

## Memorandum 2017-25

**Homestead Exemption: Dwelling**

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Memorandum 2017-13 discussed the process used by a judgment creditor to force the sale of real property that is purported to be a “dwelling.”<sup>1</sup> Under existing law, such property cannot be sold without an authorizing court order.<sup>2</sup> The purpose of that judicial review is to determine whether the property is subject to a homestead exemption. If so, the court will determine the amount of the exemption and how to effectuate it.<sup>3</sup>

The law establishing and implementing the judicial review requirement is worded in a way that seems to presuppose that the property at issue is a dwelling. This could create confusion in cases where the judgment creditor believes that the property is not a dwelling and wishes to make that argument to the court.

Memorandum 2017-13 proposed that the law be revised to make clear that the existing dwelling sale procedure can be used to determine whether property is a dwelling.

At its April meeting, the Commission directed the staff to prepare proposed legislation to achieve that result.<sup>4</sup> The staff has prepared a draft tentative recommendation to comply with that direction. It is attached for the Commission’s review.

As discussed below, the staff has taken a different approach to the problem than was proposed in Memorandum 2017-13. **After considering that different approach, the Commission should decide whether to approve the attached draft as a tentative recommendation and circulate it for public comment.**

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Code Civ. Proc. § 704.740(a).

3. Code Civ. Proc. § 704.780.

4. Minutes (April 2017), p. 3.

Alternatively, the Commission could direct the staff to prepare a different draft tentative recommendation that employs the approach proposed in Memorandum 2017-13.

All statutory references in this memorandum are to the Code of Civil Procedure.

#### DISCUSSION

In Memorandum 2017-13, the staff noted that the main cause of confusion seems to be the terminology used in the existing statutes. Because they consistently refer to the property at issue as a “dwelling,” the provisions seem to presuppose the correctness of that characterization. That is what makes it unclear whether and how a judgment creditor could argue to the contrary.

Accordingly, the memorandum proposed adjusting all of the statutes to use more neutral language. For example, Section 704.760 might be revised along these lines:

The judgment creditor’s application shall be made under oath, shall describe the ~~dwelling~~ property, 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~~ property and the person or persons who claimed any such exemption.

(b) A statement, which may be based on information and belief, whether the ~~dwelling~~ property 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~~ property 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~~ property, the name of each person having a lien or encumbrance on the ~~dwelling~~ property, and the address of such person used by the county recorder for the return of the instrument creating such person’s lien or encumbrance after recording.

Having looked more comprehensively at the language in the relevant statutes, the staff is hesitant to pursue that approach. The staff’s main concern is that such an approach would be too indirect and subtle, which could create new scope for misunderstanding and confusion. A person who is trying to interpret

the intended effect of the revisions might miss the point and infer an unintended effect.

The staff is also concerned that some of the other sections could not be revised so neatly, requiring more convoluted adjustments.

Moreover, when the Commission discussed Memorandum 2017-13 at its April meeting, there was concern that some of the proposed revisions might actually result in an unintended substantive change in the law.

After considering all of those issues, the staff saw another possible approach, which would be much simpler and more direct. Rather than make numerous technical adjustments to the existing sections, to remove language that might give rise to a problematic inference, simply add a provision that directly negates the inference. Thus:

704.755. Notwithstanding any other provision of this article, a judgment creditor may dispute that the property at issue is a homestead, on the ground that the property is not a dwelling.

A provision of that type would get straight to the point and would not require readers to understand the Commission's intentions indirectly, by construing a pattern of subtle changes to terminology.

That is the approach taken in the attached staff draft. **How would the Commission like to proceed?**

Respectfully submitted,

Brian Hebert  
Executive Director

# CALIFORNIA LAW REVISION COMMISSION

**STAFF DRAFT**

TENTATIVE RECOMMENDATION

Homestead Exemption: Dwelling

June 2017

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

**COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN August 8, 2017.**

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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## SUMMARY OF TENTATIVE RECOMMENDATION

The California Constitution has long provided for a homestead exemption, to shield a person's principal dwelling from the enforcement of a money judgment.

Under existing law, an attempt by a judgment creditor to force the sale of a dwelling to satisfy a judgment must be authorized by court order. The purpose of that judicial review is to determine whether the property at issue is subject to a homestead exemption and, if so, to effectuate the exemption.

The statutes that establish and govern the judicial review requirement are phrased in a way that seems to presuppose that the property is, in fact, a dwelling. That phrasing could cause confusion about how to proceed when a judgment creditor believes that the property at issue is not a dwelling.

The Commission tentatively recommends that the law be revised to make clear that a judgment creditor may dispute whether property is a dwelling, as part of the existing process for judicial review of the proposed sale of a purported dwelling. The Commission believes that this would be a clarification of existing law, rather than a substantive change.

This tentative recommendation was prepared pursuant to Resolution Chapter 150 of the Statutes of 2016.

## HOMESTEAD EXEMPTION: DWELLING

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### BACKGROUND

2 The California Constitution provides for a homestead exemption to protect  
3 certain real property from forced sale by creditors: “The Legislature shall protect,  
4 by law, from forced sale a certain portion of the homestead and other property of  
5 all heads of families.”<sup>1</sup> Although constitutional in origin, the homestead exemption  
6 is defined and effectuated by statute.<sup>2</sup>

7 In general terms, a “homestead” is the principal dwelling of a judgment debtor  
8 or the judgment debtor’s spouse.<sup>3</sup> A “dwelling” is any “place where a person  
9 resides,” which can include (but is not limited to) a house, mobilehome, or boat.<sup>4</sup>  
10 Notably, the definition of “dwelling” focuses on how property is used (to reside),  
11 rather than on the existence of any particular kind of residential structure.

12 Under existing law, the interest of a natural person in a dwelling may not be sold  
13 to satisfy a money judgment without first obtaining an authorizing court order.<sup>5</sup> If  
14 a judgment creditor seeks to execute a writ of execution against a dwelling, to  
15 force its sale, the levying officer will notify the judgment creditor that the sale will  
16 not proceed without court authorization.<sup>6</sup>

17 The purpose of that judicial review is to determine whether the dwelling is a  
18 homestead. If so, the court will determine the amount of the homestead exemption  
19 and how to effectuate it.<sup>7</sup>

20

### PROBLEM

21 The judicial review requirement described above is triggered when the levying  
22 officer determines that the property at issue is a dwelling and notifies the judgment  
23 creditor that an authorizing court order is required. From that point forward, the  
24 statutory procedure seems to presuppose that the levying officer’s determination  
25 was correct, that the property at issue is in fact a dwelling. All of the relevant  
26 provisions refer to the property as a “dwelling.”<sup>8</sup>

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1. Cal. Const. art. XX, § 1.5.

2. Code Civ. Proc. §§ 704.710-704.995.

3. Code Civ. Proc. § 704.710(c).

4. Code Civ. Proc. § 704.710(a).

5. Code Civ. Proc. § 704.740(a). For exemptions not relevant to this discussion, see Code Civ. Proc. § 704.740(b).

6. Code Civ. Proc. § 704.750.

7. Code Civ. Proc. § 704.780.

8. See Code Civ. Proc. §§ 704.740(a) (“dwelling” may not be sold without court order), 704.750 (levying officer will not proceed with sale of “dwelling” without court order), 704.760 (judgment creditor’s

1 If the judgment creditor believes that the levying officer was not correct,  
2 because the property is not a dwelling, there is no obvious way for the judgment  
3 creditor to raise that issue. This can lead to confusion, with judges and  
4 practitioners unsure of how to proceed. That confusion can create cost and delay.

5 RECOMMENDATION

6 In order to avoid the problem described above, the Commission tentatively  
7 recommends that the law be revised to expressly state that a judgment creditor  
8 may dispute the existence of a homestead exemption on the ground that the  
9 property at issue is not a dwelling.

10 This would not be a substantive change, as the homestead exemption is only  
11 available for property that is a dwelling. It would instead be a clarification,  
12 dispelling any confusion as to whether the wording or structure of existing law  
13 precludes that issue being raised.

14 REQUEST FOR PUBLIC COMMENT

15 The Commission seeks public comment on its tentative recommendation.  
16 Comments supporting the proposed approach are just as important as comments  
17 suggesting changes to that approach or expressing other views.

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application for court order shall describe the “dwelling”), 704.770(b)(2) (service of documents on occupant of “dwelling”), 704.780 (determination of whether “dwelling” is homestead), 704.790 (order of sale of “dwelling” after non-appearance of specified persons).

## PROPOSED LEGISLATION

1 **Code Civ. Proc. § 704.755 (added). Dispute as to whether property is a dwelling**

2 SECTION 1. Section 704.755 is added to the Code of Civil Procedure to read:

3 704.755. Notwithstanding any other provision of this article, a judgment creditor  
4 may dispute that the property at issue is a homestead, on the ground that the  
5 property is not a dwelling.

6 **Comment.** Section 704.755 is added to provide clarification. Although the language and  
7 structure of this article seems to presuppose that the property at issue is a dwelling, it does not  
8 prevent a judgment creditor from arguing to the contrary. This section makes that point express.  
9 This is not a substantive change. See Section 704.710(a) (“dwelling” defined), (c) (“homestead”  
10 defined).

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