

## EXEMPT & HOMESTEAD PROPERTY

### PC 6500 - 6528

These statutory procedures are an effective means to provide for the surviving spouse and/or minor children. California's probate code states that these individuals are entitled to a probate homestead and to know that it can't be taken away from them because of either 1) their improvidence (not being able to foresee the future?), or 2) their creditors.

In addition, they are entitled to possession of ALL of the decedent's exempt personal property (prior to the Inventory & Appraisement being filed and for 60 days thereafter). The exempt personal property includes their wearing apparel, household furniture, etc. (See Code of Civil Procedure for a complete list of exempt property.) After the I&A is filed, the surviving spouse/minor children may file a petition with the court and ask that the court set aside all or part of such property, plus a probate homestead.

These procedures provide resources for the surviving family, free from creditors' claims and/or the rights of the other heirs (e.g., step-children, or first wife!) or devisees.

Exempt property is that property that would be exempt from enforcement of a money judgment under CCP Sections 704.010 - 704.210, and which is exempt under federal bankruptcy law.

After the I&A is filed, the surviving spouse/minor children, or any interested person, can file a petition asking that the exempt property or probate homestead be set aside for them. Only ONE homestead can be set aside. There is no judicial council form for this petition, so one must be typed up from scratch.

In selecting the probate homestead, the court should first look to the Community Property (or quasi-Community Property). If none exists, then the court looks to the property owned in common by Decedent and the petitioner. If there is no such property, then the court will look to Decedent's separate property. **NO PROBATE HOMESTEAD CAN BE SELECTED IF A THIRD PARTY HAS AN INTEREST IN THE PROPERTY, UNLESS THE THIRD PARTY CONSENTS TO THE HOMESTEAD.**

A probate homestead has nothing to do with ordinary homesteads under the Code of Civil Procedure.

There are several factors to be considered by the court in selecting a probate homestead:

- a. The needs of the spouse and minor children.
- b. The liens and encumbrances on the property.
- c. The Creditors' claims.
- d. The needs of Decedent's heirs or devisees.

e. Decedent's intent with respect to the property & estate plan as expressed in the Will or otherwise.

The Court must select the most appropriate property available, and set the term of possession and conditions. The probate homestead cannot last forever. The court may not allow it to exceed the surviving spouse's lifetime, or the minor child's attaining majority. These petitions are set on the court's calendar, and notice must be given to all of the usual persons.

The property selected for the probate homestead is still liable for the creditor's claims filed against the estate, including the liens and encumbrances that are secured (such as the mortgage payment), but it is exempt to the extent of the Homestead Exemption under CCP 704.710, et seq. That means that a judgment creditor cannot successfully put a lien on the property and sell it to satisfy his/her judgment.

The court can modify or terminate the Probate Homestead at any time prior to final distribution by a petition filed by any interested person.

These actions are rare because the Decedent usually leaves everything to the surviving spouse or the minor children. The typical situation is where the Decedent is a widower, remarries, and his Will leaves most of his property to his adult children from the first marriage. The surviving spouse then files one or all of these petitions in order to keep from being forced out of the home. Often, the adult children will be knocking on the door the day after the funeral and expect her to leave. They also will start carrying off all of the personal property ("Dad wanted me to have the stereo...")

After the Probate Homestead expires, the heirs take the property subject only to the creditors' claims (and of course the closing of the probate).

### FAMILY ALLOWANCE

#### PC 6540 - 6545

A Family Allowance is a court authorized payment to the surviving spouse, minor children, or physically or mentally incapacitated adult children who were actually dependent on the decedent for support. It is payable during the probate, from any available funds. It must be paid first from the principal of the estate rather than from the estate income. It is also available to the Decedent's parents or other adult children if they can prove they were dependent on Decedent for support. There is no right to receive a family allowance if the spouse is separated or divorced from Decedent.

Child support obligations continue after one's death, but the minor child can ask for Family Allowance instead. There is no right, however, to receive both, so the one is credited against the other.

A surviving spouse who is separated from the decedent at the time of death may be entitled to a family allowance, however, if there is a court order for spousal support. Of course, the spouse can always file a creditor's claim against the estate instead.

A Family Allowance is payable retroactive to the Date of Death, up to 6 months. It is payable as long as the probate is open.

If the estate is insolvent, the family allowance must not continue longer than one year after the date of appointment. (Insolvency means you can't meet your cash obligations as they come due.)

A Family Allowance must be paid in preference to all other claims except taxes, funeral expenses, expenses of last illness, and expenses of administration.

How does one obtain a family allowance? If the personal rep has independent powers, ask him or her to prepare a Notice of Proposed Action. If there's no objection, the personal rep goes ahead and pays the allowance. If the family allowance continues for more than one year, or there's a request for an increase, a new Notice should be mailed out.

If there are no independent powers, the personal rep. can file a petition with the court and ask for authority to pay it. The Petition can be filed Ex Parte on behalf of the surviving spouse, minor children, or handicapped children, but not as to parents or other adult children. For them, the court will set a hearing on its calendar and inquire as to the need an appropriate-ness of the request. The court cannot grant a family allowance if the person requesting it has other support and there is someone else who is entitled to it who does not have other support.

The costs of filing any such a petition is borne by the estate. Payment of a family allowance should be made out of the principal assets of the estate, not the estate income, unless the court orders otherwise. Also, the payments are taxable income.

**WARNING:** Payment of a family allowance may frustrate the testator's intent and plans. A person's family allowance is NOT an advance on a bequest, but is in addition to it. Therefore, this can unwittingly amend the decedent's Will by giving the requesting person a significant amount of money in addition to that given in the Will.

Local Rules of court usually provide for an itemization of expenses of the recipient. L.A. Rules require a listing of a spouse's separate property and other sources of income. Some courts require a list of expenses only when more than \$1,000/month is requested. But it's a good idea to do it anyway. Also, you should have an Inventory and Appraisement on file if solvency is a problem.

A family allowance terminates on the final settlement of the estate, or, if the estate is insolvent, no later than one year after Letters are issued.