

Memorandum 2017-44

**Homestead Exemption: Dwelling
(Draft Recommendation)**

In June, the Commission¹ released a tentative recommendation that would make a minor clarifying revision to the statutory procedure for the forced sale of property that is identified by the levying officer as a dwelling.² The deadline for public comment on the tentative recommendation was August 8, 2017.

The Commission did not receive any public comment. This is not terribly surprising. The proposed legislation is quite narrow and modest in effect. It would make a clarification of existing law, rather than break new substantive ground.

A staff draft recommendation is attached for the Commission's review and consideration. It is substantively identical to the tentative recommendation. The only differences are minor technical revisions to recast the proposal in final, rather than tentative, form.

The staff recommends that the Commission approve the draft as a final recommendation, for publication and distribution to the Legislature and Governor.

Respectfully submitted,

Brian Hebert
Executive Director

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). 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. *Tentative Recommendation on Homestead Exemption: Dwelling* (June 2017).

#D-1300

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

RECOMMENDATION

Homestead Exemption: Dwelling

September 2017

California Law Revision Commission
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Davis, CA 95616
650-494-1335
<commission@clrc.ca.gov>

SUMMARY OF 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 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. This would be a clarification of existing law, rather than a substantive change.

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

HOMESTEAD EXEMPTION: DWELLING

1

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.”¹ Although constitutional in origin, the homestead exemption
6 is defined and effectuated by statute.²

7 In general terms, a “homestead” is the principal dwelling of a judgment debtor
8 or the judgment debtor’s spouse.³ A “dwelling” is any “place where a person
9 resides,” which can include (but is not limited to) a house, mobilehome, or boat.⁴
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.⁵ 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.⁶

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.⁷

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.”⁸

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 recommends
7 that the law be revised to expressly state that a judgment creditor may dispute the
8 existence of a homestead exemption on the ground that the property at issue is not
9 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.

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).
