

Memorandum 80-94

Subject: Study D-300 - Enforcement of Judgments (Homestead Exemption)

Attached to this memorandum as Exhibit 1 is a redrafted version of the homestead exemption incorporating changes made or suggested by the Commission at the October meeting. The key changes in this draft over the prior version are:

(1) The exempt amount is \$60,000 for a debtor 65 or older or for a family unit, and \$30,000 for others.

(2) A procedure is provided to enable the judgment debtor to obtain the homestead exemption in case of a voluntary sale of the property where there is a judgment lien on the property.

(3) The court need not determine whether the debtor's equity equals or exceeds the amount of the homestead exemption. The property is simply not sold if no bid is received equal to the amount of the homestead exemption. In such a case the creditor is assessed costs and, in the court's discretion, attorney's fees and is precluded from relevy on the property for a year.

(4) The interest of the debtor is sold subject to senior liens and encumbrances, and the senior liens and encumbrances are precluded from accelerating.

Amount of homestead exemption. At the October meeting the Commission suggested a \$30,000 homestead exemption, the amount to be doubled if the judgment debtor is over 65 or has a spouse or dependents (a "family unit"). Although this scheme resolves many problems in the homestead exemption, it creates a number of other problems. Assume for purposes of discussion a homestead in which husband, wife, and child reside. Let us consider some typical (and atypical) fact situations:

(1) The homestead is entirely community property. If either spouse is the judgment debtor, the spouse is entitled to a double exemption of \$60,000 as a family unit member. If both spouses are judgment debtors, each would appear to be entitled to \$60,000 as a family unit member. An exemption of \$120,000 is too great, so the statute limits the total exemption to \$60,000 for the "family unit."

(2) The homestead is half the separate property of one spouse and half the separate property of the other spouse. If either spouse is the

judgment debtor, the spouse is entitled to a double exemption of \$60,000 as a family unit member. This means that half the property is not liable at all (the half belonging to the nondebtor spouse) and \$60,000 of the other half is exempt. This is acceptable since the presence of the child in the homestead qualifies the debtor for a double exemption. (If there were no child in the home, would the debtor qualify for a double exemption because of the spouse? The staff draft would not allow doubling since the ownership interest of the nondebtor spouse already has that effect.) If both spouses are judgment debtors, each would be entitled to \$60,000, assuming each would include the child in his or her own family unit. In this case do we want to arbitrarily restrict the spouses to \$60,000, as we have done with community property? The staff has drafted the statute to do this. (If there were no child it would not appear proper to allow each spouse to include the other spouse in his or her family unit, thereby in effect quadrupling the exemption).

(3) The homestead is two-thirds the separate property of the debtor spouse and one-third community property. All the property is liable on the judgment, and the debtor spouse is entitled to a \$60,000 exemption. But why should the debtor be able to apply the whole exemption to his or her separate property to the detriment of the community to satisfy the creditor? The staff has drafted the statute to allow an apportionment of the exemption of proceeds of sale between the spouses on the basis of their proportionate interests in the property. Thus in this situation the exemption of \$60,000 would be applied \$40,000 to the debtor's separate property (two-thirds) and \$20,000 to the community property (one-third).

(4) The homestead is two-thirds the separate property of one spouse and one-third the separate property of the other spouse. The spouses are joint debtors on the judgment. Although each spouse would be entitled to \$60,000 as a member of a family unit, we restrict the spouses to \$60,000 total. The property must be sold for at least \$60,000 and the exemption divided between the spouses. But is the exemption divided \$30,000 to each spouse, or is it split \$40,000 and \$20,000 (two-thirds and one-third)? Assume the property is in fact worth \$60,000. Then the property interests of the spouses are \$40,000 and \$20,000. To permit the one-third spouse to take \$30,000 in exempt proceeds would

give that spouse a windfall in the form of more cash than the property was worth, to the detriment of the two-thirds spouse, whose property interest is applied not to the satisfaction of the judgment but to the exemption of the other spouse. Also, if the one-third spouse receives only \$20,000, it means that the spouse has been dispossessed from the homestead with less than the amount of the homestead exemption, thereby violating the policy of the homestead law that a person should be able to remain in the home unless the value of the person's interest in the home exceeds \$30,000, in which case the person should have \$30,000 to seek replacement housing. Here the person would be dispossessed even though the person's interest is only worth \$20,000, because of the fortuity that the person happened to be a co-owner with another person obligated on the judgment. If the one-third owner were the only person obligated on the judgment, only the one-third interest would be sold and it would not be sold unless it brought \$30,000 or, since the person is a family unit member under the hypothetical, \$60,000.

The same sort of problems arise, of course, where the joint debtors are co-owners of the property and are not married. Assume a two-thirds and one-third split, the one-third owner living in the homestead with a minor child. The two-thirds owner would be entitled to a \$30,000 exemption and the one-third owner would be entitled to a \$60,000 exemption, requiring a minimum sale price of \$90,000. If the property is worth only \$90,000, the one-third interest is worth only \$30,000 but is entitled to a \$60,000 exemption, and the two-thirds interest is worth \$60,000 but is entitled to a \$30,000 exemption. If the \$90,000 proceeds are apportioned between the parties on the basis of their interests, the two-thirds owner would get \$60,000 exempt and the one-third, \$30,000 exempt, even though the two-thirds owner is entitled to only \$30,000 exempt. If the \$90,000 proceeds are apportioned between the parties on the basis of the exemptions to which they are entitled, the one-third owner would get \$60,000 on an interest worth \$30,000 for a \$30,000 windfall to the detriment of the two-thirds owner.

One way out of this impasse is to sell the interest of each debtor separately and apply the exemption to which that debtor is entitled separately. This is the solution adopted in the draft statute, but it has at least one serious drawback--interests sold separately are likely

to bring a much lower price than property sold as a whole with a subsequent apportionment of proceeds. Whether this problem is so serious that it requires some other solution is debatable. The Commission has previously decided to sell only the interest of the debtor where there are non-debtor co-owners of the property. And the likelihood of a bid higher than the minimum where the whole property is sold, as opposed to where interests are sold separately, is remote.

(5) The homestead is one-third the separate property of each spouse and one-third the property of the child. If any of the co-owners is a judgment debtor, the \$30,000 exemption should not be doubled (despite the presence of a family unit) since the other members of the family unit have property interests that satisfy the purpose of the increased exemption. But suppose the child's interest is only a one-ninety-ninth interest--should this preclude the debtor spouse from a doubled exemption? The draft statute allows a doubled exemption only if there is a member of the family unit having no interest, however small, in the property. Lines must be drawn somewhere, and at this point simplicity controls over equity.

(6) The homestead is two-thirds community property and one-third the property of the child. The child cannot be counted as a family unit member. The spouses together are a family unit and should be entitled to a \$60,000 exemption whether one or both are judgment debtors. See discussion under (1) above.

The foregoing fact situations assume a single homestead. Now assume that one spouse lives in one house with the child and the other lives in a different house. Each house is a homestead since it is the principal dwelling in which a spouse actually resides. The problems are more complex here:

(7) Both homesteads are entirely community property. All the property is liable whether one or both spouses are judgment debtors. The spouse living alone gets a \$30,000 exemption and the spouse living with the child gets a \$60,000 exemption, for a total of \$90,000. This is too high if looked at together. However, in practice only one house at a time is sold, and the proceeds are exempt for a certain period. Under the statute as drafted, after the first house is sold, either the

proceeds are exempt or the other house is exempt. In order to claim an exemption for the other house, the spouses must give up the proceeds.

(8) Both homesteads are the separate property of the debtor-spouse, who is the spouse living alone. The debtor living alone can claim a \$30,000 exemption for that dwelling and a \$60,000 exemption for the dwelling in which the spouse and child live, for a total of \$90,000 in the separate property of the debtor spouse. However, the homesteads will be sold separately, so the maximum exemption will be \$60,000. See number (7), above. But suppose the first house levied upon is not sold because the exemption is \$60,000 and the value of the house is \$55,000. The second house levied upon is not sold because the exemption is \$30,000 and the value of the house is \$25,000. The judgment debtor in effect gets two exemptions, amounting to \$80,000, and the creditor takes nothing. The staff is unable to resolve these problems, except by limiting the exemption to one house, perhaps at the election of the debtor.

(9) One homestead is the separate property of the debtor-spouse and the other is community. Here the solution proposed in subdivision (8) above falls apart. Where each spouse has an interest in one or both houses, whether community or separate, why should the debtor alone be able to make the election which is the homestead? Suppose both spouses are debtors? The only solution provided in the draft statute is the arbitrary limitation on the exemption of husband and wife to \$60,000, apportioned according to their interests.

Additional complications in all of the above situations arise where the debtor or the spouse is over 65. The statute attempts to simplify the complications by providing that the doubled exemption for a person over 65 does not further increase the doubled exemption for a family unit. The exemption is \$60,000 whether the debtor is 65 or a member of a family unit. This is consistent with the Commission's decisions at the October meeting.

Exemption in a voluntary sale. If a judgment lien has been recorded against property and the debtor desires to sell the property, sale may be impossible unless the value of the property exceeds the amount of the judgment lien. This is because the lien stays on the property until it is satisfied, and a buyer will be unwilling to pay full value for the property if the lien remains on. The judgment creditor may voluntarily release the judgment lien in case of sale if the

creditor is satisfied that a fair price is being given for the property. But if the judgment creditor is not satisfied with the amount received, or if the judgment creditor believes the property will appreciate in value and wishes to wait until the whole lien can be satisfied, or if the judgment creditor is simply unreasonable and desires to give the debtor trouble, the lien will remain on the property and the property cannot be sold.

A similar situation arises where the property is a homestead and the sale price is not adequate to satisfy both the judgment lien and the homestead exemption. Unless the judgment creditor voluntarily releases the lien the debtor must either give up the homestead exemption or remain trapped in the property.

The staff has prepared a draft in Exhibit 2 designed to remedy both these situations. The draft enables the judgment debtor who has entered into a contract of sale of property against which a judgment lien has been recorded to obtain a court order discharging the lien. The judgment creditor has the option of either accepting the proceeds of sale that will go to satisfy the judgment in part, or purchasing the property at the sale price. The purchase right is the creditor's protection against an unduly low sale price. The staff believes this is a simple scheme that will work fairly well. The Commission should study the draft to see whether it is a satisfactory solution to the problems.

Respectfully submitted,

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Assistant Executive Secretary

Exhibit 1

Homestead ExemptionIntroduction

California law provides a substantial homestead exemption for the purpose of promoting the security of the home and protecting it from the consequences of the owner's economic misfortune.¹ Under existing law there are three separate homestead exemption statutes: the declared homestead,² the dwelling house exemption for persons who have failed to declare a homestead,³ and the claimed exemption for a mobilehome or vessel.⁴ Each statute provides a homestead exemption if an exemption has not been obtained pursuant to the other statutes.⁵ The amount of the exemption provided by each statute is the same--\$45,000 if the judgment debtor is married, the head of a family, or over 65 years old, and \$30,000 in other cases.⁶ Each statute protects the dwelling from sale to satisfy a judgment if the judgment debtor's equity is less than the exempt amount; if the judgment debtor's equity exceeds the exempt amount, the dwelling may be sold to satisfy the judgment and the statute preserves the sale proceeds for the judgment debtor in the amount of the exemption.⁷

Amount of Exemption

The scheme of protecting \$45,000 if the judgment debtor is married, the head of a family, or over 65 years old, and \$30,000 in other cases discriminates against married judgment debtors. If judgment debtors are

1. The California Constitution requires the Legislature to provide for the protection of a portion of the homesteads of heads of families. Cal. Const. art. 20, § 1.5. For a discussion of the development of the homestead provisions, see *Taylor v. Madigan*, 53 Cal. App.3d 943, 955-61, 126 Cal. Rptr. 376, 384-88 (1975).
2. See Civil Code §§ 1237-1304.
3. See Section 690.31.
4. See Sections 690.3, 690.50.
5. Sections 690.3(b) and 690.31(b); but see Civil Code § 1259.2.
6. Civil Code § 1260; Code Civ. Proc. §§ 690.3(a), 690.31(a). See 1980 Cal. Stats. ch. 15.
7. Civil Code §§ 1245-1256; Code Civ. Proc. §§ 690.31(c)-(k), 690.3, 690.50(i).

living together but are not married, each is entitled to \$30,000 for a total of \$60,000, whereas married debtors are limited to \$45,000 between them. The exemption for a family unit or for a person age 65 or older should be twice the exemption for an individual, or \$60,000. If spouses live separate and apart, each should be entitled to a separate homestead, provided the total of their exemptions does not exceed \$60,000.

The exemption should apply as long as the judgment debtor or spouse continues to own and reside in the dwelling, but a judgment creditor should be permitted to obtain a judgment lien on the dwelling that facilitates collection from proceeds in case of a future sale of the dwelling or in case the judgment debtor ultimately chooses to subject it to a forced sale. When the dwelling is sold, whether voluntarily or involuntarily, judgment creditors having judgment liens on the property should receive the amounts due them, subject to the exemption of homestead sale proceeds.

Of the sale proceeds, the amount of the homestead exemption should be paid in cash to the judgment debtor and should be exempt for use by the judgment debtor for any purpose, including rental housing, for a period of 18 months.⁸ The extended period for protection of the sale proceeds is consistent with the period for reinvestment of sale proceeds of a personal residence under the tax laws.⁹

Exemption Procedure

The three dwelling exemption procedures provided by existing law display unnecessary differences and complexities. They should be simplified and unified.

Declared homestead. The judgment debtor may exempt a real property dwelling by filing a homestead declaration with the county recorder¹⁰ if the judgment creditor has not earlier obtained a judgment lien.¹¹ Once an effective declaration is recorded, the judgment debtor cannot

8. Civil Code Section 1265 protects the proceeds of sale of a homestead for a period of six months without the requirement that the proceeds be applied to purchase of another dwelling or for any other purpose.

9. See, e.g., Rev. & Tax Code § 18091.

10. See Civil Code §§ 1262-1265, 1266-1269, 1300-1303.

11. See Civil Code § 1241.

obtain a subsequent judgment lien, even if the judgment debtor's equity in the property exceeds the amount of the exemption.¹² The result of this scheme is a race to the recorder's office. If the judgment creditor wins the race, the judgment debtor may still assert a dwelling house exemption in a court hearing on the judgment creditor's application for a writ of execution.¹³ If the judgment debtor wins the race, the exemption is not secure since a hearing on entitlement to the exemption is still necessary.¹⁴ The practical effect of a declared homestead is that judgment creditors may be precluded from securing payment of the judgment by means of the relatively benign judgment lien. Judgment creditors must thus seek immediate execution in order to reach any equity the judgment debtor may have in excess of the dwelling exemption, since the creditor who first levies has priority.¹⁵

Dwelling house exemption. Before a judgment creditor may obtain a writ of execution against a dwelling, the judgment creditor must apply to a court in the county where the dwelling is located.¹⁶ This requirement applies whether or not the judgment debtor has recorded an effective homestead declaration on the dwelling. A judgment debtor who has not recorded a prior homestead declaration may nonetheless assert the dwelling house exemption at this time.¹⁷ This manner of asserting the exemption is preferable to the declared homestead because it comes into play only when the exemption is needed--when the judgment creditor seeks to apply the property to the satisfaction of the judgment. It is defective, however, in that it fails to protect any proceeds of sale of the dwelling against a judgment lien when the dwelling is sold voluntarily.¹⁸

Mobilehome and vessel exemption. Under existing law, the judgment debtor may, within 10 days after the property is levied upon, claim a

12. See *Boggs v. Dunn*, 160 Cal. 283, 285-87, 116 P. 743, 744-75 (1911); *Swearingen v. Byrne*, 67 Cal. App.3d 580, 585, 136 Cal. Rptr. 736, 739 (1977).

13. Section 690.31(b).

14. Civil Code § 1245.

15. See Adams, Homestead Legislation in California, 9 Pac. L.J. 723, 728 (1978).

16. Civil Code § 1245; Code Civ. Proc. § 690.31(c).

17. Section 690.31(a)-(b).

18. Section 674(c).

dwelling exemption for a housetrailer, mobilehome, houseboat, boat, or other waterborne vessel pursuant to the general procedure for claiming exemptions for personal property levied upon under execution.¹⁹

Exemption procedure under proposed law. The proposed law would unify these varying procedures and make them consistent to the extent practicable. Under the proposed law, if the dwelling is personal property (a mobilehome not affixed to land or a vessel) or a leasehold estate with an unexpired term of less than two years at the time of levy, the general procedure for claiming exemptions for personal property would apply.²⁰

The declared homestead would be eliminated as unnecessary. If the dwelling is real property other than a leasehold estate with an unexpired term of less than two years at the time of levy, a procedure patterned after the existing declared homestead and dwelling house exemptions would apply, subject to the following important differences:

(1) As under existing law, the proposed law would require the judgment creditor to initiate court proceedings to determine whether the property is exempt and the amount of the exemption. However, instead of the judgment creditor applying for a writ of execution, the judgment creditor would have the property levied upon and would then apply for an order permitting sale of the property. The writ will be issued by the court clerk where the judgment is entered; the order for sale will be made by the court where the dwelling is located. This will eliminate the confusion caused by issuance of writs of execution for different purposes and out of different courts for the enforcement of the same judgment.

(2) Under the proposed law, the judgment creditor must apply to the court for an order permitting sale of the dwelling within 20 days after notice of the levy, and the judgment debtor must be given 45 days'

19. Sections 690.3, 690.50(a). See the discussion under "Procedure for Claiming Exemptions After Levy" infra.

20. This continues the aspect of existing law that requires the debtor to initiate exemption proceedings as to personal property. It eliminates the overlap between Sections 690.3 and 690.31 insofar as certain mobilehomes are concerned.

notice of the hearing. This provision is intended to provide a resolution of the exemption question early in the period during which the sale of real property is delayed under the proposed law,²¹ while permitting adequate time for the judgment debtor to prepare. It also enables prompt clearing of title where property is levied upon but an order for sale is not diligently pursued.

(3) Under existing law, if the judgment creditor alleges the dwelling is not exempt, the judgment debtor has the burden of proof on the exempt status of the dwelling.²² The proposed law creates a presumption in favor of exempt status if the judgment debtor has claimed a homeowner's property tax exemption for the dwelling. Such a claim of exemption requires an affidavit by the claimant that he or she owns and occupies the property as the principal place of residence and intends to occupy the property as the principal place of residence at the same time the following year.²³

(4) Before a dwelling on which a homestead has been declared may be sold on execution, it must be determined whether a portion of the land on which it is located can be divided without material injury to the dwelling and sold to satisfy the judgment.²⁴ This requirement is time-consuming, costly, and burdensome, and results in few partitions in kind. It dates from an era when dwellings were commonly located on larger tracts. Today most dwellings are located on standard lots that cannot be divided. The proposed law does not require a determination whether the property can be divided without material injury to the dwelling. A judgment debtor living on a larger tract who desires to save the dwelling from forced sale may voluntarily divide the property and sell the remainder to satisfy the judgment.

(5) Before a dwelling subject to the homestead exemption may be sold on execution, it must be determined that the judgment debtor's

21. See the discussion under "Repeal of Statutory Redemption From Judicial Sales" supra.

22. Section 690.31(e); Civil Code § 1247.

23. Rev. & Tax Code § 253.5.

24. Civil Code § 1248; Code Civ. Proc. § 690.31(c).

equity exceeds the amount of the exemption.²⁵ This determination is unnecessary, since the market place is a better determinant of value and the property should not be sold unless the minimum bid equals or exceeds the amount of the homestead exemption. The proposed law deletes the determination of the judgment debtor's equity. To help assure that the judgment creditor does not attempt to force sale of property of low value, the proposed law provides that if the minimum bid at sale is not received, the judgment creditor is assessed costs and, in the court's discretion, attorney's fees, and is precluded from again levying on the homestead for a period of one year.

(6) Existing law requires that a dwelling be sold at 90 percent of its fair market value, or less upon court order.²⁶ This requirement is intended to protect the judgment debtor against sacrifice sales of the dwelling, but necessitates the added expense of an appraisal and a court determination of market value. Moreover, the authority of the court to waive the 90 percent requirement limits its usefulness. The Commission believes that a more effective means of protecting the interest of the judgment debtor is to defer the execution sale for a period of four months during which time the judgment debtor may sell the dwelling at a price that is satisfactory. The judgment debtor will receive the proceeds exemption and the rest of the equity will be available to satisfy the judgment. The 90 percent value limitation, with its attendant expenses, should be eliminated in favor of such a scheme.

Other Improvements

In addition to the amount of the dwelling exemption and the basic exemption procedures, there are a number of other features of the dwelling exemption that require revision.

Liens on the dwelling. To what extent must senior liens and encumbrances on a homestead be satisfied in case of a sale? To what extent can the judgment debtor defeat the efforts of the judgment creditor to sell the homestead by creating voluntary liens and encumbrances subordinate to the judgment creditor's lien, including mechanics' and contractors' liens? Existing law is unclear. The dwelling exemption is an

25. Civil Code § 1249; Code Civ. Proc. § 690.31(f).

26. Civil Code § 1254.

amount over and above "all" liens and encumbrances²⁷ and proceeds of sale are applied first to the discharge of "all" liens and encumbrances;²⁸ existing law does not distinguish between liens that are superior to the judgment creditor's lien and those that are inferior.²⁹

In practice, language requiring satisfaction of "all" liens and encumbrances appears to be ignored.³⁰ Under the proposed law, the homestead could be sold if the minimum bid equals or exceeds the amount of the homestead exemption. The sale would be subject to existing senior liens, which would not be required to be satisfied and which could not be accelerated because of the sale. This will minimize the need for new financing and make it easier to obtain an adequate sale price. Voluntary liens and encumbrances subordinate to the judgment creditor's lien would be satisfied out of the proceeds representing the homestead exemption.³¹ Moreover, subordinate voluntary liens and encumbrances would be satisfied along with subordinate involuntary liens in their order or priority out of any surplus remaining after satisfaction of the judgment creditor's lien.

Joint tenancy and tenancy in common property. If there are co-owners of a dwelling and the judgment debtor's interest in the dwelling is sold to satisfy the judgment, the proceeds of sale are used to pay all liens and encumbrances jointly burdening the property before setting apart the amount of the exempt proceeds for the judgment debtor.³²

27. Civil Code § 1260.

28. Civil Code § 1255; Code Civ. Proc. § 690.31(j).

29. The relevant language was amended in 1945 to require satisfaction of all liens and encumbrances. Pre-1945 cases indicate that the lien of the judgment creditor had priority over subsequent liens and encumbrances. See *Marelli v. Keating*, 208 Cal. 528, 530, 282 P. 793, 794 (1929) (dictum); *Lean v. Givens*, 146 Cal. 739, 743, 81 P. 128, 129 (1905).

30. See 3 H. Miller & M. Starr, *Current Law of California Real Estate* § 16:32, at 61 n.19 (rev. ed. 1977).

31. This is consistent with the general principle that exemptions are ineffective against judgments for the purchase price of exempt property or against judgments foreclosing a mortgage or other lien on the property. See Section 690.52.

32. *Schoenfeld v. Norberg*, 11 Cal. App.3d 755, 762-67, 90 Cal. Rptr. 47, ___ (1970). The holding in *Schoenfeld* is the result of the application of two rules: (1) that a joint encumbrance burdens both

When this occurs, the buyer at the execution sale becomes a co-owner in place of the judgment debtor and has an equitable claim against the other co-owners for their proportionate share of the liens and encumbrances paid off;³³ in the ordinary course of events the parties ultimately partition the property. The proposed law simplifies this scheme by eliminating the requirement that joint liens and encumbrances be satisfied. The judgment debtor's interest is sold subject to senior liens and encumbrances, so that contribution among the co-owners is unnecessary and the co-owners are able to preserve their existing financing despite execution sale.

Collateral Effect of Homestead Declaration

In addition to shielding the home from general creditors, the declaration of a homestead under existing law prevents the conveyance or encumbrance of the homestead property without the acknowledged written consent of both spouses.³⁴ Under the proposed law, the declared homestead system would be repealed, thereby eliminating this aspect of the law. The general rules limiting the ability of spouses to convey or encumber community property and requiring the spouses to support each other out of separate property would replace the comparable feature of the declared homestead.³⁵

cotenants' interests to the full amount and must be satisfied in an execution sale of either interest and (2) that a co-owner may claim the entire exemption as to his or her interest.

33. Ibid.

34. See Civil Code § 1242.

35. See, e.g., Civil Code §§ 5100, 5102, 5125, 5127 (Family Law Act). The proposed law would revise these provisions to make clear that a community personal property dwelling could not be conveyed or encumbered without the consent of the spouse and to permit a spouse to record a lis pendens in a dissolution proceeding thereby restraining alienation of a separate property dwelling for a period of three months.

Article 4. Homestead Exemption

§ 704.710. Definitions

704.710. As used in this article:

(a) "Dwelling" includes but is not limited to the following:

(1) A house together with the outbuildings and the land upon which they are situated.

(2) A mobilehome together with the outbuildings and the land upon which they are situated.

(3) A waterborne vessel.

(4) A condominium, as defined in Section 783 of the Civil Code.

(5) A planned development, as defined in Section 11003 of the Business and Professions Code.

(6) A stock cooperative, as defined in Section 11003.1 of the Business and Professions Code.

(7) A community apartment project, as defined in Section 11004 of the Business and Professions Code.

(b) "Family unit" means:

(1) The judgment debtor and spouse of the judgment debtor if the spouses reside together in the homestead.

(2) The judgment debtor or spouse of the judgment debtor and any of the following persons if either spouse cares for or maintains the person in the homestead:

(A) The minor child or minor grandchild of either spouse, or the minor child or grandchild of a deceased spouse.

(B) The minor brother or sister of either spouse, or the minor child of a deceased brother or sister of either spouse.

(C) The father, mother, grandfather, or grandmother of either spouse, or the father, mother, grandfather, or grandmother of a deceased spouse.

(D) An unmarried relative described in this subdivision who has attained the age of majority and is unable to take care of or support himself or herself.

(c) "Homestead" means the principal dwelling in which the judgment debtor or spouse of the judgment debtor actually resides.

Comment. Subdivision (a) of Section 704.710 supersedes the provisions of former law pertaining to the property that could be exempt as a homestead or dwelling. See former Civil Code § 1237 (declared homestead); former Code Civ. Proc. §§ 690.3 (housetrailer, mobilehome, houseboat, boat, or other waterborne vessel), 690.31(a) (dwelling house). Subdivision (a) is intended to include all forms of property for which an exemption could be claimed under former law and any other property in which the judgment debtor or the judgment debtor's spouse actually resides.

Subdivision (b) continues the substance of former Civil Code Section 1261(2) except that the minor grandchild of a deceased spouse is included in the listing.

Subdivision (c) is intended as a drafting aid.

CROSS-REFERENCES

Defined terms

Judgment debtor § 680.350

26758

§ 704.720. Homestead exemption

704.720. (a) The homestead is exempt from sale under this title if no bid is received at the sale that equals or exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy the requirements of Section 701.620 (minimum bid).

(b) The proceeds of sale of a homestead are exempt in the amount of the homestead exemption if the homestead is sold under this title or is otherwise voluntarily or involuntarily sold. The proceeds of sale remain exempt for a period of 18 months unless during the period a homestead exemption is applied to other property, in which case the proceeds are no longer exempt.

Comment. Section 704.720 supersedes Civil Code Sections 1238 and 1240 (providing for a declared homestead) and Code of Civil Procedure Sections 690.3 and 690.31(a) (providing for a claimed dwelling exemption). Unlike the former provisions, Section 704.720 does not specify the interest that is protected and does not limit the homestead in a leasehold to a long-term lease; any interest sought to be reached by the judgment creditor in the homestead is subject to the exemption. The question whether a dwelling is exempt is determined under the circumstances prevailing as of the date of levy. See Section 703.110. The homestead exemption does not apply where a lien on the property other than an enforcement lien is being foreclosed. See Section 703.010.

Subdivision (b) of Section 704.720 supersedes the first sentences of former Civil Code Section 1256 and former Code of Civil Procedure

Section 690.31(k). It broadens them to include voluntary sales and other dispositions of the homestead. The exemption period is comparable to the period for reimbursement of proceeds of a personal residence under the tax laws. See, e.g., Rev. & Tax Code § 18091. The proceeds exemption is subject to preexisting or voluntary liens and encumbrances. See Section 701.810.

CROSS-REFERENCES

Application to marital property § 703.120

Defined terms

Homestead § 704.710(c)

Tracing exempt proceeds § 703.080

26768

§ 704.730. Amount of homestead exemption

704.730. (a) The amount of the homestead exemption is one of the following:

(1) Thirty thousand dollars (\$30,000) unless the judgment debtor or spouse of the judgment debtor who resides in the homestead is a person described in subdivision (b).

(2) Sixty thousand dollars (\$60,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is either or both of the following:

(A) A person 65 years of age or older.

(B) A member of a family unit. This clause applies only if there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor.

(b) Notwithstanding any other provision of this section, the combined homestead exemptions of spouses on the same judgment shall not exceed sixty thousand dollars (\$60,000), regardless whether the spouses are jointly obligated on the judgment and regardless whether the homestead consists of community or separate property or both. If both spouses are entitled to a homestead exemption, the exemption of proceeds of sale of the homestead shall be apportioned between the spouses on the basis of their proportionate interests in the homestead.

Comment. Subdivision (a)(1) of Section 704.730 continues the substance of former Civil Code Section 1260(3) (homestead exemption \$30,000). Subdivision (a)(2)(A) increases the exemption of a person 65 years of age or older from \$45,000 to \$60,000. See former Civil Code § 1260(2). Subdivision (a)(2)(B) increases the exemption for the "head of a family" from \$45,000 to \$60,000. See former Civil Code § 1260(1). However, subdivision (a)(2)(B) replaces the phrase "head of a family" with the phrase "family unit" and makes clear there is no increased exemption if the members of the family unit also own interests in the homestead (except a community property interest).

Subdivision (b) is new. It is intended to preclude the exemption of unduly large amounts and inequitable application of exemptions that might otherwise occur under subdivision (a) because of the variety of ways that spouses can hold property and qualify for increased exemptions.

CROSS-REFERENCES

Defined terms

Family unit § 704.710(b)
Homestead § 704.710(c)
Judgment debtor § 680.350

27640

§ 704.740. Court order for sale and determination of homestead exemption

704.740. (a) Except as provided in subdivision (b), a dwelling may not be sold under this title to enforce a money judgment except pursuant to a court order for sale upon a determination whether the dwelling is a homestead and if so the amount of the homestead exemption.

(b) If the dwelling is personal property or is real property in which the judgment debtor has a leasehold estate with an unexpired term of less than two years at the time of levy:

(1) A court order for sale is not required and the procedures provided in this article relating to the court order for sale do not apply.

(2) An exemption claim shall be made and determined as provided in Article 2 (commencing with Section 703.510).

Comment. Subdivision (a) of Section 704.740 supersedes portions of former Civil Code Sections 1245, 1249, and 1250 and former Code of Civil Procedure Section 690.31(c) and (f).

Subdivision (b) incorporates the general procedures for claiming an exemption where the dwelling levied upon is not subject to the delay of sale provision of Section 701.540 (120-day delay of notice of sale of an interest in real property other than a leasehold estate with an unexpired term of less than two years). Under former law, a house trailer,

mobilehome, houseboat, boat, or other waterborne vessel in which the judgment debtor or the judgment debtor's family actually resided could be claimed as exempt in a similar manner. See former Sections 690(a), 690.3, 690.50. This section also applies to claims of exemption for certain mobilehomes that under former law would have been determined as provided in former Section 690.31(a)(2) (judgment creditor's application for writ of execution on dwelling, including a mobilehome as defined by Health & Safety Code § 18008).

CROSS-REFERENCES

Defined terms

Dwelling § 704.710(a)
Homestead § 704.710(c)
Judgment debtor §680.350

27641

§ 704.750. Application for order for sale

704.750. (a) When a dwelling is levied upon (other than a dwelling described in subdivision (b) of Section 704.740), the levying officer shall serve notice of levy personally or by mail on the judgment creditor. Within 20 days after service of the notice of levy, the judgment creditor shall apply to the court for an order for sale of the dwelling and shall notify the levying officer of the application. If the judgment creditor does not apply for an order for sale of the dwelling within the time prescribed in this section, the levying officer shall release the dwelling in the manner prescribed in Section 699.060.

(b) If the dwelling is located in a county other than the county where the judgment was entered:

(1) The judgment creditor shall apply to a court of similar jurisdiction in the county where the dwelling is located or, if there is no court of similar jurisdiction, to a court of higher jurisdiction in that county.

(2) The judgment creditor shall file with the application an abstract of judgment in the form prescribed by Section 674 or, in the case of a judgment described in Section 697.320, a certified copy of the judgment.

(3) The judgment creditor shall pay a filing fee of four dollars (\$4) in a justice court and six dollars (\$6) in a superior or municipal court.

Comment. Section 704.750 supersedes the introductory portion and the last two paragraphs of former Civil Code Section 1245 and former Code of Civil Procedure Section 690.31(c). Unlike the former provisions which required the judgment creditor to apply for issuance of a writ of execution, Section 704.750 requires the judgment creditor to apply for an order for sale after levy of execution. This ensures that all writs will be issued out of the court in which the judgment is entered. Notice of the application for an order for sale of the property must be given the levying officer, or the dwelling will be released. This requirement applies only to real property dwellings and not to personal property dwellings or to dwellings with less than a two-year leasehold. See Section 704.740(b).

CROSS-REFERENCES

Defined terms

Court § 680.200
Dwelling § 704.710(a)
Judgment creditor § 680.340
Levy on real property § 700.010
Service of notices §§ 684.010-684.070

27642

§ 704.760. Contents of application

704.760. The judgment creditor's application shall be made under oath, shall describe the dwelling, and shall contain one or more of the following:

(a) A statement that the dwelling is not a homestead and the reasons therefor. In such a case, the application shall also state whether the records of the county tax assessor indicate there is a current homeowner's exemption or disabled veteran's exemption for the dwelling claimed by the judgment debtor.

(b) A statement that, if the dwelling is a homestead, either the amount of the homestead exemption or that there is no homestead exemption pursuant to Section 704.720.

Comment. Section 704.760 supersedes subdivisions (a)-(c) of former Civil Code Section 1245 and subdivisions (1)-(2) of former Code of Civil Procedure Section 690.31(c).

CROSS-REFERENCES

Declaration under penalty of perjury § 2015.5
Defined terms

Dwelling § 704.710(a)
Homestead § 704.710(c)
Judgment creditor § 680.340
Judgment debtor § 680.350
Disabled veteran's exemption Rev. & Tax. Code § 205.5
Homeowner's exemption Rev. & Tax. Code § 253.5
Homestead exemption § 704.720

27643

§ 704.770. Notice of hearing

704.770. (a) Upon the filing of the application by the judgment creditor, the court shall set a time and place for hearing and order the judgment debtor to show cause why an order for sale should not be made in accordance with the application. The time set for hearing shall be not later than 45 days after the application is filed or such later time as the court orders upon a showing of good cause.

(b) Not later than 45 days before the time set for hearing, the judgment creditor shall do both of the following:

(1) Serve on the judgment debtor personally or by mail a copy of the order to show cause, a copy of the application of the judgment creditor, and a copy of the notice of the hearing in the form prescribed in Section 693.050.

(2) Serve personally a copy of each document listed in paragraph (1) on an occupant of the dwelling or, if there is no occupant present at the time service is attempted, post a copy of each document in a conspicuous place at the dwelling.

Comment. Subdivision (a) of Section 704.770 supersedes the introductory portions of former Civil Code Section 1246 and Code of Civil Procedure Section 690.31(d).

Subdivision (b) supersedes former Civil Code Section 1257 and Code of Civil Procedure Section 690.31(1).

CROSS-REFERENCES

Defined terms

Dwelling § 704.710(a)
Judgment creditor § 680.340
Judgment debtor § 680.350
Service of notices §§ 684.010-684.070

§ 704.780. Hearing

704.780. (a) The burden of proof at the hearing is determined in the following manner:

(1) If the application states that the dwelling is not a homestead and the records of the county tax assessor indicate that there is a current homeowner's exemption or disabled veteran's exemption for the dwelling claimed by the judgment debtor, the judgment creditor has the burden of proof that the dwelling is not a homestead. If the records of the county tax assessor indicate that there is not a current homeowner's exemption for the dwelling claimed by the judgment debtor, the judgment debtor or spouse of the judgment debtor has the burden of proof that the dwelling is a homestead.

(2) If the application states the amount of the homestead exemption, the judgment debtor has the burden of proof that the amount of the exemption is other than the amount stated.

(3) If the application states that there is no homestead exemption pursuant to Section 704.720, the judgment creditor shall produce a copy of the judgment debtor's claim of exemption for proceeds of sale of a homestead. If the judgment creditor produces a copy of the claim, the judgment debtor may waive the claim by delivering the proceeds of sale to the judgment creditor.

(b) The court shall determine whether the dwelling is a homestead and if so the amount of the homestead exemption and shall make an order for sale of the dwelling.

(c) The clerk of the court shall transmit a copy of the court order to (1) the levying officer and (2) the clerk of the court in which the judgment was entered, if the court making the order is not the court in which the judgment was entered.

Comment. Section 704.780 supersedes former Civil Code Section 1247 and Code of Civil Procedure Section 690.31(c) (second paragraph) and (e).

CROSS-REFERENCES

Defined terms

Dwelling § 704.710(a)

Homestead § 704.710(c)

Judgment creditor § 680.340

Judgment debtor § 680.350

Disabled veteran's exemption Rev. & Tax. Code § 205.5

Homeowner's exemption Rev. & Tax. Code § 253.5

§ 704.790. Procedure after order of sale upon default

704.790. If the court makes an order for sale upon a hearing at which neither the judgment debtor or spouse of the judgment debtor nor the attorney of the judgment debtor or spouse of the judgment debtor appeared:

(a) The judgment creditor shall, not later than 10 days after the date of the order, serve personally or by mail a copy of the order and a notice of the order in the form prescribed in Section 693.060 on the judgment debtor and spouse of the judgment debtor and shall serve personally a copy of each on an occupant of the dwelling or, if there is no occupant present at the time service is attempted, post a copy in a conspicuous place at the dwelling.

(b) If, within 10 days after service of notice of the order, the judgment debtor or spouse of the judgment debtor files with the levying officer a declaration that the absence of the judgment debtor and the spouse of the judgment debtor or the judgment debtor's or spouse of the judgment debtor's attorney from the hearing was due to mistake, inadvertence, surprise, or excusable neglect and that the judgment debtor or spouse of the judgment debtor wishes to assert the homestead exemption, the levying officer shall transmit the declaration forthwith to the court. Upon receipt of the declaration, the court shall set a time and place for hearing to determine whether the determinations of the court should be modified. The time set for hearing shall be not later than 20 days after receipt of the declaration. The clerk of the court shall promptly give notice of the hearing to the parties.

Comment. Subdivision (a) of Section 704.790 supersedes former Civil Code Sections 1251 and 1257 and former Code of Civil Procedure Section 690.31(g) and (1).

Subdivision (b) supersedes former Civil Code Section 1252 and former Code of Civil Procedure Section 690.31(h).

CROSS-REFERENCES

Defined terms

Dwelling § 704.710(a)
Judgment creditor § 680.340
Judgment debtor § 680.350
Manner of service of notice §§ 684.010-684.070

§ 704.800. Sale of homestead

704.800. (a) Upon the sale of a homestead pursuant to court order for sale, if no bid is received that equals or exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy the requirement of Section 701.620 (minimum bid), the court, upon motion of the judgment creditor, shall make an order for a new sale of the homestead.

(b) Any sale shall be conducted within six months after the date of the original order for sale or such longer period as is agreed to by the parties. If the sale is not made within the prescribed period, the order is void, the levying officer shall release the homestead in the manner prescribed in Section 699.060, and the homestead is not thereafter subject to a court order for sale upon subsequent application by the judgment creditor for a period of one year.

Comment. Section 704.800 supersedes former Civil Code Sections 1253 and 1254. If a levy and attempted sale is not successful, the judgment creditor may not recover costs and may be liable for attorney's fees. See Section 704.840.

CROSS-REFERENCES

Declaration under penalty of perjury § 2015.5

Defined terms

Homestead § 704.710(c)

Judgment creditor § 680.340

Judgment debtor § 680.350

27801

§ 704.810. Acceleration clauses

704.810. If a homestead sold pursuant to court order is subject to a lien or encumbrance superior to the judgment creditor's lien, levy on and sale of the homestead is not by itself grounds for acceleration of the obligation secured by the lien or encumbrance, notwithstanding any provision of the obligation, lien, or encumbrance.

Comment. Section 704.810 is new. It is designed to preserve existing financing when a homestead is sold, thereby encouraging a more adequate sale price and protecting the interests of co-owners sharing financing.

CROSS-REFERENCES

Defined terms

Homestead § 704.710(c)
Judgment creditor § 680.340

29198

§ 704.820. Procedure where judgment debtor is co-owner or owns less than a fee

704.820. If the dwelling is owned by the judgment debtor as a joint tenant or tenant in common or if the interest of the judgment debtor in the dwelling is a leasehold or other interest less than a fee interest, notwithstanding any other provision of this article:

(a) If the dwelling is ordered to be sold, the interest of the judgment debtor in the dwelling and not the dwelling shall be sold. If the dwelling is a homestead and there is more than one judgment debtor, the interest of each shall be sold separately and the homestead exemption shall be applied separately to each.

(b) All references in this article to the "dwelling" or "homestead" are deemed to be references to the interest of the judgment debtor in the dwelling or homestead.

Comment. Section 704.820 implements the intent of this article not to restrict the interest of the judgment debtor for which a homestead exemption is available. A homestead exemption is available to a judgment debtor regardless whether the judgment debtor's interest is a fee, leasehold, or lesser interest. See Comment to Section 704.710. If the judgment debtor's interest is an interest in community property, the whole community interest is subject to enforcement of the judgment. See Section 695.020.

CROSS-REFERENCES

Defined terms

Dwelling § 704.710(a)
Homestead § 704.710(c)
Judgment debtor § 680.350

29199

§ 704.830. Extensions of time and appeals

704.830. The provisions of Sections 703.590 and 703.600 apply to proceedings under this article.

Comment. Section 704.830 continues the substance of former Civil Code Sections 1258 (portion incorporating Code of Civil Procedure Section 690.50(1)) and 1259.1, and former Code of Civil Procedure Section 690.31(m) (portion incorporating Code of Civil Procedure Section 690.50(1)) and (n). It incorporates the provisions in the general exemption procedure pertaining to extensions of time and appeals.

29200

§ 704.840. Costs

704.840. (a) Except as provided in subdivision (b), the judgment creditor is entitled to recover reasonable costs incurred in a proceeding under this article.

(b) Upon the sale of a homestead pursuant to a court order for sale, if no bid is received that equals or exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy the requirements of Section 701.620 (minimum bid), the judgment debtor is not entitled to recover costs incurred in a proceeding under this article or costs of sale and the court in its discretion may award to the judgment debtor reasonable attorney's fees incurred in a proceeding under this article.

Comment. Section 704.840 supersedes former Civil Code Section 1259.

CROSS-REFERENCES

Costs § 685.010-685.080

Defined terms

Court § 680.200

Homestead § 704.710(c)

Judgment creditor § 680.340

Judgment debtor § 680.350

Article 5. Discharge of Judgment Lien on Real Property§ 697.810. Application of article

697.810. The judgment debtor may obtain the discharge of a judgment lien on real property in the manner provided in this article if the judgment debtor has made an agreement to transfer the judgment debtor's interest in the property and the terms of the agreement are all cash or, if the property is a homestead and the terms include credit, the credit is not in excess of the amount of the homestead exemption.

Comment. Sections 697.810 through 697.860 are new. They are derived from Oregon law. See Or. Rev. Stat. §§ 23.280-23.300 (1977). This procedure may be necessary where the sale price is not sufficient to satisfy the judgment lien and any applicable homestead exemption, but the judgment creditor does not release the lien voluntarily.

CROSS-REFERENCES

Amount of homestead exemption § 704.730

Defined terms

Judgment debtor § 680.350

Real property § 680.450

3105

§ 697.820. Notice and filing

697.820. The judgment debtor shall personally serve a notice of discharge of the judgment lien on the judgment creditor together with a copy of the agreement of transfer of the property. The judgment debtor shall file with the court in the county where the property is located a copy of the notice and agreement, together with proof of service, and shall deposit in court for the benefit of the judgment creditor one of the following:

(a) All cash proceeds of the transfer in excess of the amount of any homestead exemption.

(b) An undertaking in the amount provided in subdivision (a) to deposit the amount provided in subdivision (a) unless the judgment creditor exercises the right to purchase the judgment debtor's interest in the property as provided in Section 697.860.

Comment. See Comment to Section 697.810.

CROSS-REFERENCES

Amount of homestead exemption § 704.730
Defined terms
Judgment creditor § 680.340
Judgemnt debtor § 680.350
Service of notices §§ 684.010-684.070

3106

§ 697.830. Contents of notice of discharge

697.830. The notice of discharge of the judgment lien shall be executed under oath and shall include all of the following:

- (a) The title of the court where the judgment was entered.
- (b) The cause and number of the action.
- (c) The names of the judgment debtor, the judgment creditor, and the assignee of record if any.
- (d) The date of entry of the judgment and where it was entered in the records of the court.
- (e) A description of the property that is subject to the judgment lien.
- (f) A statement that the judgment debtor intends to discharge the judgment lien.
- (g) A statement whether the homestead exemption is claimed and if so the amount of the exemption.
- (h) A statement of the amount deposited or to be deposited with the court for the benefit of the judgment creditor.
- (i) A statement that if the judgment creditor does not respond in the manner prescribed in Section 697.840, the court will order the judgment lien discharged and the amount deposited with the court will be applied to the satisfaction of the judgment.

Comment. See Comment to Section 697.810.

CROSS-REFERENCES

Amount of homestead exemption § 704.730
Defined terms
Judgment creditor § 680.340
Judgment debtor § 680.350

§ 697.840. Response of judgment creditor

697.840. (a) Within 30 days after service of the notice of discharge and the copy of the agreement of transfer, the judgment creditor may file with the court and serve personally or by mail on the judgment debtor either or both of the following:

(1) Notice of opposition to a claim of homestead exemption as provided in Section 697.850.

(2) Notice that the judgment creditor exercises the right to purchase the judgment debtor's interest the property as provided in Section 697.860.

(b) If the judgment creditor does not respond as provided in subdivision (a), the court shall order the judgment lien discharged upon deposit in the the court, if not already deposited, of all of cash proceeds of the transfer in excess of the amount of any homestead exemption claimed in the notice of discharge. The court clerk shall pay the amount deposited to the judgment creditor.

Comment. See Comment to Section 697.810.

CROSS-REFERENCES

Defined terms

Judgment creditor § 680.340

Judgment debtor § 680.350

Service of notices §§ 684.010-684.070

§ 687.850. Opposition to claim of homestead exemption

687.850. (a) If the judgment creditor opposes a claim of homestead exemption, the matter shall be set for hearing not later than 20 days after service of notice of opposition pursuant to Section 687.840. The judgment creditor shall serve notice of the date set for the hearing on the judgment debtor not less than 10 days prior to the hearing. Service shall be made personally or by mail. The judgment creditor shall file proof of service with the court.

(b) At the hearing the court shall determine whether the property is a homestead and, if so, the amount of the homestead exemption. The

burden of proof at the hearing is as prescribed in Section 704.780 (hearing on homestead exemption).

(c) After determining the amount of any homestead exemption, the court shall order the judgment lien discharged upon deposit in court, if not already deposited, of all cash proceeds of the transfer in excess of the amount of the exemption. The court clerk shall pay the amount deposited to the judgment creditor.

Comment. See Comment to Section 687.810.

CROSS-REFERENCES

Amount of homestead exemption § 704.730
Defined terms
Judgment creditor § 680.340
Judgment debtor § 680.350
Service of notice §§ 684.010-684.070

3109

§ 687.860. Right of judgment creditor to purchase property

687.860. (a) The judgment creditor has the right to purchase the judgment debtor's interest in the property for the total amount provided in the agreement of transfer, and the agreement and all its terms shall be deemed to have been made and shall be construed in light of the purchase right.

(b) The judgment creditor shall exercise the purchase right within 30 days after service of the notice of exercise pursuant to Section 687.840 by depositing in court both of the following:

(1) The amount in cash of any homestead exemption claimed by the judgment debtor or determined by the court pursuant to Section 687.850.

(2) An acknowledgment of satisfaction of judgment to the extent of the remainder of the purchase price.

(c) Upon the deposit the court shall order the judgment debtor's interest in the property transferred to the judgment creditor. The clerk of court shall pay the cash deposited in the amount of any homestead exemption to the judgment debtor notwithstanding any provision of Section 701.810 (distribution or proceeds of sale). The transfer does not extinguish any liens on the property other than the judgment lien notwithstanding Section 701.630 (extinction of liens upon sale).

Comment. See Comment to Section 687.810.

CROSS-REFERENCES

Defined terms

Judgment creditor § 680.340

Judgment debtor § 680.350