

## Memorandum 96-21

### Homestead Exemption: Proceeds Exemption

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At the February meeting, the Commission postponed further action on the homestead exemption recommendation and directed the staff to summarize the policy issues for consideration at this (April) meeting. Senate Bill 1368, which had been introduced by Senator Kopp to implement the Commission's recommendation, was put on hold, and the Commission suggested that Senator Kopp should be free to use the bill for another purpose as he saw fit. (The bill has now been recycled.) Accordingly, the Commission no longer has a pending homestead bill in this session, although Senator Kopp indicated his willingness to attempt to pursue the matter this year if the Commission finalized its recommendation in time to meet legislative schedules.

This memorandum summarizes the main policy issues and the opinions of various interest groups. The preprint version of the Commission's recommendation that was approved last November is attached. The recommendation was approved "subject to working out additional rules to restrict the freedom to dispose of exempt proceeds from sale of a homestead." (November 1995 Minutes, p. 6.)

#### LATEST PROPOSAL

At the February meeting, the staff presented the following set of cumulative changes that would be made to Section 704.720 to implement Commission decisions to date (this would replace the section of the same number in the attached recommendation):

#### **Code Civ. Proc. § 704.720 (amended). Homestead exemption**

SEC. 5. Section 704.720 of the Code of Civil Procedure is amended to read:

704.720. (a) A homestead is exempt from enforcement of a money judgment as provided in this article and is exempt from sale under this division to the extent provided in Section 704.800.

(b) The proceeds from a disposition of a homestead are exempt for the purpose of purchasing another qualifying homestead under the following conditions:

(1) If a homestead is sold under this division or is damaged or destroyed or is acquired for public use, the proceeds of sale or of insurance or other indemnification for damage or destruction of the homestead or the proceeds received as compensation for a homestead acquired for public use are exempt in the amount of the homestead exemption provided in Section 704.730. The proceeds are exempt for a period of six months after the time date the proceeds are actually received by or become payable in an amount certain to the judgment debtor, whichever is the earlier date except that, if a homestead exemption is applied to other property of the judgment debtor or the judgment debtor's spouse during that period, the proceeds thereafter are not exempt.

(2) If a homestead is voluntarily sold, or otherwise sold in a manner not described in paragraph (1), the proceeds of sale are exempt in the amount of the homestead exemption provided in Section 704.730 for a period of six months after the date of sale.

(3) If a homestead exemption is applied to other property of the judgment debtor or the judgment debtor's spouse during the six-month period provided in paragraph (1) or (2), the proceeds exemption terminates.

(c) If the judgment debtor and spouse of the judgment debtor reside in separate homesteads, only the homestead of one of the spouses is exempt and only the proceeds of the exempt homestead are exempt.

(d) The exemption of proceeds provided in paragraph (2) of subdivision (b) does not apply to the enforcement of a judgment for child, family, or spousal support, unless the judgment debtor has other obligations for child, family, or spousal support and obtains an order, on noticed motion, that all or part of the proceeds are exempt. In making this determination, the court shall apply the standards provided in subdivision (c) of Section 703.070.

(e) Except as otherwise agreed by the judgment debtor and judgment creditor, if an exemption is claimed for proceeds under this section, the proceeds shall be deposited with the court, or held in a controlled deposit account, subject to the judgment creditor's lien. At any time during the applicable six-month exemption period provided in subdivision (b), the court shall, on noticed motion of the judgment debtor, make an order applying all or part of the proceeds to the purchase of another dwelling that qualifies for a homestead exemption under this article. Unless the judgment debtor purchases another dwelling that qualifies for a homestead exemption under this article during the six-month exemption period, the court, on noticed motion, shall order the proceeds applied to the satisfaction of the judgment.

(f) The proper court for filing motions under this section is the court where an application for an order of sale of the dwelling would be made under Section 704.750.

**Comment.** Subdivision (a) of Section 704.720 is revised for clarity and for consistency with other exemption provisions. See, e.g., Sections 703.010, 704.010, 704.020.

Subdivision (b) is amended to adopt as a general rule the exemption for proceeds of voluntary sales under former Section 704.960 (homestead declaration). Subdivision (b)(3) is generalized from the last clause of former subdivision (b) of this section. See also Section 703.080 (tracing exempt funds).

Subdivision (d) is a new provision that implements the application of the general rule on equitable division of exemptions in Section 703.070 in a situation where the judgment debtor has multiple support obligees. Unlike the general rule, however, subdivision (d) places the burden on the judgment debtor to file the motion and seek the court order.

Subdivision (e) provides a new procedure for claiming the proceeds exemption and restricting the availability of the funds to the purpose of acquiring a new homestead. Accordingly, during the six-month period during which proceeds are exempt, the money is held in a court account or other controlled account for the purchase of another homestead that qualifies under this article. The judgment creditor's lien priority is preserved on the proceeds during the six-month period. If the proceeds have been levied upon after they were received by the judgment debtor, such as in a case where the debtor has deposited the proceeds in a deposit account, the general exemption procedure following levy of execution is applicable. See Section 703.510 *et seq.* The tracing rules in Section 703.080 apply to determine the extent to which a fund contains the exempt proceeds from disposition of a homestead.

Subdivision (f) specifies the proper court for proceedings under this section.

**Revised Background Comment (1982).** Subdivision (a) of Section 704.720 supersedes former Civil Code Section 1240 (providing for a declared homestead) and former 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 may be entitled to the exemption. 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)(1) provides an exemption for proceeds of an execution sale of a homestead, for proceeds from insurance or indemnification for the damage or destruction of a homestead, and for an eminent domain award or proceeds of a sale of the homestead for public use. Subdivision (b)(1) supersedes portions of former Civil Code Sections 1256 and 1265 and of former Code of Civil Procedure Sections 690.8 and 690.31(k). The exemption for insurance proceeds was not found in former law. *But see* Houghton v. Lee, 50 Cal. 101, 103 (1875) (insurance proceeds for destruction of declared homestead exempt).

Subdivision (c) is new. The spouses may select which of the homesteads is exempt. If the spouses are unable to agree, the court determines which homestead is exempt. See Section 703.110 (application of exemptions to marital property). Note that a married person may, after a decree of legal separation or an interlocutory judgment of dissolution of marriage, be entitled to a homestead in his or her own right, and this right is not affected by subdivision (c). See Section 704.710(d) ("spouse" defined) & Comment.

The language in subdivision (b)(2) runs the six-month period from the “date of sale.” The staff discussed other possibilities with a representative of the California Land Title Association, but no clear improvement presented itself. Using a more precise event, such as the date of the recording of the deed, has the defect of not being directly related to the debtor’s actions. In addition, the “date of sale” language is the same as the existing rule under Section 704.960(a) in the homestead declaration procedure. In practice, we doubt that it will be much of a problem.

Code of Civil Procedure Section 704.720 has been revised to cover the situation where the judgment debtor has received the proceeds from sale of the homestead before the judgment creditor’s lien attaches to the home. This may occur in any case where there is no recorded judgment lien and the creditor levies on a bank account containing the proceeds of sale or insurance. The protection of proceeds in such cases is consistent with the general rule under Section 703.080(a) which provides that “a fund that is exempt remains exempt to the extent that it can be traced into deposit accounts or in the form of cash or its equivalent.” The general procedures for claiming an exemption under Section 703.510 *et seq.* would apply in this situation — levy occurs, notice of levy is given to the debtor, claim of exemption must be made within 10 days after notice of levy, burden on the debtor to prove the exemption and trace the funds, etc.

The additional feature that is needed for the homestead proceeds exemption is to hold the proceeds for purchase of another qualifying homestead within six months. Accordingly, the court will need to order that the money be deposited into court or held by the garnishee subject to court order, or paid as agreed by the debtor and the creditor. This type of procedure may also apply where the proceeds are still in escrow and the judgment creditor levies on the debtor’s interest in the escrow account.

Where the homestead is subject to a recorded judgment lien, the goal has been to make the exemption work with as little procedural complication as possible. From our discussions of these issues with title company representatives, it appears that the draft statute will work. The preliminary title report will show judgment liens of record. The debtor-seller could try to reach an agreement with the judgment creditor so that the lien can be released and the sale proceed. If an agreement is reached, the title company or other escrow agent simply follows regular procedures and obeys the escrow instructions. If no agreement can be reached, then the escrow will not close until there is a court order or the parties

finally do reach some agreement. At that time, after the exemption claim is determined, the proceeds will be deposited in court or as otherwise agreed by the debtor and creditor. This procedure provides more guidance than exists under the current proceeds exemption applicable where there is a recorded homestead declaration.

#### OVERVIEW OF POSITIONS OF INTERESTED PERSONS

Several groups have commented on aspects of the tentative recommendation and later pre-print final recommendation, as well as meeting materials. The staff has also discussed the proposals with various interested persons and met with the State Bar Business Law Section Debtor-Creditor and Bankruptcy Committee and representatives of the National Association of Consumer Bankruptcy Attorneys. The following discussion summarizes the views of those who have commented, as best we understand them:

##### **California Land Title Association.**

CLTA commented early on that it supported the concept of having one exemption statute and the elimination of the homestead declaration procedure. CLTA also indicated that this should be done only if the protections of existing law were retained. The staff has been working on the assumption that CLTA is essentially neutral on the substantive aspects of the proposal, but does not want to appear to support a bill that would hurt the interests of debtors or creditors. We have not had any further written communication since the original tentative statement from Sandra L. Fuhrman. (See First Supplement to Memorandum 95-64, Exhibit pp. 3-4.) We have had additional discussions with representatives of CLTA as to technical issues and to attempt to find out what role homestead declarations play in the real world. Based on these discussions, the staff concludes that the latest draft of Section 704.720 as set out in this memorandum would be acceptable to CLTA from a technical standpoint. In addition, we have not been able to confirm from CLTA any examples of cases where a homestead declaration has been effective to give cash proceeds to a judgment debtor against a judgment lien.

##### **Family Support Council**

The District Attorneys and the Family Support Council have commented frequently and made a number of proposals, largely through John Higgins, who

has attended several Commission meetings. The Council's efforts have been directed at preserving the collectability of support judgments against support obligors who voluntarily sell homes that have been subject to a lien for support. The Council would apparently prefer that the voluntary sale proceeds exemption not be extended, but has accepted the proposal embodied in the recommendation which makes proceeds subject to enforcement of support, but permits the debtor who has competing support obligations to obtain a court order for an equitable division of the proceeds. Discussions with Council representative have also failed to uncover any cases where a declared homestead has been effective to enable a judgment debtor to pocket exempt proceeds as against a competing judgment creditor.

#### **State Bar Consumer Advocacy Committee**

As the Commission may recall, the Legal Services Section was responsible for reopening the homestead issue through a letter sent to the Commission in response to a solicitation for comments on the decennial review of exempt amounts which became SB 832 in the 1995 legislative session. (See letter from Robin Leonard, attached to Memorandum 94-25, Exhibit p. 65.) At that time the Section argued that there is "no reason to restrict the benefit of a declared homestead ... to those who file a piece of paper.... Because few borrowers/homeowners gain any benefit from declared homesteads, there is no legal or logical justification for preserving them." In a recent letter, the Consumer Advocacy Committee of the Legal Services Section also argues for retention of the ill-conceived rule requiring satisfaction of "all liens and encumbrances" on the property before it can be sold on execution. (See letter from Laura W. Kaplan, Exhibit pp. 1-2.) However, if this aspect of the Commission's recommendation were removed, the Consumer Advocacy Committee would support the recommendation in the form presented in the attached recommendation. (For a discussion of the "all liens and encumbrances" feature, see the attached recommendation at pp. 7-8.)

#### **State Bar Debtor-Creditor and Bankruptcy Committee**

The Commission's recommendation did not garner any support from the Debtor-Creditor Relations Committee when a summary of the recommendation was presented to them by their Post-Judgment Remedies Subcommittee. (See letter from Ignacio J. Lazo, attached to the First Supplement to Memorandum 96-

9, Exhibit pp. 3-5.) The committee took no position, but statements from committee members as reported were generally negative, without suggesting what should be done. The staff met with the committee on February 29 to discuss the recommendation and options for reform of the law. The committee made no group decisions, but it would appear that they would not support repeal of the voluntary sale proceeds exemption, although no one at the meeting could say that they had any knowledge of the use of the exemption. The discussion was fairly general and we have not had any further written communication.

#### **National Association of Consumer Bankruptcy Attorneys**

Ike Shulman, President of NACBA, informed the staff informally by telephone on April 5, 1996, that NACBA could support a single homestead exemption statute for non-bankruptcy debtors that would not require a declaration. The proceeds exemption would be for the same dollar amount as the exemption from execution sales. The proceeds exemption should be for an unlimited period of time, but NACBA could live with a two-year duration — six months is too short. The proceeds could be deposited in a controlled account so that neither the debtor nor the creditor could reach it, but interest on the account should be exempt to facilitate purchase of another home. The judgment creditor's lien priority should continue, but would not be superior to the purchase money mortgage lien on a new home. The debtor should have the benefit of statutory increases in the exempt amount, without regard to when the judgment creditor's lien attached to the home. A separate, clear, and simply stated exemption for proceeds should be provided for Chapter 11 bankruptcy debtors in the same amount. The procedures applicable to the state money judgment collections exemption would not apply in bankruptcy.

#### **California Association of Collectors**

CAC opposes implementing a voluntary sale proceeds exemption in the automatic homestead procedure. Ronald H. Sargis attended the February Commission meeting and said that such a change would upset the present equilibrium between debtors and creditors in the context of voluntary sale of a home subject to a judgment lien. Consistent with everyone else, Mr. Sargis's remarks indicate that the existence of a homestead declaration is irrelevant to the behavior of the parties and the outcome of negotiations between them. We can assume that CAC would oppose any proposal to repeal the homestead

declaration procedure if it implemented a new voluntary sale proceeds exemption under the automatic exemption procedure. The elimination of the “all liens and encumbrances” rule did not appear to be of much interest to CAC, perhaps because CAC members are generally seeking to enforcing judgments in amounts under \$25,000 where it is not efficient to levy on and sell a homestead.

### **Other Groups**

Correspondence received by Senator Kopp’s office from representatives of senior citizens have expressed support for the general outlines of the proposal as formerly set forth in SB 1368. We anticipate that there would be additional support from consumer and homeowner groups once a bill was set for hearing.

## **STAFF CONCLUSIONS**

### **Practical Effect of Declared Homestead Proceeds Exemption**

We have yet to find any confirmation that the existing voluntary sale proceeds exemption under the homestead declaration procedure is any more than a paper right. None of the bar committee members, district attorney support collection attorneys, bankruptcy attorneys, title company attorneys, bank attorneys, or collections attorneys with whom we have spoken has confirmed a single case where the statutory language providing the proceeds exemption has worked. No one has even claimed to have heard of such a case. From the evidence we have been able to gather — really a massive lack of evidence — the only possible conclusion is that the voluntary sale proceeds exemption is meaningless.

Nevertheless, neither the bar committees nor the NACBA representatives are comfortable with the idea of just repealing the homestead declaration procedure without adding a proceeds exemption to the automatic homestead and relying on bankruptcy to preserve the debtor’s right to proceeds. The proceeds exemption seems to have taken on an ineffable, mystical quality and is immune from rational evaluation. From this perspective, any proposal to discontinue the voluntary sale proceeds exemption is unacceptable.

### **Bargaining Position**

In a typical case, when a person attempts to sell a home and the title company discovers a judgment lien, it is up to the debtor and the creditor to work something out. The creditor has to determine whether it is better to have some



satisfaction now and permit the sale to proceed while the debtor has to consider whether to bargain with potentially exempt proceeds in order to get the creditor to give a release of the lien so the sale can take place. We are told by CAC that this system works well enough, but predictably attorneys allied with consumer or debtor interests discount this assertion, even though we have had no reports of practical experience that questions the CAC assessment.

From all we have heard, the staff has concluded that the debtor's bargaining power is based on the threat of bankruptcy. Hence, repealing the declared homestead would not have any effect on the balance of power between debtors and creditors. As noted elsewhere, this elegant analysis, even though supported by all of the factual information we have collected, has just not engendered any support. The mystique of the voluntary sale proceeds exemption under the declared homestead is too great to overcome with logic and facts.

So we are left with the other option of disturbing the reported equilibrium between debtors and creditors by providing an automatic voluntary sale proceeds exemption.

### **Amount of Exemption**

NACBA would give the debtor the benefit of increases in the amount of the exemption, the same as existing law provides the debtor with a prior recorded homestead declaration. The Commission has thus far continued the general rule applicable under the Enforcement of Judgments Law that exemptions are determined under the law in effect at the time that the creditor's priority is established, e.g., when the judgment lien is recorded. This rule helps preserve some of the balance between debtors and creditors. It also avoids creating an incentive for creditors to levy on property in the face of an impending legislative increase in homestead amounts.

### **Control of Proceeds**

The latest draft for controlling proceeds during the exemption period seems necessary to make the extension of the proceeds exemption palatable. Some commentators would like longer periods (NACBA would have no time limitation, but would accept two years) and some have suggested that six months is too short to enable the debtor to purchase a new home. This is a judgment call. The six-month period is existing law and that is why it has been continued in the draft. To the extent that implementing the proceeds exemption in the automatic

homestead exemption statute disturbs the balance between debtors and creditors, keeping the exemption period down to six months helps to limit the disruption.

## **Conclusion**

There is no way to form a consensus in this area. That is why we have the confusing, inconsistent, and misunderstood bifurcated exemption statute in the law today. Our best guess as to what has the best chance of success is reflected in the draft in the earlier part of this memorandum — repeal the declared homestead and implement a six-month, controlled account voluntary sale proceeds exemption in the automatic exemption statute. Until the proposal is put in bill form, however, and set for hearing so that the interested persons can get together and work on language, we can't tell how it will fly. But it is a sensible, consistent approach that makes the minimal changes needed to achieve the basic goal of unifying the homestead exemption statutes while preserving basic protections.

As for the “all liens and encumbrances” rule, it is difficult to say what should be done with it. Repeal is not essential to reforming the homestead exemption procedures, but it is an irrational rule that favors irresponsible debtors and would best be eliminated. On the other hand, some consumer advocates are in favor of it.

Respectfully submitted,

Stan Ulrich  
Assistant Executive Secretary

**THE LEGAL SERVICES SECTION  
THE STATE BAR OF CALIFORNIA**

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March 27, 1996

Law Revision Commission  
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MAR 28 1996

File: D-352

Stan Ulrich, Assistant Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, California 94303-4739

Re: SB 1368 (Kopp)

Dear Stan:

As per our conversation last week concerning the homestead laws in general, and SB 1368 in particular, I wanted to reiterate the Consumer Advocacy Committee's position on these issues.

As I told you, we wholeheartedly support the melding together of the homestead declaration and homestead exemption statutes for simplification purposes and to assist in deterring the kind of deceptive advertising perpetrated by individuals operating homestead preparation services. As lead attorney on People v. Morse, I saw first hand how these individuals deceive homeowners into believing that their homes can be taken from them in a forced sale unless they file and record a declared homestead. Homeowners are, of course, not told that they can receive substantially the same benefits by relying on the homestead exemption laws. Had the two sets of laws been combined in a manner beneficial to consumers, I do not think Mr. Morse could have perpetrated his fraud.

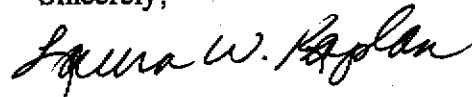
Notwithstanding our strong support of this "melding concept", we do not believe that simplification alone is a sufficient reason to support SB 1368 if it means taking away an important consumer protection in connection with the forced sale of the home. We oppose the mechanism in the bill for forced sale as against Constitutional and public policy. The reason is that under current law, homeowners will not lose their homes unless the proceeds of the sale will pay off all lienholders over and above the amount of the homestead exemption. This being the case, as a practical matter most people will not lose their home

in a distress sale. Under SB 1368, the home may be sold as long as the sale price exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances that are superior to the judgment creditor's lien. This means that the property can be sold even if the judgment creditor and the junior lienholder are not fully compensated. By allowing sales to occur for sales prices equal to the homestead amount plus senior liens rather than all liens, this would result in more people losing their homes through forced sales. In addition, judgment creditors would have much greater leverage in collections based on the in terrorem effect of a threatened sale even though the creditor would not be fully paid.

We support the inclusion of the voluntary sale provision in this bill as an important consumer protection which is only available in the declared homestead statute. If the provision relating to the mechanism for forced sale were deleted so that current law remains in effect, we would be happy to support SB 1368.

We appreciate the opportunity to comment on the bill and would be happy to review any future amended versions.

Sincerely,

A handwritten signature in cursive script, reading "Laura W. Kaplan".

LAURA W. KAPLAN  
Chair, Consumer Advocacy Committee

LWK:dmc

**PREPRINT COPY**

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

Homestead Exemption

November 1995

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739  
(415) 494-1335 FAX: (415) 494-1827

November 2, 1995

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

The Commission proposes repealing the declared homestead exemption and amending the automatic homestead exemption to protect proceeds of a voluntary sale on the same basis as other homestead proceeds are protected. Dwelling proceeds would be exempt to the extent traceable in deposit accounts and cash or its equivalent, with the burden on the exemption claimant to prove the exemption. Consistent with the general rule applicable to execution sales, the statute would be revised to require satisfaction of senior liens and encumbrances, rather than all liens and encumbrances on the property, and junior liens would be extinguished.

This recommendation was prepared pursuant to Resolution Chapter 40 of the Statutes of 1983, continued in Resolution Chapter 87 of the Statutes of 1995.

Respectfully submitted,

Colin W. Wied  
Chairperson

## HOMESTEAD EXEMPTION

The Enforcement of Judgments Law<sup>1</sup> contains two procedures relating to homestead exemptions from enforcement of money judgments: the automatic homestead exemption and the homestead declaration.<sup>2</sup> This recommendation proposes repealing the homestead declaration procedure and preserving its beneficial aspects in the general automatic homestead exemption.

### Background

There is no requirement that the law provide a homestead *declaration* procedure. The California Constitution requires the Legislature to "protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families."<sup>3</sup> The procedure for implementing this constitutional mandate is determined by the Legislature.<sup>4</sup>

California has not always had a homestead declaration procedure. A claimed homestead procedure existed from 1851 until it was superseded by the declared homestead in the early 1860's.<sup>5</sup> For over a century, the homestead was protected against money judgment liens only if the homestead declaration was recorded before the judgment lien. The principle of first in time, first in right was applied with drastic consequences to the tardy debtor. To protect families of debtors who failed to record the exemption before death, the probate homestead procedure was developed, permitting the court to declare an exemption.<sup>6</sup>

In 1974, the Legislature enacted a second procedure enabling a debtor who had not recorded a homestead declaration to claim an exemption when the dwelling was levied on under a writ of execution.<sup>7</sup> The judgment creditor was required to petition for issuance of a writ of execution directed against a dwelling and give

1. See 1982 Cal. Stat. ch. 1364, operative July 1, 1983. The Enforcement of Judgments Law was enacted on recommendation of the Commission. See *1982 Creditors' Remedies Legislation*, 16 Cal. L. Revision Comm'n Reports 1001, 1009 (1982).

2. See Code Civ. Proc. §§ 704.710-704.850 ("automatic" homestead exemption), 704.910-704.995 (declared homesteads). (All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.) The homestead declaration procedure is not complete, incorporating many substantive provisions of the automatic homestead exemption. See Sections 704.910(c) & (e), 704.950(c)(2), 704.960(a), 704.965, 704.970(b), 704.995(c). The Commission recommended repeal of the declared homestead in favor of the automatic homestead in its 1980 report. See *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001, 2090-93, 2611-12 (1980).

3. Cal. Const. Art. XX, § 1.5.

4. See, e.g., *Noble v. Hook*, 24 Cal. 638 (1864).

5. For detailed background on the history of the exemption, see *Taylor v. Madigan*, 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1975); Adams, *Homestead Legislation in California*, 9 Pac. L.J. 723 (1978) (prepared by Commission consultant).

6. See *Taylor v. Madigan*, 53 Cal. App. 3d 943, 968, 126 Cal. Rptr. 376 (1975).

7. See 1974 Cal. Stat. ch. 1251, superseded by a revised but similar procedure, 1976 Cal. Stat. ch. 1000.

notice to the debtor who could then assert the exemption. This procedure was substantially revised in the Enforcement of Judgments Law enacted in 1982, resulting in the homestead exemption procedure in Code of Civil Procedure Sections 704.710-704.850. The probate homestead was put on an independent footing, unrelated to the homestead declaration.<sup>8</sup>

#### **Automatic Homestead Exemption (Code Civ. Proc. §§ 704.710-704.850)**

The “automatic” homestead exemption — or dwelling house exemption, as it is also known — requires the judgment creditor to initiate court proceedings to determine whether the property is exempt and the amount of the exemption. Generally where property is levied on to enforce a money judgment, the debtor is given notice of levy and must make an exemption claim within 10 days.<sup>9</sup> A creditor who levies on a “dwelling,”<sup>10</sup> which may be an exempt homestead, may not have it sold to enforce a money judgment without first obtaining a court order for sale. The creditor must apply for the order for sale within 20 days after notice of levy is served on the judgment debtor.<sup>11</sup> The judgment creditor’s application is not simple: the creditor must determine whether the county tax assessor’s records show a current homeowner’s exemption or disabled veteran’s exemption, must state on information and belief whether the dwelling is a homestead, the amount of the exemption, and whether there is a homestead declaration recorded, and must state the amount of liens and encumbrances and the address of other lien creditors and encumbrancers as shown in the recorder’s files.<sup>12</sup> The creditor must give notice of the application, including personal service on any occupant, at least 30 days before the hearing.<sup>13</sup> At the hearing, the creditor has the burden of showing the dwelling is not exempt if there is a tax exemption on file in the tax assessor’s office; otherwise, the burden is on the debtor to prove the exempt status.<sup>14</sup> The property is appraised, and if it is of sufficient value, it is ordered to be sold. Notice of the sale cannot be given until at least 120 days after the notice of levy.<sup>15</sup> Ultimately, the homestead cannot be sold unless the bid exceeds the amount of the applicable homestead exemption plus the amount necessary to satisfy all liens and encumbrances on the property, and the price must be 90 percent of the appraised value unless the court orders otherwise.<sup>16</sup> Proceeds of a sale are distributed first to

8. See Prob. Code §§ 60, 6520-6528; *Recommendation Relating to Probate Homestead*, 15 Cal. L. Revision Comm’n Reports 401 (1980).

9. Section 703.520.

10. A detailed definition of “dwelling” is set out in Section 704.710.

11. Sections 704.740-704.750.

12. Section 704.760.

13. Section 704.770.

14. Section 704.780(a). This delay affords an opportunity for the debtor to redeem from the lien.

15. Section 701.545.

16. Section 704.800.



pay off "all liens and encumbrances," second to the debtor in the amount of the exemption, third to the levying officer for costs, and finally to the judgment creditor to apply to the judgment.<sup>17</sup>

This procedure is highly protective of debtors' homesteads. There are multiple notices, including personal service, built-in delays and a second chance proceeding, significant procedural burdens, appraisals with presumptive minimum bids, and burden shifting. In light of these protections, there is no need for a separate homestead declaration procedure.

### **Modern Declared Homestead Exemption (Sections 704.910-704.995)**

The minimal declared homestead procedure that has existed since 1982 is largely a formality. A homeowner or spouse of a homeowner may record a homestead declaration describing the principal dwelling. The declaration must be acknowledged in the manner of a conveyance of real property.<sup>18</sup> Unlike its predecessor, the modern homestead declaration has no effect on the right to convey or encumber the property.<sup>19</sup> Nor does it prevent creation of judgment liens.<sup>20</sup> It does not prevent attachment liens<sup>21</sup> or state tax liens.<sup>22</sup>

While the real homestead protection lies in the automatic exemption statute, the homestead declaration provides several distinct features that must be evaluated before the procedure can be repealed:

1. *Judgment lien attaches only to surplus value.* Section 704.950 is a major source of confusion. Subdivision (a) provides that judgment liens do not attach to property subject to a prior homestead declaration, seemingly preserving the old shield rule. However, subdivision (a) is subject to the exception provided in subdivision (c), which provides that a judgment lien *does* attach to the surplus value of the property over all senior liens and encumbrances plus the homestead exemption amount. Thus, the exception in subdivision (c) eats up the rule in subdivision (a).<sup>23</sup>

This section presents a conceptual conundrum. How can it be determined whether the judgment lien has attached? The amount of the homestead exemption can change, as well as the amount of senior liens. A judgment lien attaches to any property owned or acquired by a debtor in the county where the abstract of judgment is recorded; it is a "dragnet" lien and is not directed at particular

17. Section 704.850.

18. Sections 704.920-704.930.

19. Section 704.940.

20. Section 704.950(c).

21. Section 487.025.

22. Gov't Code § 7170(a).

23. Subdivision (c) was added to Section 704.950 at the last opportunity when the bill was before the Legislature, as is evident from the Comment which was not revised to reflect the final statutory language.

property.<sup>24</sup> How can it be determined when the lien attaches since the value of the property is unknown in the absence of a sale or appraisal? Section 704.950(a) provides that the lien does not attach, subject to the exception in subdivision (c). Subdivision (c) provides that the lien attaches to the surplus value, but does not say when the lien attaches. Arguably it attaches only when the surplus value exists. Section 704.965 locks in the exemption amount at the time when the lien attaches, but when is that?

This rule, then, does not appear to provide any clear advantage to the homestead declaration. Theoretically, it might be easier to sell real property free of the judgment lien if there were a prior homestead declaration recorded, assuming that the debtor's equity in the property was agreed by all parties to be less than the homestead exemption amount at the time of transfer. But this does not appear to be a practical advantage, and does not justify continuing the cumbersome homestead declaration procedure.

2. *Exemption of proceeds of voluntary sale.* Section 704.960(a) protects the proceeds of a voluntary sale of the homestead for six months after the date of sale. The automatic homestead exemption protects proceeds of sale, but only where the homestead is sold at an execution sale, is damaged or destroyed, or is acquired for public use — in other words, not in the case of a voluntary sale.<sup>25</sup> The proceeds exemption is limited, however, so that it does not include any increase in the exemption occurring after a judgment lien attaches.<sup>26</sup> This is consistent with the general rule that the amount of an exemption is determined according to the law in effect when the creditor's lien attaches to the property.<sup>27</sup>

Under the existing scheme, a sufficiently sophisticated debtor would simply record a homestead declaration before a voluntary sale of the home and thereby protect the proceeds for six months in the amount applicable when the creditor's lien attached. The Commission can envision no public policy that is served by this formality. The creditor cannot prevent the declaration. The proceeds exemption follows mechanically from the act of recording a piece of paper. The specific amount of the voluntary proceeds exemption depends on the fortuity of the order in which the debtor and the creditor record their respective papers. The recording has no relation to any other act. It is not reviewed and notice is not given. It is not

24. See Section 697.340.

25. See Section 704.720(b).

26. Section 704.965. This rule was added to the law in conjunction with a bill increasing the amount of the homestead exemption. See 1984 Cal. Stat. ch. 454. The limitation in Section 704.965 is irrelevant to the homestead exemption as applied in a forced sale by the judgment creditor. See Section 704.970(b). If a second homestead is purchased with exempt proceeds limited by the rule in Section 704.965, it appears that the exemption of voluntary sale proceeds from the second homestead would also be limited to the level locked in by the order of recording the judgment lien and initial homestead declaration. Similarly, if the homestead declaration had been recorded before any attachment or judgment lien, the debtor would have the benefit of any increased exemption amounts based solely on order of recording.

27. Section 703.050. See also Section 703.060 (liens deemed granted by statute in recognition of power of state to repeal, alter, or add to exemptions).

subject to contest at the time of recording. The protection of voluntary sale proceeds depends solely on the arbitrary factor of whether the debtor has remembered to record a paper, a paper which will then clutter up the public records for years, since it describes as a homestead property that the debtor intends to sell shortly after the declaration is recorded.

The justification for the reforms of the old homestead declaration, which resulted in the modern automatic homestead exemption, apply as well to the exemption of proceeds. Since a prior judgment lien does not prevent recording a homestead declaration with its attendant voluntary sale proceeds exemption, the proceeds exemption should be incorporated into the automatic homestead exemption. The better procedure is the general one — proceeds of a voluntary sale are exempt for six months following sale and the burden is on the debtor to claim the exemption and trace the proceeds.<sup>28</sup>

3. *Relation-back of declared homestead.* Section 704.960(b) provides a portability feature, permitting the debtor to record a homestead declaration on property acquired with proceeds from a sale of a declared homestead and continue the original recording priority in the new homestead. This applies to any exempt homestead proceeds, whether from voluntary or forced sale, or reimbursement from insurance, so long as the new declaration is recorded within six-month period during which proceeds are protected.

This feature also permits the debtor to lock in the opportunity to take advantage of later statutory increases in the homestead exemption amounts.<sup>29</sup> A person who records a homestead declaration before a creditor's lien attaches can preserve that priority and receive the benefit of increased exemptions in proceeds and in a home purchased with exempt proceeds.<sup>30</sup>

The general rule is that the amount of an exemption is determined under the law in effect when the creditor's lien attached to the property.<sup>31</sup> The general rule should be applied to homesteads, independent of the fortuity of whether a homestead declaration may have been filed.

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28. For the general rules applicable to proceeds exemptions, see, e.g., Sections 703.030 (manner of claiming exemptions; effect of failure to claim), 703.080 (tracing exempt funds).

29. See Section 704.965.

30. The exact outcome depends on the interpretation given Section 704.965. If the creditor's judgment lien attaches as of the time it is recorded, notwithstanding the language of Section 704.950(c) concerning what amount the lien attaches to (surplus over senior liens and homestead exemption amount under Section 704.730), then the problem is a simple one of comparing dates of recording. But if the creditor "obtains" a lien only at the instant that the value of the homestead actually exceeds the value of liens senior to the judgment lien at the time it was recorded plus the value of the homestead exemption — then the increased exemption, by relation back, would have the effect of forestalling the time when the judgment lien could attach to any surplus value. It is also assumed that Section 704.965 serves as an exception to the general rule in Section 703.050 that the amount of exemptions is fixed as of the time the creditor's lien is created on the property.

31. Section 703.050.

4. *Continuation of homestead after death.* Section 704.995 provides that the protection of the declared homestead from a creditor having an attachment lien, execution lien, or judgment lien continues after the death of the declared homestead owner if the dwelling was the principal dwelling of the surviving spouse or a member of the decedent's family to whom an interest in the dwelling passes. But subdivision (c) provides that the amount of the exemption is determined under Section 704.730 in the general procedure depending on the circumstances of the case at the time the amount is required to be determined.<sup>32</sup> Where special protection of the family home is appropriate, the probate homestead is the better procedure.<sup>33</sup> The existing homestead declaration procedure provides no meaningful, additional protection in the case of enforcement proceedings. Section 704.995 harks back to a time when the declared homestead created important rights in homestead property that could descend to the survivors even contrary to a testamentary disposition.

5. *Prima facie evidence.* Section 704.940 provides that the homestead declaration is prima facie evidence of the matters stated, which would include the statement that the property is the dwelling of the persons listed. Arguably, this provision may put some burden on the judgment creditor in proceedings to sell a dwelling. However, the relevant procedural provisions do not shift the burden to the creditor as in the case of a current homeowner's tax exemption or disabled veteran's tax exemption.<sup>34</sup> While the creditor is required to determine and report whether there is homestead declaration<sup>35</sup> as part of the procedure for obtaining an order for sale of a dwelling, no statutory duty results from the report.

### **Problems Created by Separate Homestead Declaration Procedure**

The declared homestead provisions present a number of problems which should be weighed against any claimed advantages:

1. *Uncertainty.* The one feature a declared homestead procedure based on filing with the county recorder should have is certainty — yet no one can rely on the validity of a homestead declaration. The filing sits in the records, but has little meaning unless it is tested in execution proceedings. The debtor may have moved to another residence or the debtor's marriage may be dissolved. A later declaration as to different property acts as an abandonment *pro tanto* of the interest of the declarant.<sup>36</sup> Thus, if spouses choose to live apart, and a second (or second and third) declaration is recorded, the first declaration becomes meaningless.

32. This is in apparent conflict with the rule in Section 704.965.

33. See Prob. Code §§ 60, 6520-6528; *Recommendation Relating to Probate Homestead*, 15 Cal. L. Revision Comm'n Reports 401 (1980).

34. See Section 704.780.

35. Section 704.760(b).

36. Section 704.990(b).

2. *Illusory protection.* The homestead declaration provides little real protection for the family home. The most important protections (other than the voluntary sale proceeds exemption) are embodied in the automatic homestead. The homestead declaration can only give a false sense of security. In any event, most homeowners have no need for the protection, because most homeowners never become judgment debtors. If they do become judgment debtors, the statute should provide essential protections without regard to whether a paper may have been filed at some time in the past.

3. *Opportunity for misleading homestead declaration mills.* Anyone who has purchased a house in recent years has probably received one or more solicitations from the homestead declaration mills.<sup>37</sup> Experience with these dubious operations, whose broadsides typically misrepresent the law, impelled the Legislature to enact a consumer protection statute governing homestead filing services.<sup>38</sup> One operator who ran afoul of the statute mailed approximately four million solicitations in a four-year period *after* enactment of the regulatory statute.<sup>39</sup> Repeal of the declared homestead would put an end to the opportunity to profit from causing undue alarm and confusing homeowners throughout the state.

### **Satisfaction of Other Liens and Encumbrances**

The minimum bid in the sale of a homestead must include an amount sufficient to satisfy "all liens and encumbrances on the property."<sup>40</sup> This language is an artifact surviving from the time when a judgment lien could not attach if there was a prior homestead declaration on record.<sup>41</sup> Notwithstanding the prior homestead declaration, however, the creditor could seek enforcement of the money judgment by writ of execution. If the property was sold on execution without a pre-existing judgment lien in favor of the creditor, there would be no junior liens practically speaking, and *all* the other liens on the property, whether mortgage liens, tax liens, other judgment liens, would be superior to the creditor's execution lien. If the creditor had won the race to the recorder's office and the judgment lien had attached first, then there would be no application of the "all liens and encumbrances" language since the homestead exemption would not apply. Instead, the various lienors would have had an opportunity to engage in several rounds of

37. See Arthur M. Louis, *Homesteading Scam Targets Unwary Homeowners*, San Francisco Chronicle, Sept. 19, 1994, at B1, B3. For a sample solicitation from Morse & Associates, see Memorandum 95-22, Exhibit pp. 22-24, on file with California Law Revision Commission. The text of the solicitation is also set out in Appendix A to *In re Morse*, 11 Cal. 4th 184, 900 P.2d 1170, 44 Cal. Rptr. 2d 620, 637-39 (1995).

38. See Bus. & Prof. Code § 17537.6.

39. See *People v. Morse*, 21 Cal. App. 4th 259, 25 Cal. Rptr. 2d 816 (1993); see also *In re Morse*, 11 Cal. 4th 184, 900 P.2d 1170, 44 Cal. Rptr. 2d 620 (1995).

40. Section 704.800.

41. See discussions of prior law in *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001, 2094 (1980); Adams, *Homestead Legislation in California*, 9 Pac. L.J. 723 (1978); Taylor v. Madigan, 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1975).

redemptions, with junior lienholders redeeming from their seniors and the debtor redeeming where possible.

Under existing law, the "all liens and encumbrances" language can act in an arbitrary manner and benefit the profligate or severely unlucky debtor. If a debtor has enough liens on the property, no creditor can reach it because any creditor would have to pay off all other liens, junior and senior, under the terms of the statute. On the other side of the coin, the home of a more responsible debtor would not be as hard to reach.

### **Commission Recommendations**

In summary, the Commission proposes repealing the declared homestead exemption and amending the automatic homestead exemption to protect proceeds of a voluntary sale on the same basis as other proceeds are protected. Dwelling proceeds would be exempt to the extent traceable in deposit accounts and cash or its equivalent, with the burden on the exemption claimant to prove the exemption. The statute should be revised to require satisfaction of *senior* liens and encumbrances, rather than *all* liens and encumbrances on the property, and junior liens would be extinguished, consistent with the general rule applicable to execution sales.

## PROPOSED LEGISLATION

### Bus. & Prof. Code § 17537.6 (repealed). Homestead filing service regulation

SECTION 1. Section 17537.6 of the Business and Professions Code is repealed.

~~17537.6. (a) It is unlawful for any person to make any untrue or misleading statements in any manner in connection with the offering or performance of a homestead filing service. For the purpose of this section, an "untrue or misleading statement" means and includes any representation that any of the following is true:~~

~~(1) The preparation or recordation of a homestead declaration will in any manner prevent the forced sale of a judgment debtor's dwelling.~~

~~(2) The preparation or recordation of a homestead declaration will prevent the foreclosure of a mortgage, deed of trust, or mechanic's lien.~~

~~(3) Any of the provisions relating to the homestead exemption set forth in Article 4 (commencing with Section 704.710) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure are available only to persons who prepare or record a homestead declaration.~~

~~(4) A homestead declaration is in any way related to the obtaining of any applicable homeowner's exemption to real property taxes.~~

~~(5) The preparation or recordation of a homestead declaration is required by law in any manner.~~

~~(6) The offeror of the homestead filing service has a file or record covering a person to whom a solicitation is made.~~

~~(7) The offeror of the homestead filing service is, or is affiliated with, any charitable or public service entity unless the offeror is, or is affiliated with, a charitable organization which has qualified for a tax exemption under Section 501(c)(3) of the Internal Revenue Code.~~

~~(8) The offeror of the homestead filing service is, or is affiliated with, any governmental entity. A violation of this paragraph includes, but is not limited to, the following:~~

~~(A) The misleading use of any governmental seal, emblem, or other similar symbol.~~

~~(B) The use of a business name including the word "homestead" and the word "agency," "bureau," "department," "division," "federal," "state," "county," "city," "municipal," "California," or "United States," or the name of any city, county, city and county, or any governmental entity.~~

~~(C) The use of an envelope that simulates an envelope containing a government check, tax bill, or government notice or an envelope which otherwise has the capacity to be confused with, or mistaken for, an envelope sent by a governmental entity.~~

~~(b)(1) It is unlawful to offer to perform a homestead filing service without making the following disclosure:~~

~~THIS HOMESTEAD FILING SERVICE IS NOT ASSOCIATED WITH ANY GOVERNMENT AGENCY.~~

~~YOU DO NOT HAVE TO RECORD A HOMESTEAD DECLARATION.~~

~~RECORDING A HOMESTEAD DECLARATION DOES NOT PROTECT YOUR HOME AGAINST FORCED SALE BY A CREDITOR. YOU MAY WISH TO CONSULT A LAWYER ABOUT THE BENEFITS OF RECORDING A HOMESTEAD DECLARATION.~~

~~IF YOU WANT TO RECORD A HOMESTEAD, YOU CAN FILL OUT A HOMESTEAD DECLARATION FORM BY YOURSELF, HAVE YOUR SIGNATURE NOTARIZED, AND HAVE THE FORM RECORDED BY THE COUNTY RECORDER.~~

~~(2) The disclosure specified in paragraph (1) shall be placed at the top of each page of every advertisement or promotional material disseminated by an offeror of a homestead filing service and shall be printed in 12-point boldface type enclosed in a box formed by a heavy line.~~

~~(3) The disclosure specified in paragraph (1) shall be recited at the beginning of every oral solicitation and every broadcast advertisement and shall be delivered in printed form as prescribed by paragraph (2) before the time each person who responds to the oral solicitation or broadcast advertisement is obligated to pay for any service.~~

~~(c) In addition to any other service, every offeror of a homestead filing service shall deliver each notarized homestead declaration to the appropriate county recorder for recordation as soon as needed or required by a homestead declarant, but no later than 10 days after the homestead declaration is notarized. The offeror of the homestead filing service shall pay all fees charged in connection with the notarization and recordation of the homestead declaration.~~

~~(d) No offeror of a homestead filing service shall charge, demand, or collect any money until after the homestead declaration is recorded. The total amount charged, demanded, or collected by an offeror of a homestead filing service, including all fees for notarization and recordation, shall not exceed twenty-five dollars (\$25).~~

~~(e) For the purposes of this section, the following definitions apply:~~

~~(1) "Homestead filing service" means any service performed or offered to be performed for compensation in connection with the preparation or completion of a homestead declaration or in connection with the assistance in any manner of another person to prepare or complete a homestead declaration. "Homestead filing service" does not include any service performed by an attorney at law authorized to practice in this state for a client who has retained that attorney or an employee of that attorney acting under the attorney's direction and supervision.~~

~~(2) A "homestead declaration" has the meaning described in Article 5 (commencing with Section 704.910) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure.~~

~~Comment. Former Section 17537.6 is superseded by new Section 17537.6.~~



**Bus. & Prof. Code § 17537.6 (added). Unlawful to offer homestead filing service**

SEC. 2. Section 17537.6 is added to the Business and Professions Code, to read:  
17537.6. (a) On and after January 1, 1997, it is unlawful for any person to offer a homestead filing service.

(b) For the purposes of this section, the following definitions apply:

(1) "Homestead filing service" means any service performed or offered to be performed for compensation in connection with the preparation or completion of a homestead declaration or in connection with the assistance in any manner of another person to prepare or complete a homestead declaration.

(2) A "homestead declaration" has the meaning provided in former Article 5 (commencing with Section 704.910) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure.

**Comment.** Section 17537.6 reflects the repeal of the homestead declaration procedure. See also Code Civ. Proc. § 694.090 (effect of homestead declaration under former law).

**Code Civ. Proc. § 487.025 (repealed). Right to attach declared homestead**

SEC. 3. Section 487.025 of the Code of Civil Procedure is repealed:

~~487.025. (a) The recording of a homestead declaration (as defined in Section 704.910) does not limit or affect the right of a plaintiff to attach the declared homestead described in the homestead declaration, whether the homestead declaration is recorded before or after the declared homestead is attached.~~

~~(b) An attachment lien attaches to a homestead (as defined in Section 704.710) in the amount of any surplus over the total of the following:~~

~~(1) All liens and encumbrances on the homestead at the time the attachment lien is created.~~

~~(2) The homestead exemption set forth in Section 704.730.~~

~~(c) Nothing in subdivision (a) or (b) limits the right of the defendant to an exemption under subdivision (b) of Section 487.020.~~

~~(d) Notwithstanding subdivision (b), a homestead (as defined in Section 704.710) is exempt from sale to the extent provided in Section 704.800 when it is sought to be sold to enforce the judgment obtained in the action in which the attachment was obtained.~~

**Comment.** Section 6528 is repealed because it is not necessary in view of the repeal of the homestead declaration procedure. See also Code Civ. Proc. § 694.090 (effect of homestead declaration under former law).

**Code Civ. Proc. § 694.090 (amended). Effect of homestead declaration**

SEC. 4. Section 694.090 of the Code of Civil Procedure is amended to read:

694.090. On and after the operative date January 1, 1997, a declaration of homestead made under prior law pursuant to Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code ~~is effective only to the extent provided in or~~ Article 5 (commencing with Section 704.910) of Chapter 4 of Division 2 of this code is ineffective.

**Comment.** Section 694.090 is amended to reflect the repeal of the homestead declaration procedure in Sections 704.910-704.995. The homestead exemption is governed by Sections 704.710-704.860. The protection of voluntary sale proceeds under the former homestead declaration procedure is continued in Section 704.720.

**Code Civ. Proc. § 704.720 (amended). Homestead exemption**

SEC. 5. Section 704.720 of the Code of Civil Procedure is amended to read:

704.720. (a) A homestead is exempt from enforcement of a money judgment as provided in this article and is exempt from sale under this division to the extent provided in Section 704.800.

(b) The proceeds from a disposition of a homestead are exempt under the following conditions:

(1) If a homestead is sold under this division or is damaged or destroyed or is acquired for public use, the proceeds of sale or of insurance or other indemnification for damage or destruction of the homestead or the proceeds received as compensation for a homestead acquired for public use are exempt in the amount of the homestead exemption provided in Section 704.730. ~~The proceeds are exempt for a period of six months after the time date the proceeds are actually received by the judgment debtor, except that, if a homestead exemption is applied to other property of the judgment debtor or the judgment debtor's spouse during that period, the proceeds thereafter are not exempt.~~

(2) If a homestead is voluntarily sold, or otherwise sold in a manner not described in paragraph (1), the proceeds of sale are exempt in the amount of the homestead exemption provided in Section 704.730 for a period of six months after the date of the sale.

(3) If a homestead exemption is applied to other property of the judgment debtor or the judgment debtor's spouse during the six-month period provided in paragraph (1) or (2), the proceeds exemption terminates.

(c) If the judgment debtor and spouse of the judgment debtor reside in separate homesteads, only the homestead of one of the spouses is exempt and only the proceeds of the exempt homestead are exempt.

(d) The exemption of proceeds provided in paragraph (2) of subdivision (b) does not apply to the enforcement of a judgment for child, family, or spousal support, unless the judgment debtor obtains an order, on noticed motion, that the proceeds are exempt in all or part. In making this determination, the court shall apply the standards provided in subdivision (c) of Section 703.070.

**Comment.** Subdivision (a) of Section 704.720 is revised for clarity and for consistency with other exemption provisions. See, e.g., Sections 703.010, 704.010, 704.020.

Subdivision (b) is amended to adopt as a general rule the exemption for proceeds of voluntary sales under former Section 704.960 (homestead declaration). Subdivision (b)(3) is generalized from the last clause of former subdivision (b) of this section. See also Section 703.080 (tracing exempt funds).

Subdivision (d) is a new provision that implements the application of the general rule on equitable division of exemptions in Section 703.070 in a situation where the judgment

debtor has multiple support obligees. Unlike the general rule, however, subdivision (d) places the burden on the judgment debtor to file the motion and seek the court order.

**Revised Background Comment (1982).** Subdivision (a) of Section 704.720 supersedes former Civil Code Section 1240 (providing for a declared homestead) and former 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 may be entitled to the exemption. 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)(1) provides an exemption for proceeds of an execution sale of a homestead, for proceeds from insurance or indemnification for the damage or destruction of a homestead, and for an eminent domain award or proceeds of a sale of the homestead for public use. Subdivision (b)(1) supersedes portions of former Civil Code Sections 1256 and 1265 and of former Code of Civil Procedure Sections 690.8 and 690.31(k). The exemption for insurance proceeds was not found in former law. *But see* Houghton v. Lee, 50 Cal. 101, 103 (1875) (insurance proceeds for destruction of declared homestead exempt).

Subdivision (c) is new. The spouses may select which of the homesteads is exempt. If the spouses are unable to agree, the court determines which homestead is exempt. See Section 703.110 (application of exemptions to marital property). Note that a married person may, after a decree of legal separation or an interlocutory judgment of dissolution of marriage, be entitled to a homestead in his or her own right, and this right is not affected by subdivision (c). See Section 704.710(d) ("spouse" defined) & Comment.

**Code Civ. Proc. § 704.760 (amended). Contents of application for sale of dwelling**

SEC. 6. Section 704.760 of the Code of Civil Procedure is amended to read:

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

(a) A statement whether or not the records of the county tax assessor indicate that there is a current homeowner's exemption or disabled veteran's exemption for the dwelling and the person or persons who claimed any such the exemption.

(b) A statement, which may be based on information and belief, whether the dwelling is a homestead and the amount of the homestead exemption, if any, ~~and a statement whether or not the records of the county recorder indicate that a homestead declaration under Article 5 (commencing with Section 704.910) that describes the dwelling has been recorded by the judgment debtor or the spouse of the judgment debtor.~~

(c) A statement of the amount of any liens or encumbrances on the dwelling, the name of each person having a lien or encumbrance on the dwelling, and the person's address ~~of such person~~ used by the county recorder for the return of the instrument creating such the person's lien or encumbrance after recording.

**Comment.** Subdivision (b) of Section 704.760 is amended to delete the obsolete reference to the repealed homestead declaration procedure. See also Section 694.090 (effect of homestead declarations under prior law). The other changes are technical, nonsubstantive revisions.

**Code Civ. Proc. § 704.780 (amended). Hearing**

SEC. 7. Section 704.780 of the Code of Civil Procedure is amended to read:

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

(1) If 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 or the judgment debtor's spouse, 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 or disabled veteran's exemption for the dwelling claimed by the judgment debtor or the judgment debtor's spouse, the burden of proof that the dwelling is a homestead is on the person who claims that the dwelling is a homestead.

(2) If the application states the amount of the homestead exemption, the person claiming the homestead exemption has the burden of proof that the amount of the exemption is other than the amount stated in the application.

(b) The court shall determine whether the dwelling is exempt. If the court determines that the dwelling is exempt, the court shall determine the amount of the homestead exemption and the fair market value of the dwelling. The court shall make an order for sale of the dwelling subject to the homestead exemption, unless the court determines that the sale of the dwelling would not be likely to produce a bid sufficient to satisfy any part of the amount due on the judgment pursuant to Section 704.800. The order for sale of the dwelling subject to the homestead exemption shall specify the amount of the proceeds of the sale that is to be distributed pursuant to Section 704.850 to each person having a lien or encumbrance on the dwelling that is superior to the judgment creditor's lien, and shall include the name and address of each such person. Subject to the provisions of this article, the sale is governed by Article 6 (commencing with Section 701.510) of Chapter 3. If the court determines that the dwelling is not exempt, the court shall make an order for sale of the property in the manner provided in Article 6 (commencing with Section 701.510) of Chapter 3.

(c) The court clerk shall transmit a certified copy of the court order (1) to the levying officer and (2) if the court making the order is not the court in which the judgment was entered, to the clerk of the court in which the judgment was entered.

(d) The court may appoint a qualified appraiser to assist the court in determining the fair market value of the dwelling. If the court appoints an appraiser, the court shall fix the compensation of the appraiser in an amount determined by the court to be reasonable, not to exceed similar fees for similar services in the community where the dwelling is located.

**Comment.** Subdivision (b) of Section 704.780 is amended to make clear that only liens with priority over the judgment creditor's lien, upon which the property is to be sold, are entitled to satisfaction from the proceeds of sale. See also Sections 704.800 (minimum bid), 704.850 (distribution of proceeds).

**Code Civ. Proc. § 704.800 (amended). Minimum bid at sale of homestead**

SEC. 8. Section 704.800 of the Code of Civil Procedure is amended to read:

704.800. (a) If no bid is received at a sale of a homestead pursuant to a court order for sale that exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property, including but not limited to any attachment or judgment lien, that are superior to the judgment creditor's lien, the homestead shall not be sold and shall be released and is not thereafter subject to a court order for sale upon subsequent application by the same judgment creditor for a period of one year after the date set for the sale.

(b) If no bid is received at the sale of a homestead pursuant to a court order for sale that is 90 percent or more of the fair market value determined pursuant to Section 704.780, the homestead shall not be sold unless the court, upon motion of the judgment creditor, does one of the following:

(1) Grants permission to accept the highest bid that exceeds the amount of the minimum bid required by subdivision (a).

(2) Makes a new order for sale of the homestead.

**Comment.** Subdivision (a) of Section 704.800 is amended to provide that only liens senior to the judgment creditor's lien, taking into account any relation back, are entitled to satisfaction out of the proceeds from the sale of a dwelling under this article. See also Sections 704.780 (hearing), 704.850 (distribution of proceeds).

**Code Civ. Proc. § 704.840 (amended). Costs incurred in sale proceedings**

SEC. 9. Section 704.840 of the Code of Civil Procedure is amended to read:

704.840. (a) Except as provided in subdivision (b), the judgment creditor is entitled to recover reasonable costs incurred in a proceeding under this article.

(b) If no bid is received at a sale of a homestead pursuant to a court order for sale that exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property that are superior to the judgment creditor's lien, the judgment creditor is not entitled to recover costs incurred in a proceeding under this article or costs of sale.

**Comment.** Section 704.840 is amended for consistency with Section 704.800.

**Code Civ. Proc. § 704.850 (amended). Distribution of proceeds of sale of homestead**

SEC. 10. Section 704.850 of the Code of Civil Procedure is amended to read:

704.850. (a) The levying officer shall distribute the proceeds of sale of a homestead in the following order:

(1) To the discharge of all liens and encumbrances, ~~if any,~~ on the property that are superior to the judgment creditor's lien.

(2) To the judgment debtor in the amount of any applicable exemption of proceeds pursuant to Section 704.720.

(3) To the levying officer for the reimbursement of the levying officer's costs for which an advance has not been made.

(4) To the judgment creditor to satisfy the following:

(A) First, costs and interest accruing after issuance of the writ pursuant to which the sale is conducted.

(B) Second, the amount due on the judgment with costs and interest, as entered on the writ.

(5) To any other judgment creditors who have delivered writs of execution to the levying officer, accompanied by instructions to levy on the proceeds of sale, in the amounts to which the persons are entitled in order of their respective priorities.

(6) To the judgment debtor in the amount remaining.

(b) Sections 701.820 and 701.830 apply to distribution of proceeds under this section.

**Comment.** Subdivision (a)(1) of Section 704.850 is amended for consistency with Section 704.800. The words "if any" are deleted as surplus. A new subdivision (a)(5) is added to permit junior creditors whose liens will be extinguished pursuant to Section 704.860 to seek satisfaction from any excess proceeds at the sale, by delivering a writ of execution and levy instructions to the levying officer. This procedure is consistent with the general rule in Section 701.810(g) (distribution of proceeds of sale or collection). Note that under the rule in Section 704.800(a) the items listed in paragraphs (1) and (2) of subdivision (a) are of equal priority since the homestead may not be sold unless all senior liens and encumbrances are satisfied and the judgment debtor receives the full amount of the applicable exemption.

**Revised Background Comment (1982).** Subdivision (a) of Section 704.850 continues the priority of distribution of proceeds provided by subdivision (j) of former Section 690.31 and of former Civil Code Section 1255. This section is an exception to the general rules on distribution of proceeds provided by Section 701.810. Liens and encumbrances required to be satisfied under subdivision (a)(1) include not only preferred labor claims to be satisfied pursuant to Section 1206 and the amount of any state tax lien (as defined in Government Code Section 7162) but also any other liens and encumbrances with priority over the judgment creditor's lien.

Subdivision (b) makes clear that the general provisions governing the time for distributing proceeds (Section 701.820) and the resolution of conflicting claims to proceeds (Section 701.830) apply to the distribution of proceeds from the sale of a homestead.

**Code Civ. Proc. § 704.860 (added). Extinction of liens upon sale**

SEC. 11. Section 704.860 is added to the Code of Civil Procedure, to read:

704.860. If property is sold pursuant to this article, the lien under which it is sold and any liens subordinate thereto on the property sold are extinguished.

**Comment.** Section 704.860 is new. The rule in this section applicable to homestead sales is consistent with the general rule under Section 701.630.

**Code Civ. Proc. §§ 704.910-704.995 (repealed). Declared homestead**

SEC. 12. Article 5 (commencing with Section 704.910) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure is repealed.

**Note.** The text of Sections 704.910-704.995 is set out *infra*. See material under "Comments to Repealed Sections."

**Gov't Code § 7170 (technical amendment). Attachment of tax lien**

SEC. 13. Section 7170 of the Government Code is amended to read:

7170. (a) Except as provided in subdivisions (b) and (c), a state tax lien attaches to all property and rights to property whether real or personal, tangible or

intangible, including all after-acquired property and rights to property, belonging to the taxpayer and located in this state. ~~A state tax lien attaches to a dwelling notwithstanding the prior recording of a homestead declaration (as defined in Section 704.910 of the Code of Civil Procedure).~~

(b) A state tax lien is not valid as to real property against the right, title, or interest of any of the following persons where the person's right, title, or interest was acquired or perfected prior to recording of the notice of state tax lien in the office of the county recorder of the county in which the real property is located pursuant to Section 7171:

(1) A successor in interest of the taxpayer without knowledge of the lien.

(2) A holder of a security interest.

(3) A mechanic's lienor.

(4) A judgment lien creditor.

(c) A state tax lien is not valid as to personal property against:

(1) The holder of a security interest in the property whose interest is perfected pursuant to Section 9303 of the Commercial Code prior to the time the notice of the state tax lien is filed with the Secretary of State pursuant to Section 7171.

(2) Any person (other than the taxpayer) who acquires an interest in the property under the law of this state without knowledge of the lien or who perfects an interest in accordance with the law of this state prior to the time that the notice of state tax lien is filed with the Secretary of State pursuant to Section 7171.

(3) A buyer in ordinary course of business who, under Section 9307 of the Commercial Code, would take free of a security interest created by the seller.

(4) Any person (other than the taxpayer) who, notwithstanding the prior filing of the notice of the state tax lien:

(A) Is a holder in due course of a negotiable instrument.

(B) Is a holder to whom a negotiable document of title has been duly negotiated.

(C) Is a bona fide purchaser of a security.

(D) Is a purchaser of chattel paper or an instrument who gives new value and takes possession of the chattel paper or instrument in the ordinary course of business.

(E) Is a holder of a purchase money security interest.

(F) Is a collecting bank holding a security interest in items being collected, accompanying documents and proceeds, pursuant to Section 4210 of the Commercial Code.

(G) Acquires a security interest in a deposit account or in the beneficial interest in a trust or estate.

(H) Acquires any right or interest in letters of credit, advices of credit, or money.

(I) Acquires without actual knowledge of the state tax lien a security interest in or a claim in or under any policy of insurance including unearned premiums.

(J) Acquires any right or interest in property subject to a certificate of title statute of another jurisdiction under the law of which indication of a security interest on

the certificate of title is required as a condition of perfection of the security interest.

(5) A judgment lien creditor whose lien was created by the filing of a notice of judgment lien on personal property with the Secretary of State prior to the time the notice of state tax lien is filed with the Secretary of State pursuant to Section 7171.

**Comment.** The second sentence of Section 7170(a) is deleted in view of the repeal of the homestead declaration procedure. See also Code Civ. Proc. §§ 688.030 (exemptions from enforcement of tax), 694.090 (effect of homestead declaration under former law), 704.850 (satisfaction of liens upon execution sale of homestead).

**Prob. Code § 6528 (repealed). Declared homestead**

SEC. 14. Section 6528 of the Probate Code is repealed.

~~6528. Nothing in this chapter terminates or otherwise affects a declaration of homestead by, or for the benefit of, a surviving spouse or minor child of the decedent with respect to the community, quasi-community, or common interest of the surviving spouse or minor child in property in the decedent's estate. This section is declaratory of, and does not constitute a change in, existing law.~~

**Comment.** Section 6528 is repealed because it has no purpose in view of the repeal of the homestead declaration procedure. See also Code Civ. Proc. § 694.090 (effect of homestead declaration under former law). Repeal of this section has no effect on the ability of a surviving judgment debtor to take advantage of the homestead exemption provided in Code of Civil Procedure Sections 704.710-704.860.

**COMMENTS TO REPEALED SECTIONS**

**Code Civ. Proc. §§ 704.910-704.995 (repealed). Declared homestead**

**Note.** Sections 704.910-704.995 are set out below for reference purposes. A Comment to each section indicates its proposed disposition in the revised statute or its relation to the general homestead exemption provisions that supersede the homestead declaration procedure.

**Article 5. Declared Homesteads**

**§ 704.910 (repealed). Definitions**

704.910. As used in this article:

(a) "Declared homestead" means the dwelling described in a homestead declaration.

(b) "Declared homestead owner" includes both of the following:

(1) The owner of an interest in the declared homestead who is named as a declared homestead owner in a homestead declaration recorded pursuant to this article.

(2) The declarant named in a declaration of homestead recorded prior to July 1, 1983, pursuant to former Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code and the spouse of such declarant.



(c) "Dwelling" means any interest in real property (whether present or future, vested or contingent, legal or equitable) that is a "dwelling" as defined in Section 704.710, but does not include a leasehold estate with an unexpired term of less than two years or the interest of the beneficiary of a trust.

(d) "Homestead declaration" includes both of the following:

(1) A homestead declaration recorded pursuant to this article.

(2) A declaration of homestead recorded prior to July 1, 1983, pursuant to former Title 5 (commencing with former Section 1237) of Part 4 of Division 2 of the Civil Code.

(e) "Spouse" means a "spouse" as defined in Section 704.710.

**Comment.** Former Section 704.910 is superseded by Section 704.710.

**§ 704.920 (repealed). Manner of selection of homestead**

704.920. A dwelling in which an owner or spouse of an owner resides may be selected as a declared homestead pursuant to this article by recording a homestead declaration in the office of the county recorder of the county where the dwelling is located. From and after the time of recording, the dwelling is a declared homestead for the purposes of this article.

**Comment.** Former Section 704.920 is superseded by the homestead exemption procedure in Sections 704.710-704.860. See also Sections 694.090 (effect of homestead declaration under prior law), 704.710 (definitions).

**§ 704.930 (repealed). Execution and contents of homestead declaration**

704.930. (a) A homestead declaration recorded pursuant to this article shall contain all of the following:

(1) The name of the declared homestead owner. A husband and wife both may be named as declared homestead owners in the same homestead declaration if each owns an interest in the dwelling selected as the declared homestead.

(2) A description of the declared homestead.

(3) A statement that the declared homestead is the principal dwelling of the declared homestead owner or such person's spouse, and that the declared homestead owner or such person's spouse resides in the declared homestead on the date the homestead declaration is recorded.

(b) The homestead declaration shall be executed and acknowledged in the manner of an acknowledgment of a conveyance of real property by at least one of the following persons:

(1) The declared homestead owner.

(2) The spouse of the declared homestead owner.

(3) The guardian or conservator of the person or estate of either of the persons listed in paragraph (1) or (2). The guardian or conservator may execute, acknowledge, and record a homestead declaration without the need to obtain court authorization.

(4) A person acting under a power of attorney or otherwise authorized to act on behalf of a person listed in paragraph (1) or (2).

(c) The homestead declaration shall include a statement that the facts stated in the homestead declaration are known to be true as of the personal knowledge of the person executing and acknowledging the homestead declaration. If the homestead declaration is executed and acknowledged by a person listed in paragraph (3) or (4) of subdivision (b), it shall also contain a statement that the person has authority to so act on behalf of the declared homestead owner or the spouse of the declared homestead owner and the source of the person's authority.

**Comment.** Former Section 704.930 is superseded by the homestead exemption procedure in Sections 704.710-704.860.

**§ 704.940 (repealed). Right to convey or encumber not limited; Evidentiary effect of homestead**

704.940. A homestead declaration does not restrict or limit any right to convey or encumber the declared homestead. A homestead declaration, when properly recorded, is prima facie evidence of the facts therein stated, and conclusive evidence thereof in favor of a purchaser or encumbrancer in good faith and for a valuable consideration.

**Comment.** Former Section 704.940 is superseded by the homestead exemption procedure in Sections 704.710-704.860. See also Section 704.780 (burden of proof in hearing on homestead exemption).

**§ 704.950 (repealed). Attachment of judgment lien to homestead**

704.950. (a) Except as provided in subdivisions (b) and (c), a judgment lien on real property created pursuant to Article 2 (commencing with Section 697.310) of Chapter 2 does not attach to a declared homestead if both of the following requirements are satisfied:

(1) A homestead declaration describing the declared homestead was recorded prior to the time the abstract or certified copy of the judgment was recorded to create the judgment lien.

(2) The homestead declaration names the judgment debtor or the spouse of the judgment debtor as a declared homestead owner.

(b) This section does not apply to a judgment lien created under Section 697.320 by recording a certified copy of a judgment for child, family, or spousal support.

(c) A judgment lien attaches to a declared homestead in the amount of any surplus over the total of the following:

(1) All liens and encumbrances on the declared homestead at the time the abstract of judgment or certified copy of the judgment is recorded to create the judgment lien.

(2) The homestead exemption set forth in Section 704.730.

**Comment.** Former Section 704.950 is superseded by the homestead exemption procedure in Sections 704.710-704.860.

**§ 704.960 (repealed). Proceeds exemption after voluntary sale; Reinvestment of proceeds of voluntary or involuntary sale and effect of new declaration**

704.960. (a) If a declared homestead is voluntarily sold, the proceeds of sale are exempt in the amount provided by Section 704.730 for a period of six months after the date of sale.

(b) If the proceeds of a declared homestead are invested in a new dwelling within six months after the date of a voluntary sale or within six months after proceeds of an execution sale or of insurance or other indemnification for damage or destruction are received, the new dwelling may be selected as a declared homestead by recording a homestead declaration within the applicable six-month period. In such case, the homestead declaration has the same effect as if it had been recorded at the time the prior homestead declaration was recorded.

**Comment.** Former Section 704.960 is superseded by the homestead exemption procedure in Sections 704.710-704.860. The proceeds exemption is continued in Section 704.720(b).

**§ 704.965 (repealed). Determination of amount of exemption**

704.965. If a homestead declaration is recorded prior to the operative date of an amendment to Section 704.730 which increases the amount of the homestead exemption, the amount of the exemption for the purposes of subdivision (c) of Section 704.950 and Section 704.960 is the increased amount, except that, if the judgment creditor obtained a lien on the declared homestead prior to the operative date of the amendment to Section 704.730, the exemption for the purposes of subdivision (c) of Section 704.950 and Section 704.960 shall be determined as if that amendment to Section 704.730 had not been enacted.

**Comment.** Former Section 704.965 is superseded by the homestead exemption procedure in Sections 704.710-704.860. The principle in former Section 704.965 is applicable under the general rule in Section 703.050 (exemptions in effect at time of lien govern).

**§ 704.970 (repealed). Effect of article on rights after levy of execution**

704.970. Whether or not a homestead declaration has been recorded:

(a) Nothing in this article affects the right of levy pursuant to a writ of execution.

(b) Any levy pursuant to a writ of execution on a dwelling (as defined in Section 704.710) and the sale pursuant thereto shall be made in compliance with Article 4 (commencing with Section 704.710) and the judgment debtor and the judgment creditor shall have all the rights and benefits provided by that article.

**Comment.** Section 704.970 is repealed as unnecessary following repeal of the homestead declaration procedure. The homestead exemption is now governed exclusively by Article 4 (commencing with Section 704.710) and related rules.

**§ 704.980 (repealed). Declaration of abandonment**

704.980.(a) A declared homestead may be abandoned by a declaration of abandonment under this section, whether the homestead declaration was recorded pursuant to this article or pursuant to former Title 5 (commencing with former Section 1237) of Part 4 of Division 2 of the Civil Code.

(b) A declaration of abandonment shall be executed and acknowledged in the manner of an acknowledgment of a conveyance of real property. It shall be executed and acknowledged by a declared homestead owner or by a person authorized to act on behalf of a declared homestead owner. If it is executed and acknowledged by a person authorized to act on behalf of a declared homestead owner, the declaration shall contain a statement that the person has authority to act on behalf of the declared homestead owner and the source of the person's authority.

(c) The declaration of abandonment does not affect the declared homestead of any person other than the declared homestead owner named in the declaration of abandonment.

**Comment.** The procedure for abandonment in former Section 704.980 is obsolete in view of the repeal of the homestead declaration procedure. See also Section 694.090 (effect of homestead declarations under prior law).

**§ 704.990 (repealed). Abandonment of homestead by recording homestead declaration for different property**

704.990. (a) A declared homestead is abandoned by operation of law as to a declared homestead owner if the declared homestead owner or a person authorized to act on behalf of the declared homestead owner executes, acknowledges, and records a new homestead declaration for the declared homestead owner on different property. An abandonment under this subdivision does not affect the declared homestead of any person other than the declared homestead owner named in the new homestead declaration.

(b) Notwithstanding subdivision (a), if a homestead declaration is recorded which includes property described in a previously recorded homestead declaration, to the extent that the prior homestead declaration is still valid, the new homestead declaration shall not be considered an abandonment of the prior declared homestead.

**Comment.** Former Section 704.990 relating to abandonment is obsolete in view of the repeal of the homestead declaration procedure. See also Section 694.090 (effect of homestead declarations under prior law).

**§ 704.995 (repealed). Continuation of protection after death of declared homestead owner**

704.995. (a) The protection of the declared homestead from any creditor having an attachment lien, execution lien, or judgment lien on the dwelling continues after the death of the declared homestead owner if, at the time of the death, the dwelling was the principal dwelling of one or more of the following persons to whom all or part of the interest of the deceased declared homestead owner passes:

- (1) The surviving spouse of the decedent.
- (2) A member of the family of the decedent.

(b) The protection of the declared homestead provided by subdivision (a) continues regardless of whether the decedent was the sole owner of the declared homestead or owned the declared homestead with the surviving spouse or a

member of the decedent's family and regardless of whether the surviving spouse or the member of the decedent's family was a declared homestead owner at the time of the decedent's death.

(c) The amount of the homestead exemption is determined pursuant to Section 704.730 depending on the circumstances of the case at the time the amount is required to be determined.

**Comment.** Former Section 704.995 is superseded by the homestead exemption procedure in Sections 704.710-704.860. The general homestead exemption applies with full force to the interest of the survivor, consistent with the rule in subdivision (c). Additional protection is provided by the probate homestead procedure. See Prob. Code §§ 6520-6527.

## REVISED COMMENTS

### Code Civ. Proc. § 704.710 (revised comment). Definitions

**Revised Background Comment (1982).** 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 Civ. Code § 1237 (declared homestead); former Code Civ. Proc. §§ 690.3 (house trailer, mobile home, 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) continues the substance of former Civil Code Section 1261(2) except that the minor grandchild of a deceased spouse and a child or grandchild of a former spouse are included in the listing.

Subdivision (c) is intended to preclude a judgment debtor from moving into a dwelling after creation of a judgment lien or after levy in order to create an exemption. Subdivision (c) also makes clear that, even though an abstract of judgment has been recorded to create a judgment lien, the existence of the lien does not prevent a homestead exemption on after-acquired property that is acquired as the principal dwelling using exempt proceeds. Subdivision (c) is an exception to the rule of Section 703.100 (time for determination of exemption).

Subdivision (d) preserves the effect of former Civil Code Sections 1300-1304 (married person's separate homestead). The effect of subdivision (d) is to permit each spouse to claim a separate homestead after entry of a judgment decreeing legal separation or of an interlocutory judgment of dissolution of the marriage, because subdivision (c) of Section 704.720 is not applicable.

**Revised Background Comment (1983).** Section 704.710 is amended to delete "actually" which appeared before "resides" or "resided" in various provisions. The word "actually" is deleted to avoid a possible construction that a person temporarily absent (such as a person on vacation or in the hospital) could not claim a homestead exemption for the principal dwelling merely because the person is temporarily absent, even though the dwelling is the person's principal dwelling and residence.