

Memorandum 80-84

Study D-310 - Enforcement of Judgments (Homestead Exemption)

Attached is a draft of the homestead exemption revised to provide a single \$45,000 exemption--the judgment debtor's homestead may be sold if the equity exceeds \$45,000, and after sale (whether voluntary or involuntary) \$45,000 remains exempt for a period of 18 months. If the judgment debtor is a co-owner, the exemption is prorated among the co-owners in proportion to their interests. There are a number of problems with this scheme, which are discussed below. If we are unable to resolve all the problems by the time the remainder of the enforcement of judgment recommendation is ready for printing, the Commission may wish to publish its recommendations on the homestead exemption separately.

Interrelation of homestead proceeds. One problem arises where the \$45,000 is held in cash or in a bank account and during the 18-month period the judgment debtor acquires another home (whether by gift, inheritance, or with funds of which the creditor is unaware). Or, during the 18-month period the judgment debtor uses some, but not all, of the \$45,000 to acquire another home. Rather than working out an elaborate system allowing the judgment debtor to accumulate an aggregate of \$45,000 part in equity and part in cash, the staff has required the judgment debtor to make a simple election--the \$45,000 18-month proceeds exemption is not available if the judgment debtor claims another homestead exemption during the 18-month period.

Treatment of co-owners. Under existing law when a homestead is sold on execution, only the interest of the judgment debtor is sold and the interests of any co-owners remain unaffected. One consequence of this scheme is that the interest of the judgment debtor is likely to bring only a small amount at sale since the purchaser at sale will be purchasing only a part interest. In all likelihood the purchaser will end up partitioning the property; this is particularly true if the purchaser is the judgment creditor (which is frequently the case).

To help enable a more adequate sale price for the judgment debtor's interest, the Commission has devised a new scheme modeled on provisions

in the new Bankruptcy Code. The Commission's scheme requires sale of the whole property, including the interests of co-owners, and the proceeds of sale are apportioned among the co-owners. This in effect is a partition sale of the property. The interests of co-owners are protected by giving them the right of first refusal at sale in the amount of the high bid.

Upon further thought, the staff is now convinced that our proposed scheme is worse than existing law. True, it provides the opportunity of obtaining a fair price for the property, but as a practical matter the property will most likely be sold for no more than the amount of the homestead exemption anyway. And what is the cost of this opportunity? Even if the co-owners end up buying the property, they lose their existing financing (which may be on favorable terms) and the whole property gets reassessed under Proposition 13. The staff believes the better approach is simply to sell the interest of the judgment debtor, as under existing law. The co-owners can buy the interest, at the sale if they so desire, or subsequently upon partition by the creditor.

Treatment of liens. Under existing law, when a homestead is sold all liens and encumbrances on the homestead must be satisfied. The purpose of this requirement, enacted in 1945, evidently is to protect the judgment debtor from being dispossessed from the homestead and yet remain liable for obligations that burdened the homestead. It is a form of anti-deficiency legislation.

This scheme creates a number of problems. Because a purchaser at sale has to come up with cash for both the amount of the homestead exemption and the liens and encumbrances, the number of potential purchasers is restricted and the amount the homestead will sell for is reduced. Moreover, any favorable financing on the homestead is lost; this is particularly a problem where the liens and encumbrances extend to the interests of co-owners. See discussion above.

The Commission should consider the possibility of selling the judgment debtor's interest in the homestead subject to existing liens and encumbrances. General anti-deficiency laws would protect the judgment debtor from personal liability for purchase-money encumbrances. Non-purchase-money encumbrances could be required to be paid off. The

statute would make clear that the purchase-money lienholders could not accelerate their loans and require payment unless they were able to demonstrate an impairment of security.

Apportioning the exemption. At the September meeting the Commission decided that, in the case where the judgment debtor is a co-owner of the property, the \$45,000 exemption should be reduced to an amount proportionate to the judgment debtor's interest. Thus if the judgment debtor were a half owner in a joint tenancy the homestead exemption would be \$22,500.

The staff has drafted the statute in accordance with the Commission's decision, but questions the wisdom of reducing the \$45,000 exemption if the judgment debtor is a co-owner of the homestead. Suppose the judgment debtor owns a \$100,000 home; the judgment debtor is entitled to a \$45,000 exemption. Suppose the judgment debtor pools funds with another person and becomes a joint owner of a \$200,000 home; why should the judgment debtor's exemption be cut in half? If the policy of the homestead law is to protect the debtor in the possession of the homestead and to allow an adequate amount for replacement housing in the event of dispossession, this policy is defeated by cutting the exemption in half for no apparent reason other than that the debtor happens to be a co-owner.

To add another complication, suppose during the 18-month exemption period the judgment debtor lives in two houses--one of which the judgment debtor is sole owner and the other, a co-owner. Is the judgment debtor entitled to \$45,000 proceeds in a bank account or only part of the \$45,000? Suppose the judgment debtor claims one of the residences was only temporary, pending acquisition of a permanent residence? The staff can discern no policies to give guidance here.

Respectfully submitted,

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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 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 scheme of protecting \$45,000 if the judgment debtor is married, the head of a family, or over 65 years old, and \$30,000 in other cases

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.

62. Civil Code §§ 1245-1256; Code Civ. Proc. §§ 690.31(c)-(k), 690.3, 690.50(1).

enables judgment debtors who are living together but who are not married to multiply exemptions and accumulate substantial wealth in a residence at the expense of the judgment creditor. A single exemption of \$45,000 should be provided for any one dwelling, no matter how many judgment debtors reside in the dwelling, married or unmarried. Upon sale of the homestead, the judgment debtor should receive as exempt the portion of the \$45,000 exemption of proceeds that corresponds to the judgment debtor's proportionate interest in the dwelling.^{62a}

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. When the dwelling is sold, whether voluntarily or involuntarily, judgment creditors having judgment liens on the property should receive the amounts due them, subject to the exemption of homestead sale proceeds.

Of the sale proceeds, \$45,000 (or the judgment debtor's proportionate share) should be exempt for use by the judgment debtor for any purpose, including rental housing, for a period of 18 months.⁶³ The extended period for protection of the sale proceeds is consistent with the period for reinvestment of sale proceeds of a personal residence under the tax laws.⁶⁴

Exemption Procedure

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

62a. See discussion under "Joint tenancy and tenancy in common property," below.

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.

64. See, e.g., Rev. & Tax Code § 18091.

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 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 encourages the recording of a declaration at a time when it is not needed for protection against the claims of creditors. Moreover, as long as the homestead is recorded the judgment debtor cannot claim another homestead even though the judgment debtor may have moved to another home which the judgment creditor seeks to apply to the judgment.

Dwelling house exemption. Before a judgment creditor may obtain a writ of execution against a dwelling, the judgment creditor must apply

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

66. See Civil Code § 1241.

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).

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 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:

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

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

(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, and the judgment debtor must be given 45 days' notice of the hearing. 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 while permitting adequate time for the judgment debtor to prepare. 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

certain mobilehomes are concerned. The special treatment of personal property and of real property leases of less than two years is based upon Code of Civil Procedure Section 700a (redemption).

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

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

(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 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. Moreover, the authority of the court to waive the 90 percent requirement limits its usefulness. 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.

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

80. Civil Code § 1254.

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 liens and encumbrances subordinate to the judgment creditor's lien, including mechanics' and contractors' liens? Existing law is unclear. The dwelling exemption is an amount over and above "all" liens and encumbrances⁸¹ and 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 reduce the judgment debtor's equity for purposes of determining whether the homestead may be sold. Such liens and encumbrances would be satisfied out of the proceeds representing the dwelling exemption.⁸⁵ Moreover, subordinate voluntary liens and encumbrances would be satisfied along with subordinate involuntary liens in their order or priority out of any surplus remaining after satisfaction of the judgment creditor's lien.

Joint tenancy and tenancy in common property. If there are co-owners of a dwelling and the judgment debtor's interest in the dwelling

81. Civil Code § 1260.

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 is consistent with the general principle that exemptions are ineffective against judgments for the purchase price of exempt

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 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;⁸⁷ in the ordinary course of events the parties ultimately partition the property. The proposed law codifies this scheme but reduces the judgment debtor's exemption proportionate to the judgment debtor's interest in the property. This precludes the judgment debtor from exempting a large amount in the dwelling by creating multiple interests, each entitled to a whole exemption. It also recognizes that the exemption laws should not place the judgment debtor in a better position after execution than before. If the judgment debtor chooses to reside in a homestead that the judgment debtor only partly owns, the judgment debtor is entitled to a comparable portion of the homestead exemption with which to procure a new dwelling.

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 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

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.

87. *Ibid.*

88. See Civil Code § 1242.

other out of separate property would replace the comparable feature of the declared homestead.⁸⁹

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.

§ 680.245. Equity

680.245. "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 680.245 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).

CROSS-REFERENCES

Defined terms

Judgment creditor § 680.340
Judgment debtor § 680.350

406/239

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 § 680.350

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) The amount of the homestead exemption is forty-five thousand dollars (\$45,000).

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 Section 703.110. The homestead exemption does not apply where a lien on the property other than an enforcement lien is being foreclosed. See Section 703.010.

Subdivision (b) 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. The amount of the exemption is reduced if the judgment debtor is a co-owner of the property (other than a co-owner of community property). See Section 704.840.

CROSS-REFERENCES

Application to marital property § 703.120

Defined terms

Dwelling § 704.710(a)

Equity § 680.245

Homestead § 704.710(b)

Judgment debtor § 680.350

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 the homestead exemption. The proceeds remain exempt for a period of 18 months unless during the period the homestead exemption is applied to other property, in which case the proceeds are no longer exempt.

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). The amount of the exemption is reduced if the judgment debtor is a co-owner of the property (other than a co-owner of community property. See Section 704.840. The exemption period is comparable to the period for reimbursement of proceeds of a personal residence under the tax laws. See, e.g., Rev. & Tax Code § 18091. The proceeds exemption is subject to preexisting or voluntary liens and encumbrances. See Section 701.810.

CROSS-REFERENCES

Application to marital property § 703.120

Defined terms

Dwelling § 704.710(a)

Homestead § 704.710(b)

Judgment debtor § 680.350

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 any of the following:

(1) The dwelling is not a homestead.

(2) The dwelling is a homestead but it appears likely the equity in the homestead exceeds the amount of the homestead exemption.

(3) The dwelling is a homestead but the judgment debtor claims an exemption for proceeds of sale of a homestead pursuant to Section 704.730.

(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 relating to the court order for sale do not apply.

(2) An 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 680.245 (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 701.540 (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 § 680.245
Homestead § 704.710(b)
Judgment debtor §680.350
Homestead exemption § 704.720
Exemption of proceeds of sale § 704.730

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 699.060.

(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 § 680.200
Dwelling § 704.710(a)
Judgment creditor § 680.340
Levy on real property § 700.010
Service of notices §§ 684.010-684.070

27642

§ 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 more 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.

(c) A statement that, if the dwelling is a homestead, the judgment debtor claims an exemption for proceeds of sale of a homestead pursuant to Section 704.730.

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 § 680.245
Homestead § 704.710(b)
Judgment creditor § 680.340
Judgment debtor § 680.350

Disabled veteran's exemption Rev. & Tax. Code § 205.5
Homeowner's exemption Rev. & Tax. Code § 253.5
Homestead exemption § 704.720
Exemption of proceeds of sale § 704.730

27643

§ 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 45 days after the application is filed or such later time as the court orders upon a showing of good cause.

(b) Not later than 45 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 § 680.340
Judgment debtor § 680.350
Manner of service of notice §§ 684.010-684.070

§ 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 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.

(3) If the application states that the judgment debtor claims an exemption for proceeds of sale of a homestead pursuant to Section 704.730, the judgment creditor shall produce a copy of the claim. If the judgment creditor produces a copy of the claim, the judgment debtor may waive the claim by delivering the proceeds of sale to the judgment creditor.

(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

§ 704.790

Dwelling § 704.710(a)
Equity § 680.245
Homestead § 704.710(b)
Judgment creditor § 680.340
Judgment debtor § 680.350
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 that it appears likely the equity in the homestead exceeds the amount of the homestead exemption or that the judgment debtor claims an exemption for proceeds of sale of a homestead pursuant to Section 704.730, 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.

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

§ 704.800

Dwelling § 704.710(a)
Equity § 680.245
Homestead § 704.710(b)
Judgment creditor § 680.340
Judgment debtor § 680.350
Homestead exemption § 704.720

27800

§ 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 § 680.340

Judgment debtor § 680.350

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 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 699.060.

(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 § 680.245

Homestead § 704.710(b)

Judgment creditor § 680.340

Judgment debtor § 680.350

Homestead exemption § 704.720

§ 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 699.060, 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 § 680.340

Judgment debtor § 680.350

Homestead exemption § 704.720

§ 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 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 § 680.350

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 or tenant in common, 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 judgment debtor and co-owners in the dwelling.

(c) The amount of the homestead exemption and the amount of the exemption proceeds of sale are reduced to an amount proportionate to the interest of the judgment debtor in the dwelling.

(d) The purchaser at the sale is entitled to contributions from the co-owners for any proceeds of sale applied to the satisfaction of liens and encumbrances on the the interests of the co-owners.

Comment. Section 704.840 is new. It requires reduction of the homestead exemption where the judgment debtor is a joint tenant or tenant in common but not where the judgment debtor is an owner of community property. If liens and encumbrances on the judgment debtor's interest that are satisfied pursuant to Section 704.830 also burdened

the interests of co-owners, the purchaser may obtain reimbursement from the co-owners to prevent a windfall. See *Schoenfeld v. Norberg*, 11 Cal. App.2d 755, 90 Cal. Rptr. 47 (1970).

CROSS-REFERENCES

Defined terms

Dwelling § 704.710(a)

Judgment debtor § 680.350

Exemption of proceeds of sale § 704.730

Homestead exemption § 704.720

Notice of hearing, form § 693.050

29198

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

704.850. If the dwelling is owned by the judgment debtor as a joint tenant or tenant in common or if the interest of the judgment debtor in the dwelling is a leasehold or other interest less than a fee 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 and not the dwelling shall be sold.

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

Comment. Section 704.850 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. If the judgment debtor's interest is an interest in community property, the whole community interest is subject to enforcement of the judgment. See Section 695.020.

CROSS-REFERENCES

Defined terms

Dwelling § 704.710(a)

Homestead § 704.710(b)

Judgment debtor § 680.350

29199

§ 704.860. Extensions of time and appeals

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

Comment. Section 704.860 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

§ 704.870. Costs

704.870. 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 704.870 supersedes former Civil Code Section 1259.

CROSS-REFERENCES

Costs § 685.010-685.080

Defined terms

Judgment creditor § 680.340