

## Memorandum 2017-13

### Homestead Exemption: Dwelling

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As discussed in Memorandum 2012-5, the Commission<sup>1</sup> received a letter from John Schaller, an attorney from Chico, suggesting that the Commission address an apparent problem involving the operation of the homestead exemption. Under existing law, before a creditor can enforce a money judgment by forcing the sale of real property that is a “dwelling,” the creditor must obtain a court order determining whether the property is subject to a homestead exemption (and if so, determining the effect of the exemption).

The problem is that existing law does not provide a clear way for a creditor to dispute whether the property is a dwelling.

This memorandum, which was co-authored by Commission extern Greg Gonzalez of U.C. Davis School of Law, discusses how the issue described above might be addressed.

Unless otherwise noted, all statutory citations are to the Code of Civil Procedure.

#### BACKGROUND

##### **Homestead Protection in California Constitution**

The California Constitution provides for a homestead exemption to protect certain real property from forced sale by creditors. Specifically, the Constitution directs: “The Legislature shall protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families.”<sup>2</sup> That provision has been a part of California law since the original California Constitution was

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

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

2. Cal. Const. art. XX, § 1.5.

adopted in 1849.<sup>3</sup> The Legislature determines the procedure for implementing this constitutional protection.<sup>4</sup>

### **Existing Procedure for Forced Sale of Dwelling**

Under existing law, a judgment creditor cannot force the sale of a dwelling without first obtaining a court order to determine whether the dwelling is the judgment debtor's homestead.<sup>5</sup>

A "dwelling" is a place where a person resides.<sup>6</sup> Notably, the term "dwelling" is not limited to property with a permanent residential building. It may include but is not limited to, property where a person resides in a less permanent structure, such as a mobilehome.<sup>7</sup> This means that it may not be possible to determine whether property is a dwelling simply by looking at public records to determine whether the property contains a residential building.

A "homestead" is the principal dwelling of a judgment debtor or the judgment debtor's spouse, from the date that a judgment lien attaches through the date that the court determines that the dwelling is a homestead.<sup>8</sup>

If a judgment creditor wishes to satisfy a money judgment by forcing the sale of real property, the levying officer (the sheriff) must first levy the property. If the property is a dwelling, the levying officer will notify the judgment creditor that the sale will not proceed without an authorizing court order.<sup>9</sup>

The purpose of that requirement is to provide an opportunity for the court to determine whether the property is subject to a homestead exemption and, if so, how to effectuate the exemption.<sup>10</sup>

If the court determines that the property at issue is protected by a homestead exemption, it will determine the amount of the homestead exemption<sup>11</sup> and the fair market value of the property. In order for homestead property to be sold, the proceeds of sale must be sufficient to satisfy all liens and encumbrances against the property and pay the exemption amount to the judgment debtor.<sup>12</sup> If the court finds it likely that the proceeds of sale will be insufficient for that purpose,

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3. See *Taylor v. Madigan*, 126 Cal. Rptr. 376, 382 (1975).

4. *Noble v. Hook*, 24 Cal. 638, 639-40 (1864).

5. Section 704.740.

6. Section 704.710(a).

7. *Id.*

8. Section 704.710(c).

9. Section 704.750.

10. Section 704.780(b).

11. *Id.* See also Section 704.730 (homestead exemption amount).

12. Section 704.800.

it will not order the sale of the property.<sup>13</sup> If the proceeds are likely to be sufficient, the court will make an order for sale of the property, subject to the homestead exemption.<sup>14</sup>

If the court determines that the property is *not* a homestead, then the court will make an order for sale of the property.<sup>15</sup>

#### THE PROBLEM

By its terms, the procedure described above only applies to property that is a dwelling. Thus, the apparent focus of the court's inquiry is not whether the property is a *dwelling*, but whether it is a *homestead* (i.e., the principal dwelling of the judgment debtor or the judgment debtor's spouse). The status of the property as *someone's* dwelling seems to be assumed.

But suppose that the judgment creditor believes that the property is not a dwelling, but the levying officer gives notice that the property is a dwelling and therefore a court order will be required before the sale can proceed. In that case, the judgment creditor's only way forward would be to apply for a court order authorizing the sale and then convince the court that the property is not subject to a homestead exemption. In most cases, that should be possible, because a homestead is necessarily a dwelling. If the judgment creditor can establish that the property is not a dwelling, then the court should find that the property is not a homestead and will order the sale of the property.

However, the law is not well-tailored to achieve that result. The existing statutes are drafted in a way that assumes that the property at issue is a dwelling. For example, Section 704.760 specifies the information that must be included in the judgment creditor's application for a court order authorizing sale:

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

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

(b) A statement, which may be based on information and belief, *whether the dwelling is a homestead* and the amount of the homestead exemption, if any, and a statement whether or not the records of the county recorder indicate that a homestead declaration under

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13. Section 704.780(b).

14. Section 704.780(b).

15. *Id.*

Article 5 (commencing with Section 704.910) that *describes the dwelling* has been recorded by the judgment debtor or the spouse of the judgment debtor.

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

(Emphasis added.) The other elements of the procedure are framed in similar terms.<sup>16</sup>

That framing could create confusion. A judgment creditor or judge may not be sure whether the procedure for obtaining a court order for sale of a dwelling can be used to dispute the status of the property as a dwelling. That may lead to unnecessary consumption of resources and court time to determine how to proceed.

#### POSSIBLE APPROACHES

The staff sees two general ways to address the problem described above.

#### **Clarify that Existing Procedure Can be Used to Dispute Dwelling Status**

The law could be revised to make clear that the existing dwelling sale procedure could be used to determine whether property is a dwelling. The main obstacle to that approach is the fact that existing law uses terminology that assumes the property is a dwelling.

That problem could be addressed with minor clarifying amendments. For example, Section 704.760 could be revised along these lines:

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

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

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

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16. See Section 704.780(a) (burden of proof), (c) court determination), (d) (appraisal).

describes the ~~dwelling~~ property has been recorded by the judgment debtor or the spouse of the judgment debtor.

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

Fully implementing that kind of reform may involve slightly more difficult drafting in other provisions, but the staff believes that it could be done without too much effort. The work could probably be done as a law student project.

### **Do Nothing**

Another possibility is that the Commission could leave the law as it stands today. Although the procedure is not as clear as it could be, it seems likely that any dispute about whether property is a dwelling could eventually be resolved under existing law. The judgment creditor would simply need to apply for an order to sell the property and then explain to the court that the property is not a homestead *because it is not a dwelling*.

That may entail some added inefficiency, as it requires briefing on a point that is not clearly addressed by the statute, but it would probably be workable in most cases.

### RECOMMENDATION

**The staff recommends that the Commission pursue the first approach — make technical revisions to make clear that the existing procedure can be used to dispute the status of property as a dwelling.** But it would also be reasonable for the Commission to conclude that the problem is too modest to justify expending any Commission resources.

### **How would the Commission like to proceed?**

Respectfully submitted,

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