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Homestead Legislation in California†

Charles W. Adams*

The legislature is required by the California Constitution to provide legislation to protect a portion of the homestead of all heads of families from forced sale.¹ When homestead legislation was first enacted in California in 1851,² it was the subject of great controversy.³ Another controversy exists today as the California Legislature has recently attempted to extend the protection of homestead legislation to larger numbers of families.⁴ This article will survey the laws in California that presently provide homestead protection and will make proposals for further reform.

The purpose of homestead legislation was stated recently in *Swearingen v. Byrne*⁵ as follows: "The broad purpose of the homestead law is to promote the security of the home, and to place such property beyond the reach of the consequences of the home owner's economic misfortune."⁶ In

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1. CAL. CONST. art. XX, §1.5.

2. See CAL. STATS. 1851, c. 31, §§1-11, at 296-98.

3. See *Taylor v. Madigan*, 53 Cal. App. 3d 943, 955-61, 126 Cal. Rptr. 376, 384-88 (1975). This case contains an excellent discussion of the history of the homestead law.

4. Cf. CAL. STATS. 1977, c. 305, §§1-10, at —; CAL. STATS. 1976, c. 1000, §§1-4, at 2368-73; CAL. STATS. 1974, c. 1251, §§1-6, at 2704-11.

5. 67 Cal. App. 3d 580, 136 Cal. Rptr. 736 (1977).

6. 67 Cal. App. 3d at 584, 136 Cal. Rptr. at 738, quoting *Schoenfeld v. Norberg*, 267 Cal. App. 2d 496, 498, 72 Cal. Rptr. 924, 926 (1968).

addition to protecting the homestead from the claims of creditors, the declared homestead law also protects the family by restricting the conveyance of the homestead by one spouse without the consent of the other⁷ and by providing for the descent of the homestead to the surviving spouse after the death of one of the spouses.⁸

Three distinct statutory schemes presently provide homestead protection.⁹ The law of declared homesteads is found at Sections 1237 to 1304 in the Civil Code. Sections 660 through 668 of the Probate Code provide for the disposition of the homestead on the death of its owner and the designation of a probate homestead from a decedent's estate if no declared homestead exists. Recently the California Legislature enacted Code of Civil Procedure Section 690.31, which requires a creditor to give notice to a debtor of the debtor's right to claim an exemption from execution at a hearing before the creditor can obtain a writ of execution against a dwelling house. Because these laws were not written together, significant differences exist between them. It would be desirable to eliminate these differences so that homestead protection would be provided by a single consistent statutory system.¹⁰

THE DECLARED HOMESTEAD

A. Selection of the Declared Homestead

Civil Code Section 1237 provides that a homestead consists of the dwelling house¹¹ in which the homestead claimant resides plus the outbuild-

7. CAL. CIV. CODE §1242.

8. See CAL. CIV. CODE §1265.

9. For an excellent survey of homestead legislation in the United States, see S. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION 302-22 (2d ed. 1975); Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289 (1950).

Useful references on California's declared homestead law include: 5 B. WITKIN, CALIFORNIA PROCEDURE, *Enforcement of Judgment* §§29-49 (2d ed. 1971); 25 CAL. JUR. 2d *Homesteads* §§1-50 (1955); Comment, *Creation of the Homestead and Its Requirements*, 26 CALIF. L. REV. 241 (1938); Comment, *The Nature of the Homestead Right and its Termination*, 26 CALIF. L. REV. 466 (1938).

See Healey, *Disposition of the Homestead Upon Divorce or Death*, 29 L.A.B. BULL. 131, 169 (1954), for a good discussion of the disposition of the declared homestead and the designation of a probate homestead. See also Comment, *The Probate Homestead in California*, 53 CALIF. L. REV. 655 (1965).

10. The need for such a consistent statutory system was noted recently in *Krause v. Superior Court*, 78 Cal. App. 3d 499, 144 Cal. Rptr. 194 (1978). The *Krause* court said:

Undoubtedly many persuasive arguments could be presented that a single procedure applicable to both the homestead exemption and the dwelling house exemption would be desirable and that the procedures prescribed by sections 674(c) and 690.31 afford debtors more protection than the procedures prescribed by Civil Code sections 1245 through 1259. (But cf., Civ. Code §§1253, 1255). We are cognizant, too, that the enactment of sections 674(c) and 690.31 and their interrelation with Civil Code sections 1245 through 1259 give rise to a number of troublesome questions most of which are not resolved by today's decision. (See Miller & Starr, *Current Law of California Real Estate*, vol. 3 (Rev. ed. 1977) §16:50, pp. 89-98.) These matters, however, bear not so much on our determination of the question before us as the urgent need for further consideration and action by the Legislature.

78 Cal. App. 3d at 508, 144 Cal. Rptr. at 199.

11. Although property must be used as the declarant's home to qualify as a homestead, some use of the property for other purposes is permitted. *Bodden v. Community Nat'l Bank*, 271 Cal. App. 2d 432, 435, 76 Cal. Rptr. 278, 280 (1969) (homestead consisted of two houses on

ings and the land on which they are situated. A homestead must be claimed by the filing of a declaration of homestead in the office of the recorder of the county where the homestead is located.¹² A homestead may be selected from any freehold title, interest, or estate that vests the immediate right of possession in the homestead declarant or the declarant's spouse,¹³ even if the right of possession is not exclusive.¹⁴ The amount of the homestead exemption is \$30,000 over and above all liens and encumbrances if the homestead is selected by a head of a family or a person 65 years of age or older, and \$15,000 for other persons.¹⁵

Since a homestead is subject to judgment liens that were recorded in the county where the property is located before the declaration of homestead was filed, a homestead is not exempt until a declaration of homestead is recorded.¹⁶ The requirement that a property owner file a declaration of homestead before the owner can receive the protection of the homestead law was not found in the first homestead law enacted in 1851.¹⁷ The California Supreme Court noted this omission in *Cook v. McChristian*¹⁸ and the homestead law was amended in 1860 to require that a declaration of homestead be recorded before the recordation of an abstract of judgment in order for the homestead to be protected from the judgment lien.¹⁹

The recording requirement has been criticized because it denies homestead protection to those debtors who do not record declarations of homestead because they are unaware of the homestead law.²⁰ The constitutionality of the recording requirement was unsuccessfully challenged recently in *Taylor v. Madigan*,²¹ and the California Legislature has enacted a dwelling house exemption law to provide many of the benefits of homestead protection to debtors who fail to record declarations of homestead in time.²² The major benefit of the recording requirement is that it facilitates chain of title searches. Without it a title searcher could not determine whether a judgment lien attached to real property unless the title searcher went beyond the public

one lot; the declarant lived in one and rented the other); *Phelps v. Loop*, 64 Cal. App. 2d 332, 333-34, 148 P.2d 674, 675-76 (1944) (18-unit apartment building was a homestead where declarant lived in one unit).

12. CAL. CIV. CODE §§1262-1264.

13. If the spouses are legally separated, they may each claim a married person's separate homestead. CAL. CIV. CODE §§1300-1304.

14. Property in which a claimant holds an equitable interest may be selected as a homestead. *Alexander v. Johnson*, 92 Cal. 514, 519, 28 P. 593, 594 (1891). Property held in joint tenancy or tenancy in common may also be selected as a homestead. *Estate of Kachigan*, 20 Cal. 2d 787, 790-91, 128 P.2d 865, 867 (1942); *Bradley v. Scully*, 255 Cal. App. 2d 101, 105, 62 Cal. Rptr. 834, 837 (1967).

15. CAL. CIV. CODE §1260.

16. CAL. CIV. CODE §1241(1).

17. See *Taylor v. Madigan*, 53 Cal. App. 3d 943, 954-56, 126 Cal. Rptr. 376, 383-84 (1975); CAL. STATS. 1851, c. 31, §§1-11, at 296-98.

18. 4 Cal. 24, 27 (1854).

19. See CAL. STATS. 1860, c. 320, §1, at 311.

20. See Rifkind, *Archaic Exemption Laws*, 39 CAL. ST. B.J. 370, 371 (1964).

21. 53 Cal. App. 3d 943, 961, 126 Cal. Rptr. 376, 387-88 (1975).

22. See CAL. CIV. PROC. CODE §690.31.

records to find out if the real property constituted a homestead at the time the abstract of judgment was recorded.

Thus, the recording requirement is necessary if the homestead law is going to protect homesteads from judgment liens and title to homesteads is to be determinable from county records; on the other hand, the present effect of the recording requirement is to deny the protection of the homestead laws to those who are not aware of them. This conflict could be resolved in a number of ways. The simplest solution would be to amend the homestead law so that it would allow a debtor to claim a homestead after an abstract of judgment is recorded, but before the execution sale, by recording a declaration of homestead. The claim of homestead would then dissolve any pre-existing judgment liens to the extent of the exemption.²³ Any writ of execution levied against a dwelling house would be required to be accompanied by a notice (in both English and Spanish) to the debtor of the right to claim the homestead under this scheme.²⁴ The debtor could record a declaration of homestead and discharge pre-existing judgment liens as long as the debtor resided on the property; however, if the debtor transferred the property before claiming the homestead, any pre-existing judgment liens could be enforced against the transferee.²⁵

Alternatively, the homestead law could be changed so that the homestead was exempt from execution, but not from judgment liens that would attach to the homestead and would be satisfied whenever the property was transferred by the debtor.²⁶ This would seriously impair the protection afforded by homestead laws and would produce hardships for debtors who change residences frequently. Civil Code Sections 1257 and 1265a of the present homestead law protect the proceeds of a sale of a homestead from execution for six months after the sale. In addition, under Section 1265a a debtor may select another homestead within six months after a sale of an earlier homestead and the later homestead is treated as dating from the time of recordation of the earlier homestead. These provisions reflect the sound legislative policy of permitting a debtor to change residences in our highly mobile society without losing the protection of the homestead laws. It would be contrary to this policy to allow a judgment lien to attach to the home-

23. The claiming of a homestead after execution is permitted in a number of states. *E.g.*, OR. REV. STAT. §23.270 (1975); UTAH CODE ANN. §28-1-10 (1953); WIS. STAT. ANN. §815.21 (West 1977). See also text accompanying notes 153-155 *infra*.

24. The notice required should be similar to that provided for in Section 690.31 of the California Code of Civil Procedure.

25. Oregon and Wisconsin have procedures for a homestead claimant to discharge judgment liens on the homestead if its value is less than the exempt amount. *See* OR. REV. STAT. §23.280 (1975); WIS. STAT. ANN. §815.20(2) (West 1977). By following these procedures, a homestead claimant can insure that a judgment lienholder cannot levy on the homestead in the future when its value may rise above the homestead exemption.

26. This is analogous to California Code of Civil Procedure Section 674(c) which now provides that a dwelling house that is exempt from execution under California Code of Civil Procedure Section 690.31 is nevertheless subject to judgment liens.

stead, even if the homestead were exempt from execution as long as the debtor owned it.

A third alternative would be to provide that a claim of a homeowner's or veteran's property tax exemption²⁷ would also effect a selection of a homestead.²⁸ The claims of homeowner's or veteran's exemptions are public records and are therefore easily accessible to a title searcher. The standards for entitlement to a homeowner's or veteran's exemption are similar to those of a homestead; both require the claimant to reside on the claimed property.²⁹

A variation of this proposal would be to provide a place where a homestead could be claimed on the forms for claiming a homeowner's or veteran's property tax exemption. In addition, information about the homestead laws could be supplied (in both English and Spanish) with the homeowner's or veteran's exemption forms. The criticism that present homestead laws afford protection only to those who are aware of the protection they offer would be greatly mollified if a larger number of homeowners were informed of the homestead laws and could conveniently select a homestead.

B. Execution or Forced Sale of a Homestead

A homestead is subject to execution or forced sale on account of mechanics' and other similar types of liens, consensual liens, and judgment liens recorded prior to the declaration of homestead.³⁰ In addition, Civil Code Sections 1245 to 1259 provide a procedure³¹ for a creditor to execute on or attach³² a homestead if the value of the homestead, over and above all liens

27. CAL. REV. & TAX CODE §§205.5, 218.

28. A possible advantage of giving homeowners an automatic homestead exemption when they claim a homeowner's exemption is that the claim of a homestead exemption would not affect their ability to obtain loans. Some lenders require borrowers to state whether they have claimed a homestead on their loan forms.

29. One distinction between entitlement to a homestead and a homeowner's exemption is that a homestead remains valid until abandoned, while a homeowner's exemption is valid only so long as the homeowner continues to occupy the home as his principle place of residence. These and other differences, however, could be removed by modifying either the homestead or homeowner's exemption laws. On the other hand, it may be undesirable to force the homestead and homeowner's exemption laws into the same mold, because they were enacted for different purposes.

30. CAL. CIV. CODE §1241.

31. The procedure provided for in California Civil Code Sections 1245 through 1259 is as follows: The creditor first levies a writ of execution on the homestead in order to create a lien on the excess over the homestead exemption. Within 60 days after levy of execution, the creditor must file an application with the court clerk for the appointment of appraisers of the homestead. If the creditor does not make such an application within the 60-day period, his execution lien ceases and he cannot enforce his judgment by levy of another execution on the homestead. Within 90 days of the filing of the application, the creditor must give the debtor notice of a hearing for the appointment of three appraisers. Next, within 15 days after their appointment the appraisers are required to report to the court as to the value of the homestead, the amount of liens and encumbrances, and whether it can be divided without material injury. If the value of the homestead, over and above all liens and encumbrances, exceeds the homestead exemption and the homestead cannot be divided without material injury, the court must order an execution sale. The proceeds from the sale are then distributed in accordance with California Civil Code Section 1256.

32. Southern Pac. Milling Co. v. Milligan, 15 Cal. 2d 729, 730-31, 104 P.2d 654, 654-55 (1940); Marelli v. Keating, 208 Cal. 528, 530, 282 P. 793, 793-94 (1929).

and encumbrances, exceeds the amount of the homestead exemption.³³

Although a creditor may utilize the procedure in Civil Code Sections 1245 to 1259 to obtain an execution or attachment lien on the excess over the homestead exemption, a judgment lien does not attach to the excess because property subject to a prior homestead declaration is totally exempt from judgment liens.³⁴ The rule that a judgment lien does not attach to the excess over the homestead exemption should be changed, because it permits other creditors to gain priority with respect to the excess value over a judgment creditor who does not promptly obtain an execution lien. The present law thus encourages judgment creditors to execute as soon as possible so that the debtor cannot convey or encumber the homestead in order to prevent the judgment creditor from reaching the excess value. The homestead should be exempt from judgment liens only to the extent of the homestead exemption.

The present homestead law treats a homestead held by a husband and wife as joint tenants quite differently from a community property homestead. In *Schoenfeld v. Norberg*,³⁵ the court held that in order for a joint tenancy homestead to be sold at an execution sale, the value of the debtor's share in the property must exceed the sum of the homestead exemption and the total of the joint encumbrances on the property.³⁶ On the other hand, a community property homestead may be sold if the total value of the property—not merely the debtor's share of the property—exceeds the sum of the homestead exemption and the encumbrances on the property.³⁷ The *Schoenfeld* court recognized that its holding placed severe limitations on the situations in which a creditor could reach the excess over the homestead exemption when a homestead is held in joint tenancy. It noted that if a debtor held a one-half interest in a homestead, a sale could not be ordered if a joint encumbrance exceeded one-half the value of the property.³⁸ Nevertheless, the court decided that it was compelled to reach its conclusion by the language of the statute.³⁹ This language should be changed so that a judgment creditor could execute on a homestead if its total value exceeded the sum of the homestead exemption and the encumbrances, whether the homestead was held in joint tenancy or as community property.

33. California Civil Code Sections 1245 through 1259 were not impliedly repealed by the enactment of Code of Civil Procedure Section 690.31 and the procedure found in Civil Code Sections 1245 through 1259 is still applicable to execution on declared homesteads. *Krause v. Superior Court*, 78 Cal. App. 3d 499, 144 Cal. Rptr. 194 (1978).

34. *E.g.*, *Boggs v. Dunn*, 160 Cal. 283, 285-87, 116 P. 743, 744-45 (1911); *Swearingen v. Byrne*, 67 Cal. App. 3d 580, 585, 136 Cal. Rptr. 736, 739 (1977).

35. 11 Cal. App. 3d 755, 90 Cal. Rptr. 47 (1970).

36. *Id.* at 764-65, 90 Cal. Rptr. at 53.

37. *See id.* at 760, 90 Cal. Rptr. at 49.

38. *Id.* at 766, 90 Cal. Rptr. at 54.

39. *Id.* at 764-65, 90 Cal. Rptr. at 53.

Civil Code Section 1256 provides for the allocation of the proceeds from an execution sale of a homestead in the following order of priority: first, to the discharge of all liens and encumbrances; second, the amount of the homestead exemption is distributed to the homestead claimant; third, to the satisfaction of the execution; and fourth, the balance is distributed to the homestead claimant. A too literal interpretation of this section would permit creditors holding liens or encumbrances that are subsequent to the judgment creditor's execution lien to obtain priority over the judgment creditor.⁴⁰ Fortunately, the courts that have dealt with this problem have given the judgment creditor's execution lien priority over subsequent liens, encumbrances and conveyances.⁴¹ The erroneous statutory language, however, should be corrected.

C. *The Homestead Exemption in Bankruptcy*

One of the most important aspects of the homestead law is the application of the homestead exemption in bankruptcy. Sections 6 and 70a of the Bankruptcy Act⁴² provide bankrupts with those exemptions that are prescribed by federal or state law.⁴³ In order to claim the homestead exemption in a bankruptcy proceeding a debtor must have established a right to the exemption prior to the date of bankruptcy.⁴⁴ Since a debtor in California must record a declaration of homestead before the debtor is entitled to a homestead exemption,⁴⁵ the debtor may not claim a homestead exemption in bankruptcy unless the debtor has recorded a declaration of homestead prior to the date of bankruptcy.⁴⁶ In addition to satisfying the state law requirements for entitlement to a homestead exemption, the debtor must also comply with the federal bankruptcy law procedure for claiming an exemption by stating a claim to the homestead exemption in the schedule of property that is filed in the bankruptcy proceeding.⁴⁷

A homestead will be exempt in bankruptcy even if it was acquired and the declaration of homestead was recorded on the eve of bankruptcy, so long as

40. CAL. CIV. CODE §1256.

41. *Marelli v. Keating*, 208 Cal. 528, 530, 282 P. 793, 794 (1929) (dictum); *Lean v. Giveňs*, 146 Cal. 739, 743, 81 P. 128, 129 (1905).

42. 11 U.S.C. §§ 24, 110(a) (1976).

43. A new Bankruptcy Law was pending before Congress at time of publication. Both the House of Representatives version of the law, H.R. 8200, 95th Cong., 1st Sess. (1977), and the Senate version, S. 2266, 95th Cong., 1st Sess. (1977), provide for exemptions for property that is exempt under federal, state or local law. The new Bankruptcy Law would also provide an alternative exemption for a debtor's interest, not to exceed \$10,000 in value, in real property that the debtor or his family used as a residence. Since this is less than the amount of the homestead exemption in California, the new Bankruptcy Law would have no effect on the amount of the homestead exemption that could be claimed in a bankruptcy proceeding in California.

44. *White v. Stump*, 266 U.S. 310 (1924); 1A J. MOORE, *COLLIER ON BANKRUPTCY Exemption of Bankrupts* ¶ 6.07, at 825-26 (14th ed. 1976) [hereinafter cited as J. MOORE].

45. See CAL. CIV. CODE §1265.

46. *White v. Stump*, 266 U.S. 310 (1924); J. MOORE, *supra* note 44, ¶ 6.07, at 825-26.

47. BANKR. RULE 403; J. MOORE, *supra* note 44, ¶ 6.19[1], at 903-05.

this was done without fraudulent intent.⁴⁸ Also since a homestead is exempt from the claims of creditors, a transfer of a homestead cannot be set aside as a fraudulent conveyance⁴⁹ or a voidable preference.⁵⁰

D. Protection of the Debtor's Spouse

The homestead laws are intended not only for the protection of a debtor from creditors, but also for the protection of the debtor's spouse and family.⁵¹ Thus, the homestead may be selected by the debtor's spouse, as well as the debtor, even if their residence is the debtor's separate property.⁵² Moreover, a married person generally cannot convey or encumber the homestead without the spouse's consent⁵³ and on the death of one of the spouses, the property vests in the survivor.⁵⁴ The restriction on conveyancing and the survivorship features of the homestead laws are significant where the homestead is the separate property of one spouse. These features may be removed by abandonment of the homestead⁵⁵ or by the conveyance of one spouse's interest in the homestead to the other.⁵⁶

On dissolution of a marriage the community and quasi-community property of the spouses, including the homestead, is divided equally between them.⁵⁷ A court in a dissolution proceeding has the power to order the homestead sold so that it can be divided between the spouses despite the fact that Civil Code Sections 1240 and 1241 do not provide for such a sale.⁵⁸ The marital dissolution does not cause the homestead to be abandoned and the homestead remains exempt from creditors after the dissolution.⁵⁹ After a legal separation or an interlocutory judgment of dissolution of a marriage,

48. See *In re Jackson*, 472 F.2d 589, 590 (9th Cir. 1973); *Wurdick v. Clements*, 451 F.2d 988, 989 (9th Cir. 1971); *In re Smith*, 366 F. Supp. 1213, 1218 (D. Idaho 1973); J. MOORE, *supra* note 44, ¶ 611[5], at 857-58.

49. See *Montgomery v. Bullock*, 11 Cal. 2d 58, 62, 77 P.2d 846, 849 (1938); *Oppenheim v. Goodley*, 148 Cal. App. 2d 325, 327, 306 P.2d 944, 946 (1957); 11 U.S.C. §107(d) (1976). If a trustee in bankruptcy, however, recovers property that has been fraudulently conveyed or concealed, a bankrupt will be barred from claiming that the property is exempt. 11 U.S.C. §24 (1976); J. MOORE, *supra* note 44, ¶ 6.11[4] at 857.

50. *Rutledge v. Johansen*, 270 F.2d 881, 882-83 (10th Cir. 1954); see *In re Hausman*, 209 F. Supp. 219, 222 (M.D. Ga. 1962).

51. See *Estate of McIntyre*, 189 Cal. App. 2d 498, 11 Cal. Rptr. 733 (1961):

The object of homestead legislation is to provide a place for the family and its surviving members, where they may reside and enjoy the comforts of a home, freed from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence, or from the importunity of their creditors.

Id. at 502, 11 Cal. Rptr. at 736, quoting *Estate of Fath*, 132 Cal. 609, 613, 64 P. 995, 997 (1901).

52. CAL. CIV. CODE §§1238, 1260-1261.

53. CAL. CIV. CODE §1242.

54. CAL. CIV. CODE §1265. The next section of this article contains a detailed discussion of the disposition of a declared homestead on the death of its owner.

55. See CAL. CIV. CODE §1243.

56. See CAL. CIV. CODE §§1242, 1265.

57. CAL. CIV. CODE §4800.

58. *Bonner v. Superior Court*, 63 Cal. App. 3d 156, 163-67, 133 Cal. Rptr. 592, 597-99 (1976).

59. *Id.* at 163, 133 Cal. Rptr. at 596-97.

each spouse may select a married person's separate homestead from that spouse's separate property or from the property awarded to that spouse.⁶⁰

The foregoing discussion has focused primarily on the protection that the homestead law provides from creditors. The next portion of this article will deal with the elaborate statutory system that provides for the disposition of the family home, whether or not it is a declared homestead, on the death of its owner.

DISPOSITION OF THE FAMILY HOME ON DEATH

Special rules for the disposition of the family home upon the death of its owner are found in Probate Code Sections 660 through 668. Sections 660, 663, 664, 665, 666 and 668 govern the disposition of a homestead that was declared during the lifetime of its owner and Sections 661, 662 and 667 provide for the setting aside of a probate homestead where no homestead has been declared during the decedent's lifetime. Significant differences exist between the treatment of a declared homestead and a probate homestead. Since there does not appear to be any justification for these differences, it is recommended that they be removed by appropriate legislation.⁶¹

A. *Disposition of the Declared Homestead*

After the decedent's death, the surviving spouse and minor children may remain in possession of the homestead and other exempt property of the estate until the estate inventory is filed.⁶² Thereafter, upon petition of the surviving spouse, the declared homestead (other than a married person's separate homestead)⁶³ will be set apart from the estate and will vest absolutely in the surviving spouse. A declared homestead, however, will be deemed to be terminated on the date of death of its owner, if: (1) it was selected by the surviving spouse out of the decedent's separate property and the decedent did not join in its selection;⁶⁴ (2) it was declared during a previous marriage of the decedent;⁶⁵ or (3) the surviving spouse conveyed the homestead to the decedent without a reservation of homestead rights.⁶⁶ If a declared homestead is deemed to have terminated on the death of the decedent, it will pass to the decedent's heirs or devisees, subject to the power of the probate court to set it aside for a limited time for the benefit of

60. CAL. CIV. CODE §§1300-1304.

61. See text accompanying notes 160-164 *infra*.

62. CAL. PROB. CODE §660.

63. See CAL. CIV. CODE §§1300-1304.

64. See *Weinreich v. Hensley*, 121 Cal. 647, 653-56, 54 P. 254, 255-57 (1898) (case decided under former CAL. CIV. PROC. CODE §§1465, 1474, which were repealed by CAL. STATS. 1931, c. 281, §1700, at 687); CAL. CIV. CODE §1265; CAL. PROB. CODE §§661, 663.

65. *Estate of Ronayne*, 104 Cal. App. 2d 53, 56-57, 231 P.2d 105, 107 (1951); *Estate of Clavo*, 6 Cal. App. 774, 779-80, 93 P. 295, 296-97 (1907).

66. See CAL. CIV. CODE §1265; CAL. PROB. CODE §663.

the decedent's family.⁶⁷

Title to a declared homestead that does not terminate on the decedent's death vests absolutely in the surviving spouse without administration of the estate and the decedent's power of testamentary disposition is subordinate to the surviving spouse's right to the homestead.⁶⁸ The surviving spouse, however, may elect to take under the decedent's will and may thereby waive or be estopped from claiming homestead rights.⁶⁹ The exemption features of a declared homestead continue in effect after title vests in the surviving spouse;⁷⁰ however, the homestead characteristics that restrict conveyancing or provide for its descent cease after title vests in the surviving spouse.⁷¹

One of the major differences between the treatment of a declared homestead and a probate homestead is that liens and encumbrances on a declared homestead are exonerated,⁷² whereas liens and encumbrances on a probate homestead are not.⁷³ Probate Code Section 735 provides that claims secured by liens and encumbrances on the homestead must be paid from the funds of the estate if such funds are sufficient to pay all claims against the estate. If the funds are not sufficient, then claims secured by liens and encumbrances on the homestead are to be paid proportionately with other claims allowed against the estate. The remaining liens and encumbrances are enforceable against the homestead, if this is permitted by Civil Code Sections 1241 and 1265, only for any deficiency left after such payments.⁷⁴

Probate Code Section 664 places a significant limitation on the value of a declared homestead that may pass to the surviving spouse. Under Probate Code Section 664 the homestead will be set apart to the surviving spouse if the appraised value of the homestead in the inventory of the estate is less than the amount of the homestead exemption in effect at the date of death of the decedent. Alternatively, if the homestead had previously been appraised under Civil Code Sections 1245 through 1259, the homestead will be set

67. Estate of Wright, 98 Cal. App. 633, 635, 277 P. 372, 373 (1929); CAL. CIV. CODE §1265. See text accompanying notes 76-103 *infra*.

68. See Bradley v. Scully, 255 Cal. App. 2d 101, 105, 62 Cal. Rptr. 834, 837 (1967); CAL. CIV. CODE §1265.

69. Estate of Cecala, 104 Cal. App. 2d 526, 532-34, 232 P.2d 48, 52-53 (1951). *But see generally* Dixon v. Russell, 9 Cal. 2d 262, 70 P.2d 196 (1937); Selinger v. Milly, 51 Cal. App. 2d 286, 124 P.2d 631 (1942).

70. Estate of Ronayne, 104 Cal. App. 2d 53, 55, 231 P.2d 104, 106 (1951); Estate of Clavo, 6 Cal. App. 774, 779, 93 P. 295, 296 (1907); see CAL. CIV. CODE §1265.

71. See Estate of Ronayne, 104 Cal. App. 2d 53, 56, 231 P.2d 105, 107 (1951); Estate of Clavo, 6 Cal. App. 774, 779-80, 93 P. 295, 296-97 (1907).

72. See CAL. PROB. CODE §735.

73. See Estate of Huelsman, 127 Cal. 275, 59 P. 776 (1899) (case decided under former Section 1475 of the Code of Civil Procedure which was repealed by CAL. STATS. 1931, c. 281, §1700, at 687, when the California Probate Code was adopted); 2 J. GODDARD, CALIFORNIA PRACTICE, *Probate Court Practice* §916, at 8 (3d ed. 1977); CONTINUING EDUCATION OF THE BAR, CALIFORNIA DECEDENT ESTATE ADMINISTRATION §12.58 (1971) (exempt and homestead property). *But see* Estate of Shively, 145 Cal. 400, 403, 78 P. 869, 870-71 (1904).

74. See CAL. PROB. CODE §735.

apart to the surviving spouse if its value at that time had been determined to be less than the homestead exemption at the date of death. Since the liens and encumbrances on the homestead are exonerated under Section 735, they are not deducted from the appraised value for the purposes of Section 664.⁷⁵ If the homestead is returned in the inventory appraised at more than the amount of the homestead exemption at the date of death, then the inheritance tax referee must appraise the homestead at the time it was selected. If the value of the homestead at the time it was selected, or, if it was appraised pursuant to Civil Code Sections 1245 through 1259, its value at the time of such appraisal, exceeds the homestead exemption at the date of death, then the homestead must be divided, if this can be done without material injury, or sold pursuant to Probate Code Section 665, so that the proceeds can be distributed to the surviving spouse and the estate. It is apparent that these provisions for the valuation of the homestead are needlessly complex, arbitrary and in need of reform.

B. Designation of a Probate Homestead

The family home is also protected on the death of its owner from heirs and creditors of the decedent's estate when the family home is not the subject of a declared homestead. The protection that the law provides for the surviving spouse and minor children of the decedent was summarized recently in *Taylor v. Madigan*⁷⁶ as follows:

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 There are a number of basic differences which indicate that the rights created here are considerably different from those created by the statutory homestead procedures, e.g., the court may put a time limit on the duration of the homestead the court is not limited to the property actually occupied by the family at the time of decedent's death, but may select it out of any of the estate property suitable for residence purposes, and it may be used for other purposes as well, . . . and the value is left to the discretion of the court with no monetary limit, provided the property is the bona fide residence of the family It will thus be seen that there is a legislative policy of even greater protection for those who have lost the head of their family and, therefore, are in a more precarious position than those families in which the head of the family is still in the home.⁷⁷

Probate Code Section 661 provides that if no homestead has been declared during the lifetime of the decedent or if a declared homestead

75. Estate of Herbert, 122 Cal. 329, 331, 54 P. 1109, 1110 (1898) (dictum); see Estate of Durham, 108 Cal. App. 2d 148, 152, 238 P.2d 1057, 1060 (1951).

76. 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1975).

77. *Id.* at 968, 126 Cal. Rptr. at 392.

terminated at the date of death,⁷⁸ then the probate court must designate a probate homestead for the use of the surviving spouse and minor children of the decedent. As with the declared homestead, the decedent's power of testamentary disposition is subordinate to the right of the surviving spouse and minor children to a probate homestead.⁷⁹ The right to a probate homestead is independent of, and in addition to, any other rights or property that the surviving spouse and minor children may have, and is not conditioned on their not having other property or any other place to live.⁸⁰ The probate homestead may be lost by waiver,⁸¹ estoppel⁸² or election⁸³ of the surviving spouse to take under the will of the decedent. The claim of a surviving spouse to a probate homestead, however, is strongly favored and the waiver, estoppel or election must be clearly demonstrated in order to defeat the surviving spouse's right to a probate homestead.⁸⁴

The probate court is given broad discretion in selecting the property to be designated as a probate homestead from the estate.⁸⁵ Section 661 states that the probate homestead must be selected from community property, quasi-community property or real property held by the decedent and the surviving spouse in common, or, if there is no such property, from the decedent's separate property. Nevertheless, the court in *Estate of Raymond*⁸⁶ upheld the probate court's designation of a probate homestead from the decedent's separate property, even though the estate contained residential property owned by the decedent and his widow as tenants in common, because the separate property was a more suitable home for the widow.⁸⁷ The property designated as a probate homestead must be useable as a residence, but some

78. See text accompanying notes 64-66 *supra*, for the circumstances when a declared homestead terminates on the death of its owner.

79. *Estate of Schmelz*, 259 Cal. App. 2d 440, 443, 66 Cal. Rptr. 480, 483 (1968); *Estate of Dell*, 196 Cal. App. 2d 809, 812, 17 Cal. Rptr. 46, 48 (1961); *Estate of Davis*, 86 Cal. App. 2d 263, 264-65, 194 P.2d 713, 714 (1948).

80. *Estate of Firth*, 145 Cal. 236, 238, 78 P. 643, 644 (1904); *Estate of Nelson*, 224 Cal. App. 2d 138, 145, 36 Cal. Rptr. 352, 356 (1964); *Estate of Ronayne*, 104 Cal. App. 2d 53, 58, 231 P.2d 105, 108 (1951).

81. *Estate of Hawkins*, 141 Cal. App. 2d 391, 397-98, 296 P.2d 873, 877 (1956); *Estate of Howe*, 81 Cal. App. 2d 95, 99, 183 P.2d 329, 331 (1947); *Estate of Wyss*, 112 Cal. App. 487, 497-98, 297 P. 100 (1931).

82. *Estate of Hawkins*, 141 Cal. App. 2d 391, 397-98, 296 P.2d 873, 877 (1956); *Estate of Howe*, 81 Cal. App. 2d 95, 99, 183 P.2d 329, 331 (1947); *Estate of Wyss*, 112 Cal. App. 487, 497-98, 297 P. 100, 104 (1931).

83. *Estate of Wyss*, 112 Cal. App. 487, 495-97, 297 P. 100 (1931).

84. *Estate of Schmelz*, 259 Cal. App. 2d 440, 447, 66 Cal. Rptr. 480, 485 (1968); *Estate of Alba*, 238 Cal. App. 2d 618, 622-23, 48 Cal. Rptr. 100, 103 (1965); *Estate of Claussenius*, 96 Cal. App. 2d 600, 613, 216 P.2d 485, 494 (1950). Since the probate homestead is intended for the benefit of the family unit, when minor children are involved, a waiver by the widow will defeat neither the children's nor the widow's right to a probate homestead. *Estate of Branam*, 66 Cal. App. 2d 309, 316-17, 152 P.2d 354, 358-59 (1944).

85. *Estate of Nelson*, 224 Cal. App. 2d 138, 144, 36 Cal. Rptr. 352, 355 (1964); *Estate of Raymond*, 137 Cal. App. 2d 134, 136, 289 P.2d 890, 891 (1955). The probate court has the discretion to designate as a probate homestead property other than that selected by the surviving spouse. *Estate of Mattingly*, 19 Cal. App. 2d 550, 551-52, 65 P.2d 1338, 1338-39 (1937).

86. 137 Cal. App. 2d 134, 289 P.2d 890 (1955).

87. *Id.* at 136-37, 289 P.2d at 892.

commercial use is permitted.⁸⁸

In selecting a probate homestead a court will consider the rights of creditors, the financial status of the estate and the value of the probate homestead.⁸⁹ Probate Code Section 661 places no limit on the value of the probate homestead to be selected and a court should select a probate homestead for the surviving family of as great a value as possible considering the amount and condition of the estate.⁹⁰

Unlike the declared homestead, title to which vests in the surviving spouse on the death of the decedent, the probate homestead is set apart for the use of the surviving spouse and minor children. Probate Code Section 667 provides that one-half of the probate homestead becomes the property of the surviving spouse and the other half goes to the decedent's minor children⁹¹ in equal shares. The probate homestead will be lost if the surviving spouse remarries or dies,⁹² or if a minor child reaches majority,⁹³ before the time of the order setting apart the probate homestead. In order to receive a probate homestead, the surviving spouse must have been married to the decedent at the date of death; if the decedent and surviving spouse were separated, then the probate homestead will be set apart to the surviving spouse out of the decedent's estate only if the surviving spouse was entitled to support from the decedent.⁹⁴

If the probate homestead is selected from property other than separate property of the decedent, it may be assigned to the surviving spouse and minor children for an indefinite period, including an estate in fee simple.⁹⁵ If the probate homestead, however, is selected from the separate property of the decedent, it can be set apart for only a limited period, the duration of which is subject to the discretion of the probate court,⁹⁶ provided that it does not exceed the lifetime of the surviving spouse or the minority of the children.⁹⁷ A probate homestead selected from the separate property of the

88. *Compare* Estate of Nelson, 224 Cal. App. 2d 138, 145, 36 Cal. Rptr. 352, 356 (1964) (30-unit apartment building designated as probate homestead) *with In re Noah*, 73 Cal. 590, 593, 15 P. 290, 292 (1887) (four-story office building could not be designated as probate homestead).

89. Estate of Nelson, 224 Cal. App. 2d 138, 144, 36 Cal. Rptr. 352, 355 (1964); Estate of Claussenius, 96 Cal. App. 2d 600, 611, 216 P.2d 485, 493 (1950).

90. Estate of Nelson, 224 Cal. App. 2d 138, 144, 36 Cal. Rptr. 352, 355 (1964); Estate of Raymond, 137 Cal. App. 2d 134, 136, 289 P.2d 890, 891 (1955). The probate homestead can even absorb the entire estate. Estate of Alba, 238 Cal. App. 2d 618, 621, 48 Cal. Rptr. 100, 102 (1965).

91. Minor children of a previous marriage are not eligible for a probate homestead. Estate of Rosenaur, 107 Cal. App. 2d 461, 462, 237 P.2d 17, 18 (1951).

92. *In re Still*, 117 Cal. 409, 514, 49 P. 463, 465 (1897) (remarries). *See* Estate of Blair, 42 Cal. 2d 728, 731-33, 269 P.2d 612, 614-15 (1954) (dies).

93. Estate of Heywood, 149 Cal. 129, 130-31, 84 P. 834, 839 (1906).

94. Estate of Brooks, 28 Cal. 2d 748, 171 P.2d 724 (1946).

95. *See* Estate of Rogoff, 205 Cal. App. 2d 650, 654, 23 Cal. Rptr. 334, 336 (1962); Estate of Cesare, 130 Cal. App. 2d 557, 569, 279 P.2d 607, 614 (1955).

96. Estate of Moskowitz, 247 Cal. App. 2d 499, 502, 55 Cal. Rptr. 572, 573-74 (1966); Estate of Somers, 84 Cal. App. 2d 726, 727-28, 191 P.2d 776, 777 (1948); Estate of Rosland, 76 Cal. App. 2d 709, 712, 173 P.2d 830, 832 (1946); CAL. PROB. CODE §661.

97. Estate of Bonner, 222 Cal. App. 2d 426, 428, 35 Cal. Rptr. 264, 265 (1963); CAL. PROB. CODE §661. A decedent's undivided interest in property held by the decedent and the surviving

decedent for a limited period remains subject to administration by the probate court and passes to the heirs or devisees of the decedent at the end of this period.⁹⁸

Since the probate homestead is set apart for the benefit of the surviving spouse and the minor children, the power of these parties to convey or encumber the probate homestead is limited. In *Hoppe v. Fountain*,⁹⁹ the court held that while a widow could convey or encumber her interest in the probate homestead, a purchaser of her interest could not deprive her children of the right to occupy the probate homestead during their minority by obtaining a partition of the probate homestead.¹⁰⁰ Similarly, the conveyance by an adult child of his or her interest in the probate homestead cannot operate to prejudice the right of the surviving spouse to occupancy of the probate homestead.¹⁰¹

The requirement of Probate Code Section 735 that liens and encumbrances on the homestead be exonerated does not appear to be applicable to probate homesteads.¹⁰² The probate homestead, however, is exempt from claims of unsecured creditors of the estate and the surviving spouse to the same extent as a declared homestead.¹⁰³

Until July 1, 1975, the homestead legislation in California consisted of the declared homestead and probate homestead laws. The legislature introduced a third system of homestead protection in 1975 by providing for the exemption from execution of dwelling houses for which no declaration of homestead had been recorded. This new dwelling house exemption is the topic of the next section of this article.

spouse as tenants in common was held to be the separate property of the decedent and could be assigned to the surviving spouse for only a limited period. Estate of Adams, 228 Cal. App. 2d 264, 266, 39 Cal. Rptr. 522, 524 (1964); Estate of Maxwell, 7 Cal. App. 2d 641, 46 P.2d 777 (1935).

98. CAL. PROB. CODE §§661, 663.

99. 104 Cal. 94, 37 P. 894 (1894).

100. *Id.* at 101, 37 P. at 895; *accord*, Hodge v. Norton, 133 Cal. 99, 65 P. 123 (1901). The children may, however, convey or encumber their interests upon attaining majority, and during their minority, their guardian may sell their interests under court supervision. Estate of Hamilton, 120 Cal. 421, 428-29, 52 P. 708, 710-11 (1898).

101. Moore v. Hoffman, 125 Cal. 90, 92-93, 57 P. 769, 770 (1899).

102. Estate of Huelsman, 127 Cal. 275, 277, 59 P. 776, 776 (1899). This case was decided under former Section 1475 of the Code of Civil Procedure, *repealed* CAL. STATS. 1931, c. 281, at 587, which was expressly limited to homesteads selected and recorded prior to the death of the decedent. Although Probate Code Section 735 does not contain this limitation, *Huelsman* is still cited by commentators for the proposition that liens and encumbrances on probate homesteads are not exonerated. *See, e.g.*, 1 CONTINUING EDUCATION OF THE BAR, CALIFORNIA DECEDENT ESTATE ADMINISTRATION §12.58 (1971); Comment, *The Probate Homestead in California*, 53 CALIF. L. REV. 655, 671, 679 (1965).

103. *Keyes v. Cyrus*, 100 Cal. 322, 34 P. 722 (1893). In *Keyes*, the court stated:

Section 1240 of the Civil Code, which declares that "the homestead is exempt from execution or forced sale, except as in this title provided," is not in terms limited to the homestead selected by the parties, and . . . the provisions of this section must be held to apply to every homestead, whether selected and recorded by the voluntary act of the parties or by an order of the superior court.

Id. at 327, 34 P. at 724.

THE DWELLING HOUSE EXEMPTION

A. Introduction

Code of Civil Procedure Section 690.235 was enacted in 1975. The apparent legislative intent was to provide many of the benefits of the declared homestead law to those debtors who are unaware of the declared homestead law and who therefore may fail to take advantage of it by recording a declaration of homestead before a creditor records an abstract of judgment in the county where the debtor's principal residence is located.¹⁰⁴ Code of Civil Procedure Section 690.235 was replaced by Section 690.31 on July 1, 1977.¹⁰⁵ Section 690.31 was evidently intended to clarify a number of ambiguities and legal problems found in Section 690.235; yet many of these ambiguities and legal problems persist in Section 690.31. Section 690.31 imposes a burden on creditors by requiring a notice and hearing to determine the availability of the dwelling house exemption before a creditor can enforce a judgment against a dwelling house. At the same time, as will be discussed in this section, it does not fulfill its legislative purpose of giving large numbers of debtors the full protection of the declared homestead law. It is recommended, therefore, that attorneys continue to record declarations of homestead for their clients rather than rely on the automatic protection of the claimed dwelling house exemption of Section 690.31.

B. Nature and Extent of the Claimed Dwelling House Exemption

Section 690.31(a) incorporates much of the declared homestead law into the dwelling house exemption by defining the extent and amount of the dwelling house exemption by reference to the declared homestead law. The dwelling house exemption, therefore, extends to the same types of property and ownership interests that are protected by the declared homestead law. In addition, the dwelling house exemption is limited to the amount of the declared homestead exemption.¹⁰⁶

While Section 690.31(a) appears to carry over much of the declared homestead law, substantial differences exist between the claimed dwelling house exemption and the declared homestead law. The most significant difference is that a judgment lien can attach to a dwelling house whereas a judgment lien cannot attach to a declared homestead. When Section 690.31 was adopted, Section 674 was amended¹⁰⁷ by the addition of subsection (c) which provides that, notwithstanding the exemption provided by Section

104. For a discussion of former Section 690.235 of the California Code of Civil Procedure see Adams, *California's New Homestead Law*, 64 CALIF. L. REV. 180 (1976).

105. CAL. STATS. 1976, c. 1000, §§3, 4, at 2369.

106. See text accompanying note 15 *supra*.

107. CAL. STATS. 1976, c. 1000, §1, at 2368.

690.31, a judgment lien attaches to a dwelling house, other than a declared homestead, when an abstract of judgment against an owner of the dwelling house is recorded in the county where the dwelling house is located.

Section 674(c) is of substantial benefit to judgment creditors because it enables them to obtain priority over subsequent lienholders with respect to the dwelling house without having to execute on it. It also benefits the title insurance industry because it eliminates the need of a title searcher to determine whether the debtor is eligible for the dwelling house exemption in order to determine title to the property. Whether or not the debtor is eligible for the dwelling house exemption, a creditor's judgment lien will attach to the debtor's dwelling house, and constitute a cloud on the debtor's title, unless the dwelling house is a declared homestead.

On the other hand, Section 674(c) is a serious detriment to the debtor's protection because under Sections 690.31 and 674(c) the dwelling house is exempt from execution for only so long as it is owned by the debtor. If the debtor should find it necessary to sell the dwelling house, the creditor could enforce a judgment: (1) against the dwelling house in the hands of the new owner; (2) out of the proceeds of the sale; or (3) against the debtor's new dwelling house, if the new dwelling house happens to be in a county where the abstract of judgment was recorded.¹⁰⁸ Section 674(c) seriously undermines the protection afforded by the dwelling house exemption in our highly mobile society in which persons change residences rather frequently. As noted earlier,¹⁰⁹ the declared homestead law provides that a debtor may change residences without losing the protection of the homestead law. Such a provision is an essential part of the protection afforded by the homestead law and the absence of such a provision from the claimed dwelling house exemption is unfortunate.

Since a dwelling house is exempt "to the same extent" as a declared homestead and no special rule is provided for property held in joint tenancy, the rule from *Schoenfeld v. Norberg*¹¹⁰ is applicable to the dwelling house exemption as well as to declared homesteads. As noted earlier, the *Schoenfeld* rule¹¹¹ should be abolished by an amendment that would permit a creditor to execute on joint-tenancy property if its total value exceeded the amount of the exemption and the total of the encumbrances.¹¹²

The claimed dwelling house exemption found in Section 690.31 incorporates only the exemption features of the declared homestead law. Therefore, persons who desire to obtain other homestead characteristics such as those

108. See CAL. CIV. PROC. CODE §674(c).

109. See text accompanying notes 26-27 *supra*.

110. 11 Cal. App. 3d 755, 90 Cal. Rptr. 47 (1970).

111. See text accompanying notes 35-39 *supra*.

112. See text accompanying notes 156-157 *infra* for a proposal for abolishing the *Schoenfeld* rule.

pertaining to descent¹¹³ or restriction on conveyancing¹¹⁴ of the homestead must record a declaration of homestead to do so.

C. Exceptions to the Dwelling House Exemption

Section 690.31(b) provides for a number of situations where the dwelling house exemption does not apply. It states:

- (b) The exemption provided in subdivision (a) does not apply:
 - (1) Whenever the debtor or the spouse of the debtor has an existing declared homestead on any property in this state other than property which is the subject of a proceeding under subdivision (c) of this section. The existence of a homestead declared by the debtor or the debtor's spouse under Section 1300 of the Civil Code shall not affect the right of the other spouse to an exemption under this section.
 - (2) Whenever a judgment or abstract thereof or any other obligation which by statute is given the force and effect of a judgment lien has been recorded prior to either:
 - (i) The acquisition of the property by the debtor or the spouse of the debtor; or
 - (ii) The commencement of residence by the debtor or the spouse of the debtor, whichever last occurs.
 - (3) Whenever the execution or forced sale is in satisfaction of judgments obtained:
 - (i) On debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, or materialmen's or vendors' liens upon the premises;
 - (ii) On debts secured by encumbrances on the premises executed and acknowledged by husband and wife, by a claimant of a married person's separate homestead, or by an unmarried claimant; or
 - (iii) On debts secured by encumbrances on the premises, executed and recorded prior to or in connection with the acquisition of the property by the debtor or the spouse of the debtor.¹¹⁵

This section has been largely taken over from former Section 690.235 with seemingly little attention paid to its ramifications. The first paragraph, Section 690.31(b)(1), is confusing. It evidently limits a debtor's entitlement to a claimed dwelling house exemption to situations where neither the debtor nor the debtor's spouse has an existing declared homestead in California, except if the declared homestead is the subject of a proceeding by a creditor to enforce a judgment against the homestead. In that case, it seems that this section would enable a debtor to claim a dwelling house exemption on one

113. See CAL. CIV. CODE §1265.

114. See CAL. CIV. CODE §1242.

115. CAL. CIV. PROC. CODE §690.31(b).

residence and a homestead exemption on another if a creditor were proceeding to execute on the homestead. This strange interpretation appears to be required by the plain language of Section 690.31(b)(1). The section also permits a debtor to claim a dwelling house exemption if the debtor's spouse has declared a married person's separate homestead, pursuant to Civil Code Section 1300.

The second paragraph, Section 690.31(b)(2), is also poorly drafted. It should be interpreted to state that the exemption does not apply to the enforcement of those judgments against the debtor whose abstracts were recorded in the county where the dwelling house is located prior to the time either the debtor or the debtor's spouse acquired the property or began living there. Even so construed, this provision denies the protection of the dwelling house exemption to a debtor who changes residences. With this provision, the dwelling house exemption is only temporary and its protection is lost when the debtor sells the dwelling house. In contrast, under the declared homestead law a debtor can carry the homestead exemption from one homestead to another.¹¹⁶

The third paragraph, Section 690.31(b)(3), makes the dwelling house exemption inapplicable to the enforcement of debts secured by mechanics' or similar types of liens, and consensual liens. Even though the dwelling house may be subject to the liens specified in Section 690.31(b)(3), a creditor may lose his lien on the dwelling house if the creditor violates the one action rule.¹¹⁷ Where a debt is secured by a mortgage, the creditor must foreclose on the mortgage in order to obtain the lien priority of Section 690.31(b)(3); if the creditor obtains a personal money judgment against the debtor instead of foreclosing, the debtor may protect the dwelling house by claiming the exemption in Section 690.31.¹¹⁸

D. Procedure for Claiming the Dwelling House Exemption

One of the major changes made by the substitution of Section 690.31 for Section 690.235 is in the procedure for claiming the dwelling house exemption.¹¹⁹ Under Section 690.31(c) a creditor who wishes to enforce a judgment against a dwelling house must file a verified application for the issuance of a writ of execution with a court in the county where the property

116. CAL. CIV. CODE §1265a.

117. CAL. CIV. PROC. CODE; §726; see J. HETLAND, CALIFORNIA REAL ESTATE SECURED TRANSACTIONS §§6.3-.12 (1970); J. HETLAND, SECURED REAL ESTATE TRANSACTIONS §§9.4-.18 (1974).

118. See *James v. P.C.S. Ginning Co.*, 276 Cal. App. 2d 19, 22, 80 Cal. Rptr. 457, 459 (1969).

119. The exemption under Section 690.235 of the Code of Civil Procedure, *repealed* CAL. STATS. 1976, c. 1000, §3, at 2369, was claimed by the procedure set forth in Section 690.50 of the Code of Civil Procedure, which procedure is applicable to the claiming of many of the exemptions set forth in Section 690 of the Code of Civil Procedure.

is located.¹²⁰ The application must state either that the dwelling house is not exempt or that the value of the dwelling house, over and above all liens and encumbrances thereon,¹²¹ exceeds the amount of the dwelling house exemption. If the creditor alleges in the application that the dwelling house is not exempt, the creditor must state in the application the reasons why it is not exempt and that no declared homestead has been recorded with respect to the dwelling house. In addition, if the creditor alleges that the dwelling house is not exempt, the creditor must state in the application that no current homeowner's exemption¹²² has been claimed by the debtor or the debtor's spouse with respect to the dwelling house, or, if one has been claimed, the reasons why the debtor is not entitled to the dwelling house exemption.

The literal wording of Section 690.31(c) appears to require a judgment creditor to follow its procedure if the creditor wishes to enforce a judgment against any dwelling house, including a declared homestead. In the recent case of *Krause v. Superior Court*,¹²³ however, the court held that Section 690.31 applied only to dwelling houses other than declared homesteads, and that a judgment creditor must follow the procedures set forth in Civil Code Sections 1245 to 1259 in order to execute on a declared homestead rather than the procedure found in Section 690.31.¹²⁴

If the judgment was rendered in a county other than where the dwelling house is located, the judgment creditor must file an abstract of judgment with the court and pay the fees specified in Section 690.31(c).¹²⁵ Once a completed application has been filed with the court, the court must set a time and place for a hearing on the application and issue an order for the debtor to show cause why a writ of execution should not be issued.¹²⁶ The levying officer is required to mail copies of the creditor's application, the order to show cause, and the notice specified in Section 690.31(d) to the debtor and to any other person in whose name the property stands on the records of the office of the county tax assessor.¹²⁷ The levying officer is also required to personally serve the occupant of the dwelling house with copies of the creditor's application, the order to show cause, and the notice, or post these documents in a conspicuous place, or leave them with an agent, or employee of the occupant or a member of the occupant's household.¹²⁸ The notice

120. This contrasts with the general practice of having the court where the judgment was entered issue the writ of execution.

121. The phrase "all liens and encumbrances" probably should not be interpreted to include the creditor's own judgment lien, *see* CAL. CIV. PROC. CODE §674(c), or liens that are subsequent to the creditor's lien; otherwise, the creditor would be prevented from using an execution sale to recover on only a portion of his judgment.

122. *See* CAL. REV. & TAX. CODE §218.

123. 78 Cal. App. 3d 499, 144 Cal. Rptr. 194 (1978).

124. *Id.* at 505, 144 Cal. Rptr. at 197.

125. CAL. CIV. PROC. CODE §690.31(c)(2).

126. CAL. CIV. PROC. CODE §690.31(d).

127. CAL. CIV. PROC. CODE §690.31(1).

128. CAL. CIV. PROC. CODE §690.31(1).

required by Section 690.31(d) must be provided in both English and Spanish and is set forth below:

IMPORTANT LEGAL NOTICE TO HOMEOWNER AND RESIDENT

1. Your house is in danger of being sold to satisfy a judgment obtained in court. You may be able to protect the house and real property described in the accompanying application from execution and forced sale if you or your family now actually reside on the property and presently do not have a declared homestead legally recorded with the county recorder on any other property in the State of California. **YOU OR YOUR SPOUSE MUST COME TO THE HEARING TO SHOW THESE FACTS.**

2. If you or your spouse want to contest the forced sale of this property, you or your spouse must appear at _____
on _____ and be prepared to answer questions concerning
(date and time) (location set forth in OSC)
the statements made in the attached application. **THE ONLY PURPOSE OF THE HEARING WILL BE TO DETERMINE WHETHER THE PROPERTY CAN BE SOLD, NOT WHETHER YOU OWE THE MONEY.**

3. **FOR YOUR OWN PROTECTION, YOU SHOULD PROMPTLY SEEK THE ADVICE OF AN ATTORNEY IN THIS MATTER. IF YOU ARE A TENANT AND DO NOT CLAIM TO BE THE OWNER OR BUYER OF THIS PROPERTY, THIS NOTICE DOES NOT AFFECT YOU. PLEASE GIVE IT TO YOUR LANDLORD.¹¹**

The notice to the debtor does much to cure one of the major failings of the declared homestead law: that many debtors were unaware of the homestead law and were consequently not protected by it because they failed to record a declaration of homestead before an abstract of judgment against them was recorded. Under Section 690.31 a debtor must receive notice and a hearing before a writ of execution can be issued against the dwelling house. In contrast, under former Section 690.235 the debtor did not receive notice of the right to claim the exemption until the debtor was served with the writ of execution.

Under Section 690.31 the court is required to determine at a hearing on the creditor's application whether the dwelling house is exempt, and if so, whether its value over and above all liens and encumbrances thereon,¹²⁹ exceeds the amount of the dwelling house exemption. Section 690.31(e) allocates the burden of proof at the hearing to the debtor on the issue of

¹²⁹. See note 121 *supra*.

whether the dwelling house is exempt, and to the creditor on the issue of whether the value of the dwelling house, over and above all liens and encumbrances, exceeds the exempt amount.¹³⁰ The debtor should be able to prove entitlement to this exemption by showing that the debtor or the debtor's family actually resides in the dwelling house. On the other hand, if the creditor contends that the exemption is not applicable because of one of the exceptions to the exemption found in Section 690.31(b),¹³¹ the creditor should have the burden of proving that one of these exceptions is available to defeat the debtor's claim of exemption. Section 690.31(h) gives the debtor a second chance under certain circumstances to claim the dwelling house exemption, if the debtor failed to attend the hearing on the creditor's application the first time. If a writ of execution is issued after a hearing at which neither the debtor, the debtor's spouse nor the debtor's attorney appeared, then the debtor must be served with a notice, in the form specified in Section 690.31(g), that the debtor has a second chance to claim the dwelling house exemption.¹³² The debtor or the debtor's spouse may then submit a declaration stating that the dwelling house may be exempt and that their absence or the absence of their attorney from the hearing was due to mistake, inadvertence, surprise or excusable neglect.¹³³ If such a declaration is filed, the levying officer must postpone the sale of the dwelling house and the clerk of the court must set another hearing to determine if the writ of execution should be recalled.¹³⁴

E. Execution on the Dwelling House and Allocation of the Proceeds

After the hearing the court must make an order¹³⁵ directing the issuance of a writ of execution if the court determines that the dwelling house is not exempt or, if it is exempt, that the creditor is entitled to levy against the excess over the exemption.¹³⁶ If the creditor's application is denied, subsequent applications within 12 months of the denial must be supported by a statement under oath that there is a material change of circumstances affecting the exemption.¹³⁷

130. Evidentially, the value of the dwelling house is determined from evidence submitted by the creditor and the debtor at the hearing on the creditor's application. In contrast, under the declared homestead law, the value of the homestead is determined from the report of three disinterested appraisers appointed by the court. CAL. CIV. CODE §§1249-1254.

131. See text accompanying note 115 *supra*.

132. CAL. CIV. PROC. CODE §690.31(h).

133. CAL. CIV. PROC. CODE §690.31(h).

134. CAL. CIV. PROC. CODE §690.31(h).

135. The order must specify whether the dwelling house is exempt, and if so, the amount of the exemption, and a copy of the order must be transmitted to the court where the judgment was rendered. The writ of execution must specify the amounts to be distributed and provide the names and addresses of the exempt debtor and persons having encumbrances against the dwelling house. CAL. CIV. PROC. CODE §690.31(f).

136. The second sentence of California Civil Procedure Code Section 690.31(f) is incorrectly worded. It states: "The order shall state whether or not the dwelling house is exempt and, if not exempt, state that the judgment creditor is entitled only to execution against the excess over the exempt amount." The phrase "if not exempt" should be changed to "if exempt."

137. CAL. CIV. PROC. CODE §690.31(i).

Section 690.31(j) provides for the allocation of the proceeds of an execution sale of a dwelling house in the same manner as Civil Code Section 1256.¹³⁸ Like Civil Code Section 1256, Code of Civil Procedure Section 690.31(j) should be interpreted so that the judgment creditor holding the execution sale receives priority over subsequent lienholders, and the claimant of the dwelling house exemption receives priority over the judgment creditor. It would be helpful if the statutory language were changed to reflect this interpretation.

Section 690.31(k) exempts from execution for six months that portion of the proceeds received by the claimant after an execution sale that represents the amount of the dwelling house exemption. It also exempts from execution a dwelling house acquired by the debtor with the exempt proceeds within six months after their receipt. The exemption of the subsequently acquired dwelling house, however, is not applicable to judgment liens obtained before the acquisition of the dwelling house;¹³⁹ thus, a debtor receives no more protection by purchasing another dwelling house from the exempt proceeds of an execution sale of the previous dwelling house than would be obtained if the debtor had purchased the new dwelling house from other funds. As previously noted,¹⁴⁰ the protection afforded by the dwelling house exemption is very limited after the dwelling house has been sold.

F. Attachment of the Dwelling House

Another aspect of the protection afforded by exemption laws is the protection they afford from attachment. Section 690.31 provides only for an exemption from execution and it does not specifically exempt a dwelling house from attachment; but Code of Civil Procedure Section 487.020 provides that all property exempt from execution is exempt from attachment.

While a dwelling house is exempt from attachment to the same extent that it is exempt from execution,¹⁴¹ the procedure for claiming an exemption from attachment differs from the procedure set forth in Section 690.31. Under Code of Civil Procedure Section 484.070 the debtor must claim an exemption from attachment at the attachment hearing with respect to property listed in the creditor's application for a writ of attachment. Section 484.070 requires that the debtor receive a copy of the creditor's application at least 20 days prior to the hearing. In order to obtain an *ex parte* writ of attachment the creditor must file an application supported by an affidavit showing that the property sought to be attached is not exempt from attachment; following the issuance of an *ex parte* writ of attachment, a debtor may

138. See text accompanying note 41 *supra*.

139. CAL. CIV. PROC. CODE §690.31(k).

140. See text accompanying note 109 *supra*.

141. CAL. CIV. PROC. CODE §487.020.

claim an exemption by following the procedure set forth in Section 690.50 within 30 days after receiving the notice of attachment.

Although the procedure for claiming an exemption from attachment offers some protection to the debtor, the debtor does not receive the explicit notice set forth in Section 690.31(d) of the right to claim the dwelling house exemption. Since a debtor should receive at least as much protection from attachment as from execution, it is recommended that the law be changed so that this notice is given prior to attachment as well as prior to execution.

G. *The Dwelling House Exemption in Bankruptcy*

As noted earlier,¹⁴² a bankrupt may claim those exemptions that are allowed by state law. A debtor in California is entitled to a dwelling house exemption for the dwelling house in which the debtor or the debtor's family actually resides, provided that the debtor does not have an existing declared homestead. Therefore, such a debtor would be entitled to claim the dwelling house exemption in a bankruptcy proceeding by stating the claim in the schedule of property filed pursuant to Bankruptcy Rule 108.¹⁴³ Because of the similarity of the dwelling house exemption to the homestead exemption, statutory and case law pertaining to the homestead exemption in bankruptcy, other than that dealing with the recording of a declaration of homestead, should be applicable to the dwelling house exemption in bankruptcy.¹⁴⁴

H. *Retroactivity*

The dwelling house exemption law provides that the law will not affect the rights of any lienholder or encumbrancer that have vested prior to July 1, 1977.¹⁴⁵ Thus the dwelling house exemption is not applicable to judgment liens obtained against a dwelling house prior to July 1, 1977, notwithstanding the fact that the debtor may have acquired the dwelling house and may have begun living there before the creditor's abstract of judgment was recorded.

A recent case may have narrowed the application of the dwelling house exemption even further. In *Daylin Medical and Surgical Supply, Inc. v. Thomas*,¹⁴⁶ the court held that the application of the exemption of Section 690.235 to debts incurred before its effective date (July 1, 1975) violated

142. See notes 42-43 and accompanying text *supra*.

143. 11 U.S.C. §110(c)(3) (1976) gives the trustee of the bankrupt's estate the status of a creditor who has obtained a judgment lien on the debtor's property at the date of bankruptcy. Although a judgment lien will attach to a dwelling house under California Civil Procedure Code Section 674(c), the dwelling house is exempt from execution on account of the judgment lien to the extent of the exemption. Since the dwelling house is exempt from execution to the extent of the exemption, a debtor should be entitled to claim the dwelling house exemption in bankruptcy.

144. See notes 47-50 and accompanying text *supra*.

145. CAL. STATS. 1976, c. 1000, §5, at 2373.

146. 69 Cal. App. 3d Supp. 37, 138 Cal. Rptr. 878 (1977).

article I, section 10 of the United States Constitution by impairing the obligation of contracts.¹⁴⁷ The court reasoned that Section 690.235 created a new exemption which had not existed before it was enacted and that it would be unconstitutional to apply this new exemption to defeat an obligation that arose prior to the enactment of Section 690.235.¹⁴⁸ The court relied on cases holding that an increase in the amount of the homestead exemption could not be applied to debts arising before the increase took effect.¹⁴⁹ However, the court missed the point that all homeowners in California had been entitled to homestead protection prior to the enactment of Section 690.235 and that Section 690.235 merely substituted a different procedure for claiming this protection, as in turn did Section 690.31. The fundamental purpose of Sections 690.235 and 690.31 was to provide debtors with notice of their right to claim homestead protection, not to create a new exemption. With the enactment of Sections 690.235 and 690.31 the legislature, in effect, caused declarations of homestead to be filed on behalf of all homeowners in California, and in doing so, no more impaired the obligation of contracts than if the homeowners had recorded declarations of homesteads themselves.

PROPOSALS FOR LEGISLATIVE REFORM

The preceding discussion has pointed out a number of inconsistencies that exist between the three systems that California presently provides for the protection of the family home. Each system has its own peculiar advantages and disadvantages with respect to the others and much of the complexity in this area of the law results from the interplay of these separate systems. It would be beneficial if the legislature would reduce this complexity by adopting a more uniform statutory scheme for the protection of the family home. This section of the article will serve to highlight the differences between the three systems of homestead legislation and offer recommendations for eliminating these differences so that the humane purpose of the homestead laws can be furthered.

A. Reform of the Declared Homestead and Dwelling House Exemption

The two most significant differences between the dwelling house exemption and the declared homestead are in the procedure for claiming the exemption and in the ability of the debtor to carry the exemption from one home to the next. The declared homestead law requires the debtor to record

147. *Id.* at 39, 138 Cal. Rptr. at 880.

148. *Id.* at 39, 138 Cal. Rptr. at 880. See also Karol, *Effective Insolvency Planning for the Consumer Bankrupt in California*, 52 L.A.B.J. 376 (1977).

149. See *In re Rauer's Collection Co.*, 87 Cal. App. 2d 248, 253-54, 196 P.2d 803, 807 (1948); *In re Towers*, 146 F. Supp. 882, 885-86 n.2 (N.D. Cal. 1956), *aff'd sub nom.*, *Towers v. Curry*, 247 F.2d 738, 740 (9th Cir. 1957).

a declaration of homestead before a creditor records an abstract of judgment in order to protect the debtor's home from the creditor.¹⁵⁰ Under Section 690.31 the debtor is allowed to claim the dwelling house exemption at a hearing prior to the issuance of a writ of execution after receiving notice of the debtor's right to the exemption.

The purpose of the recording requirement of the declared homestead law is to enable title searchers to determine title to residential property. A title searcher can easily determine from the county records whether a recorded abstract of judgment affects title to a declared homestead by noting whether or not the abstract of judgment was recorded prior to the declaration of homestead. Without a system for recordation of homesteads the title searcher would have to go outside the county records to determine whether a debtor was entitled to homestead protection; the task of determining title would be nearly impossible if the debtor owned more than one residence or if the recorded abstract of judgment was far back in the chain of title.

The need for recordation of a homestead does not arise under the dwelling house exemption procedure, because Code of Civil Procedure Section 674(c) provides that a judgment lien will attach to a dwelling house, except if it is a declared homestead. Section 690.31 only protects a dwelling house from execution temporarily; if the dwelling house is sold, either voluntarily or involuntarily at an execution sale, the creditor can enforce the judgment lien against the new owner. In contrast, under the declared homestead law, no judgment lien will attach to a declared homestead. If the homestead is sold, the creditor cannot enforce the judgment against the new owner. Moreover, the proceeds of the sale are protected for six months¹⁵¹ and the debtor can protect a new home that is purchased within six months with the proceeds of the sale from the creditor by recording a second declaration of homestead.¹⁵²

The fact that a debtor's protection under Section 690.31 is effectively lost when the dwelling house is sold, outweighs the benefit of any notice the debtor may receive of the right to claim the exemption. Fortunately, it is possible to combine the advantage in Section 690.31 that the debtor receives notice of the exemption in time to claim it with the advantage of the declared homestead law that the debtor can change homesteads without losing the protection of the homestead exemption. It is proposed that this be accomplished by repealing Section 690.31 and modifying the declared homestead law to provide for notice to the debtor of the right to the homestead exemption.

The easiest way to modify the declared homestead law so that the debtor would have notice of the exemption would be to permit the debtor to record

150. See CAL. CIV. PROC. CODE §1241(1).

151. CAL. CIV. PROC. CODE §§1257, 1265.

152. CAL. CIV. PROC. CODE §1265a.

a declaration of homestead for a period after levy of execution on the dwelling.¹⁵³ A notice in the form prescribed by Section 690.31(d) would be required to accompany the writ of execution. The recordation of a declaration of homestead prior to the execution sale would operate to dissolve any judgment liens on the dwelling to the extent of the homestead exemption. Judgment liens would continue after the declaration of homestead on the excess over the amount of the homestead exemption, however, so that the judgment creditor would retain priority with respect to subsequent lienholders.

Allowing a debtor to record a declaration of homestead after levy of execution on the debtor's home would also benefit debtors in bankruptcy. Under present law a California debtor must record a declaration of homestead prior to the date of bankruptcy in order to claim the homestead exemption in bankruptcy; but, if the debtor could protect the home from judgment creditors by recording a declaration of homestead after an abstract of judgment against the debtor had been recorded, it would not be necessary for the debtor to record a declaration of homestead before the date of bankruptcy in order to claim the homestead exemption in bankruptcy.¹⁵⁴ Therefore, changing the homestead law so that a debtor could record a declaration of homestead after levy of execution would extend the protection of the homestead exemption to those bankrupt debtors who fail to record a declaration of homestead before the date of bankruptcy because they are unaware of the homestead law.

These changes can be implemented by removing Civil Code Section 1241(1) and modifying Civil Code Section 1240 to provide that the homestead is exempt from execution or forced sale only to the extent of the exemption provided in Civil Code Section 1260. Code of Civil Procedure Section 674 should be changed by deleting subsection (c) and changing subsection (a) so that a judgment lien attaches to real property of the debtor to the extent that it is not exempt from execution. Also, a provision should be added to the Code of Civil Procedure that would require a writ of execution or attachment against a dwelling house, other than a declared homestead, to be accompanied by a notice to the debtor of the right to a homestead exemption in a form similar to that now required by Code of Civil Procedure Section 690.31. Finally, there should be an explicit provision in the Civil Code stating that a debtor is entitled to protect the dwelling from execution or attachment by recording a declaration of homestead and notifying the levying officer during a period after the levy but before the sale of the property.¹⁵⁵

153. See text accompanying notes 151-164 *supra*, for other proposals to extend the protection of the declared homestead law.

154. *Schultz v. Mantrangelo*, 333 F.2d 278 (9th Cir. 1964).

155. See note 23 *supra*.

The provisions in Civil Code Sections 1245 through 1259 should be retained with some modifications and should continue to govern the procedure for execution or attachment on a declared homestead. One area of concern is that the debtor should not be allowed to block an execution sale by voluntarily encumbering the homestead so that the excess over the homestead exemption is wiped out. Therefore, the provisions in section 1245 to 1259 permitting an execution sale if the value of the homestead exceeds the amount of the homestead exemption plus the amount of all liens and encumbrances thereon, should be altered so that only liens and encumbrances prior to the judgment creditor's lien on the excess are considered. Also, the rule in the *Schoenfeld v. Norberg*¹⁵⁶ case should be changed by legislation so that if a homestead is held by the debtor and the debtor's spouse in joint tenancy, the court could order an execution sale of both of their interests in the homestead, subject to the spouse's right of first refusal to purchase the property at its sale price. Such a provision could be patterned after Section 363 of the proposed Bankruptcy Law¹⁵⁷ and would serve to facilitate the execution sale of joint tenancy property.

Civil Code Section 1256 should be amended so that it states more accurately the order of priority of lienholders with respect to the proceeds of an execution sale. The order of priority of the liens on the homestead should be as otherwise provided by law and the proceeds of an execution sale should be distributed accordingly, with the exception that the debtor should receive the amount of the homestead exemption out of the sale proceeds ahead of any judgment creditor. Problems may arise if there are creditors with consensual or mechanics or similar types of liens that are subsequent to the lien of the judgment creditor who caused the execution sale. In such cases the judgment creditor should retain priority with respect to these subsequent creditors, but if the subsequent creditors hold consensual, mechanics or similar types of liens, they should be allowed to enforce such liens out of the sale proceeds, including the amount of the homestead exemption, received by the debtor.

Although a declaration of homestead would dissolve judgment liens to the extent of the homestead exemption, the excess over the homestead exemption would still be subject to judgment liens. Judgment liens on the excess might create a cloud on the debtor's title even if there were no excess to which the judgment liens could attach because the value of the homestead was less than the total of the homestead exemption and the encumbrances prior to the judgment liens. A procedure should be adopted to enable a

156. See text accompanying notes 35-40 *supra*.

157. S. 2266, 95th Cong., 1st Sess. (1977); H.R. 8200, 95th Cong., 1st Sess. (1977).

debtor to discharge judgment liens in their entirety where no excess over the homestead exemption exists, so that clouds on the debtor's title due to judgment liens on a nonexistent excess could be removed, and the debtor could sell the homestead if he chose. Such a procedure could be modelled after that found in Oregon Revised Statutes Section 23.280 (1975).¹⁵⁸ The Oregon procedure permits a debtor or a prospective purchaser of the homestead to file a notice of intent to discharge the lien with the judgment lienholder and the court where the judgment was rendered. The lien will be discharged 14 days after the filing of the notice unless the creditor objects to the notice and requests a hearing. At the hearing the court determines if the homestead is exempt, and if so, whether its fair market value exceeds the exemption. If the fair market value is less than the exemption, the court will order that the homestead is not subject to the lien; otherwise, the lien will remain unaffected by the notice.

The provisions in Sections 1257 and 1265 protecting the proceeds from the sale of a homestead up to the amount of the homestead exemption should be retained, as should the provision in Section 1265a that permits a debtor to protect a homestead purchased from the proceeds of a sale of a previous homestead. The requirement in Section 1265a, however, that the declaration of homestead be recorded within six months of the sale of the previous homestead is unnecessary and should be removed.

A number of the provisions of the declared homestead law could also be simplified and reordered. The definitions in Civil Code Section 1237.5 are unnecessary and should be removed. Also, the first three sentences in Section 1238 could be simplified by substituting for them a statement that the homestead may be selected from any property of the debtor or his spouse. In addition, the provisions relating to the procedure for declaration of a homestead could be placed together or consolidated. Finally, a procedure should be adopted by which the amount of the homestead exemption could be revised to reflect changes in the cost of living without the need for the legislature to act to amend Civil Code Section 1260.¹⁵⁹

The foregoing proposed changes would extend the protection of the declared homestead law to larger numbers of debtors in California. At the same time these changes would bolster the ability of creditors to reach the excess value of a homestead over the exempt amount in order to enforce a debtor's obligations. In addition, the burdens imposed by Section 690.31 on debtors, creditors and the courts would be reduced as a debtor would be able

158. See also WIS. STAT. ANN. §815.20(2) (West 1977).

159. See H.R. 8200, 95th Cong., 1st Sess. §104 (1977) for the procedure in the proposed Bankruptcy Law for adjusting dollar amounts in the proposed law.

to claim an exemption by recording a declaration of homestead instead of having to attend a hearing, and a creditor would not have to provide notice and a hearing to the debtor, except where such notice and hearing were necessary to protect the debtor's interests. These changes would, however, only improve the homestead law as it relates to debtors' and creditors' rights; additional changes are necessary to reform the homestead law as it relates to the disposition of the family home on the death of its owner.

B. Reform of the Declared Homestead and Probate Homestead Laws

The manner of disposition of the family home on the death of its owner is affected by whether the owner or the owner's spouse elected to obtain protection from their creditors by recording a declaration of homestead during the owner's lifetime. The major differences between the declared homestead and probate homestead laws can be summarized as follows: first, if a homestead was declared during the decedent's lifetime, title will vest in the surviving spouse; whereas, if no homestead was declared, a probate homestead will be selected which will pass to the surviving spouse and minor children of the decedent; second, the value of a declared homestead that can pass to the surviving spouse is limited to an arbitrary amount and the declared homestead must be divided or sold if its value exceeds that amount, while no limitation is placed on the value of a probate homestead that may be assigned; third, liens and encumbrances on a declared homestead are exonerated from the funds of the estate, while a probate homestead passes to the surviving spouse and minor children subject to existing liens and encumbrances; finally, the probate homestead can be set aside to the surviving spouse and minor children for only a limited period if the probate homestead is selected from separate property of the decedent, but they can receive an estate in fee simple if the probate homestead is selected from other than separate property of the decedent.

It is submitted that no justification exists for the disparity in the treatment of declared homesteads and probate homesteads and it is urged that the law be changed so that the disposition of the family home on the death of its owner would be handled in the same manner whether or not a declaration of homestead had been recorded during his lifetime. The fundamental purpose of the declaration of homestead is to protect the family home from creditors; the existence of a declaration of homestead ought not affect its disposition upon the death of its owner.

In order to make the declared homestead and probate homestead laws more uniform, it is recommended that the law be changed so that the probate court is required to designate a probate homestead from the estate for the benefit of the surviving spouse and minor children whether or not a declara-

tion of homestead had previously been filed.¹⁶⁰ Provision should be made, however, to limit the discretion of the probate court in its selection of the probate homestead if both spouses have joined in a declaration of homestead during the decedent's lifetime; in such a circumstance, the probate court should be required to designate the declared homestead as the probate homestead.¹⁶¹ Also, the surviving spouse and minor children should be given the same interest, including an estate in fee simple, that the decedent had in the family home even if the probate homestead is designated from the decedent's separate property.¹⁶² The present limitation of the interest in a decedent's separate property that can be set aside to a surviving spouse to a life estate restricts the spouse's ability to sell the homestead and move to another one.

No limit should be placed on the value of the probate homestead to be designated by the probate court and the court should have discretion to designate a probate homestead that would provide the most suitable home for the surviving spouse and minor children. The law should specify, however, that a probate homestead is protected only to the extent of a declared homestead, and creditors of the estate and of the surviving spouse and children should be able to execute on the excess over the homestead exemption to enforce the obligations owed to them. Also, debts of the kind specified in subsections (2), (3) and (4) of Civil Code Section 1241 should be enforceable against the probate homestead to the same extent as they would be enforceable against a declared homestead.

Finally, the provision in Probate Code Section 735 that liens and encumbrances on a declared homestead should be paid out of the funds of the estate should be abolished. In today's economy it is unusual for real property to be owned free and clear of all liens and encumbrances. Real property is generally financed by means of mortgages and deeds of trust, so that the interest of the owner in the property is only a small portion of its value.¹⁶³ The exoneration rule in Probate Code Section 735 is out of step with today's economy and opposed to the modern trend which disfavors exoneration.¹⁶⁴

These changes would simplify the procedure for the disposition of the family home and help insure that the decedent's surviving spouse and minor children are protected from losing the family home as a result of his death.

160. This recommendation was made in *Recommendation Relating to Summary Distribution of Small Estates Under Probate Code Sections 640 to 646*, 1 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS AND STUDIES 50, 52 (1955).

161. Such a provision would enable the spouses to determine the disposition of the family home in the event one of them should die, without fear that their plans will be upset by the probate court.

162. This was also proposed in *Recommendations Relating to Summary Distribution of Small Estates Under Probate Code Sections 640 to 646*, 1 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS AND STUDIES 50, 52 (1955).

163. See *Estate of Brown*, 240 Cal. App. 2d 818, 820, 50 Cal. Rptr. 78, 80 (1966).

164. *Id.*

CONCLUSION

California's homestead legislation provides a great deal of protection for debtors and their families. Both the current declared homestead and claimed dwelling house exemption laws protect debtor's homes to a large extent from forced sale by unsecured creditors. The declared homestead and probate homestead laws protect a decedent's family from loss of the family home. Unfortunately, there exist a number of technical legal problems with each of the three systems of homestead legislation and each system is in some respects inconsistent with the others. Accordingly, it is proposed that the legislature act to simplify and strengthen California's homestead legislation.

