

Memorandum 79-1

Subject: Study D-310 - Homestead Property

Introduction

The Commission has determined that to protect the family home from execution to satisfy a money judgment, the homestead exemption should be claimed and the declared homestead scheme, eliminated. However, in the case of a married person there are other consequences of the declared homestead besides exemption from execution. The ability to convey, encumber, or partition property, as well as rights of spouses on marriage dissolution or death, are affected by the declared homestead. These consequences implement the function of the homestead laws to protect the family dwelling not only against the claims of creditors but also against the improvidence of spouses.

The issue raised by the decision to eliminate the declared homestead for purposes of exemption from execution is whether it is necessary to retain the declared homestead in order to preserve these family protection aspects of the homestead laws or whether they can be achieved by some other means, and apart from that whether the basic family protections are necessary or desirable. This memorandum first examines the interspousal protections provided by the declared homestead, then examines the policies behind the declared homestead, and concludes that the declared homestead is not necessary to achieve the desired family dwelling protection.

Interspousal Homestead Protections

The homestead of a married person may be selected from community property, property held jointly or in common by the spouses, or the separate property of either spouse. Civil Code § 1238. "The declaration of a homestead shall not affect the property rights of spouses as between themselves other than as provided by this title." Civil Code § 1263. The homestead title provides that the rights of spouses are affected in three basic ways:

(1) "The homestead is exempt from execution or forced sale." Civil Code § 1240.

(2) "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife." Civil Code § 1242.

(3) "The land so selected, on the death of either of the spouses, vests in the survivor." Civil Code § 1265.

Forced Sale

The primary purpose of the homestead laws is to protect the homestead from execution or forced sale. Article XX, Section 1.5 of the California Constitution provides that "The Legislature shall protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families."

The protection against forced sale is most important for purposes of this memorandum as it relates to partition of homestead property between spouses. The cases have consistently held that property on which a homestead has been declared is not subject to partition. See, e.g., *Walton v. Walton*, 59 Cal. App.2d 26, 138 P.2d 54 (1943). It is immaterial whether the spouse seeking partition is the homestead declarant:

By placing on record her declaration of homestead, plaintiff wife not only exempted the homestead premises from liability to forced sale to satisfy the debts of the owners, but she also thereby exempted the property from forced sale in an action for partition. By homesteading said real property, plaintiff wife waived her right as a joint tenant to have her interest severed from that of her cotenant. [*Kaupe v. Kaupe*, 131 Cal. App.2d 511, 514, 280 P.2d 856, ___ (1955).]

This feature of the homestead laws is superfluous insofar as it relates to a homestead declared on community property, since partition may not be made of community property whether or not a homestead has been declared on the property. Code Civ. Proc. § 872.210(b). And it is irrelevant to separate homestead property since separate property is not held in concurrent or successive ownership and is therefore not capable of being partitioned. Code Civ. Proc. § 872.210(a). Its only application is to joint tenancy or tenancy in common property on which a homestead is declared.

For the purpose of protecting the homestead from partition, a declaration of homestead is unnecessary. It would be sufficient to provide that property on which either of the spouses resides is not subject to partition. This would be more effective than the existing declared homestead in achieving the objective of providing a secure home

for the family since, unlike the declared homestead, the protection would be ambulatory if the spouses change residences. Whether such a restraint on partition of property is desirable is discussed below under "Policy Considerations."

Conveyance or Encumbrance

The selection of a homestead by either spouse restricts the ability of each spouse to convey or encumber any interest in the property. A conveyance or encumbrance is not valid unless both spouses join in it. This rule applies regardless whether the homestead property is community property or the separate property of one of the spouses.

Elimination of the declared homestead would not affect the ability of the spouses to convey or encumber community property. Civil Code Section 5127 requires that a conveyance or encumbrance of community real property must be joined in by both spouses; this rule governs community property whether or not there is a declared homestead on the property.

Elimination of the declared homestead would affect only the ability of the spouses to convey or encumber separate property since, absent the homestead laws, there are no limitations on the ability of the spouses to manage, control, and dispose of their own separate property. The declared homestead could be replaced by a provision to the effect that a spouse cannot convey separate property on which the other spouse resides. Such a provision might be superior to the present declared homestead in some respects, such as its ambulatory character if the spouses change residences. However, it would not provide the degree of certainty concerning its status that the declared homestead presently provides for third persons as well as for the spouses. Nor would it provide the same protection a declared homestead provides against a designing spouse who moves the non-owning spouse off the homestead just so the property may be freely conveyed or encumbered.

A provision to the effect that no real property may be conveyed or encumbered unless both spouses join might be more effective than a restraint on alienation tied to residence. Such a provision would have a tremendous impact on the property rights of spouses, although it might have little impact on the practice of some title insurance companies to require signature of both spouses for a conveyance of any real property, whether community or separate.

Whether any restraints on alienation of the separate property of a spouse are necessary or desirable to replace the declared homestead is open to question. This matter is examined below under "Policy Considerations."

Dissolution of Marriage

Under former law, a declaration of homestead had some effect on the disposition of the homestead property on dissolution. Under the Family Law Act, however, homestead property is treated as any other property for purposes of division.

Community property is divided equally between the spouses, "including any such property from which a homestead has been selected." Civil Code § 4800. Community homestead property not divided on dissolution becomes tenancy in common property and is thereupon subject to division by partition. *Lang v. Lang*, 182 Cal. 765, 190 P. 181 (1920).

Separate property is not divided on dissolution, but remains the property of the owning spouse. Former law specified that separate homestead property must be assigned to the owner on dissolution regardless of the homestead, and the cases held that where this was not done the property belonged to the owner free of the homestead rights of the other spouse nonetheless. *Burkett v. Burkett*, 78 Cal. 310 (1889); *Zanone v. Sprague*, 16 Cal. App. 333 (1911); *California Bank v. Schlesinger*, 159 Cal. App.2d Supp. 854, 324 P.2d 119 (1958). This would also apparently be the law under the Family Law Act, although the issue has not yet been decided.

If a homestead has been declared on either community or separate property, the rights of the spouses as between each other cease upon dissolution, but the exemption from execution by creditors continues. *Bonner v. Superior Court*, 63 Cal. App.3d 156, 133 Cal. Rptr. 592 (1976) (community property); *City Store v. Cofer*, 111 Cal. 482 (1896) (separate property); but see *Shoemake v. Chalfant*, 47 Cal. 432 (1874) (community property) (exemption does not continue).

Elimination of the declared exemption would not affect these principles.

Survivorship

One of the interspousal protection features of the declared homestead is the right of survivorship on the death of one of the spouses.

The right of survivorship serves to limit the power of the deceased spouse to devise the homestead property and to protect the home from creditors of the decedent.

Under Civil Code Section 1265 and Probate Code Section 663, if a married person has declared a homestead on community property, or has declared or joined in a homestead declaration on his or her own separate property, the homestead property vests in the survivor. If a married person has declared a homestead on the separate property of the person's spouse and the spouse has not joined in the declaration, the homestead property vests in the heirs or devisees of the owning spouse subject to the power of the probate court to assign the homestead to the surviving family for a limited period.

Under this scheme the property passes to the surviving spouse despite an attempted testamentary disposition to the contrary by the deceased spouse. The right of the surviving spouse to succeed to the ownership of the property is not affected even though the value of the property may exceed the homestead exemption. However, the property is subject to the claims of creditors to the extent its value exceeds the homestead exemption if the property can be divided so that a portion can be set off as a homestead. Prob. Code §§ 664-666. The remaining portion is subject to the claims of creditors. If the property is not susceptible of division for this purpose, and if the value of the property exceeded the homestead exemption at the time of declaration, the probate court may order the entire premises sold and the proceeds distributed to the claimants.

Where no homestead is declared during marriage or where a married person has unilaterally declared a homestead on the decedent spouse's separate property, the probate court may set apart a probate homestead to the surviving family. Prob. Code § 661. The probate homestead must be selected out of the community or other common property of the spouses, and if none, then out of the separate property of the decedent. It vests in the surviving spouse and children, if selected out of community or other common property. If selected out of separate property, it may be set apart only for a limited period, not to exceed the lifetime of the surviving spouse and the minority of the children.

The law affords greater protection to survivorship rights in the probate homestead than in the declared homestead. The declared homestead protects only the spouse, while the probate homestead protects minor children as well. The declared homestead must be made on the property on which the spouses reside at the time, while the probate homestead is not so limited. Declared homesteads are limited in the value of the property that may be set apart, while probate homesteads are not.

If the declared homestead were eliminated, the probate homestead would be fully adequate to provide survivorship protection to the family of the decedent. An early Commission recommendation suggested this, and the Commission's consultant, Mr. Charles Adams, has also recommended this. See Recommendation Relating to Summary Distribution of Small Estates Under Probate Code Sections 640 to 646, 1 Cal. L. Revision Comm'n Reports 50, 52 (1955); Adams, Homestead Legislation in California, 9 Pac. L.J. 723, 751 (1978). While it could be argued that reliance on the probate homestead rather than the declared homestead may tend to frustrate the estate plan of the decedent, a provision could be added requiring the probate court to take into account the estate plan of the decedent and the needs of devisees and the surviving family in selecting the homestead property. Moreover, it is likely that in practice today selection by the court of a probate homestead is a much more frequent occurrence than survivorship rights in a declared homestead.

Policy Considerations

The preceding review of the effects of a declared homestead on the property rights as between spouses reveals that for the most part, the same family protections are or can be provided by more direct means. The major exception to this observation is that the declared homestead may be a superior means of restraining the partition, conveyance, or encumbrance of the separate property of a spouse that constitutes the home during marriage. The question remains whether such restraints are necessary or desirable, even if actually intended by a homestead declarant seeking to immunize property from the claims of creditors.

The basic intent of the homestead laws 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, whether by reason of their own necessity or improvidence, or from the importunity of their creditors." Estate of Fath, 132 Cal. 609, 613, 64 P. 995, ___ (1901).

The homestead laws in the past have achieved this goal primarily by protecting a community property homestead. Where the spouses made a home on the separate property of the wife, the husband could not declare a homestead interest in the separate property without the consent of the wife. It was only where the home was on the separate property of the husband that the wife was allowed unilaterally to impose a homestead on the husband's separate property. This scheme derives from a time when the husband was the head of the household, had the management and control of the community property, and had a correspondingly greater duty to support the wife.

This scheme was reflected in the laws governing rights of spouses in community and separate property. At that time, a wife could convey her separate property without the consent of the husband, but not vice versa. See former Civil Code §§ 162 and 163. The recent reforms in the law governing marital property have abandoned this protective scheme, and allow either spouse to freely dispose of his or her own separate property. See, e.g., Civil Code §§ 5107 and 5108 (each spouse may, without the consent of the other spouse, convey his or her separate property). The homestead laws giving a spouse a right to restrict the disposition of the separate property of the other spouse are now inconsistent with present concepts of marital property rights.

When the community property laws were revised, the right to declare a homestead in the other spouse's separate property was made nondiscriminatory by permitting either spouse to declare a homestead in the separate property of the other without the other's consent. The discriminatory aspect could also have been eliminated by requiring that the owner of separate property, whether husband or wife, must join in its designation as a homestead. The staff believes that the choice made by the revisors was not well-considered. The opportunity to unilaterally declare a homestead in the other spouse's separate property and thereby tie it up, is not only inconsistent with modern notions of interspousal rights but also seems divisive and implies spousal disagreement.

Protection of the rights of spouses and preservation of a family home can be achieved directly without the burdensome and rigid device of

the homestead declaration. The spouses are mutually obligated to support each other, and a spouse must support the other spouse while they are living together out of the separate property of the spouse when there is no community property or quasi-community property. Civil Code §§ 5100, 5132. The basic right of the spouses to preservation and occupation of the family home is stated in the Family Law Act:

Civil Code § 5102. Neither husband nor wife has any interest in the separate property of the other, but neither can be excluded from the other's dwelling except as provided in [the provisions relating to annulment and dissolution], upon application of either party in the manner provided by Section 527 of the Code of Civil Procedure, the court may order the temporary exclusion of either party from the family dwelling of the other upon a showing that physical or emotional harm would otherwise result, until the final determination of the proceeding.

These provisions implement the same policy as the homestead laws-- to further the security of the family home. The staff believes that the homestead declaration on the separate property of a nonconsenting spouse is unnecessary and that as a matter of policy a spouse should not be permitted to restrain the alienation of the other spouse's separate property. Thus the obligation of the spouses mutually to support each other and provide a dwelling would not need to be satisfied out of particular property, but would be a general charge upon all community and separate assets of the spouses. The staff believes this is a more satisfactory state of affairs.

Conclusion

The staff's analysis indicates that the declared homestead can safely be repealed without endangering any of the important family protection aspects of the homestead. The major policy consideration in such a repeal is whether to continue in some form the ability of a spouse to restrain the conveyance, encumbrance, or partition of the separate property of the other spouse on which they reside. The staff's opinion is that such restraints should not be continued.

Attached is a staff draft of provisions to implement the repeal of the declared homestead. The major drafting problems encountered were those relating to the probate homestead. As indicated above, the existing law provides somewhat greater rights in a probate homestead than the survivor's right in a declared homestead. The staff has combined what

appear to be the best features of the two types of homesteads along the following lines:

(1) The court has broad discretion in selecting the homestead property and is not limited to the residence at the time of death. This is a feature of the existing probate homestead.

(2) The homestead may be selected out of personal property such as a mobilehome. This changes existing law but is consistent with the general dwelling exemption from execution.

(3) The homestead exemption from the claims of creditors is the same as the general dwelling exemption from execution. This is a feature of the existing survivor's homestead; it appears from case law to also be a feature of the probate homestead, but this is not clear.

(4) To the extent there are liens and encumbrances on the property selected as a homestead, these may be satisfied out of general estate funds. This is a feature of the existing survivor's homestead; it is not clear whether it is also a feature of the existing probate homestead.

(5) The court in selecting a homestead may take into account the needs of the prospective heirs who would otherwise have received the property, and may require adjustments in distribution of the estate to accommodate the needs of the frustrated devisees. This is new, but has precedent in the provisions relating to pretermitted heirs and legatees and devisees frustrated by sale of property to satisfy claims against the estate.

(6) The persons for whom the homestead may be set apart are limited to the surviving spouse and minor children. This is a feature of the existing probate homestead. The declared homestead permits the court to set aside a homestead declared by the "head of a family" for surviving relatives "for a limited period"; the draft statute does not continue this provision since the head of a family can, in lieu of declaring a homestead in favor of surviving relatives, make an appropriate inter vivos or testamentary disposition.

One of the potential problems in eliminating the declared homestead is the constitutionality of frustrating the interest of a person who has declared the homestead--the right to restrain alienation, the right to survivorship, etc. While a colorable argument of unconstitutionality could be made, the staff believes such an argument is weak. Cf. Reppy,

Retroactivity of the 1975 California Community Property Reforms, 48 So. Cal. L. Rev. 977 (1975). The staff draft includes transitional provisions to make the elimination of the declared homestead effective immediately.

If the staff draft meets with the Commission's approval, we will incorporate it into the enforcement of judgments project among the conforming changes and draft a preliminary part that explains the changes. Conforming changes in the guardianship-conservatorship statute relating to disposition of community and homestead property will also be necessary. We will be seeking input on these matters from interested persons, and particularly from the title companies.

Respectfully submitted,

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EXHIBIT 1

DECLARED HOMESTEAD

Civil Code §§ 1237-1304 (repealed). Homesteads

SEC. . Title 5 (commencing with Section 1237) of Part 4 of Division Second of the Civil Code is repealed.

Comment. Sections 1237 through 1304 relating to the declared homestead are not continued. As an exemption from execution (former Section 1240), the declared homestead is superseded by the claimed exemption for a dwelling. See Code Civ. Proc. §§ 707.810-707.860. As a right of survivorship (former Section 1265), the declared homestead is superseded by the probate homestead. See Prob. Code §§ 660-667. As a restraint on the ability to convey, encumber, or partition property (former Sections 1240 and 1242), the declared homestead is superseded by more general provisions governing conveyance, encumbrance, and partition of community and separate property and imposing obligations of spouses for mutual support and to provide a dwelling; the ability of one spouse to affect the separate property of the other spouse is not continued. See Civil Code §§ 5107 (wife may convey separate property without consent of husband), 5108 (husband may convey separate property without consent of wife), 5125 (spouse may not convey or encumber community personal property used as a dwelling without written consent of other spouse), 5127 (both spouses must join in conveyance or encumbrance of community real property), 5100 (spouses' obligation of mutual support), 5102 (right to occupy dwelling of spouse); Code Civ. Proc. § 872.210(b) (no partition of community property).

8382

DIVISION OF PROPERTY

Civil Code § 4800 (amended)

SEC. . Section 4800 of the Civil Code is amended to read:

4800. (a) Except upon the written agreement of the parties, or an oral stipulation of the parties in open court, the court shall, either in its interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties ~~; including any such property from which a homestead has been selected,~~ equally. For purposes of making such division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days' notice by the moving party

to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community property and the quasi-community property of the parties in an equitable manner.

(b) Notwithstanding subdivision (a), the court may divide the community property and quasi-community property of the parties as follows:

(1) Where economic circumstances warrant, the court may award any asset to one party on such conditions as it deems proper to effect a substantially equal division of the property.

(2) As an additional award or offset against existing property, the court may award, from a party's share, any sum it determines to have been deliberately misappropriated by such party to the exclusion of the community property or quasi-community property interest of the other party.

(3) If the net value of the community property and quasi-community property is less than five thousand dollars (\$5,000) and one party cannot be located through the exercise of reasonable diligence, the court may award all such property to the other party on such conditions as it deems proper in its final judgment decreeing the dissolution of the marriage or in its judgment decreeing the legal separation of the parties.

(c) Notwithstanding the provisions of subdivision (a), community property personal injury damages shall be assigned to the party who suffered the injuries unless the court, after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages, and all other facts of the case, determines that the interests of justice require another disposition. In such case, the community property personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just, except that at least one-half of such damages shall be assigned to the party who suffered the injuries. As used in this subdivision, "community property personal injury damages" means all money or other property received by a married person as community property in satisfaction of a judgment for damages for his or her personal injuries or pursuant to an agreement for the settlement or compromise of

a claim for such damages, unless such money or other property has been commingled with other community property.

(d) The court may make such orders as it deems necessary to carry out the purposes of this section.

Comment. Section 4800 is amended to reflect the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

8384

Civil Code § 4810 (amended)

SEC. . Section 4810 of the Civil Code is amended to read:

4810. The disposition of the community and quasi-community property, ~~of the quasi-community property and of the homestead,~~ as above provided, is subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the court.

Comment. Section 4810 is amended to reflect the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

12/344

COMMUNITY PERSONAL PROPERTY

Civil Code § 5125 (amended)

SEC. . Section 5125 of the Civil Code is amended to read:

5125. (a) Except as provided in subdivisions (b), (c), and (d) and Sections 5113.5 and 5128, either spouse has the management and control of the community personal property, whether acquired prior to or on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.

(b) A spouse may not make a gift of community personal property or dispose of community personal property without a valuable consideration, without the written consent of the other spouse.

(c) A spouse may not sell, convey, or encumber property used as a dwelling, the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children which is community personal property, without the written consent of the other spouse.

(d) A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest.

(e) Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property.

Comment. Section 5125 is amended to limit the disposition of personal property used as a dwelling, such as a mobilehome. Cf. Code Civ. Proc. § 707.810 ("dwelling"). This change accommodates the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

405/844

PARTNERSHIPS

Corporations Code § 15025 (amended)

SEC. . Section 15025 of the Corporations Code is amended to read:

15025.. (1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment, or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the ~~homestead or~~ exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin, and is not community property.

Comment. Section 15025 is amended to delete the reference to rights under the homestead laws. The declared homestead is eliminated in favor of a claimed exemption. See Comment to former Civil Code §§ 1237 through 1304.

18/321

SUCCESSION

Probate Code § 228 (amended)

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

228. If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was community property of the decedent and a previously deceased spouse, and belonged or went to the decedent by virtue of its community character on the death of such spouse, or came to the decedent from said spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead prior to January 1, 1981 , or in a joint tenancy between such spouse and the decedent or was set aside as a probate homestead, such property goes in equal shares to the children of the deceased spouse and their descendants by right of representation, and if none, then one-half of such community property goes to the parents of the decedent in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and their descendants by right of representation, and the other half goes to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of said deceased spouse and to their descendants by right of representation.

If any of the property subject to the provisions of this section would otherwise escheat to this state because there is no relative, including next of kin, of one of the spouses to succeed to such portion of the estate, such property shall be distributed in accordance with the provisions of Section 196.4 of this code.

Comment. Section 228 is amended to reflect the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

10/920

Probate Code § 229 (amended)

SEC. . Section 229 of the Probate Code is amended to read:

229. (a) If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously

deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead prior to January 1, 1981 or in a joint tenancy between such spouse and the decedent, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then to the parents of the deceased spouse, in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of the deceased spouse and to their descendants by right of representation.

(b) If the decedent leaves neither issue nor spouse, that portion of the estate created by gift, descent, devise, or bequest from the separate property of a parent or grandparent shall go to the parent or grandparent who made such gift, devise, or bequest or from whom the property descended, or if such parent or grandparent is dead, such property shall go in equal shares to the heirs of such deceased parent or grandparent.

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

Comment. Section 229 is amended to reflect the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

10/919

PROBATE HOMESTEAD

Probate Code § 660 (amended)

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

660. (a) The decedent's surviving spouse and minor children are entitled to remain in possession of the ~~homestead~~ dwelling, the wearing apparel of the family, the household furniture and other property of the decedent exempt from execution, until the inventory is filed.

(b) Upon the filing of the inventory ~~Thereupon~~, or at any subsequent time during the administration, the court, on petition therefor, may in its discretion set apart to the surviving spouse, or, in case of

his or her death, to the minor child or children of the decedent, all or any part of the property of the decedent exempt from execution, and must select and set apart the a homestead selected by the spouses, or either of them, and recorded while both were living, other than a married person's separate homestead, in the manner provided in this article.

Comment. The provisions of Section 660 that related to the declared homestead are deleted in recognition of the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

10/916

Probate Code § 661 (amended)

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

661. (a) The homestead shall be set apart if no homestead has been selected, designated and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court, in the manner hereinafter provided, must select, designate and set apart and cause to be recorded a homestead for the use of the surviving spouse and the minor children, or, if there be no surviving spouse, then for the use of the minor child or children ; .

(b) The homestead shall be suitable for use as a dwelling and shall be selected out of the community or quasi-community property or out of ~~real~~ property owned in common by the decedent and the person or persons entitled to have the homestead set apart, or if there be no community property or quasi-community property and no such property owned in common, then out of the separate property of the decedent.

(c) Notwithstanding Section 667, if ~~if~~ the property set apart is the separate property of the decedent, the court can set it apart only for a limited period, to be designated in the order, and in no case beyond the lifetime of the surviving spouse, or, as to a child, beyond its minority ; ~~and, subject to such~~ . Subject to the homestead right, ~~the such~~ property remains subject to administration.

~~For the purposes of this section, the terms "quasi-community property" and "separate property" have the meanings given those terms in Section 1237-5 of the Civil Code.~~

Comment. The provisions of Section 661 that related to the declared homestead are deleted in recognition of the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304. The provision of Section 661 that related to recordation is continued in Section 1222.

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

Subdivision (b) and Section 666, which continue the former last paragraph of Section 661, do not require that the homestead be selected out of real property. The homestead may be selected out of personal property such as a mobilehome. Cf. Code Civ. Proc. § 707.810 ("dwelling").

405/331

Probate Code § 662 (no change)

662. When such petition is filed, the clerk must set it for hearing by the court and give notice thereof for the period and in the manner required by section 1200 of this code.

Note. There is no change in this section; it is set out merely for completeness.

100/908

Probate Code § 663 (repealed)

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

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

If the homestead was selected from the separate property of the decedent without his consent, or if the surviving spouse has conveyed the homestead to the other spouse by a conveyance which failed to expressly reserve homestead rights as provided by Section 1242 of the Civil Code, the homestead vests, on death, in his heirs

or devisees, subject to the power of the court to set it apart for a limited period to the family of the decedent as hereinabove provided. In either case the homestead is not subject to the payment of any debt or liability existing against the spouses or either of them, at the time of death of either, except as provided in the Civil Code.

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

Comment. Section 663 is repealed in recognition of the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

100/939

Probate Code § 663 (added)

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

663. (a) Except to the extent that the dwelling is exempt as provided in Article 4 (commencing with Section 707.810) of Chapter 7 of Title 9 of Part 2 of the Code of Civil Procedure, during administration of the estate the property set apart as a homestead is subject to claims against the estate and, subject to Section 735, to liens and encumbrances on the property.

(b) After distribution, the property set apart as a homestead is subject to enforcement of a money judgment to the same extent as any other property of a similar character.

Comment. Section 663 codifies the rule that the probate homestead is liable for debts except to the extent of the homestead exemption. See, e.g., Estate of Huelsman, 127 Cal. 275, 59 P. 776 (1899) (probate homestead does not impair or destroy mortgage or other lien on property); Keyes v. Cyrus, 100 Cal. 322, 34 P. 722 (1893) (probate homestead exempt to the same extent and in the same manner as declared homestead); see also former Section 663. For purposes of the rights of creditors, this section implements the policy of treating uniformly property in probate and property not in probate. Section 663 also changes prior law by making expressly applicable to the probate homestead the discharge provisions of Section 735. See Section 735 and Comment thereto.

100/968

Probate Code § 664 (repealed)

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

~~664. If the homestead so selected and recorded, as provided in Section 663, is returned in the inventory appraised at not over the amount of the homestead exemption, as provided in the Civil Code~~

and in effect at the date of death of the decedent, or was previously appraised as provided in the Civil Code and such appraised value did not exceed that amount, the court shall order it set apart to the persons in whom title is vested by the preceding section. If it is returned in the inventory appraised at more than that amount, the inheritance tax referee must, before he makes his return, ascertain and appraise the value of the homestead at the time the same was selected, and if such value exceeds that amount, or if the homestead was appraised as provided in the Civil Code and such appraised value exceeded that amount, he must determine whether the premises can be divided without material injury, and if he finds that they can be thus divided, he must admeasure and set apart to the parties entitled thereto such portion of the premises, including the dwelling house, as will equal in value that amount, and make report thereof, giving an exact description of the portion set apart as a homestead.

Comment. Section 664 is repealed in recognition of the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

101/127

Probate Code § 664 (added)

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

664. In selecting the homestead, the court shall consider the needs of the surviving spouse and minor children, the value of the property, the liens and encumbrances on the property, the financial condition of the decedent's estate, the claims of creditors, the estate plan of the decedent, and the needs of the heirs and devisees of the decedent. The property selected as a homestead shall be the most appropriate property available in light of the foregoing considerations and other relevant considerations, as determined by the court in its discretion.

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

Under Section 664, unlike former Sections 664-666, there is no appraisal and division procedure required. The court will have available the appraised value of all the property returned in the inventory, and may select accordingly. If property selected has an excess value above the dwelling exemption, it may be subject to creditors' claims. See Section 663 and Comment thereto.

Probate Code § 665 (repealed)

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

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

Comment. Section 665 is repealed in recognition of the elimination of the declared homestead law. See Comment to former Civil Code §§ 1237 through 1304.

28/834

Probate Code § 665 (added)

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

665. If property selected as a homestead was given by will to persons other than the residuary devisees or legatees, the court may make such provision out of the estate as it deems appropriate for such persons under the circumstances of the case, including, but not limited to, requiring proportionate contribution to such persons by the other devisees and legatees, conditioning the selection of the property upon assignment of other property to such persons by the surviving spouse and minor children, or adopting some other apportionment consistent with the intention of the testator.

Comment. Section 665 is added to authorize the court to attempt to minimize the disruptive effect on the decedent's estate plan of setting apart a homestead. The court is permitted, but not required, to make such an effort. Disruption of the estate plan is a more likely occurrence with the elimination of the survivor's right in a declared homestead and reliance on the probate homestead.

The court may take into account the decedent's estate plan in making the initial selection of property to set apart as the homestead. Section 664. Section 665 gives the court broad discretion in abating the shares of devisees and legatees, based on the statutory authority of Sections 91 (pretermitted heirs) and 753 (sale of asset of devisee). Although the court may condition the selection of particular property on the willingness of the homestead recipients to make offsetting assignments of property, the court does not have discretion to refuse to set apart a homestead altogether. See Section 660(b).

Probate Code § 666 (repealed)

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

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

Comment. Section 666 is repealed in recognition of the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

Probate Code § 666 (added)

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

666. As used in this article:

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

(1) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

(2) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

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

Comment. Section 666 continues the substance of the former last paragraph of Section 661, which incorporated by reference former Civil Code Section 1237.5. Unlike former Civil Code Section 1237.5, however, Section 666 applies to personal property as well as real property. The homestead may be selected out of personal property such as a mobilehome. Cf. Code Civ. Proc. § 707.810 ("dwelling").

Probate Code § 667 (amended)

SEC. . Section 667 of the Probate Code is amended to read:

667. When property ~~other than a homestead selected and recorded during the lifetime of the decedent,~~ is set apart to the use of the

family, in accordance with the provisions of this article, such property, if the decedent left a surviving spouse and no minor child, is the property of such spouse; if the decedent left also a minor child or children, one-half of such property belongs to the surviving spouse and the remainder to the child or in equal shares to the children; if there is no surviving spouse, the whole belongs to the minor child or children.

Comment. The provisions of Section 667 that related to the declared homestead are deleted in recognition of the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

28/837

Probate Code § 668 (repealed)

SEC. Section 668 of the Probate Code is repealed.

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

Comment. Section 668 is repealed in recognition of the elimination of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

28/838

Probate Code § 735 (amended)

SEC. . Section 735 of the Probate Code is amended to read:

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

Comment. Section 735 is amended to make clear that it applies to the probate homestead. Cases under an earlier version of this section had held it was limited to the survivor's right in a declared homestead. See, e.g., McGahey v. Forrest, 109 Cal. 63, 41 P. 817 (1895).

Probate Code § 1200 (amended)

SEC. . Section 1200 of the Probate Code is amended to read:

1200. Upon the filing of the following petitions:

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

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

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

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

(5) A petition for the sale of stocks or bonds;

(6) A petition for confirmation of a sale or a petition to grant an option to purchase real property;

(7) A petition for leave to enter into an agreement to sell or give an option to purchase a mining claim or real property worked as a mine;

(8) A petition for leave to execute a promissory note or mortgage or deed of trust or give other security;

(9) A petition for leave to lease or to exchange property, or to institute an action for the partition of property;

(10) A petition for an order authorizing or directing the investment of money;

~~(11) A report of appraisers concerning a homestead;~~

~~(12)~~ (11) An account of an executor or administrator or trustee;

~~(13)~~ (12) A petition for partial or ratable or preliminary or final distribution;

~~(14)~~ (13) A petition for the delivery of the estate to a nonresident;

~~(15)~~ (14) A petition for determination of heirship or interests in an estate;

~~(16)~~ (15) A petition of a trustee for instructions;

~~(17)~~ (16) A petition for the appointment of a trustee;

~~(18)~~ (17) Any petition for letters of administration or for probate of will, or for letters of administration-with-will annexed, which is filed after letters of administration or letters testamentary have once been issued; and in all cases in which notice is required and no other time or method is prescribed by law or by court or judge, the clerk

shall set the same for hearing by the court and shall give notice of the petition or application or report or account by causing a notice of the time and place of hearing thereof to be posted at the courthouse of the county where the proceedings are pending, at least 10 days before the day of hearing, giving the name of the estate, the name of the petitioner and the nature of the application, referring to the petition for further particulars, and stating the time at which the application will be heard.

At least 10 days before the time set for the hearing of such petition, account or report, the petitioner or person filing the account or desiring the confirmation of a report of appraisers, must cause notice of the time and place of hearing thereof to be mailed to the executor or administrator, when he is not the petitioner, to any coexecutor or coadministrator not petitioning, and to all persons (or their attorneys, if they have appeared by attorney), who have requested notice or who have given notice of appearance in the estate in person or by attorney, as heir, devisee, legatee or creditor, or as otherwise interested, addressed to them at their respective post office addresses given in their requests for special notice, if any, otherwise at their respective offices or places of residence, if known, and if not, at the county seat of the county where the proceedings are pending, or to be personally served upon such person.

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

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

28/843

Probate Code § 1240 (amended)

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

1240. An appeal may be taken from an order granting or revoking letters testamentary or of administration; removing or refusing to remove a trustee of a testamentary trust; admitting a will to probate or revoking the probate thereof; setting aside an estate claimed not to

exceed twenty thousand dollars (\$20,000) in value; setting apart property as a homestead or claimed to be exempt from execution ~~confirming a report of an appraiser or appraisers in setting apart a homestead~~; granting or modifying a family allowance; directing or authorizing the sale or conveyance or confirming the sale of property; directing or authorizing the granting of an option to purchase real property; adjudicating the merits of any claim under Sections 851.5, 852 or 853; allocating debts under Section 980; settling an account of an executor or administrator or trustee, or instructing or appointing a trustee; instructing or directing an executor or administrator; directing or allowing the payment of a debt, claim, legacy or attorney's fee; fixing, directing or allowing payment of a trustee's compensation; determining heirship or the persons to whom distribution should be made or trust property should pass; distributing property; determining that property is community property passing or belonging to the surviving spouse pursuant to Section 655; refusing to make any order heretofore mentioned in this section; fixing an inheritance tax or determining that none is due; or authorizing a personal representative to invest or reinvest any surplus moneys pursuant to Section 584.5.

Comment. Section 1240 is amended to reflect the repeal of former Sections 664 through 666 relating to the appraisal of homestead property.

28/844

INHERITANCE TAX

Revenue & Taxation Code § 13621 (repealed)

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

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

Comment. Section 13621 is repealed in recognition of the abolition of the declared homestead. See Comment to former Civil Code §§ 1237 through 1304.

28/845

TRANSITIONAL PROVISION

SEC. . (a) A homestead declared and recorded prior to the operative date of this act pursuant to Sections 1237 through 1304, inclusive,

of the Civil Code shall, on the operative date, cease to have effect for any purpose.

(b) A homestead set apart by order of the court prior to the operative date of this act pursuant to Sections 660 through 668, inclusive, of the Probate Code remains vested as provided therein, but is subject to the claims of creditors to the extent provided in Section ____ of this act [Probate Code Section 663].

32/576

SEVERABILITY CLAUSE

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