

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Probate Homestead

November 1979

**CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305**

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This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

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November 30, 1979

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission is presently engaged in a major study of creditors' remedies and related matters pursuant to authority of Resolution Chapter 45 of the Statutes of 1974. Among the matters under study are the various homestead laws. The Commission herewith submits its recommendation relating to one facet of this study, the probate homestead. The Commission recommends that the survivorship aspect of a declared homestead be eliminated in favor of a probate homestead and that the probate homestead itself be limited to a right of occupancy for a term of years instead of a fee interest.

Respectfully submitted,

BEATRICE P. LAWSON
Chairperson

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RECOMMENDATION

relating to

THE PROBATE HOMESTEAD

Introduction

One important purpose¹ of the homestead laws is to ensure that the surviving members of a family will have a home after the death of one spouse.² To achieve this purpose, the homestead laws limit the power of the deceased spouse to devise the family home and limit the right of a creditor to resort to the family home to satisfy a judgment.³

California has two separate sets of statutory provisions to protect the family home after the death of a spouse:⁴

- (1) The survivorship right in the declared homestead.
- (2) The probate homestead.

The two sets of provisions exhibit significant differences and are outlined briefly below.

If married persons have declared a homestead on property pursuant to Sections 1237 through 1304 of the Civil Code, upon the death of a spouse the survivor is entitled to have the homestead set apart unless it has been declared unilaterally by the survivor upon the separate property of the decedent.⁵ The basic incidents of the survivorship right in the declared homestead are that title to the property vests in the surviving spouse and the homestead enjoys an

¹ The homestead laws serve two other major purposes:

(1) Exempting the family home from execution. See, *e.g.*, Civil Code § 1240 ("The homestead is exempt from execution or forced sale. . .").

(2) Protecting a spouse from disposition or encumbrance of the family home without the spouse's consent. See, *e.g.*, Civil Code § 1242 ("[T]he homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife. . .").

² See, *e.g.*, *Taylor v. Madigan*, 53 Cal. App.3d 943, 968, 126 Cal. Rptr. 376, 392 (1975) ("The objective of the probate homestead statutes is protection of the family, as a social unit in the home, against demands of creditors and heirs, against the family's own improvidence.").

³ See *Basye, A Comparative Study of the Homestead Law and Probate Code Sections 640 to 646*, 1 Cal. L. Revision Comm'n Reports 41 (1955).

⁴ See generally *Wayne, Exempt and Homestead Property*, in 1 *California Decedent Estate Administration* §§ 12.24-12.72 (Cal. Cont. Ed. Bar 1971).

⁵ Civil Code § 1265; Prob. Code § 660.

exemption up to statutory limits from the claims of creditors.⁶

If no homestead has been declared or if it has been declared unilaterally by the survivor upon the separate property of the decedent, upon the death of a spouse the probate court must set apart property as a probate homestead for the use of the surviving spouse and minor children.⁷ Title to the property may or may not vest in the survivors and may vest in different proportions depending upon the character of the property selected as a homestead and the status of the survivors; the homestead enjoys protection from the claims of creditors.⁸

This recommendation first analyzes the major differences between the survivorship right in the declared homestead and the probate homestead. The recommendation concludes that there is no justification for two separate bodies of law and proposes repeal of the survivorship right in the declared homestead. The recommendation then proposes a series of reforms and improvements in the probate homestead.

Comparison of Declared and Probate Homesteads

There are a number of basic differences between the survivorship right in the declared homestead and the probate homestead,⁹ with the result that the rights created by them are considerably different.¹⁰ The major differences involve the choice of property available for the homestead, the value of the property, the treatment of liens and encumbrances on the property, and the title to the property.

⁶ For a more detailed analysis of the operation of the survivorship right in the declared homestead, see, e.g., 7 B. Witkin, Summary of California Law *Wills and Probate* § 513 (8th ed. 1974).

⁷ Prob. Code § 661.

⁸ For a more detailed analysis of the operation of the probate homestead, see, e.g., 7 B. Witkin, Summary of California Law *Wills and Probate* § 514 (8th ed. 1974).

⁹ The commentators have catalogued the numerous differences. See, e.g., Adams, *Homestead Legislation in California*, 9 Pac. L.J. 723, 751 (1978); Basye, *A Comparative Study of the Homestead Law and Probate Code Sections 640 to 646*, 1 Cal. L. Revision Comm'n Reports 41, 45-46 (1955); Comment, *The Probate Homestead in California*, 53 Calif. L. Rev. 655, 677-79 (1965).

¹⁰ Taylor v. Madigan, 53 Cal. App.3d 943, 968, 126 Cal. Rptr. 376, 392 (1975).

Choice of property. There is no choice available to the court in setting apart property by reason of a survivorship right in a declared homestead. Only the property upon which the homestead has been declared may be set apart.¹¹ The survivors may not waive the survivorship right and take a probate homestead instead.¹²

In contrast, the court has wide discretion in selecting appropriate property as a probate homestead.¹³ Any property in the decedent's estate is available; the court is not limited to the property on which the spouses resided at the time of the decedent's death.¹⁴

Value of property. One major limitation on the survivorship right in the declared homestead is the value of the property that may be set apart. Section 664 of the Probate Code limits the value of the property to the amount of the homestead exemption in effect at the date of death of the decedent. If the value of the property exceeds the applicable homestead exemption, an inheritance tax referee must ascertain whether the premises can be divided without material injury. If so, the referee must determine the portion of the premises, including the dwelling house, equal in value to the amount of the exemption, which is then set apart to the surviving spouse.¹⁵ If not, the court makes an order for sale of the property and the portion of the net proceeds equal to the applicable homestead exemption is set aside to the survivor and continues to retain exempt status.¹⁶

There is no value limitation on property set apart as a probate homestead. Property valued in excess of the applicable homestead exemption may be set apart.¹⁷

Liens and encumbrances. The order setting apart a homestead does not impair or destroy liens and encumbrances on the property, which remains subject thereto.¹⁸ Ordinarily liens and encumbrances on a declared

¹¹ Prob. Code § 660.

¹² Wayne, *Exempt and Homestead Property*, in 1 California Decedent Estate Administration § 12.51 (Cal. Cont. Ed. Bar 1971).

¹³ See, e.g., Estate of Nelson, 224 Cal. App.2d 138, 36 Cal. Rptr. 352 (1964).

¹⁴ See, e.g., Estate of Henningsen, 199 Cal. 103, 247 P. 1082 (1926).

¹⁵ Prob. Code § 664.

¹⁶ Prob. Code § 665; Estate of Durham, 108 Cal. App.2d 148, 238 P.2d 1057 (1951).

¹⁷ See, e.g., Estate of Levy, 141 Cal. 646, 75 P. 301 (1904).

¹⁸ See, e.g., Estate of McCauley, 50 Cal. 544 (1875).

homestead are exonerated from the funds of the estate,¹⁹ while a probate homestead passes to the surviving spouse and minor children subject to existing liens and encumbrances.²⁰

Vesting of title. The right of survivorship in the declared homestead vests title generally in the surviving spouse alone. This is the case if the homestead was declared on community or quasi-community property or the separate property of the decedent if the decedent joined in the declaration; if the homestead was declared on the separate property of the decedent without the decedent's consent, title vests in the decedent's heirs or devisees, subject to the authority of the court to set a probate homestead apart for the surviving family for a limited time.²¹

Selection of a probate homestead vests title generally in the surviving spouse and minor children. If the homestead is selected out of property in the estate other than the separate property of the decedent, title vests one-half in the surviving spouse and one-half in the minor children equally; if there is no surviving spouse, title vests in the minor children equally, and if there are no children, title vests in the surviving spouse.²² If the homestead is selected out of the separate property of the decedent, it may be set apart for the survivors only for a limited period and then vests in the heirs or devisees.²³

Repeal of Declared Homestead

The basic policy of the homestead laws to protect the family home for the survivors after the decedent's death is implemented in different ways by the survivorship right in the declared homestead and the probate homestead. The

¹⁹ Probate Code Section 735 provides for payment of claims secured by liens and encumbrances on homestead property from the funds of the estate if the funds are sufficient to pay all claims against the estate. Otherwise, the claims secured by liens and encumbrances are paid proportionately with other allowed claims; any deficiency continues to encumber the property. Probate Code Section 735 applies to the survivorship right in the declared homestead but not to the probate homestead. See, *e.g.*, Estate of Huelsman, 127 Cal. 275, 59 P. 776 (1899).

²⁰ Adams, *Homestead Legislation in California*, 9 Pac. L.J. 723, 751 (1978).

²¹ Civil Code § 1265; Prob. Code § 663.

²² Prob. Code § 667.

²³ Prob. Code § 661.

protection afforded the surviving family varies with the type of homestead, without apparent reason for the variation. Commentators who have reviewed this situation have been able to discern no justification for the disparity in treatment and have urged that the law be changed so that the disposition of the family home on the death of its owner is handled in the same manner regardless of the type of homestead applicable.²⁴

A comparison of the survivorship right in the declared homestead with the probate homestead reveals that the probate homestead affords generally greater protection to the survivors.²⁵ The flexibility of the court in selecting any property appropriate for the homestead, the absence of any value limitation on the homestead, and the vesting of title in minor children as well as in the surviving spouse make the probate homestead more advantageous from the viewpoint of the survivors. One aspect of the declared homestead that favors the survivors is the provision for exoneration of liens, although this provision is out of step with today's economy and opposed to the modern trend which disfavors exoneration.²⁶

The probate homestead was designed by the Legislature expressly for the purpose of preserving the family home for the surviving members of the decedent's family.²⁷ It is probable that probate homesteads are set apart far more frequently than survivorship rights in declared homesteads.

By way of contrast, the fundamental purpose of the declared homestead is to provide an exemption for the family home from claims of creditors; the survivorship function is merely incidental.²⁸ It is likely that persons who

²⁴ See, e.g., Adams, *Homestead Legislation in California*, 9 Pac. L.J. 723, 751 (1978); Comment, *The Probate Homestead in California*, 53 Calif. L. Rev. 655, 677 (1965) ("Most of the differences which exist between the probate homestead and the marital homestead which has devolved on the surviving spouse have no rational basis. [Footnote omitted.] Since the two forms of homestead protection serve the same purpose—to provide a secure home for the surviving family of a decedent—and involve the same classes of interested parties, a uniform system of homestead legislation is desirable."). See also *Report and Recommendation Relating to Summary Distribution of Small Estates Under Probate Code Sections 640 to 646*, 1 Cal. L. Revision Comm'n Reports 50, 52 (1955).

²⁵ Taylor v. Madigan, 53 Cal. App.3d 943, 968, 126 Cal. Rptr. 376, 392 (1975).

²⁶ Adams, *Homestead Legislation in California*, 9 Pac. L.J. 723, 752 (1978).

²⁷ See, e.g., Taylor v. Madigan, 53 Cal. App.3d 943, 968, 126 Cal. Rptr. 376, 392 (1975); Estate of Claussenius, 96 Cal. App.2d 600, 612, 216 P.2d 485, 494 (1950).

²⁸ Adams, *Homestead Legislation in California*, 9 Pac. L.J. 723, 751 (1978).

declare homesteads do so primarily for the purpose of protection against creditors; the survivorship consequences of the homestead declaration may be subsidiary or unintended. Where survivorship consequences are in fact knowingly intended by the homestead declarant, they can be achieved much more simply, directly, and effectively by appropriate inter vivos instrument or by will.

For these reasons, the Law Revision Commission recommends that the survivorship right in the declared homestead be repealed. The surviving family of any decedent should be eligible for a probate homestead regardless of the existence of a declared homestead. This recommendation would not disturb existing survivorship rights that have been set apart by the court out of declared homesteads before repeal of the survivorship provisions, but would restrict any future survivors' protections to probate homesteads.

While the probate homestead is superior to the declared homestead as a survivors' protection device, it is not perfect. The Commission also recommends a number of improvements in the probate homestead.

Reform of Probate Homestead

Choice of property. Probate Code Section 661 permits the court to select the probate homestead out of community property or quasi-community property or out of real property owned in common by the decedent and the persons entitled to have the homestead set apart. If there is no such property, the court may select the homestead out of the separate property of the decedent.

The cases have held that, notwithstanding Section 661, the court may select the homestead out of the separate property of the decedent if the separate property is most suitable for use as a homestead, even though there may be other residential property in the estate.²⁹ This rule is sound; the probate homestead should be selected out of the most appropriate available property, regardless of its character. As between separate property and other forms of property, the other property should be preferred for the probate homestead. The statute should make clear the preference

²⁹ See, e.g., *Estate of Raymond*, 137 Cal. App.2d 134, 289 P.2d 890 (1955).

and should also codify the rule that separate property is eligible for selection as the homestead if it is most suitable.

The limitation of the probate homestead to real property is unduly restrictive. Families sometimes reside in personal property such as mobilehomes and waterborne vessels. The general exemption laws have recognized that a mobilehome or waterborne vessel may serve as a dwelling and have provided exemptions from claims of creditors.³⁰ Personal property should likewise be eligible for selection as a probate homestead.

Vesting of title. If the probate homestead is selected out of community or quasi-community property or property owned in common, fee title vests in the surviving spouse and minor children.³¹ If the homestead is selected out of the separate property of the decedent, the court may set the homestead apart only for a limited time for the survivors, not to exceed the lifetime of the surviving spouse and the minority of minor children;³² ultimately, the property goes to the decedent's heirs or devisees.³³

Vesting of title in the surviving spouse and minor children creates a number of problems. As a general rule, the probate homestead operates to frustrate the estate plan of the decedent. The occasion for a probate homestead does not arise where the property passes by intestate succession to the survivors or where the decedent wills his or her interest in the property to the survivors. The homestead comes into play primarily where the decedent makes a testamentary disposition otherwise.

A common provision in a will is a trust for the lifetime of the surviving spouse with remainder to other beneficiaries, perhaps children of a previous marriage of the decedent. The probate homestead can effectively destroy this estate plan by giving the surviving spouse a fee interest and leaving the other beneficiaries nothing.

The title-vesting attribute of the probate homestead in effect substitutes the surviving spouse's ultimate disposition

³⁰ Code Civ. Proc. § 690.3.

³¹ Prob. Code § 667.

³² Prob. Code § 661.

³³ See discussion in Comment, *The Probate Homestead in California*, 53 Calif. L. Rev. 655, 668-70 (1965).

of the property for the decedent's. Besides abridging the decedent's right of testamentary disposition, this has a number of economic disadvantages for all persons concerned. The property may have to pass through probate twice—once through the decedent's estate and again through the surviving spouse's estate. There are also adverse tax consequences. A probate homestead that vests in fee will inevitably consume some or all of the marital deduction.³⁴ A probate homestead that vests in fee is also subject to full death taxes twice.³⁵

The vesting characteristics of the probate homestead are also awkward in their treatment of surviving children. A probate homestead vests in the surviving minor children, but not in surviving adult children. Where the decedent leaves both minor and adult children, the probate homestead may not only treat the children inequitably by vesting property in the minors but not in the adults, but may also frustrate the decedent's efforts to treat them equitably.

These problems are not present where the probate homestead is set apart out of the decedent's separate property. By statute, the homestead may be set apart only for a limited term, in the discretion of the court. This statutory treatment is more sensible than vesting title in fee. A term of years for the survivors satisfies the basic policy of providing a secure dwelling for the survivors during their time of need. It also effectuates to the greatest extent practical the basic policy of the state probate laws to permit a decedent full testamentary powers over the decedent's property.³⁶ It does not have the adverse probate and tax features of a homestead set apart in fee.

The existing title vesting attributes of the probate homestead should be replaced by the following new provisions:

(1) The decision whether to set apart a homestead at all should be in the discretion of the court, dependent upon need.³⁷

³⁴ See discussion in Wayne, *Exempt and Homestead Property*, in 1 California Decedent Estate Administration § 12.73 (Cal. Cont. Ed. Bar 1971).

³⁵ See Rev. & Tax. Code § 13622 (probate homestead a transfer subject to inheritance tax).

³⁶ See, e.g., Estate of Walkerly, 108 Cal. 627, 653, 41 P. 772, 778 (1895).

³⁷ Probate Code Section 661 provides that the homestead "must" be set apart by the court. Since under the recommended scheme title will not pass, setting apart the

(2) The homestead (consisting of the dwelling and a reasonable amount of adjoining property) should be set apart for the surviving spouse or minor children of the decedent only for a limited term (to be determined by the court) upon such conditions as the court deems proper, regardless of the character of the property from which the homestead is selected.

(3) The court should retain jurisdiction to modify the term and conditions of the homestead right until the time of entry of a final decree of distribution of the estate in order to accommodate changes in circumstances.

(4) Ultimately, title should vest in accordance with the rules of testate and intestate succession.

These new provisions will make the probate homestead responsive to the basic needs it is intended to serve.

Creditors' rights. The primary cause of existing problems concerning creditors' rights in the probate homestead is a lack of statutory definition of these rights; creditors must look to case law to determine their rights.³⁸ The statute should clarify and codify the rights of creditors.

The rights of creditors may be viewed from three aspects:

- (1) Creditors of the decedent.
- (2) Creditors of the homestead recipient.
- (3) Creditors of the heirs or devisees who take the property subject to the probate homestead.

Under existing law, the extent to which creditors of the decedent may satisfy their claims out of property set apart as a probate homestead depends upon the nature of the claim and the character of the homestead. A homestead set apart in fee for the surviving spouse and minor children is removed from estate administration and is not liable for claims of unsecured creditors of the decedent.³⁹ A homestead set apart for a limited term for the surviving spouse and minor children remains subject to administration,⁴⁰ and claims of unsecured creditors of the decedent may be enforced against the property, subject to the homestead right, notwithstanding the interest of the

homestead should not be mandatory.

³⁸ Comment, *The Probate Homestead in California*, 53 Calif. L. Rev. 655, 670 (1965).

³⁹ See, e.g., *Estate of Tompkins*, 12 Cal. 114 (1859).

⁴⁰ Prob. Code § 661.

heirs or devisees.⁴¹ Setting apart a probate homestead, regardless of its character, does not affect rights of secured creditors; liens and encumbrances continue to burden the homestead property and are enforceable against the property.⁴²

The rules as to the liability of the probate homestead for claims against the decedent should be codified. Since the probate homestead will be set apart for the survivors only for a limited period in every case, the property will be subject to administration and to the claims of unsecured creditors in every case, subject to the homestead right; the homestead right itself will be subject to claims of secured creditors.⁴³ However, because the probate homestead is intended to protect the family home despite the decedent's death, the homestead should not be subject to claims of secured creditors if the homestead would have been exempt from such claims were the decedent still living.

Once the probate homestead has been set apart to the surviving spouse and minor children, the homestead right is subject to the claims of their creditors to the same extent a nonprobate homestead would be subject to claims of creditors.⁴⁴ This rule should be abrogated. Under the recommended legislation, the homestead will be set apart only for a limited period and only dependent upon need of the survivors. The homestead right should be exempt absolutely during the survivors' time of need; such a right of occupancy for a term of years should not be subject to enforcement processes.

The rights of creditors of the ultimate heirs or devisees who will receive the property after termination of the probate homestead are not clear. The law should make clear that creditors of the ultimate recipients of the homestead property are permitted to satisfy their claims out of the property to the same extent as out of any other property, subject to the homestead right.

⁴¹ See, *e.g.*, Estate of Tittel, 139 Cal. 149, 72 P. 909 (1903).

⁴² See, *e.g.*, Estate of McCauley, 50 Cal. 544 (1875); Estate of Huelsman, 127 Cal. 275, 59 P. 776 (1899).

⁴³ See, *e.g.*, Estate of Shively, 145 Cal. 400, 78 P. 869 (1904). The court should have discretion to select the most appropriate property as the homestead, taking into account, among other factors, liens and encumbrances burdening the property. See, *e.g.*, Estate of Nelson, 224 Cal. App.2d 138, 144, 36 Cal. Rptr. 352, 355 (1964).

⁴⁴ See, *e.g.*, Keyes v. Cyrus, 100 Cal. 322, 34 P. 722 (1893); MacQuiddy v. Rice, 47 Cal. App.2d 755, 118 P.2d 853 (1941).

Proposed Legislation

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Section 1265 of the Civil Code, to amend Sections 228, 600, 660, 661, 662, 1200, 1202, and 1240 of, to repeal and add Sections 663, 664, 665, and 666 to, and to repeal Sections 667, 668, and 735 of, the Probate Code, and to repeal Section 13621 of the Revenue and Taxation Code, relating to the probate homestead.

The people of the State of California do enact as follows:

Declared Homestead

Civil Code § 1265 (amended)

SECTION 1. Section 1265 of the Civil Code is amended to read:

1265. From and after the time the declaration is filed for record, the premises therein described constitute a homestead. ~~If the selection was made by a married person from the community property, or from the quasi/community property, or from the separate property of the spouse making the selection or joining therein, and if the surviving spouse has not conveyed the homestead to the other spouse by a recorded conveyance which failed to expressly reserve his homestead rights as provided by Section 1262 of the Civil Code, the land so selected, on the death of either of the spouses, vests in the survivor, except in the case of a married person's separate homestead, subject to no other liability than such as exists or has been created under the provisions of this title; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to the heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in~~ *In* no case shall ~~it, the homestead~~ or the products, rents, issues or profits thereof be held liable for the debts of the owner, except as provided in this title; and should the homestead be sold by the owner, the proceeds arising from such sale

to the extent of the value allowed for a homestead exemption as provided in this title shall be exempt to the owner of the homestead for a period of six months next following such sale.

Comment. The survivorship right in the declared homestead formerly provided by Section 1265 is not continued. A probate homestead may be set apart for the surviving spouse or minor children pursuant to Probate Code Sections 660-666.

Succession

Probate Code § 228 (amended)

SEC. 2. Section 228 of the Probate Code is amended to read:

228. (a) If the decedent leaves no living spouse or issue and there are issue of the decedent's predeceased spouse, the portion of the decedent's estate attributable to the decedent's predeceased spouse shall go in equal shares to the children of the predeceased spouse and their descendants by right of representation, and if none, then one-half of such portion goes to the parents of the decedent in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and their descendants by right of representation, and the other half goes to the parents of the predeceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of the predeceased spouse and to their descendants by right of representation.

(b) For the purposes of this section, the "portion of the decedent's estate attributable to the decedent's predeceased spouse" shall mean:

(1) One-half of the community property in existence at the time of the death of the predeceased spouse.

(2) One-half of any community property, in existence at the time of death of the predeceased spouse, which was given to the decedent by the predeceased spouse by way of gift, descent, devise, or bequest.

(3) That portion of any community property in which the predeceased spouse had any incident of ownership and

which vested in the decedent upon the death of the predeceased spouse by right of survivorship.

(4) That portion of any property which, because of the death of the predeceased spouse, became vested in the decedent and was set aside as a probate homestead, *prior to January 1, 1981*.

(c) That portion of the decedent's estate not otherwise subject to this section shall be distributed pursuant to the provisions of this article, except that if a portion of the decedent's estate would otherwise escheat to the state because there is no relative, including next of kin, such portion of the estate shall be distributed in equal shares to the children of the predeceased spouse and to their descendants by right of representation.

(d) If any of the property subject to the provisions of this section would otherwise escheat to this state because there is no relative, including next of kin, of one of the spouses to succeed to such portion of the estate, such property shall be distributed in accordance with the provisions of Section 296.4 of this code.

Comment. Section 228 is amended to reflect the fact that the probate homestead no longer vests title in the person for whom it is set apart. See Section 661(d) and Comment thereto.

Inventory and Appraisalment

Probate Code § 600 (amended)

SEC. 3. Section 600 of the Probate Code is amended to read:

600. Within three months after ~~his~~ appointment, or within such further time as the court or judge for reasonable cause may allow, the executor or administrator ~~must~~ *shall* file with the clerk of the court an inventory and appraisalment of the estate of the decedent which has come to ~~his~~ *the* possession or knowledge *of the executor or administrator*. A copy of the ~~same~~ *inventory and appraisalment* shall be transmitted by ~~such~~ *the* clerk to the county assessor if timely requested by ~~such~~ *the* assessor. The inventory ~~must~~ *shall* include ~~the homestead, if any, and~~ all the estate of the decedent, real and personal, particularly

specifying all debts, bonds, mortgages, deeds of trust, notes and other securities for the payment of money belonging to the decedent, with the name of each debtor, the date, the sum originally payable, the indorsements thereon, if any, with their dates, and a statement of the interest of the decedent in any partnership of which ~~he~~ *the decedent* was a member, to be appraised as a single item. It ~~must~~ *shall* include an account of all moneys belonging to the decedent. The inventory and appraisal shall be prepared in such form as to set down each item separately with the fair market value thereof at the time of the decedent's death in dollars and cents in figures opposite the respective items.

Comment. The provision of Section 600 that related to the declared homestead is deleted in recognition of the elimination of the survivorship right in the declared homestead. See Comment to Civil Code § 1265. The other changes in Section 600 are technical.

Probate Homestead

Probate Code § 660 (amended)

SEC. 4. Section 660 of the Probate Code is amended to read:

660. ~~The~~ *(a) Until the inventory is filed and for a period of 60 days thereafter or such other period as is ordered by the court for good cause, the decedent's surviving spouse and minor children are entitled to remain in possession of the ~~homestead~~ family dwelling, the wearing apparel of the family, the household furniture and other property of the decedent exempt from execution; ~~until the inventory is filed.~~ Thereupon,*

(b) Upon the filing of the inventory or at any subsequent time during the administration, the court, on petition therefor, may in its discretion set:

(1) Set apart to the surviving spouse, or, in case of his or her death, to the minor ~~child~~ or children of the decedent, all or any part of the property of the decedent exempt from execution ~~other than the dwelling; and must.~~

(2) Select and set apart ~~the one~~ homestead ~~selected by the spouses, or either of them, and recorded while both~~

were living, other than a married person's separate homestead, in the manner provided in this article.

Comment. Section 660 is revised to make establishment of a probate homestead permissive rather than mandatory. The factors to be used in guiding the court in the exercise of its discretion are prescribed in Section 664.

The provisions of Section 660 that related to the declared homestead are deleted in recognition of the elimination of the survivorship right in the declared homestead. See Comment to Civil Code § 1265.

Probate Code § 661 (amended)

SEC. 5. Section 661 of the Probate Code is amended to read:

661. ~~If no homestead has been selected, designated and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court, in the manner hereinafter provided, must select, designate and set apart and cause to be recorded a homestead~~ *(a) The homestead shall be set apart for the use of the one or more of the following persons:*

(1) The surviving spouse . and the

(2) The minor children of the decedent. ; or, if there be no surviving spouse, then for the use of the minor child or children,

(b) The homestead shall be selected out of the following property, giving first preference to the community and quasi-community property of, or property owned in common by, the decedent and the person entitled to have the homestead set apart:

(1) If the homestead is set apart for the use of the surviving spouse or for the use of the surviving spouse and minor children, out of community property or quasi-community property . or

(2) If the homestead is set apart for the use of the surviving spouse or for the use of the minor children, out of real property owned in common by the decedent and the person or persons entitled to have the homestead set apart, or if there be no community property or quasi-community property and no such property owned in common, then out

of the separate property of *the decedent or, if the decedent was not married at the time of death, out of property owned by the decedent.*

(c) The homestead shall not be selected out of property the right to possession of which is vested in a third person unless the third person consents thereto. As used in this subdivision, "third person" means a person whose right to possession of the property (1) existed at the time of the death of the decedent or came into existence upon the death of the decedent and (2) was not created by testate or intestate succession from the decedent.

(d) ~~If the property set apart is the separate property of the decedent, the court can~~ The property set apart as a homestead shall be set ~~it~~ apart only for a limited period, to be designated in the order, and in no case beyond the lifetime of the surviving spouse, or, as to a child, beyond its minority; ~~and, subject to such~~. Subject to the homestead right, the property of the decedent remains subject to administration including testate and intestate succession. The rights of the parties during the period for which the homestead is set apart are governed, to the extent applicable, by the Legal Estates Principal and Income Law, Chapter 2.6 (commencing with Section 731) of Title 2 of Part 1 of Division 2 of the Civil Code.

For the purposes of this section, the terms "quasi-community property" and "separate property" have the meanings given those terms in Section 1237.5 of the Civil Code.

Comment. The provisions of Section 661 that related to the declared homestead are deleted in recognition of the elimination of the survivorship right in the declared homestead. See Comment to Civil Code § 1265. The provision of Section 661 that related to recordation is continued in Section 1222. The substance of the provision of Section 661 that defined quasi-community and separate property is continued in Section 666.

Subdivision (a) permits the homestead to be set apart for minor children of a decedent even if there is a surviving spouse. This may occur, for example, where the minor children live apart from the surviving spouse or where the minor children are not

children of the surviving spouse. Subdivision (a) does not preserve the provision of former Civil Code Section 1265 that permitted the court to assign the homestead for a limited period to the "family" of the head of a family other than the surviving spouse and minor children. The decedent is not ordinarily legally obligated for the support of such persons. A decedent who wishes to provide for such persons may do so by an inter vivos instrument other than the declared homestead or by a testamentary disposition.

Subdivision (b) does not require that the homestead be selected out of real property. The homestead may be selected out of personal property such as a mobilehome. Subdivision (b) also codifies the rule that the court may select a homestead out of separate property of the decedent despite the availability of community or quasi-community property or property held in common by the decedent and person for whose use the homestead is set apart. See *Estate of Raymond*, 137 Cal. App.2d 134, 289 P.2d 890 (1955). However, the court must give preference to property other than the separate property of the decedent for selection as a probate homestead.

Subdivision (c) limits the property from which the homestead may be selected. A probate homestead may not be created on property of which a third person has the right to possession, whether by partial ownership, lease, or otherwise, without the person's consent. The probate homestead can affect the possessory rights only of testate and intestate successors of the decedent.

Subdivision (d) requires that the homestead be set apart only for a limited period, regardless whether the homestead is selected out of the separate property of the decedent or otherwise. This changes the rule of former Section 667, which provided for vesting of the homestead property in fee. Under subdivision (d), the property remains subject to administration so that upon termination of the homestead right title to the property of the decedent set apart as a homestead vests in the heirs or devisees. Any portion of the homestead that is the property of the person for whom the homestead was set apart remains vested in the person at the termination of the homestead right. The rights of the homestead recipients and remaindermen are governed by the Legal Estates Principal and Income Law. The court setting apart the homestead may vary the requirements of the law where appropriate to do so. See Civil

Code § 731.04. As to the rights of creditors during and after administration, see Section 663.

Probate Code § 662 (technical amendment)

SEC. 6. Section 662 of the Probate Code is amended to read:

662. When ~~such~~ *the* petition to select and set apart a homestead is filed, the clerk ~~must~~ *shall* set it for hearing by the court and give notice thereof for the period and in the manner required by ~~section~~ *Section 1200 of this code* .

Comment. The changes in Section 662 are technical.

Probate Code § 663 (repealed)

SEC. 7. Section 663 of the Probate Code is repealed.

~~663. If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, other than a married person's separate homestead, was selected from the community property or quasi/community property, or from the separate property of the person selecting or joining in the selection of the same, and if the surviving spouse has not conveyed the homestead to the other spouse by a recorded conveyance which failed to expressly reserve his homestead rights as provided by Section 1242 of the Civil Code, the homestead vests, on the death of either spouse, absolutely in the survivor.~~

~~If the homestead was selected from the separate property of the decedent without his consent, or if the surviving spouse has conveyed the homestead to the other spouse by a conveyance which failed to expressly reserve homestead rights as provided by Section 1242 of the Civil Code, the homestead vests, on death, in his heirs or devisees, subject to the power of the court to set it apart for a limited period to the family of the decedent as hereinabove provided. In either case the homestead is not subject to the payment of any debt or liability existing against the spouses or either of them, at the time of the death of either, except as provided in the Civil Code.~~

~~For the purposes of this section, the terms "quasi/community property" and "separate property" have~~

~~the meanings given those terms in Section 1237.5 of the Civil Code.~~

Comment. Section 663 is repealed in recognition of the elimination of the survivorship right in the declared homestead. See Comment to Civil Code § 1265.

Probate Code § 663 (added)

SEC. 8. Section 663 is added to the Probate Code, to read:

663. (a) Property of the decedent set apart as a homestead is liable for claims against the estate of the decedent, subject to the homestead right. The homestead right in property of the decedent is liable for claims that are secured by liens and encumbrances on the property at the time of the decedent's death but is exempt to the extent of the dwelling exemption as to any claim that would have been subject to a dwelling exemption at the time of the decedent's death.

(b) The homestead right in the property of the decedent is not liable for claims against the person for whose use the homestead is set apart.

(c) Property of the decedent set apart as a homestead is liable for claims against the testate or intestate successors of the decedent or other successors to the property after administration, subject to the homestead right.

Comment. Subdivision (a) of Section 663 states the rules governing liability of homestead property for debts of the decedent. The first sentence makes clear that such property may be used to satisfy debts of the decedent, but any sale is subject to the homestead right of occupancy by the person for whose use the homestead is set apart. This codifies the rule of *Estate of Tittel*, 139 Cal. 149, 72 P. 909 (1903). The second sentence recognizes the common law rule that the homestead does not affect prior liens and encumbrances. See, e.g., *Estate of McCauley*, 50 Cal. 544 (1875); *Estate of Huelsman*, 127 Cal. 275, 59 P. 776 (1899). However, the court may select as a homestead property not subject to liens and encumbrances or property whose liens and encumbrances will be discharged in probate. See Section 664 (discretion of court). Preexisting liens and encumbrances on the property may be satisfied out of the homestead right. If the property would have been exempt from

enforcement of a claim secured by a lien or encumbrance at the time of the decedent's death, however, the homestead recipient may claim a dwelling exemption for the homestead right.

Subdivision (b) states the rule governing liability of the homestead right for debts of the person for whose use the homestead is set apart. Subdivision (b) creates an absolute exemption for the homestead right, both as to prior and subsequently incurred debts, regardless of liens created on the homestead right. This reverses the rule of *MacQuiddy v. Rice*, 47 Cal. App.2d 755, 118 P.2d 853 (1941). Subdivision (b) does not preclude a creditor of the person for whose use the homestead is set apart from reaching any interest in the property the person may have apart from the homestead right; this may occur where the homestead was selected out of community property or of property held in common by the decedent and person for whose use the homestead is set apart. In such a situation, the exemption from execution for a dwelling may be available to the person for whose use the homestead is set apart to protect his or her property interest. See, *e.g.*, Civil Code § 1240; Code Civ. Proc. § 690.31.

Subdivision (c) states the rule governing liability of homestead property for debts of the heirs or devisees or other persons who may have acquired the property through administration. The homestead property is subject to administration and devolves as any other property, subject to the right of use of the homestead by the persons for whose use it is set apart. See Section 661 (d). Under subdivision (c) of Section 663, the remainder interest but not the homestead right is subject to claims of creditors.

Probate Code § 664 (repealed)

SEC. 9. Section 664 of the Probate Code is repealed.

~~664. If the homestead so selected and recorded, as provided in Section 663, is returned in the inventory appraised at not over the amount of the homestead exemption, as provided in the Civil Code and in effect at the date of death of the decedent, or was previously appraised as provided in the Civil Code and such appraised value did not exceed that amount, the court shall order it set apart to the persons in whom title is vested by the preceding section. If it is returned in the inventory appraised at more than that amount, the inheritance tax referee must, before he makes his return, ascertain and~~

appraise the value of the homestead at the time the same was selected, and if such value exceeds that amount, or if the homestead was appraised as provided in the Civil Code and such appraised value exceeded that amount, he must determine whether the premises can be divided without material injury, and if he finds that they can be thus divided, he must measure and set apart to the parties entitled thereto such portion of the premises, including the dwelling house, as will equal in value that amount, and make report thereof, giving an exact description of the portion set apart as a homestead.

Comment. Section 664 is repealed in recognition of the elimination of the survivorship right in the declared homestead. See *Comment to Civil Code* § 1265.

Probate Code § 664 (added)

SEC. 10. Section 664 is added to the Probate Code, to read:

664. In selecting and setting apart the homestead, the court shall consider the needs of the surviving spouse and minor children, the liens and encumbrances on the property, the claims of creditors, the needs of the heirs or devisees of the decedent, and the intent of the decedent with respect to the property in the estate and the estate plan of the decedent as expressed in inter vivos and testamentary transfers or by other means. The court, in light of the foregoing and other relevant considerations as determined by the court in its discretion, shall select as a homestead the most appropriate property available that is suitable for use as a dwelling and shall set apart in addition to the dwelling such adjoining property as appears reasonable for such a term and upon such conditions (including but not limited to assignment by the homestead recipient of other property to the heirs or devisees of the property set apart as a homestead) as appear proper.

Comment. Section 664 codifies the principle that the court has broad discretion in selecting the homestead and may take into account a wide variety of factors in exercising its discretion. See, *e.g.*, *Estate of Claussenius*, 96 Cal. App.2d 600, 216 P.2d 485 (1950); *Estate of Barkley*, 91 Cal. App. 388, 267 P. 148 (1928).

Section 664 expressly authorizes the court to condition the homestead on any terms that appear proper to the court. The court may select the homestead out of the separate property of the decedent but must give a preference to community or quasi-community property of or other property held in common by the decedent and the person for whose use the homestead is set apart. See Section 661 and Comment thereto. The court must select the most appropriate property as the homestead and is not limited to the existing dwelling. Under Section 664, unlike former Sections 664-666, there is no appraisal and division procedure required. The court will have available the appraised value of all the property returned in the inventory, and may select accordingly. The court is not limited to existing lots or parcels, but must set apart only so much of the property as is reasonable under the circumstances of the case. This supersedes the authority under former Section 664 to partition declared homestead property having surplus value.

Probate Code § 665 (repealed)

SEC. 11. Section 665 of the Probate Code is repealed.

~~665. If the inheritance tax referee finds that the value of the premises at the time of their selection exceeded the amount referred to in Section 664, and that they cannot be divided without material injury, he must report such finding, and thereafter the court may make an order for the sale of the premises and the distribution of the proceeds to the parties entitled thereto.~~

Comment. Section 665 is repealed in recognition of the elimination of the survivorship right in the declared homestead. See Comment to Civil Code § 1265.

Probate Code § 665 (added)

SEC. 12. Section 665 is added to the Probate Code, to read:

665. (a) The court may in its discretion by order modify the term or conditions of the homestead right or terminate the homestead right at any time prior to entry of a final decree of distribution of the decedent's estate if to do so appears appropriate under the circumstances of the case.

(b) A court order under this section shall be made upon motion of any of the following parties and notice to the others:

- (1) The person for whose use the homestead is set apart.
- (2) The testate or intestate successors of the decedent or other successors to the property set apart as a homestead.
- (3) Persons having claims secured by liens or encumbrances on the property set apart as a homestead.

Comment. Section 665 gives the court jurisdiction to modify the homestead until the entry of the final decree of distribution in recognition of the possibility of changed circumstances.

Probate Code § 666 (repealed)

SEC. 13. Section 666 of the Probate Code is repealed.

~~666. When the report of the inheritance tax referee is filed, the clerk shall set the same for hearing by the court and give notice thereof for the period and in the manner required by Section 1200 of this code. If the court is satisfied that the report is correct, it must be confirmed, otherwise rejected. In case the report is rejected, the court may appoint a new referee to examine and report upon the homestead, and similar proceedings may be had for the confirmation or rejection of his report, as upon the first report.~~

Comment. Section 666 is repealed in recognition of the elimination of the survivorship right in the declared homestead. See Comment to Civil Code § 1265.

Probate Code § 666 (added)

SEC. 14. Section 666 is added to the Probate Code, to read:

666. As used in this article:

(a) "Quasi-community property" means personal property, wherever situated, and real property situated in this state, heretofore or hereafter acquired in any of the following ways:

- (1) By the decedent while domiciled elsewhere which would have been community property if the decedent had been domiciled in this state at the time of the acquisition of the property.
- (2) In exchange for real or personal property, wherever situated, which would have been community property if

the decedent had been domiciled in this state at the time of the acquisition of the property so exchanged.

(b) "Separate property" does not include quasi-community property.

Comment. Section 666 continues the substance of the former last paragraph of Section 661, which incorporated by reference former Civil Code Section 1237.5. Unlike former Civil Code Section 1237.5, however, Section 666 applies to personal property as well as real property and is limited to property acquired by the decedent. The homestead may be selected out of personal property such as a mobilehome.

Probate Code § 667 (repealed)

SEC. 15. Section 667 of the Probate Code is repealed.

~~667. When property, other than a homestead selected and recorded during the lifetime of the decedent, is set apart to the use of the family, in accordance with the provisions of this article, such property, if the decedent left a surviving spouse and no minor child, is the property of such spouse; if the decedent left also a minor child or children, one-half of such property belongs to the surviving spouse and the remainder to the child or in equal shares to the children; if there is no surviving spouse, the whole belongs to the minor child or children.~~

Comment. Former Section 667 is superseded by Section 661 (d), which permits the homestead to be set apart only for a limited period, regardless of the character of the property from which the homestead is selected.

Probate Code § 668 (repealed)

SEC. 16. Section 668 of the Probate Code is repealed.

~~668. A person succeeding by purchase or otherwise to the interest of a surviving spouse in a homestead which has been declared in the lifetime of the decedent, shall have the same right to apply for an order setting aside the homestead to him as is conferred by law on the person whose interest he has acquired.~~

Comment. Section 668 is repealed in recognition of the elimination of the survivorship right in the declared homestead. See Comment to Civil Code § 1265.

Payment of Claims

Probate Code § 735 (repealed)

SEC. 17. Section 735 of the Probate Code is repealed.

~~735. If there are subsisting liens or encumbrances on the homestead, and the funds of the estate are adequate to pay all claims against the estate, the claims secured by such liens and encumbrances, whether filed or presented or not, if known or made known to the executor or administrator, must be paid out of such funds. If the funds of the estate are not sufficient for that purpose, the claims so secured shall be paid proportionately with other claims allowed, and the liens or encumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment.~~

Comment. Former Section 735 was limited to the survivorship right in a declared homestead. See, *e.g.*, *McGahey v. Forrest*, 109 Cal. 63, 41 P. 817 (1895) (predecessor statute). It is repealed in recognition of the elimination of the survivorship right in the declared homestead. See Comment to Civil Code § 1265.

Notices

Probate Code § 1200 (amended)

SEC. 18. Section 1200 of the Probate Code, as amended by Section 106 of Chapter 730 of the Statutes of 1979, is amended to read:

1200. Upon the filing of the following petitions:

(1) A petition under Section 641 of this code for the setting aside of an estate;

(2) A petition to set apart a homestead or exempt property;

(3) A petition relating to the family allowance filed after the return of the inventory;

(4) A petition for leave to settle or compromise a claim against a debtor of the decedent or a claim against the estate or a suit against the executor or administrator as such;

- (5) A petition for the sale of stocks or bonds;
- (6) A petition for confirmation of a sale or a petition to grant an option to purchase real property;
- (7) A petition for leave to enter into an agreement to sell or give an option to purchase a mining claim or real property worked as a mine;
- (8) A petition for leave to execute a promissory note or mortgage or deed of trust or give other security;
- (9) A petition for leave to lease or to exchange property, or to institute an action for the partition of property;
- (10) A petition for an order authorizing or directing the investment of money;
- ~~(11) A report of appraisers concerning a homestead;~~
- ~~(12) (11)~~ An account of an executor or administrator or trustee;
- ~~(13) (12)~~ A petition for partial or ratable or preliminary or final distribution;
- ~~(14) (13)~~ A petition for the delivery of the estate of a nonresident;
- ~~(15) (14)~~ A petition for determination of heirship or interests in an estate;
- ~~(16) (15)~~ A petition of a trustee for instructions;
- ~~(17) (16)~~ A petition for the appointment of a trustee;
- ~~(18) (17)~~ Any petition for letters of administration or for probate of will, or for letters of administration-with-will annexed, which is filed after letters of administration or letters testamentary have once been issued; and in all cases in which notice is required and no other time or method is prescribed by law or by court or judge, the clerk shall set the same for hearing by the court and shall give notice of the petition or application ~~or report~~ or account by causing a notice of the time and place of hearing thereof to be posted at the courthouse of the county where the proceedings are pending, at least 10 days before the day of hearing, giving the name of the estate, the name of the petitioner and the nature of the application, referring to the petition for further particulars, and stating the time at which the application will be heard.

At least 10 days before the time set for the hearing of such petition; *or* account ~~or report~~, the petitioner or person

filing the account ~~or desiring the confirmation of a report of appraisers, must~~ *shall* cause notice of the time and place of hearing thereof to be mailed to the executor or administrator, ~~when he is~~ *if* not the petitioner, to any coexecutor or coadministrator not petitioning, and to all persons (or to their attorneys, if they have appeared by attorney), who have requested notice or who have given notice of appearance in the estate in person or by attorney, as heir, devisee, legatee or creditor, or as otherwise interested, addressed to them at their respective post office addresses given in their request for special notice, if any, otherwise at their respective offices or places of residence, if known, and if not, at the county seat of the county where the proceedings are pending, or to be personally served upon such person.

Proof of the giving of notice must be made at the hearing; and if it appears to the satisfaction of the court that ~~said the~~ notice has been regularly given, the court shall so find in its order, and ~~such the~~ order, when it becomes final, ~~shall be~~ *is* conclusive upon all persons.

This section does not apply to proceedings under Division 4 (commencing with Section 1400). When a provision of Division 4 applies the provisions of this code applicable to executors or administrators to proceedings under Division 4, a reference to this section in the provisions applicable to executors or administrators shall be deemed to be a reference to Chapter 3 (commencing with Section 1460) of Part 1 of Division 4.

Comment. Section 1200 is amended to reflect the repeal of former Sections 664 through 666 relating to the report of appraisal of homestead property.

Probate Code § 1202 (amended)

SEC. 19. Section 1202 of the Probate Code is amended to read:

1202. At any time after the issuance of letters testamentary or of administration, any person interested in the estate, whether as heir, devisee, legatee, creditor, beneficiary under a trust, or as otherwise interested, or the State Controller, may, in person or by attorney, serve upon

the executor or administrator or trustee, or upon the attorney for ~~such~~ *the* executor, administrator, or trustee, and file with the clerk of the court where the proceedings are pending, with a written admission or proof of ~~such~~ service, a written request, stating that ~~he~~ *the person* desires special notice of the filing of any or all of the petitions ; *or* accounts ~~or reports~~ mentioned in Section 1200 ~~of this code~~ , and giving the post office address of the person making the ~~same~~ ; ~~or his request or the person's~~ attorney. Thereafter ~~such~~ *the person shall be* is entitled to notice as provided in ~~said~~ Section 1200.

Comment. Section 1202 is amended to reflect the repeal of former Sections 664 through 666 relating to the report of appraisal of homestead property.

Appeals

Probate Code § 1240 (amended)

SEC. 20. Section 1240 of the Probate Code is amended to read:

1240. An appeal may be taken from an order ~~granting or the refusal to make an order~~:

(a) *Granting* or revoking letters testamentary or of administration ; ~~removing or refusing to remove~~ .

(b) *Removing* a trustee of a testamentary trust ; ~~admitting~~ .

(c) *Admitting* a will to probate or revoking the probate thereof ; ~~setting~~ .

(d) *Setting* aside an estate claimed not to exceed twenty thousand dollars (\$20,000) in value ; ~~setting~~ .

(e) *Setting* apart property as a homestead or claimed to be exempt from execution ~~confirming a report of an appraiser or appraisers in setting apart a homestead~~ ; ~~granting~~ .

(f) *Granting* or modifying a family allowance ; ~~directing~~ .

(g) *Directing* or authorizing the sale or conveyance or confirming the sale of property ; ~~directing~~ .

(h) *Directing* or authorizing the granting of an option to purchase real property ; ~~adjudicating~~ .

(i) *Adjudicating* the merits of any claim under Sections 851.5, 852 or 853 ; ~~allocating~~ .

(j) *Allocating* debts ~~of~~ under Section 980 ; ~~settling~~ .

(k) *Settling* an account of an executor or administrator or trustee, or instructing or appointing a trustee ; ~~instructing~~ .

(l) *Instructing* or directing an executor or administrator ; ~~directing~~ .

(m) *Directing* or allowing the payment of a debt, claim, legacy or attorney's fee ; ~~fixing~~ .

(n) *Fixing*, directing or allowing payment of a trustee's compensation ; ~~determining~~ .

(o) *Determining* heirship or the persons to whom distribution should be made or trust property should pass ; ~~distributing~~ .

(p) *Distributing* property ; ~~determining~~ .

(q) *Determining* that property is community property passing or belonging to the surviving spouse pursuant to Section 655 ; ~~refusing to make any order heretofore mentioned in this section~~ ; ~~fixing~~ .

(r) *Fixing* an inheritance tax or determining that none is due ; ~~or authorizing~~ .

(s) *Authorizing* a personal representative to invest or reinvest any surplus moneys pursuant to Section 584.5.

Comment. Section 1240 is amended to reflect the repeal of former Sections 664 through 666 relating to the report of appraisal of homestead property and to make nonsubstantive drafting improvements.

Inheritance Tax

Revenue & Taxation Code § 13621 (repealed)

SEC. 21. Section 13621 of the Revenue and Taxation Code is repealed.

~~13621. The vesting in the surviving spouse or any other person of any property constituting a homestead created pursuant to the Civil Code is a transfer subject to this part.~~

Comment. Section 13621 is repealed in recognition of the elimination of the survivorship right in the declared homestead. See Comment to Civil Code § 1265.

Transitional Provision

SEC. 22. (a) A homestead declared and recorded prior to the effective date of this act pursuant to Sections 1237 through 1304, inclusive, of the Civil Code shall, on the effective date, cease to have effect for the purpose of survivorship rights.

(b) A homestead set apart by order of the court prior to the effective date of this act pursuant to Sections 660 through 668, inclusive, of the Probate Code remains vested as provided therein and is a transfer subject to Part 8 (commencing with Section 13301) of the Revenue and Taxation Code.

Severability Clause

SEC. 23. If any provision of this act or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

(437-450 blank)