creditor to obtain information regarding other property of the judgment debtor and will help achieve the policy of the exemptions laws to protect only a limited amount of the judgment debtor's property.

The right of the judgment debtor to move for a hearing on the exemption claim should be eliminated as unnecessary. Under the proposed law, if the judgment creditor does not file the notice of opposition with the levying officer and file notice of motion within the five-day period after service of the claim of exemption, the property will be released and the judgment creditor will be precluded from levying on it again absent a showing of changed circumstances. Accordingly, the judgment debtor has nothing to gain by moving for a hearing on the exemption claim. The 15-day period after the motion is filed during which the hearing is required to be commenced should be increased to 20 days so that the judgment debtor receives additional notice of the hearing.

128. For minor and technical revisions, see the Comments to the sections in the Proposed Legislation infra.

129. Notice of levy is required to be given the judgment debtor promptly after levy. See Section 688(b) (incorporating the levy provisions in the Attachment Law, Sections 488.310-488.430).

130. See Section 1013 (general provision for extension of time where notice served by mail).

CHAPTER 4. EXEMPTIONS

Article 1. General Provisions§ 703.010. "Equity" defined

703.010. As used in this chapter, "equity" means the fair market value of the interest of the judgment debtor in property, or in the case of community property the fair market value of the interest of the judgment debtor and the spouse of the judgment debtor in the property, over and above all liens and encumbrances on the interest superior to the judgment creditor's lien.

Comment. Section 703.010 is intended to simplify drafting. It 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 in a homestead. Section 703.010 makes clear that the judgment creditor's lien and junior liens are excluded in a determination of equity for purposes of applying the homestead and other exemptions to the judgment creditor's judgment. See Sections 704.010 (motor vehicle), 704.030 (building materials), 704.060 (tools of trade), 704.720 (homestead). In the case of joint judgment debtors, the equity includes the sum of the interests of all judgment debtors.

CROSS-REFERENCES

Defined terms

Judgment creditor § _____

Judgment debtor § _____

405/598

§ 703.015. Application of exemptions

703.015. (a) Except as otherwise provided by statute, the exemptions provided by this chapter or by any other statute apply to all procedures for enforcement of a money judgment.

(b) The exemptions provided by this chapter or by any other statute do not apply if the judgment to be enforced is for the foreclosure of a mortgage or other lien on the property other than a lien created pursuant to this title.

Comment. Subdivision (a) of Section 703.015 makes clear that exemptions apply regardless of the procedure selected for the enforcement of a money judgment. Subdivision (a) is comparable to but broader

than former Section 690 in that subdivision (a) applies to exemptions prescribed by statute apart from this chapter and applies to all procedures for enforcement of a money judgment and not just execution. For exemptions not included in this chapter, see, e.g., Civil Code § 986(a)(6) (artist's residual payment); Code Civ. Proc. §§ 723.050-723.052 (earnings); Gov't Code § 32210 (fire service pensions); Health & Safety Code §§ 8561 (cemeteries), 32508 (hospital endowments), 33124, 34142, 34217 (public property); 10 U.S.C. § 1035 (servicemen savings); 38 U.S.C. § 3101 (veterans benefits); 42 U.S.C. § 407 (U.S. life insurance); 48 U.S.C. § 231(m) (railroad retirement pensions). The exemptions do not apply to nonmoney judgments except for enforcement of costs and damages under such judgments. See Section _____.

For the application of exemptions to enforcement of support judgments, see Civil Code Section 4384. For the application of exemptions to tax obligations, see Section _____.

Subdivision (b) continues the substance of a portion of former Section 690.52. See also former Civil Code § 1241; former Code Civ. Proc. §§ 690.28, 690.31(b)(3). The portion of former Section 690.52 that made exemptions inapplicable in the case of a judgment for the purchase price of the property is not continued because it was unenforceable in practice.

CROSS-REFERENCES

Defined terms

Judgment § _____

405/922

§ 703.020. Persons entitled to exemptions

703.020. (a) The exemptions provided in this chapter apply only to property of a natural person or property set aside and held for the purpose of making payments to a natural person.

(b) The exemptions provided in this chapter may be claimed by any of the following persons:

(1) In all cases, by the judgment debtor.

(2) In the case of community property, by the spouse of the judgment debtor, whether or not the spouse is also a judgment debtor under the judgment.

(3) In the case of property set aside and held for the purpose of making payments to the judgment debtor or the spouse or dependents of the judgment debtor, by the person holding the property.

Comment. Subdivision (a) of Section 703.020 codifies the rule of Canal-Randolph Anaheim v. Wilkoski, ___ Cal. App.3d ___, ___ Cal. Rptr. ___ (1980).

The persons entitled to claim an exemption on behalf of a judgment debtor under subdivision (b) include the judgment debtor's agent and other persons authorized to exercise the rights of a judgment debtor. If community property is sought to be applied to the satisfaction of a judgment, either the judgment debtor or the spouse of the judgment debtor may claim exemptions for the property. Cf. White v. Gobey, 130 Cal. App. Supp. 789, 791, 19 P.2d 876 (1933). See also Section 703.120 (application of exemptions to marital property) and Comment thereto.

CROSS-REFERENCES

Defined terms

Judgment creditor § _____

Judgment debtor § _____

405/474

§ 703.030. Manner of claiming exemptions

703.030. (a) Except as otherwise provided in this section, an exemption for property that is described as exempt pursuant to this chapter or any other statute shall be claimed within the time and in the manner prescribed in the applicable enforcement procedure. If the exemption is not so claimed, the property is subject to enforcement of a money judgment.

(b) Property that is described as exempt pursuant to this chapter or any other statute without making a claim is not subject to any procedure for enforcement of a money judgment.

(c) Nothing in this section limits the authority of the court pursuant to Section 473, within the time prescribed in Section 473, to relieve a person, upon such terms as may be just, from failure to claim an exemption within the time and in the manner prescribed in the applicable enforcement procedure.

Comment. Subdivisions (a) and (b) of Section 703.030 continue the substance of former Section 690 but are broader in their application since they are not limited to exemptions provided in this chapter. Former law also referred to exemptions "from execution" whereas this section makes clear that exemptions apply in all proceedings for the enforcement of a money judgment. See Section 703.010.

If property is levied upon by a levying officer, the applicable procedure for claiming an exemption is that provided in Article 2, with

the exception of the homestead exemption which is governed by Article 4. The exemption procedure is also incorporated in other instances, e.g., where property is attached under an ex parte writ of attachment (see Section 485.610) or where a warrant or notice of levy for the collection of taxes is treated as a writ of execution (see Section _____). If the property is sought to be reached by a procedure other than a levy under a writ, a court hearing is required and exemption claims will be determined at such time or later upon noticed motion. See Sections _____ (examination proceedings), _____ (creditor's suit), _____ (assignment orders), _____ (collection where public entity is debtor of judgment debtor).

Subdivision (c) makes clear the power of the court under Section 473 to relieve the claimant from the consequences of failure to properly file a claim of exemption through mistake, inadvertance, surprise, or excusable neglect.

405/475

§ 703.040. Waiver of exemptions

703.040. Subject to Section 703.010, a purported contractual or other prior waiver of the exemptions provided by this chapter or by any other statute, other than a waiver by failure to claim an exemption required to be claimed or otherwise made at the time enforcement is sought, is against public policy and void.

Comment. Section 703.040 codifies existing case law. See, e.g., Industrial Loan & Inv. Co. v. Superior Court, 189 Cal. 546, 209 P. 360 (1922).

26751

§ 703.050. Exemptions in effect at time of levy govern

703.050. (a) The determination whether property is exempt or the amount of an exemption shall be made by application of the exemption statutes in effect at the time of levy on the property. For the purposes of this section, levy on the property includes other action pursuant to court order for application of the property to satisfaction of the judgment.

(b) Except as provided in Section 694.190 (transition provision), it is the intent of the Legislature that this section be applied to all judgments enforced on or after the operative date of this chapter, whether based upon tort, contract, or other legal theory or cause of action that arose before or after the operative date of this chapter, and whether the judgment was entered before or after the operative date of this chapter.

Comment. Section 703.050 declares the intent of retroactive application of the exemption provisions, including the exemption amounts. This is consistent with the decisions in *San Diego White Truck Co. v. Swift*, 96 Cal. App.3d 88, 157 Cal. Rptr. 745 (1979), and *National Collection Agency, Inc. v. Fabila*, 93 Cal. App.3d Supp. 1, 155 Cal. Rptr. 536 (1979), and rejects the case law rule that the judgment debtor could take advantage of only the exemptions in effect at the time an obligation was incurred. 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); *Smith v. Hume*, 29 Cal. App.2d Supp. 747, 749, 74 P.2d 566, ____ (1937); *Medical Fin. Ass'n v. Wood*, 20 Cal. App.2d Supp. 749, 751, 63 P.2d 1219, ____ (1936). See also Comment, The Contract Clause and the Constitutionality of Retroactive Application of Exemption Statutes: A Reconsideration, 9 Pac. L.J. 889 (1978).

CROSS-REFERENCES

Defined terms

Judgment § ____

Operative date § ____

Transition provision § 694.190

26752

§ 703.060. Reserved power of state

703.060. (a) The Legislature finds and declares that generally persons who enter into contracts do not do so in reliance on an assumption that the exemptions in effect at the time of the contract will govern enforcement of any judgment based on the contract, that liens imposed on property are imposed not as a matter of right but as a matter of privilege granted by statute for purposes of priority, that no vested rights with respect to exemptions are created by the making of a contract or 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 repeal, alter, or add to the exemptions and the procedures therefore at any time and intends, unless otherwise provided by statute, that any repeals, alterations, or additions apply upon their operative date to enforcement of all money

judgments, whether based upon tort, contract, or other legal theory or cause of action that arose before or after the operative date of the repeals, alterations, or additions, whether the judgment was entered before or after the operative date of the repeals, alterations, or additions, and whether any liens based on the judgment have been imposed on the exempt property before or after the operative date of the repeals, alterations, or additions.

(b) All contracts shall be deemed to have been made and all liens on property shall be deemed to have been created in recognition of the power of the state to repeal, alter, and add to statutes providing for liens and exemptions from the enforcement of money judgments.

Comment. Section 703.060 reserves the power of the state to change and add to existing exemptions in line with recent decisions in other jurisdictions. See, e.g., *Wilkinson v. Carpenter*, 277 Or. 557, ___, 561 P.2d 607, 610-11 (1977); *Hooter v. Wilson*, 273 So.2d 516, 521-22 (La. 1973). Section 703.060 makes clear that the Legislature may give changes in exemptions retroactive as well as prospective effect.

CROSS-REFERENCES

Defined terms

Judgment § _____
 Judgment creditor § _____
 Judgment debtor § _____

Transition provision § 694.190

10034

§ 703.070. Exemptions from suport judgment

703.070. The exemptions provided by this chapter or by any other statute apply to a judgment for child or spousal support to the extent provided in Section 4384 of the Civil Code.

Comment. Section 703.070 is included for cross-referencing purposes. The text of Civil Code Section 4384 is appended to this tentative recommendation.

32/236

§ 703.080. Tracing exempt funds

703.080. (a) A fund that is exempt remains exempt to the extent that it can be traced through deposit accounts and in the form of cash or an equivalent of cash.

(b) The exemption claimant has the burden of tracing an exempt fund.

(c) The tracing of exempt funds in deposit accounts shall be by application of the lowest intermediate balance principle unless the exemption claimant or the judgment creditor shows that some other method

of tracing would better serve the interests of justice and equity under the circumstances of the case.

Comment. Section 703.080 prescribes the general rule governing the duration of an exemption for payments through deposit accounts and in the form of cash and its equivalents, including cashier's checks, certified checks, and money orders.

Subdivision (a) is consistent with decisions under prior law. See, e.g., *Kruger v. Wells Fargo Bank*, 11 Cal.3d 352, 367, 521 P.2d 441, ___, 113 Cal. Rptr. 449, ___ (1974) (unemployment benefits in checking account); *Holmes v. Marshall*, 145 Cal. 777, 782-83, 79 P. 534, ___ (1905) (life insurance benefits deposited in bank account); *Bowman v. Wilkinson*, 153 Cal. App.2d 391, 395-96, 314 P.2d 574, ___ (1957) (life insurance check converted to cashier's check and deposited in attorney's trust account). See also former Sections 690.18(a) (pension benefits exempt in debtor's possession and when deposited), 690.30 (direct deposit of social security payments); *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 416-17 (1973) (disability benefits in bank account); *Porter v. Aetna Cas. & Sur. Co.*, 370 U.S. 159, 162 (1962) (veterans' benefits in savings and loan account). This section applies to any fund which is exempt as provided in this chapter. Proceeds from a motor vehicle or tools may be traced only during the applicable period. See Sections 704.010 (90 days in case of motor vehicle) and 704.060 (90 days in case of tools).

Subdivision (b) continues existing law concerning the burden of tracing exempt funds. See, e.g., former Section 690.30(b)(2) (tracing Social Security payments). This is consistent with the general burden on the claimant in exemption proceedings. See Section 703.580(b).

Subdivision (c) prescribes the general rule for tracing exempt funds in deposit accounts. It reverses the rule in *California United States Bond & Mort. Corp. v. Grodzins*, 139 Cal. App. 240, 242-43, 34 P.2d 193, ___ (1934) (portion of life insurance benefits which exceeded exempt amount when received was earmarked for creditors even though benefits remaining at time of levy were below exempt amount). Under the lowest intermediate balance rule, the exempt fund may not exceed the lowest balance occurring at any time between the deposit of the exempt amount of money and the time of levy. New deposits do not replenish the original exempt fund although the new deposits may themselves be exempt. See *Republic Supply Co. v. Richfield Oil Co.*, 79 F.2d 375, 379 (9th Cir. 1935), concerning the determination of the lowest intermediate balance. As an example of the operation of the lowest intermediate balance principal, suppose the judgment debtor has a deposit account in which there is a balance of \$400 composed of nonexempt funds. The judgment debtor then makes a deposit of \$400 of exempt funds (leaving a balance of \$800), a withdrawal of \$600 (leaving a balance of \$200), and a deposit of \$300 of nonexempt funds (leaving a balance of \$500). The total exempt funds deposited were \$400, but under the lowest intermediate balance rule, the \$600 withdrawal reduces first the nonexempt funds and then the exempt funds, leaving \$200 of exempt funds. The final \$300 deposit does not affect the exempt funds, which remain exempt in the

§ 703.090

amount of \$200, the lowest intermediate balance, despite the final balance of \$500.

CROSS-REFERENCES

Defined terms

Deposit account \$ _____

Judgment creditor \$ _____

100/913

§ 703.090. Costs in case of subsequent levy on exempt property

703.090. If the judgment creditor has failed to oppose a claim of exemption within the time allowed by Section 703.550 or if property has been determined by a court to be exempt and the judgment creditor subsequently levies upon or otherwise seeks again to apply the property toward the satisfaction of the same money judgment, the judgment creditor shall not recover the subsequent costs of collection unless the property is applied to satisfaction of the judgment.

Comment. Section 703.090 is intended to limit repeated levies on the same property by the judgment creditor. Nothing in this section affects any right the judgment debtor may have to recover damages for abuse of process. If a subsequent court order for sale of a dwelling is sought, the application must show a material change in circumstances. See Section 704.810(c).

CROSS-REFERENCES

Defined terms

Judgment creditor \$ _____

10158

[\$ 703.100. Reserved]

28765

§ 703.110. Time for determination of exemptions

703.110. Except as provided in Section 694.190 (transition provision):

(a) Subject to subdivision (b), the determination whether property is exempt shall be made under the circumstances existing at the time of levy on the property. For the purposes of this section, levy on the property includes other action pursuant to court order for application of the property to satisfaction of the judgment.

(b) The court may in its discretion take into consideration any of the following changes that have occurred between the time of levy and the time of the hearing:

(1) Change in use of the property if the exemption is based upon the use of property and if the property was used for the exempt use at the time of the levy but is used for a nonexempt use at the time of the hearing.

(2) Change in value of the property if the exemption is based upon the value of property.

(3) Change in circumstances of the judgment debtor and spouse and dependents of the judgment debtor if the exemption is based upon their need.

Comment. Subdivision (a) of Section 703.110 rejects the holding in *California United States Bond & Mort. Corp. v. Grodzins*, 139 Cal. App. 240, 242-43, 34 P.2d 193, ____ (1934) (portion of life insurance benefits which exceeded exempt amount when received was earmarked for creditors even though benefits remaining at time of levy were below exempt amount). It adopts the principle that the question of exemptions does not arise until the judgment creditor has sought to apply the judgment debtor's property toward the satisfaction of the judgment. See *Medical Fin. Ass'n v. Rambo*, 33 Cal. App.2d Supp. 756, 758-60, 86 P.2d 159, ____ (1939).

Subdivision (b) gives the court discretion to adjust the rule of subdivision (a) in cases where to do so appears appropriate in light of the purposes of the exemption. Where the exemption is based upon the use made of the property, the judgment debtor is entitled to the exemption only if the property was used for the exempt use at the time of levy, but the court may disallow the exemption of the property if subsequently devoted to another use.

CROSS-REFERENCES

Transition provision § 694.190

045/060

§ 703.120. Application of exemptions to marital property

703.120. If the judgment debtor is married:

(a) The exemptions provided by this chapter or by any other statute apply to community property or separate property of the judgment debtor that is liable for the satisfaction of the judgment.

(b) Except as otherwise expressly provided by statute, an exemption applies to the property of both spouses that is liable for the satisfaction of the judgment as a marital unit, whether or not both spouses are judgment debtors under the judgment.

(c) The court in determining an exemption based upon need of the judgment debtor and spouse and dependents of the judgment debtor shall take into account all property of the judgment debtor and spouse and dependents, including community property and separate property of the spouse, whether or not such property is liable for the satisfaction of the judgment.

(d) If an exemption is required by statute to be applied first to property not before the court and then to property before the court, the application of the exemption to property not before the court shall be made to community property and separate property of both spouses, whether or not such property is liable for the satisfaction of the judgment.

(e) If the same exemption is claimed by the judgment debtor and the spouse of the judgment debtor for different property and either the property claimed by the judgment debtor or the property claimed by the spouse of the judgment debtor is exempt, but not both, the exemption shall be applied as the spouses agree. If the spouses are unable to agree, the exemption shall be applied as directed by the judgment creditor.

Comment. Subdivision (a) of Section 703.120 is an application of the basic rule that exemptions apply to property that is liable for the satisfaction of a judgment. If the judgment debtor is married, the property liable for the satisfaction of the judgment may include the community property and the separate property of both spouses in certain situations. See generally Civil Code §§ 5120.005-5120.030. In such situations, both spouses may claim exemptions but the exemptions are not increased for the marital unit. See Section 703.020 (persons entitled to claim exemptions) and subdivision (b).

Subdivision (b) states the general rule that the fact that one or both spouses are judgment debtors or that community or separate property is sought to be applied to the satisfaction of the judgment, does not affect the exemptions applicable to the spouses as a marital unit. There are express statutory exceptions to this rule. See, e.g., Sections 704.010 (second motor vehicle for married judgment debtor), 704.720-704.730 (homestead exemption).

Generally, property that is not liable for the satisfaction of a judgment does not enter into exemption determinations. Subdivision (c) creates an exception to this rule for exemptions based on need of the judgment debtor and spouse and dependents of the judgment debtor. See

Sections 704.010 (motor vehicle), 704.020 (household furnishings), 704.050 (health aids), 704.060 (tools of the trade), 704.100(c) (life insurance benefits), 704.140 (damages for personal injury), 704.150 (damages for wrongful death), 723.052 (earnings). In such situations, the court must take into account nonliable as well as liable property in making a determination of need.

Certain exemptions are required to be applied first to property not before the court. See Sections 704.070 (deposit accounts) and 704.100(b) (life insurance policies). Subdivision (d) makes clear that in applying the exemptions to property not before the court, the court should consider marital property that would not be liable for satisfaction of the judgment as well as property that would be liable for satisfaction.

Subdivision (e) is new. Exemptions may be claimed by both the judgment debtor and the spouse of the judgment debtor in some situations. See Section 703.020 (persons entitled to exemptions).

CROSS-REFERENCES

Defined terms

Court § _____

Judgment debtor § _____

Persons entitled to exemptions § 703.020

28767

§ 703.130. Continuing review of exemptions

703.130. (a) Five years following the operative date of this act and every five years thereafter the California Law Revision Commission shall examine the exempt amounts provided in this chapter and in other statutes in light of changes in the Consumer Price Index or other index represented by the Bureau of Labor Statistics of the United States Department of Labor as most accurately reflecting changes in the purchasing power of the dollar for consumers. The Commission shall recommend to the Governor and the Legislature any changes in exempt amounts that appear proper.

(b) Nothing in this section precludes the Commission from making recommendations concerning exempt amounts more frequently than required by subdivision (a) or from making recommendations concerning any other aspect of this title, and the Commission is authorized to maintain a continuing review of and submit recommendations concerning enforcement of judgments.

Comment. Section 703.130 is intended to provide an institutional mechanism for periodically updating and modernizing the exemptions without mandating increases tied to the cost of living.

Article 2. Procedure for Claiming Exemptions After Levy

§ 703.510. Application of article

703.510. (a) Except as otherwise provided by statute, property that has been levied upon may be claimed to be exempt as provided in this article.

(b) Property that is exempt without making a claim that has been levied upon may be released pursuant to the claim of exemption procedure provided in this article.

Comment. Subdivision (a) of Section 703.510 indicates the scope of the application of the exemption procedure provided in this article. As recognized by the introductory clause, special exemption procedures apply in certain cases where property has been levied upon. See, e.g., Sections 484.070(a) (attachment), 704.080 (deposit accounts consisting of Social Security benefits), 704.710-704.890 (homestead) 723.010-723.154 (earnings). This continues the introductory portion of former Section 690.50(a).

Subdivision (b) supersedes former Section 690(b) which provided that property for which a claim of exemption was not required was not subject to enforcement procedures. See Section 703.030. Subdivision (b) makes clear that if such property is levied on, its release may be obtained through the exemption procedures. Cf. Section 695.030 (property not subject to enforcement of a money judgment).

16/973

§ 703.520. Claim of exemption

703.520. (a) The claimant may make a claim of exemption by filing with the levying officer a claim of exemption together with a copy thereof. The claim shall be made within 10 days after the date the notice of levy was served on the judgment debtor.

(b) The claim of exemption shall be executed under oath and shall include all of the following:

(1) The name of the claimant and the mailing address where service of a notice of opposition to the claim may be made upon the claimant.

(2) The name and last known address of the judgment debtor if the claimant is not the judgment debtor.

(3) A description of the property claimed to be exempt. If an exemption is claimed pursuant to Section 704.010 or 704.060, the claimant shall describe all other property of the same type owned by the

judgment debtor alone or in combination with others on the date of levy and state which items are claimed as exempt. If an exemption is claimed pursuant to Section 704.070 or subdivision (b) of Section 704.100, the claimant shall state the nature and amount of all other funds of the same type owned by the judgment debtor or the spouse of the judgment debtor alone or in combination with others on the date of levy.

(4) A financial statement if required by Section 703.530.

(5) A citation of the provision of this chapter or other law upon which the claim is based.

(6) A statement of the facts necessary to support the claim.

Comment. Section 703.520 supersedes subdivision (a) of former Section 690.50. See also Sections 703.020 (persons entitled to exemptions); 703.030 (manner of claiming exemptions; late claims).

CROSS-REFERENCES

Declaration under penalty of perjury § 2015.5

Defined terms

Judgment debtor § _____

Levying officer § _____

28768

§ 703.530. Judgment debtor's financial statement

703.530. (a) If property is claimed as exempt pursuant to a provision exempting property to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor, the claim of exemption shall include the judgment debtor's financial statement.

(b) The judgment debtor's financial statement shall be executed under oath and shall include all of the following information:

(1) The name, age, and relationship of all persons dependent upon the judgment debtor and spouse of the judgment debtor for support.

(2) All sources and the amounts of earnings and other income of the judgment debtor and the spouse and dependents of the judgment debtor.

(3) A listing of the assets of the judgment debtor and the spouse and dependents of the judgment debtor and the value of such assets.

(4) All outstanding obligations of the judgment debtor and the spouse and dependents of the judgment debtor.

Comment. Section 703.530 is comparable to Section 723.124 (wage garnishment). An exemption based upon the need of the judgment debtor and the spouse and dependents of the judgment debtor must take into account the property of the spouse and dependents. See Section 703.120(b).

CROSS-REFERENCES

Declaration under penalty of perjury § 2015.5

Defined terms

Judgment debtor § _____

16/972

§ 703.540. Notice of claim of exemption

703.540. Upon the making of the claim of exemption, the levying officer shall promptly serve personally or by mail on the judgment creditor both of the following:

(a) A copy of the claim of exemption.

(b) A notice of claim of exemption which states that the claim of exemption has been made and that the levying officer will release the property unless a notice of opposition to the claim of exemption is filed with the levying officer by the judgment creditor within five days (in the case of personal service) or 10 days (in the case of service by mailing) after the date of service of the notice of the claim.

Comment. Section 703.540 supersedes subdivision (b) of former Section 690.50. The five-day period provided by former law for giving the notice of opposition is increased to 10 days in the case of service by mail. See Section 684.040 (time for performing act).

CROSS-REFERENCES

Defined terms

Judgment creditor § _____

Levying officer § _____

968/708

§ 703.550. Opposition to exemption claim

703.550. (a) Within five days after service of the notice of claim of exemption, a judgment creditor who opposes the claim of exemption shall file with the court a notice of opposition to the claim of exemption and a notice of motion for an order determining the claim of exemp-

tion and serve on the levying officer a copy of the notice of opposition and notice of motion. Upon the filing of the copy of the notice of opposition and notice of motion, the levying officer shall promptly transmit the claim of exemption to the court.

(b) If the levying officer is not served with a copy of the notice of opposition and a notice of motion within the time prescribed in subdivision (a), the levying officer shall immediately release the property in the manner provided by Section _____ to the extent it is claimed to be exempt.

Comment. Subdivision (a) of Section 703.550 supersedes portions of subdivisions (c) and (e) of former Section 690.50. Subdivision (a), unlike former law, does not provide the claimant with the right to request a hearing on the claim of exemption since, if the judgment creditor does not file a notice of opposition and file a notice of motion for an order determining the claim of exemption within the time provided, the property is released pursuant to Section _____, making a hearing unnecessary. Consequently, the delay between the filing of the counteraffidavit and the notice of motion provided by subdivision (e) of former Section 690.50 has been eliminated. The five-day period for filing the notice of opposition and notice of motion runs from the date of service of the notice of claim of exemption. In the case of service by mail, 10 days is the relevant period. See Section 684.040 (time for performing act).

Subdivision (b) supersedes subdivisions (d) (release if no counter-affidavit served) and (f) (release if no motion) of former Section 690.50.

CROSS-REFERENCES

Defined terms

Judgment creditor § _____
Levying officer § _____

16/971

§ 703.560. Contents of notice of opposition

703.560. The notice of opposition to the claim of exemption shall be executed under oath and shall include all of the following:

(a) An allegation either that (1) the property or a portion thereof is not exempt under the provision of this chapter or other law relied upon or (2) the equity in the property claimed to be exempt is in excess of the amount provided in the applicable exemption.

§ 703.570

- (b) A statement of the facts necessary to support the allegation.
- (c) Points and authorities supporting any legal issues raised.

Comment. Section 703.560 supersedes a portion of subdivision (c) of former Section 690.50.

CROSS-REFERENCES

Declaration under penalty of perjury § 2015.5
Defined terms
Equity § 703.000

16/970

§ 703.570. Notice of motion for hearing

703.570. (a) The hearing on the motion shall be held not later than 20 days from the date the notice of motion was filed unless continued by the court for good cause.

(b) Not less than 10 days prior to the hearing, the judgment creditor shall personally serve a notice of the hearing and a copy of the notice of opposition to the claim of exemption on the claimant and on the judgment debtor, if other than the claimant.

Comment. Section 703.570 supersedes portions of subdivisions (c) and (e) of former Section 690.50.

CROSS-REFERENCES

Defined terms
Judgment creditor § _____
Judgment debtor § _____
Proof of service § _____

16/968

§ 703.580. Hearing and order

703.580. (a) The claim of exemption and notice of opposition to the claim of exemption constitute the pleadings, subject to the power of the court to permit amendments in the interest of justice.

(b) At a hearing under this section, the claimant has the burden of proof.

(c) The claim of exemption is deemed controverted by the notice of opposition and both shall be received in evidence. If no other evidence

is offered, the court, if satisfied that sufficient facts are shown by the claim of exemption and the notice of opposition to the claim of exemption, including the financial statement if one is required, may make its determination thereon. If not satisfied, the court shall order the hearing continued for the production of other evidence, oral or documentary.

(d) At the conclusion of the hearing, the court by order shall determine whether or not the property is exempt, in whole or in part. Subject to Section 703.600, the order is determinative of the right of the judgment creditor to apply the property to the satisfaction of the judgment. No findings are required in a proceeding under this section.

(e) The clerk shall promptly transmit a certified copy of the order to the levying officer. Subject to Section 703.610, the levying officer shall, in compliance with the order, release the property in the manner provided by Section _____ or apply the property to the satisfaction of the judgment.

Comment. Subdivisions (a)-(d) of Section 703.580 continue the substance of a portion of subdivision (i) of former Section 690.50.

Subdivision (e) continues the substance of the first sentence of subdivision (j) of former Section 690.50.

CROSS-REFERENCES

Appeal from order § 703.600

Defined terms

Court § _____

Judgment creditor § _____

Levying officer § _____

101/133

§ 703.590. Extension of time

703.590. If the court extends the time allowed for an act to be done under this article, written notice of the extension shall be given promptly to the opposing party, unless notice is waived, and to the levying officer.

Comment. Section 703.590 continues the substance of a portion of former Section 690.50(1).

CROSS-REFERENCES

Defined terms

Court § _____

Levying officer § _____

§ 703.600. Appeal

703.600. An appeal lies from any order made under this article and shall be taken in the manner provided for appeals in the court in which the proceeding takes place.

Comment. Section 703.600 continues the substance of subdivision (m) of former Section 690.50.

§ 703.610. Disposition of property during pendency of proceedings

703.610. (a) Except as otherwise provided in this section or in Sections [702.620] and [706.750], until the final determination of the claim of exemption:

(1) The levying officer shall not release property unless the judgment creditor otherwise instructs.

(2) Property shall not be sold or otherwise disposed of except pursuant to Section [703.220] or by order of the court pursuant to statute.

(b) At any time while the exemption proceedings are pending, upon motion of the judgment creditor or a claimant, or upon its own motion, the court may make such orders for disposition of the property as may be proper under the circumstances of the case. Such an order may be modified or vacated by the court at any time during the pendency of the exemption proceedings upon such terms as are just.

(c) If an appeal of the determination of a claim of exemption is taken, notice of the appeal shall be given to the levying officer and the levying officer shall hold, release, or dispose of the property subject to the provisions governing enforcement and stay of enforcement of money judgments pending appeal.

Comment. Subdivision (a) of Section 703.610 continues the substance of subdivision (h) and the second sentence of subdivision (j) of former Section 690.50. It requires, as did former Section 690.50(h), that the levying officer preserve the status quo by maintaining the lien on the property.

Subdivision (b) continues the substance of former Section 690.50(g), except that orders for the disposition of perishable property are governed by Section 703.220.

Subdivision (c) is new. For provisions governing enforcement and stays pending appeal, see Sections 916-923.

CROSS-REFERENCES

Defined terms

Court § _____
Judgment creditor § _____
Levying officer § _____

27/868

Article 3. Exempt Property

§ 704.010. Motor vehicle; proceeds

704.010. (a) One motor vehicle is exempt if the equity in the motor vehicle does not exceed one thousand dollars (\$1,000). A second motor vehicle is exempt if the judgment debtor is married and the second motor vehicle is necessary to enable both the judgment debtor and the spouse of the judgment debtor to earn a livelihood, provided the equity in the second motor vehicle does not exceed one thousand dollars (\$1,000). For the purpose of determining the equity, the fair market value of the motor vehicle shall be determined by reference to used car price guides customarily used by California automobile dealers unless the motor vehicle is not listed in such price guides.

(b) If the motor vehicle is sold, or if it has been lost, damaged, or destroyed, the proceeds of sale or of insurance or other indemnification are exempt in the amount of one thousand dollars (\$1,000) for a period of 90 days after the sale in the case of a voluntary sale, or 90 days after the receipt of proceeds in all other cases.

(c) If the judgment debtor has only one motor vehicle, proceeds of an execution sale of the motor vehicle are exempt in the amount provided in this section without making a claim. The levying officer shall consult and may rely upon the records of the Department of Motor Vehicles in determining whether the judgment debtor has only one motor vehicle.

Comment. Section 704.010 supersedes subdivisions (a), (d), and (e) of former Section 690.2.

Subdivision (a) increases the motor vehicle exemption from \$500 to \$1,000 and exempts a second motor vehicle in the case where the second is necessary so that both the judgment debtor and the spouse of the judgment debtor may work.

Subdivision (b) provides an exemption for proceeds of sale, or of insurance or other indemnification, whereas subdivision (e) of former Section 690.2 exempted "any amount representing the motor vehicle exemption." Cf. Houghton v. Lee, 50 Cal. 101, 103 (1875) (exemption of proceeds from insurance on homestead). Subdivision (b) also makes clear that the 90-day period during which proceeds are exempt runs from the receipt of the proceeds by the judgment debtor except in the case of a voluntary sale in which case the period runs from the date of sale. This principle is derived from the provisions exempting the proceeds from the sale of a homestead. See former Civil Code §§ 1257, 1265; Chase v. Bank of America, 227 Cal. App.2d 259, 263-64, 38 Cal. Rptr. 567, ____ (1964).

Subdivision (c) makes clear that the exemption of proceeds need not be claimed where there is only one motor vehicle. See Section 707.030. Section 701.810 requires distribution of such proceeds to the judgment debtor before the judgment creditor. See also Section ____ (sale price required to exceed liens required to be satisfied and proceeds exemption).

CROSS-REFERENCES

Application to marital property § 703.120

Defined terms

Equity § 703.000

Judgment debtor § ____

Levying officer § ____

Motor vehicle § ____

§ 704.020. Household furnishings, wearing apparel, personal effects

704.020. Household furnishings, appliances, provisions, wearing apparel, and other personal effects, ordinarily and reasonably necessary for an average household are exempt in all of the following cases:

(a) If personally used or procured for use by the judgment debtor and members of the judgment debtor's household at the judgment debtor's principal place of residence.

(b) Where the judgment debtor and the judgment debtor's spouse live separate and apart, if personally used or procured for use by the spouse and members of the spouse's household at the spouse's principal place of residence.

Comment. Section 704.020 supersedes the first sentence of former Section 690.1 and makes clear that the exemption applies to a second household where the spouses live separate and apart. Section 704.020 continues the ordinarily and reasonably necessary standard but limits the exemption to items that are necessary for the average household. This limitation is intended to eliminate the unfairness inherent in the "station in life" test as applied in cases such as Independence Bank v. Heller, 275 Cal. App.2d 84, 79 Cal. Rptr. 868 (1969), and Newport Nat'l Bank v. Adair, 2 Cal. App.3d 1043, 83 Cal. Rptr. 1 (1969).

CROSS-REFERENCES

Application to marital property § 703.120

Defined terms

Judgment debtor § _____

§ 704.030. Materials for repair or improvement of dwelling

704.030. All material in which the equity does not exceed one thousand dollars (\$1,000) is exempt as long as the material in good faith is about to be applied to the repair of the residence in all of the following cases:

(a) If purchased in good faith for use in the repair or improvement of the judgment debtor's principal place of residence.

(b) Where the judgment debtor and the judgment debtor's spouse live separate and apart, if purchased in good faith for use in the repair or improvement of the spouse's principal place of residence.

Comment. Section 704.030 continues a portion of former Section 690.17 and makes clear that a second exemption is available where the spouses live separate and apart.

CROSS-REFERENCES

Application to marital property § 703.120

Defined terms

Equity § 703.000

Judgment debtor § _____

§ 704.040. Jewelry, heirlooms, works of art

704.040. Jewelry, heirlooms, works of art, and other personal effects are exempt if the court determines that their reasonable sentimental or psychological value to the judgment debtor or a spouse or

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dependent of the judgment debtor outweighs the need of the judgment creditor to enforce the judgment to such an extent that it would be inequitable to subject them to enforcement.

Comment. Section 704.040 provides an exemption for items of sentimental value. This section supersedes portions of former Section 690.1 which provided an exemption for wearing apparel, furnishings, and works of art "of or by the debtor and his resident family." The exemption of property under Section 704.040 depends upon a balancing of equities between the sentimental or psychological value of the property and the need of the judgment creditor.

CROSS-REFERENCES

Defined terms

Court § _____
 Judgment creditor § _____
 Judgment debtor § _____

405/332

§ 704.050. Health aids

704.050. Health aids reasonably necessary to enable the judgment debtor or a spouse or dependent of the judgment debtor to work or sustain health, and prosthetic and orthopedic appliances, are exempt.

Comment. Section 704.050 supersedes former Section 690.5 which exempted prosthetic and orthopedic appliances used by the debtor. Section 704.050 is based on Section 5(2) of the Uniform Exemptions Act (1976). The requirement that health aids be reasonably necessary to enable the individual to work or sustain health permits the exemption of such items as a wheel chair for a person unable to walk to work, an air conditioner for a person afflicted with asthma, or an elevator for a person unable to climb stairs, but does not permit the exemption of a swimming pool, sauna, bicycle, golf clubs, or gymnastic equipment merely because their use is conducive to maintaining good health.

CROSS-REFERENCES

Defined terms

Judgment debtor § _____

§ 704.060. Tools, etc., used in trade, business, or profession;
proceeds

704.060. (a) Tools, implements, instruments, materials, uniforms, furnishings, books, equipment, one motor vehicle, one vessel, and other personal property are exempt to the extent that the aggregate equity therein does not exceed two thousand five hundred dollars (\$2,500) in all of the following cases:

(1) If reasonably necessary to and actually used by the judgment debtor in the exercise of the trade, business, or profession by which the judgment debtor earns a livelihood.

(2) If reasonably necessary to and actually used by the spouse of the judgment debtor in the exercise of the trade, business, or profession by which the spouse earns a livelihood.

(3) If reasonably necessary to and actually used by the judgment debtor and by the spouse of the judgment debtor in the exercise of the same trade, business, or profession by which both earn a livelihood. In the case covered by this paragraph, the exempt items and amounts are doubled but the exemptions provided in paragraphs (1) and (2) are not available.

(b) If an item exempt pursuant to subdivision (a) is sold, or if it has been lost, damaged, or destroyed, the proceeds of sale or of insurance or other indemnification are exempt in the amount prescribed in subdivision (a), less the value of other items exempt pursuant to subdivision (a), for a period of 90 days after the sale, in the case of a voluntary sale, or after receipt of the proceeds by the judgment debtor or the spouse of the judgment debtor, in all other cases.

Comment. Subdivision (a) of Section 704.060 continues the substance of former Section 690.4 and a portion of former Section 690.17 (building materials not exceeding \$1,000) and makes clear that an additional exemption is available to the spouse of the judgment debtor as well as to the judgment debtor.

Subdivision (b) provides an exemption for the proceeds of sale or of insurance or other indemnification analogous to that provided by Section 704.010(b) (motor vehicle).

CROSS-REFERENCES

Application to marital property § 703.120

Defined terms

Equity § 703.000

Judgment debtor § _____

Motor vehicle § _____

Vessel § _____

§ 704.070. Deposit accounts and money

704.070. (a) Any combination of deposit accounts (other than deposit accounts described in subdivisions (b) and (c)) and money is exempt in the maximum aggregate amount of two hundred fifty dollars (\$250).

(b) Any combination of savings deposits (including "investment certificates" and "withdrawable shares" as defined in Sections 5061 and 5067 of the Financial Code) in, shares or other accounts in, or shares of stock of, any state or federal savings and loan association is exempt in the maximum aggregate amount of five hundred dollars (\$500).

(c) Any combination of shares and certificates for funds deposited in a credit union and all the accumulation thereon is exempt in the maximum aggregate amount of seven hundred fifty dollars (\$750).

(d) If the judgment debtor is married, each spouse is entitled to the exemptions provided by this section, regardless whether the deposit accounts belong to either or both spouses and regardless whether the spouse of the judgment debtor is also a judgment debtor under the judgment. The amount of the exemptions provided by this section are reduced by the amount of any funds in the deposit account or money traceable and exempt pursuant to this chapter or any other law providing an exemption. Application of the exemptions provided by this section shall be first to amounts in deposit accounts and money other than the deposit account or money before the court and then, if not exhausted, to the deposit account or money before the court.

Comment. Subdivision (a) of Section 704.070 is new. It provides an exemption for deposit accounts other than savings and loan and credit unions as well as for money. The \$250 exemption is a maximum (except in the case of a married judgment debtor, where the maximum is \$500), available only to the extent the deposit account does not consist of other exempt funds.

Subdivision (b) supersedes former Section 690.7 (\$1,000 of savings deposits in, shares or other accounts in, or shares of stock of, savings and loan associations); it halves the amount of the exemption (except in the case of a married judgment debtor). See also Section 704.080 (exemption of deposit account into which social security payments are directly deposited).

Subdivision (c) supersedes former Financial Code Section 15406 (\$1,500 of shares or certificates in credit unions); it halves the amount of the exemption (except in the case of a married judgment debtor).

Subdivision (d) provides for doubling of the exemptions in the case of a married judgment debtor. Each spouse may claim an exemption of property subject to enforcement on the judgment in the same account or different accounts. Subdivision (d) adopts the rule that the deposit account exemption is applied first to property not levied upon. The intent of this rule is to subject the greatest amount available to enforcement of the judgment. See Section 703.520 (exemption claim discloses assets not levied upon).

CROSS-REFERENCES

Application to marital property § 703.120

Defined terms

Court § _____
Deposit account § _____
Judgment debtor § _____

32/239

§ 704.080. Deposit account in which social security payments are directly deposited

704.080. (a) For the purposes of this section, "payments authorized by the Social Security Administration" means regular retirement and survivors' benefits, supplemental security income benefits, coal miners' health benefits, and disability insurance benefits.

(b) A deposit account in which payments authorized by the Social Security Administration are directly deposited by the United States government is exempt in the following amount without making a claim:

(1) Five hundred dollars (\$500) where one depositor is the designated payee of the directly deposited payments.

(2) Seven hundred fifty dollars (\$750) where two or more depositors are the designated payees of the directly deposited payments, unless such depositors are joint payees of directly deposited payments which represent a benefit to only one of the depositors, in which case the exempt amount is five hundred dollars (\$500).

(c) The amount of a deposit account described in subdivision (b) that exceeds the exemption provided in subdivision (b) is exempt to the extent that it consists of payments authorized by the Social Security Administration.

(d) Notwithstanding [Article 5 (commencing with Section 701.010) of Chapter 3], upon levy or service of other process the financial institution that holds the deposit account shall either place the amount that exceeds the exemption provided in subdivision (b) in a suspense account or otherwise prohibit withdrawal of the amount pending notification of the failure of the judgment creditor to file the affidavit required by this section or the judicial determination of the exempt status of the amount. Within 10 business days after the levy, the financial institution shall provide the levying officer with a written notice stating that the deposit account is one described in subdivision (b) and state the balance of the deposit account. Promptly upon receipt of the notice, the levying officer shall serve personally or by mail notice of the nature and balance of the deposit account on the judgment creditor.

(e) Notwithstanding the procedure prescribed in Article 2 (commencing with Section 703.510), whether there is an amount exempt under subdivision (c) shall be determined as follows:

(1) Within five days after the levying officer serves notice of the nature and balance of the deposit account on the judgment creditor, a judgment creditor who desires to claim that the amount is not exempt shall file with the court an affidavit alleging that the amount is not exempt and serve a copy on the levying officer. The affidavit shall be in the form of the notice of opposition provided by Section 703.560, and a hearing shall be set and held, and notice given, as provided by Sections 703.570 and 703.580. For the purpose of this subdivision, the "notice of opposition to the claim of exemption" in Sections 703.570 and 703.580 means the affidavit under this subdivision.

(2) If the judgment creditor does not serve the affidavit on the levying officer and give notice of hearing pursuant to Section 703.570 within the time provided in paragraph (1) of this subdivision, the levying officer, if any, shall release the property in the manner provided by Section _____ and shall notify the financial institution.

(3) The affidavit constitutes the pleading of the judgment creditor, subject to the power of the court to permit amendments in the interest of justice. The affidavit is deemed controverted and no counteraffidavit is required.

(4) At a hearing under this subdivision, the judgment debtor has the burden of proving that the excess amount is exempt.

(5) At the conclusion of the hearing, the court by order shall determine whether or not the amount of the deposit account is exempt pursuant to subdivision (c) in whole or in part and shall make an appropriate order for the prompt disposition of the money. No findings are required in a proceeding under this subdivision.

(6) Upon determining that all or part of the amount of the deposit account is exempt pursuant to subdivision (c), the clerk shall immediately transmit a certified copy of the order to the levying officer and the levying officer shall serve the copy of the order on the financial institution.

(f) If the judgment debtor claims that a portion of the amount is exempt other than pursuant to subdivision (c), the claim of exemption shall be made pursuant to Article 2 (commencing with Section 703.510). If the judgment debtor also opposes the judgment creditor's affidavit regarding an amount exempt pursuant to subdivision (c), both exemptions shall be determined at the same hearing, provided the judgment debtor has complied with Article 2 (commencing with Section 703.510).

Comment. Section 704.080 supersedes former Section 690.30. Social Security payments may be directly deposited pursuant to 31 U.S.C. § 492 (1976). Subdivision (a) continues former Section 690.30(c). Subdivision (b) continues the substance of the first paragraph and subdivision (a) of former Section 690.30. Subdivision (c) continues the substance of the introductory paragraph of former Section 690.30(b). Subdivision (d) continues the substance of former Section 690.30(b)(1).

Subdivision (e) supersedes paragraphs (2), (3), and (4) of subdivision (b) of former Section 690.30. Subdivision (e), along with subdivision (f), clarifies the procedure applicable to claiming exemptions for excess amounts in deposit accounts described in this section and the relation between this procedure and the procedure provided by Article 2 (commencing with Section 703.510) (superseding former Section 690.50, incorporated by reference in former Section 690.30). Paragraph (6) supersedes former Section 690.30(b)(3). The provision for an order determining priority or dividing the property between several creditors is superseded by Section 701.810 (distribution of proceeds). Paragraph (7) continues former Section 690.30(b)(4).

Where a deposit account is not one described by subdivision (b) or where an exemption of excess funds in a deposit account described in

subdivision (b) is claimed on other grounds, the procedures provided in Article 2 (commencing with Section 703.510) apply to the determination of the exemption. See Section 704.070 and subdivision (f) of this section.

See also Section _____ (release).

CROSS-REFERENCES

Defined terms

Deposit account \$ _____
 Judgment creditor \$ _____
 Judgment debtor \$ _____
 Levying officer \$ _____

999/322

§ 704.090. Inmate's trust account

704.090. The funds of a judgment debtor confined in a prison or facility under the jurisdiction of the Department of Corrections or the Youth Authority or confined in any county or city jail, road camp, industrial farm, or other local correctional facility, held in trust for or to the credit of the judgment debtor, in an inmate's trust account or similar account by the state, county, or city, or any agency thereof, are exempt without making a claim in the amount of one thousand dollars (\$1,000). If the judgment debtor is married, each spouse is entitled to a separate exemption under this section or the spouses may combine their exemptions.

Comment. Section 704.090 supersedes former Section 690.21, which provided an exemption of \$40.

CROSS-REFERENCES

Application to marital property § 703.120

Defined terms

Judgment debtor \$ _____

101/153

§ 704.100. Life insurance, endowment, annuity policies

704.100. (a) Unmatured life insurance policies, including endowment and annuity policies (but not the loan value of such policies), are exempt without making a claim.

(b) The aggregate loan value of unmatured life insurance policies, including endowment and annuity policies is subject to the enforcement of a money judgment but is exempt in the amount of four thousand dollars (\$4,000). If the judgment debtor is married, each spouse is entitled to the exemption provided by this subdivision, regardless whether the policies belong to either or both spouses and regardless whether the spouse of the judgment debtor is also a judgment debtor under the judgment. Application of the exemption provided by this subdivision shall be first to policies other than the policy before the court and then, if not exhausted, to the policy before the court.

(c) Benefits from matured life insurance policies, including endowment and annuity policies, paid or payable to the judgment debtor or the spouse or dependents of the judgment debtor, are exempt to the extent reasonably necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor.

Comment. Section 704.100 supersedes the exemptions provided in former Sections 690.9 (life insurance represented by \$500 annual premium), 690.10 (group life insurance), and 690.14 (fraternal benefit society). Under subdivision (a), the judgment creditor is precluded from reaching an unmatured policy except for its loan value; this prevents the judgment creditor from forcing the judgment debtor to surrender a life insurance policy for its cash value.

Subdivision (b) protects a portion of the loan value of unmatured insurance policies. It provides for doubling of the exemption in the case of a married judgment debtor. Each spouse may claim an exemption of property subject to enforcement on the judgment in the same policy or different policies. The loan value is not subject to execution (see Section [703.110(b)(7)]) but may be reached by some other appropriate procedure. See Sections _____ (examination of judgment debtor), _____ (order in examination proceedings), _____ (appointment of receiver), _____ (assignment order).

Subdivision (c) codifies former law, which made the exemption of benefits available to the judgment debtor regardless whether the judgment debtor was the insured or the beneficiary under the policy. See Jackson v. Fisher, 56 Cal.2d 196, 200, 363 P.2d 479, ___, 14 Cal. Rptr. 439, ___ (1961). Under subdivision (c), the exemption may be asserted against creditors of the judgment debtor or of the spouse or dependents of the judgment debtor. See Holmes v. Marshall, 145 Cal. 777, 779-82, 79 P. 534, ___ (1905).

CROSS-REFERENCES

Application to marital property § 703.120

Defined terms

Court § _____

Judgment debtor § _____

§ 704.110. Public retirement and related benefits and contributions

704.110. (a) As used in this section:

(1) "Public entity" means the state, or a city, city and county, county, or other political subdivision of the state, or a public trust, public corporation, or public board, or the governing body of any of them, but does not include the United States except where expressly so provided.

(2) "Public retirement benefit" means a pension or an annuity, or a retirement, disability, death, or other benefit, paid or payable by a public entity.

(3) "Public retirement system" means a system established pursuant to statute by a public entity for retirement, annuity, or pension purposes, or payment of disability or death benefits.

(b) All money held, controlled, or in process of distribution by a public entity derived from contributions by the public entity or by an officer or employee of the public entity for public retirement benefit purposes, and all rights and benefits accrued or accruing to any person under a public retirement system, are exempt without making a claim.

(c) All money received by any person, a resident of the state, as a public retirement benefit or as a return of contributions and interest thereon from the United States or a public entity or from a public retirement system is exempt.

Comment. Section 704.110 continues the substance of subdivisions (a) and (b) of former Section 690.18, with drafting changes for purposes of uniformity. The exemption provided in subdivision (c) applies whether the money is in the actual possession of the retirement benefit recipient or has been deposited. See Section 703.080 (tracing exempt funds). For the exemption of vacation credits, see Section 704.113. For the exemption of benefits under the Unemployment Insurance Code, see Section 704.120. For the application of exemptions against court-ordered spousal and child support judgments, see Civil Code Section 4384.

§ 704.113. Public employee vacation credits

704.113. (a) As used in this section, "vacation credits" means vacation credits accumulated by a state employee pursuant to Section

18050 of the Government Code or by any other public employee pursuant to any law for the accumulation of vacation credits applicable to the employee.

(b) All vacation credits are exempt without making a claim.

(c) Amounts paid periodically or as a lump sum representing vacation credits are exempt to the same extent as earnings of a judgment debtor.

Comment. Subdivision (b) of Section 704.113 continues the substance of a portion of former Section 690.18(b).

Subdivision (c) makes clear that vacation pay is treated the same as earnings for exemption purposes. See Sections 723.050-723.052.

§ 704.115. Private retirement and related benefits and contributions

704.115. (a) As used in this section, "private retirement plan" means:

(1) Private retirement plans, including, but not limited to, union retirement plans.

(2) Profit-sharing plans designed and used for retirement purposes.

(3) Self-employed retirement plans and individual retirement annuities or accounts provided for in the Internal Revenue Code of 1954 as amended by the federal "Employee Retirement Income Security Act of 1974" (P.L. 93-406, 29 U.S.C. § 1001 et seq.) and by the "Tax Reform Act of 1976" (P.L. 94-455), to the extent the moneys held in the plans, annuities, or accounts do not exceed the maximum amounts exempt from federal income taxation under these acts.

(b) All money held, controlled, or in process of distribution by a private retirement plan, or the payment of benefits as an annuity, pension, retirement allowance, disability payment, or death benefit from a private retirement plan, and all contributions and interest thereon returned to any member of a private retirement plan, are exempt.

(c) The exemption provided by this subdivision does not apply to a private retirement plan described in subdivision (a)(3) with regard to moneys withheld from employees' wages and contributions based on wages in employment under provisions of the Unemployment Insurance Code.

Comment. Section 704.115 continues the substance of subdivision (c) of former Section 690.18. The exemption provided in subdivision (b) applies whether money received by the judgment debtor is in the actual possession of the recipient or has been deposited. See Section 703.080 (tracing exempt funds). In addition to the exemption provided by this section, federal law exempts periodic payments from a retirement fund to the same extent as wages. For the application of exemptions against court-ordered spousal and child support judgments, see Civil Code Section 4384.

405/355

§ 704.120. Unemployment benefits and contributions; strike benefits

704.120. (a) Contributions by workers payable to the Unemployment Compensation Disability Fund and by employers payable to the Unemployment Fund are exempt without making a claim.

(b) Before payment, money held for payment of the following benefits is exempt without making a claim:

(1) Unemployment compensation benefits payable under Part 1 (commencing with Section 100) of Division 1 of the Unemployment Insurance Code.

(2) Unemployment compensation disability benefits payable under Part 2 (commencing with Section 2601) of Division 1 of the Unemployment Insurance Code.

(3) Extended duration benefits payable under Part 3 (commencing with Section 3501) of Division 1 of the Unemployment Insurance Code.

(4) Federal-state extended benefits payable under Part 4 (commencing with Section 4001) of Division 1 of the Unemployment Insurance Code.

(5) Incentive payments payable under Division 2 (commencing with Section 5000) of the Unemployment Insurance Code.

(6) Benefits under a plan or system established by an employer that makes provision for employees generally or for a class or group of employees for the purpose of supplementing unemployment compensation benefits.

(7) Unemployment benefits by a fraternal organization to bona fide members.

(8) Benefits payable by a union due to a labor dispute.

(c) After payment, the benefits described in subdivision (b) are exempt.

Comment. Section 704.120 supersedes former Sections 690.13, 690.16, and 690.175 and portions of former Section 690.18(b) and Unemployment Insurance Code Sections 988 and 1342. Subdivision (b)(8) is new.

§ 704.130. Disability and health benefits and contributions

704.130. (a) Before payment, benefits from a disability or health insurance policy or program are exempt without making a claim. After payment, the benefits are exempt.

(b) Subdivision (a) does not apply if the judgment creditor is a provider of health care whose claim arises out of the condition for which the benefits are collected.

Comment. Subdivision (a) of Section 704.130 supersedes former Section 690.11 (disability or health insurance benefits represented by \$500 annual premium), 690.13 (money used exclusively in payment of sick benefits by fraternal organization to bona fide members), 690.14 (fraternal benefit society funds), and portions of former Section 690.18 (disability benefits from retirement plans).

Subdivision (b) is new.

CROSS-REFERENCES

Defined terms

Judgment creditor § _____

§ 704.140. Damages for personal injury

704.140. (a) A cause of action for personal injury is exempt without making a claim.

(b) An award of damages or a settlement arising out of personal injury is exempt to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor.

(c) Subdivision (b) does not apply if the judgment creditor is a provider of health care whose claim arises out of the provision of health care for the personal injury for which the award or settlement was made.

Comment. Section 704.140 is new. A pending cause of action may only be reached by the lien procedure provided by Article 4 (commencing with Section 708.310) of Chapter 6.

CROSS-REFERENCES

Application to marital property § 703.120

Defined terms

Judgment creditor § _____

Judgment debtor § _____

29215

§ 704.150. Damages for wrongful death

704.150. (a) A cause of action for wrongful death is exempt without making a claim.

(b) An award of damages or a settlement arising out of the wrongful death of a person of whom the judgment debtor was a spouse or a person of whom the judgment debtor or the spouse of the judgment debtor was a dependent is exempt to the extent reasonably necessary for support of the judgment debtor and the spouse and dependents of the judgment debtor.

Comment. Section 704.150 is new. A pending cause of action may only be reached by the lien procedure provided by Article 4 (commencing with Section 708.310) of Chapter 6.

CROSS-REFERENCES

Application to marital property § 703.120

Defined terms

Judgment debtor § _____

405/354

§ 704.160. Worker's compensation

704.160. Except as provided by Chapter 1 (commencing with Section 4900) of the Labor Code, before payment, a claim for worker's compensation or compensation awarded or adjudged is exempt without making a claim. After payment, the award is exempt.

Comment. Section 704.160 continues the substance of former Section 690.15.

§ 704.170. Aid

704.170. Before payment, aid provided pursuant to Division 9 (commencing with Section 10000) of the Welfare and Institutions Code or similar aid provided by a charitable organization or a fraternal benefit society as defined in Section 10990 of the Insurance Code, is exempt without making a claim. After payment, the aid is exempt.

Comment. Section 704.170 is based on former Sections 690.14 and 690.19. This section exempts local aid as well as federal aid administered by the state pursuant to the Welfare and Institutions Code. See also Welf. & Inst. Code § 10052 ("aid" defined).

Section 704.170 also expands the category of nongovernmental aid that is exempt. Former Section 690.14 applied only to fraternal benefit societies.

27/872

§ 704.180. Relocation benefits

704.180. Before payment, relocation benefits for displacement from a dwelling which are to be paid pursuant to Chapter 16 (commencing with Section 7260) of Division 7 of Title 1 of the Government Code or the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, are exempt without making a claim. After payment, the benefits are exempt.

Comment. Section 704.180 supersedes Section 690.8a. The last sentence of this section requires the debtor to claim an exemption for such benefits after payment, whereas under former law these benefits were designated as exempt without filing a claim.

27/823

§ 704.190. Licenses

704.190. Except as provided in Section 705.330, a license to engage in any business, profession, or activity issued by a public entity is exempt without making a claim.

Comment. Section 704.190 is derived from a portion of subdivision (f) of former Section 688 which precluded levy or sale on execution of a "license issued by this state to engage in any business, profession, or activity." See Section _____ (receiver to sell liquor license).

§ 704.200. Cemetery plot

704.200. (a) As used in this section:

(1) "Cemetery" has the meaning provided by Section 7003 of the Health and Safety Code.

(2) "Family plot" is a plot that satisfies the requirements of Section 8650 of the Health and Safety Code.

(3) "Plot" has the meaning provided by Section 7022 of the Health and Safety Code.

(b) A family plot is exempt without making a claim.

(c) Except as provided in subdivision (d), a cemetery plot for the judgment debtor and the spouse of the judgment debtor is exempt.

(d) Land held for the purpose of sale or disposition as cemetery plots or otherwise is not exempt.

Comment. Section 704.200 supersedes portions of former Section 690.24 which provided an exemption for a cemetery lot not exceeding one-quarter of an acre in size or, in the case of a religious or benevolent association or corporation, five acres in size. Subdivision (b) recognizes that family plots are inalienable. See Health & Saf. Code § 8650. Subdivision (c) exempts cemetery lots for the judgment debtor and spouse. See also Health & Saf. Code § 8601 (spouse's vested right of interment). Subdivision (d) continues the substance of the third paragraph of former Section 690.24. The fourth paragraph of former Section 690.24, relating to the application of the exemption against a judgment for the purchase price, is not continued because it is no longer necessary. See Comment to Section 703.010(b). The portion of land containing graves of human beings is not subject to enforcement of a money judgment. See *Peebler v. Danziger*, 104 Cal. App.2d 491, 493, 231 P.2d 895, ____ (1951).

CROSS-REFERENCES

Application to marital property § 703.120

Defined terms

Judgment debtor § _____

Article 4. Homestead Exemption

§ 704.710. Definitions

704.710. 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) "Homestead" means the principal dwelling in which the judgment debtor or spouse of the judgment debtor actually resides.

Comment. Subdivision (a) of Section 704.710 supersedes the provisions of former law pertaining to the property that could be exempt as a homestead or dwelling. See former 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) is intended as a drafting aid.

CROSS-REFERENCES

Defined terms

Judgment debtor § _____

26758

§ 704.720. Homestead exemption

704.720. (a) The homestead is exempt if the equity in the homestead does not exceed the amount of the homestead exemption.

(b) If the judgment debtor and the spouse of the judgment debtor live separate and apart in property that would be liable for the satisfaction of the judgment, each spouse may claim the exemption and each homestead is exempt if the equity in that homestead does not exceed one-half the amount of the homestead exemption, regardless whether the

spouse of the judgment debtor is also a judgment debtor under the judgment. The judgment debtor and the spouse of the judgment debtor may, upon motion to the court hearing the judgment debtor's application for sale of a dwelling, combine their exemptions in one homestead.

(c) The amount of the homestead exemption is one hundred thousand dollars (\$100,000).

Comment. Section 704.720 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 dwelling exemption). Unlike the former provisions, Section 704.720 does not specify the interest that is protected and does not limit the homestead in a leasehold to a long-term lease; any interest sought to be reached by the judgment creditor in the homestead is subject to the exemption. The question whether a dwelling is exempt is determined under the circumstances prevailing as of the date of levy. See Sections 703.110 and 704.850. The homestead exemption does not apply where a lien on the property other than an enforcement lien is being foreclosed. See Section 703.010.

Subdivisions (a) and (b) make clear that two homesteads may be exempt in the case of a married judgment debtor living separate and apart from his or her spouse. In such a case, however, the amount of the exemption must be split between the two homesteads unless the judgment debtor and spouse agree to some other allocation of the exempt amount. The spouse may claim an exemption for the separate homestead even though it may be the separate property of the judgment debtor.

Subdivision (c) supersedes former Civil Code Section 1260 and former Code of Civil Procedure Sections 690.3(a) and 690.31(a), which provided an exemption of \$45,000 for heads of families and persons 65 years and older and \$30,000 for other persons. Section 704.720 increases the amount that is protected; however, if the equity exceeds the increased amount, the homestead may be sold and the amount of proceeds exempted is lower. See Section 704.730.

CROSS-REFERENCES

Application to marital property § 703.120

Defined terms

Dwelling § 704.710(a)

Equity § 703.000

Homestead § 704.710(b)

Judgment debtor § _____

26768

§ 704.730. Exemption of proceeds of sale

704.730. If a homestead is sold under this title to enforce a money judgment or is otherwise voluntarily or involuntarily sold, the

proceeds of sale are exempt in the amount of seven thousand five hundred dollars (\$7,500) each for the judgment debtor and the spouse of the judgment debtor who actually reside in the dwelling. Notwithstanding any other provision of this title, the exemption provided in this section applies against all liens and encumbrances on the property, regardless of the time the lien was created and regardless whether the lien was voluntary or involuntary.

Comment. Section 704.730 supersedes the first sentences of former Civil Code Section 1256 and former Code of Civil Procedure Section 690.31(k). It broadens them to include voluntary sales and other dispositions of the homestead and deletes the six-month limitation for the proceeds exemption in favor of the general tracing provisions. See Section 703.080 (tracing of exempt amounts); see also the last portion of former Civil Code Section 1265. The amount of the proceeds exemption provided by Section 704.730 supersedes the amounts provided by former Civil Code Section 1260 and former Code of Civil Procedure Sections 690.3(a) and 690.31(a). It is consistent with the exemption for a residence prescribed in bankruptcy. See 11 U.S.C. § 522 (bankruptcy). The proceeds exemption is absolute and is not subject to preexisting or voluntary liens and encumbrances.

CROSS-REFERENCES

Application to marital property § 703.120
 Defined terms
 Dwelling § 704.710(a)
 Homestead § 704.710(b)
 Judgment debtor § _____

27640

§ 704.740. Limitation on sale of dwelling

704.740. (a) Except as provided in subdivision (b), a dwelling may not be sold under this title to enforce a money judgment except pursuant to a court order for sale upon a determination of either of the following:

- (1) The dwelling is not a homestead.
- (2) The dwelling is a homestead but the equity in the homestead exceeds the amount of the homestead 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 703.510).

Comment. Subdivision (a) of Section 704.740 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 homestead 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 703.000(a) (defining "equity") and Comment thereto. In determining whether the equity exceeds the amount of the exemption, the court does not determine market value but only whether it appears likely there is an excess. See Section 704.790.

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 § 704.710(a)
 Equity § 703.000
 Homestead § 704.710(b)
 Judgment debtor §
 Homestead exemption § 704.720

27641

§ 704.750. Application for order for sale

704.750. (a) When a dwelling is levied upon (other than a dwelling described in subdivision (b) of Section 704.740), 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 levying officer shall release the dwelling 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 county where the dwelling is located or, if there is no court of similar jurisdiction, to a court of higher jurisdiction in that county.

(2) The judgment creditor shall file with the application an abstract of judgment in the form prescribed by Section 674 or, in the case of a judgment described in Section 697.320, a certified copy of the judgment.

(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 704.750 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 704.750 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 704.740(b).

CROSS-REFERENCES

Defined terms

Court § _____
 Dwelling § 704.710(a)
 Judgment creditor § _____
 Levy on real property § _____
 Service of notices §§ 684.010-684.070

§ 704.760. Contents of application

704.760. The judgment creditor's application shall be made under oath, shall describe the dwelling, and shall contain one or both of the following:

(a) A statement that the dwelling is not a homestead and the reasons therefor. In such a case, the application shall also state whether the records of the county tax assessor indicate there is a current homeowner's exemption or disabled veteran's exemption for the dwelling claimed by the judgment debtor.

(b) A statement that, if the dwelling is a homestead, the equity in the homestead exceeds the amount of the homestead exemption.

Comment. Section 704.760 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

Declaration under penalty of perjury § 2015.5

Defined terms

Dwelling § 704.710(a)

Equity § 703.000

Homestead § 704.710(b)

Judgment creditor § _____

Judgment debtor § _____

Disabled veteran's exemption Rev. & Tax. Code § 205.5

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

Homestead exemption § 704.720

§ 704.770. Notice of hearing

704.770. (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 orders 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.

Comment. Subdivision (a) of Section 704.770 supersedes the introductory portions of former Civil Code Section 1246 and Code of Civil Procedure Section 690.31(d).

Subdivision (b) supersedes 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 704.840.

CROSS-REFERENCES

Defined terms

Dwelling § 704.710(a)

Judgment creditor § _____.

Judgment debtor § _____

Manner of service of notice §§ 684.010-684.070

27645

§ 704.780. Hearing

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

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

(2) If the application of the judgment creditor states that the equity in the homestead exceeds the amount of the homestead exemption,

the judgment creditor has the burden of proof that the equity exceeds the amount of the exemption.

(b) 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.

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

(1) The levying officer; and

(2) The clerk of the court in which the judgment was entered if the court making the order is not the court in which the judgment was entered.

Comment. Section 704.780 supersedes former Civil Code Section 1247 and Code of Civil Procedure Section 690.31(c) (second paragraph) and (e).

CROSS-REFERENCES

Defined terms

Dwelling § 704.710(a)

Equity § 703.000

Homestead § 704.710(b)

Judgment creditor § _____

Judgment debtor § _____

Disabled veteran's exemption Rev. & Tax. Code § 205.5

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

Homestead exemption § 704.720

27646

§ 704.790. Order for sale

704.790. (a) If the court determines that the dwelling is not a homestead, or that the dwelling is a homestead but it appears likely that the equity in the homestead exceeds the amount of the homestead exemption, the court shall make an order for sale of the dwelling.

(b) If the dwelling is a homestead, the order for sale shall state the aggregate amount of all liens and encumbrances on the judgment debtor's interest in the homestead superior to the judgment creditor's lien, or in the case of community property, the aggregate amount of all liens and encumbrances on the interest of the judgment debtor and the

spouse of the judgment debtor in the homestead superior to the judgment creditor's lien.

Comment. Section 704.790 supersedes former Civil Code Sections 1248-1250 and former Code of Civil Procedure Section 690.31(f). Unlike the former provisions, Section 704.790 does not provide for a determination whether the property can be divided without material injury. Nor does Section 704.790 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 704.840. In the case of joint judgment debtors, see Section 704.850.

Section 704.790 does not require the court to value the equity in the homestead to ascertain whether the equity exceeds the homestead exemption; the court is required only to determine that it appears likely there is an excess. See Section 704.740. The bids at sale determine whether there is in fact an excess and whether the property may be sold. See Section 704.820.

CROSS-REFERENCES

Defined terms

Dwelling § 704.710(a)
Equity § 703.000
Homestead § 704.710(b)
Judgment creditor § _____
Judgment debtor § _____
Homestead exemption § 704.720

§ 704.800. Procedure after order of sale upon default

704.800. If the court makes an order for sale upon a hearing at which neither the judgment debtor or spouse of the judgment debtor nor the attorney of the judgment debtor or spouse of the judgment debtor appeared:

(a) 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 spouse of 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.

(b) If, within 10 days after service of notice of the order, the judgment debtor or spouse of the judgment debtor files with the levying officer a declaration that the absence of the judgment debtor and the spouse of the judgment debtor or the judgment debtor's or spouse of the judgment debtor's attorney from the hearing was due to mistake, inadvertence, surprise, or excusable neglect and that the judgment debtor or spouse of the judgment debtor wishes to assert the homestead 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 704.800 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) supersedes former Civil Code Section 1252 and former Code of Civil Procedure Section 690.31(h).

CROSS-REFERENCES

Defined terms

Dwelling § 704.710(a)

Judgment creditor § _____

Judgment debtor § _____

Manner of service of notice §§ 684.010-684.070

27801

§ 704.810. Denial of order

704.810. (a) If the court determines that the dwelling is a homestead and it appears likely that the equity in the homestead does not exceed the amount of the homestead 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 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 704.810 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(i), 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

Declaration under penalty of perjury § 2015.5

Defined terms

Dwelling § 704.710(a)

Equity § 703.000

Homestead § 704.710(b)

Judgment creditor § _____

Judgment debtor § _____

Homestead exemption § 704.720

27802

§ 704.820. Sale of homestead

704.820. If a homestead is sold pursuant to court order for sale:

(a) No bid shall be received unless it exceeds the aggregate amount of all liens and encumbrances on the judgment debtor's interest in the homestead superior to the judgment creditor's lien plus the amount of the homestead exemption, or in the case of community property, all liens and encumbrances on the interest of the judgment debtor and spouse of the judgment debtor in the homestead superior to the judgment creditor's lien plus the amount of the homestead exemption.

(b) If no bid is made that satisfies the requirements of subdivision (a), the court, upon motion of the judgment creditor, shall make an order for a new sale of the homestead.

(c) Any sale shall be conducted within six months after the date of the original order for sale or such longer period as is agreed to by the

parties. If the sale is not made within the prescribed period, the order is void, the levying officer shall release the homestead in the manner prescribed in Section _____, and the homestead is not thereafter subject to a court order for sale upon subsequent application by the judgment creditor unless supported by a statement under oath alleging that there is a material change in circumstances affecting the homestead and setting forth facts supporting the claimed material change of circumstances.

Comment. Section 704.820 supersedes former Section 1254. If a subsequent levy and attempted sale is not successful, the judgment creditor may not recover costs. See Section 703.090.

CROSS-REFERENCES

Declaration under penalty of perjury § 2015.5
 Defined terms
 Homestead § 704.710(b)
 Judgment creditor § _____
 Judgment debtor § _____
 Homestead exemption § 704.720

27803

§ 704.830. Distribution of proceeds of sale

704.830. If a homestead is sold pursuant to court order for sale, the proceeds of sale shall be distributed in the order prescribed in Section 701.810, except that prior to any other distribution, the proceeds shall be (1) distributed to the judgment debtor and the spouse of the judgment debtor in the amount of the exemption of proceeds of sale to the extent provided in Section 704.730 and (2) applied to the satisfaction of all liens and encumbrances on the judgment debtor's interest in the homestead superior to the judgment creditor's lien, or in the case of community property, applied to the satisfaction of all liens and encumbrances on the interest of the judgment debtor and the spouse of the judgment debtor in the homestead superior to the judgment creditor's lien.

Comment. Section 704.830 supersedes former Civil Code Section 1255.

CROSS-REFERENCES

Defined terms

Homestead § 704.710(b)

Judgment debtor § _____

Exemption of proceeds of sale § 704.730

29197

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

704.840. 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, in addition to the other requirements of this article the following provisions apply:

(a) The co-owners shall be served with a copy of the notice of hearing in the form prescribed in Section 693.050.

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

(c) If the dwelling is ordered to be sold, the interests of the judgment debtor and the co-owners in the dwelling shall be sold.

(d) If a homestead is sold pursuant to court order for sale, no bid shall be received unless, in addition to all other bid requirements, the bid exceeds 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 amount of the exemption of proceeds of sale.

(e) The co-owners shall have the right to purchase the dwelling at the sale for the amount of the highest bid on the terms and conditions that would be applicable if the co-owners were the highest bidder.

(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 share apportioned to the judgment debtor shall be distributed in the order prescribed in Section 701.810 except that prior to any

other distribution, the proceeds shall be distributed to the judgment debtor and the spouse of the judgment debtor in the amount of the exemption of proceeds of sale to the extent provided in Section 704.730.

Comment. Section 704.840 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 question whether this section should apply to all real property sales, not merely to sales of dwellings, is reserved.

CROSS-REFERENCES

Defined terms

Dwelling § 704.710(a)

Homestead § 704.710(b)

Judgment debtor § _____

Exemption of proceeds of sale § 704.730

Notice of hearing, form § 693.050

26767

§ 704.850. Procedure where there are joint judgment debtors

704.850. If judgment debtors who are jointly obligated on a money judgment have interests in a dwelling sought to be applied to enforcement of the judgment, in addition to the other requirements of this article, the following provisions apply:

(a) The dwelling is a homestead if any of the joint judgment debtors or the spouse of any of the joint judgment debtors actually resides in the dwelling on the date of levy.

(b) If the dwelling is a homestead, the court shall not make an order for sale of the homestead unless the court determines that the aggregate equities in the homestead exceed the amount of the homestead exemption.

(c) If a homestead is sold pursuant to court order for sale, no bid shall be received unless, in addition to all other bid requirements, the bid exceeds the aggregate amount of all liens and encumbrances on the interests of the joint judgment debtors superior to the judgment creditor's lien plus the amount of the exemption of proceeds of sale.

(d) The proceeds of sale of a homestead remaining after the satisfaction of all liens and encumbrances on the interests of the joint judgment debtors superior to the judgment creditor's lien shall be apportioned among the persons entitled thereto. The shares apportioned to the joint judgment debtors shall be distributed in the order prescribed in Section 761.810 except that prior to any other distribution, the proceeds shall be distributed to the joint judgment debtors in the amount of the exemption of proceeds of sale to the extent provided in Section 704.730, each joint judgment debtor who actually resides in the homestead on the date of levy being eligible for a separate exemption of proceeds of sale.

Comment. Section 704.850 establishes the rule that although the equities of joint judgment debtors are combined to determine whether a dwelling may be sold, each joint judgment debtor who qualifies for the dwelling exemption receives the full amount of the exemption of dwelling proceeds not exceeding his or her share of the proceeds.

CROSS-REFERENCES

Defined terms

Dwelling § 704.710(a)
 Equity § 703.000
 Homestead § 704.710(b)
 Judgment creditor §
 Judgment debtor §
 Exemption of proceeds of sale § 704.730
 Homestead exemption § 704.720

29198

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

704.860. 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) If the dwelling is ordered to be sold, the interest of the judgment debtor in the dwelling (including a community property interest), and not the ownership interest, shall be sold.

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

Comment. Section 704.860 implements the intent of this article not to restrict the interest of the judgment debtor for which a homestead exemption is available. A homestead 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 704.710.

CROSS-REFERENCES

Defined terms

Dwelling § 704.710(a)

Judgment debtor §

29199

§ 704.870. Extensions of time and appeals

704.870. The provisions of Sections 703.590 and 703.600 apply to proceedings under this article.

Comment. Section 704.870 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.

29200

§ 704.880. Costs

704.880. Notwithstanding any other provision of this title, the judgment creditor is entitled to recover reasonable costs incurred in a proceeding under this article but shall not recover the costs if the court denies or rescinds the order for sale.

Comment. Section 704.880 supersedes former Civil Code Section 1259.

CROSS-REFERENCES

Costs § 685.010-685.080

Defined terms

Judgment creditor § _____

Transition Provision§ 694.190. Exemptions

694.190. (a) The exemptions from enforcement of a money judgment provided by this title apply to claims made after the operative date unless the lien pursuant to which enforcement is sought was obtained prior to the operative date on the property claimed to be exempt, in which case the exemptions provided by law at the time the lien was created apply.

(b) For the purpose of this section, Section _____ pertaining to the relation back of liens does not apply.

Comment. Subdivision (a) of Section 694.190 facilitates the early application of Section 703.050 (exemptions in effect at time of levy govern) but recognizes that the judgment creditor may have a vested right in the application of the exemptions of prior law in a case where a lien has been obtained before the operative date. Subdivision (b) prevents the relation back rule from defeating the purpose of achieving full application of the exemption provisions of the Enforcement of Judgments Law. For example, if a judgment creditor has obtained an attachment lien on property prior to the operative date and levies under a writ of execution after the operative date, the new exemption provisions will apply under subdivision (a) because subdivision (b) precludes relation back to the earlier lien which is not the lien pursuant to which enforcement is sought. Subdivision (b) has no effect on the priority of a creditor as against other creditors or third-party transferees of property subject to a lien.

APPENDIX

Civil Code § 4384. Property exempt from enforcement of support obligation (new)

4384. Except as otherwise provided by statute:

(a) A person obligated to pay child or spousal support pursuant to a judgment, order, or decree of the court made or entered pursuant to this part is entitled to the exemptions from enforcement of a money judgment available to judgment debtors generally.

(b) If property sought to be applied to the satisfaction of the support obligation is shown to be exempt under subdivision (a) in appropriate proceedings, the court shall, upon noticed motion of the judgment creditor, determine the extent to which the exempt property nevertheless shall be applied to the satisfaction of the support obligation. In making this determination, the court shall take into account the needs of the judgment creditor, the needs of the judgment debtor and all the persons the judgment debtor is required to support, and all other relevant circumstances. The court shall effectuate its determination by an order specifying the extent to which the otherwise exempt property is to be applied to the satisfaction of the support obligation.

Comment. Subdivision (a) of Section 4384 codifies the case law rule that exemptions apply in the enforcement of support unless there is a specific exception. See, e.g., *Miller v. Superior Court*, 69 Cal.2d 14, 442 P.2d 663, 69 Cal. Rptr. 583 (1968); *Ogle v. Heim*, 69 Cal.2d 7, 442 P.2d 659, 69 Cal. Rptr. 579 (1968); *Yager v. Yager*, 7 Cal.2d 213, 60 P.2d 422 (1936). See also Code Civ. Proc. §§ 704.010-704.880 (exemptions from enforcement of money judgments generally).

Subdivision (b) permits the court, upon noticed motion by the judgment creditor, to make an equitable division of otherwise exempt property based on the needs of the parties. This provision is drawn from older case law concerning the equitable division of earnings levied upon to enforce a support judgment. See *Rankins v. Rankins*, 52 Cal. App.2d 231, 126 P.2d 125 (1942). See also Code Civ. Proc. § 723.052 (equitable division of earnings).