

**LOS ANGELES COUNTY BAR ASSOCIATION
PROPOSED AMENDMENT TO RESOLUTION 6-7-2002
(Proponent: Orange County Bar Association)**

Trusts: Homestead from Trust Property

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to add sections 17520 through 17528 to the Probate Code to read as follows:

[no amendments proposed to sections 17520, 17521, 17522, 17523, 17524, 17526, 17527 or 17528]

51 §17525

52 (a) A petition to select and set apart a trust homestead may be filed by any interested person.

53 (b) Notice of the hearing on the petition shall be given as provided in Section 17203 to all of
54 the following persons:

55 (1) Each person listed in Section 17203.

56 (2) Each known heir whose interest in the trust would be affected by the petition.

57 (3) Each known beneficiary whose interest in the estate would be affected by the petition.

58 (c) The Court for good cause may dispense with a notice otherwise required to be given to a
59 person or beneficiary as provided for herein.

(Proposed additional language double-underlined.)

RESOLUTION 6-07 2002

DIGEST

Trusts: Homestead from Trust Property

This resolution adds sections 17520 through 17528 to the Probate Code to allow the court to set aside a probate homestead from real property held in a revocable living trust.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

Reasons:

This resolution adds Probate Code sections 17520 through 17528 to allow the court to set aside a probate homestead from real property held in a revocable living trust. This resolution should be approved in principle because the prevalent use of revocable living trusts deprives surviving spouses and minor children of the protection afforded by formal probate procedures.

A probate homestead is a court order allowing the surviving spouse or minor children to remain in possession of a the family dwelling, the wearing apparel of the family, the household furniture, and the other property of the decedent exempt from enforcement of a money judgment, while the estate is probated. Probate homestead orders are readily available within formal probate proceedings. However, where the decedent has placed his or her dwelling and all other possessions into a living trust, the probate court is not able to order a probate homestead. Nor does the law controlling trusts provide for a probate homestead from trust property.

In recent years there has been a steady reorganization of the Probate Code to provide for equal results whether a will or trust is the chosen tool to transfer a decedent's assets, i.e., to achieve parity between probate and trust law. (See, e.g., Probate Code section 6520, *et seq.*) There is no logical reason for a surviving spouse or minor child to be deprived of a homestead just because the dwelling is funding a living trust. This resolution continues the ongoing legislative process of amending the Probate Code to achieve parity with the laws regarding trusts.

SECTION/COMMITTEE REPORT

TRUST AND ESTATE SECTION

Recommends: Oppose

Reasons: This resolution raises difficult title and administrative questions in the trust context that may not be present in the decedent estate context. It also raises the question of whether to apply a decedent estate concept to trust administration in the pursuit of greater uniformity as between trusts and decedent estates. The Section is concerned that a limited approach in this area will raise unintended consequences and also unnecessarily disrupt existing trust estate plans. For these reasons, the Section believes that this resolution requires careful study and it has been assigned to the Trust and Estates Committee for further report.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to add sections 17520 through 17528 to the Probate Code to read as follows:

- 1 §17520
- 2 The court in its discretion may on petition therefor select and set apart one trust homestead in the
- 3 manner provided in this chapter.
- 4
- 5 §17521
- 6 The trust homestead shall be set apart for the use of one or more of the following persons:
- 7 (a) The surviving spouse.
- 8 (b) The minor children of the decedent.

9

10 17522

11 (a) The trust homestead shall be selected out of the following property, giving first preference to the
12 community and quasi-community property of, or property owned in common by, the decedent and the person
13 entitled to have the homestead set apart:

14 (1) If the homestead is set apart for the use of the surviving spouse or for the use of the surviving
15 spouse and minor children, out of community property or quasi-community property.

16 (2) If the homestead is set apart for the use of the surviving spouse or for the use of the minor
17 children or for the use of the surviving spouse and minor children, out of property owned in common by the
18 deceased settlor and the persons entitled to have the homestead set apart, or out of the separate property of
19 the deceased settlor or, if the deceased settlor was not married at the time of death, out of property owned by
20 the deceased settlor.

21 (b) The trust homestead may be selected from property held by an intervivos trust created by the
22 settlor during his or her lifetime and of which the settlor had the power of revocation at the time of death.

23 (c) The trust homestead shall not be selected out of property the right to possession of which is
24 vested in a third person unless the third person consents thereto. As used in this subdivision, "third person"
25 means a person whose right to possession of the property (1) existed at the time of the death of the decedent
26 or came into existence upon the death of the decedent and (2) was not created by testate or intestate
27 succession from the decedent.

28

29 §17523

30 (a) In selecting and setting apart the trust homestead, the court shall consider the needs of the
31 surviving spouse and minor children, the liens and encumbrances on the property, the claims of creditors, the
32 needs of the heirs or devisees of the deceased settlor, and the intent of the deceased settlor with respect to the
33 property in the trust and the estate plan of the decedent as expressed in inter vivos and testamentary transfers
34 or by other means.

35 (b) The court, in light of subdivision (a) and other relevant considerations as determined by the court
36 in its discretion, shall:

37 (1) Select as a trust homestead the most appropriate property available that is suitable for that use,
38 including in addition to the dwelling itself such adjoining property as appears reasonable.

39 (2) Set the trust homestead so selected apart for such a term and upon such conditions (including,
40 but not limited to, assignment by the homestead recipient of other property to the heirs or devisees of the
41 property set apart as a homestead) as appear proper.

42

43 §17524

44 The property set apart as a trust homestead shall be set apart only for a limited period, to be
45 designated in the order, and in no case beyond the lifetime of the surviving spouse, or, as to a child, beyond
46 its minority. Subject to the trust homestead right, the property of the deceased settlor remains subject to
47 administration including testate and intestate succession. The rights of the parties during the period for which
48 the trust homestead is set apart are governed, to the extent applicable, by the Legal Estates Principal and
49 Income Law, Chapter 2.6 (commencing with Section 731) of Title 2 of Part 1 of Division 2 of the Civil Code.

50

51 §17525

52 (a) A petition to select and set apart a trust homestead may be filed by any interested person.

53 (b) Notice of the hearing on the petition shall be given as provided in Section 17203 to all of the
54 following persons:

55 (1) Each person listed in Section 17203.

56 (2) Each known heir whose interest in the trust would be affected by the petition.

57 (3) Each known beneficiary whose interest in the estate would be affected by the petition.

58

59 §17526

60 (a) Property of the deceased settlor set apart as a trust homestead is liable for claims against the
61 deceased settlor, subject to the trust homestead right. The trust homestead right in property of the deceased

62 settlor is liable for claims that are secured by liens and encumbrances on the property at the time of the
63 deceased settlor's death but is exempt to the extent of the homestead exemption as to any claim that would
64 have been subject to a homestead exemption at the time of the decedent's death under Article 4 (commencing
65 with Section 704.710) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure.

66 (b) The trust homestead right in the property of the decedent is not liable for claims against the
67 person for whose use the trust homestead is set apart.

68 (c) Property of the deceased settlor set apart as a trust homestead is liable for claims against the
69 testate or intestate successors of the decedent or other successors to the property after administration, subject
70 to the trust homestead right.

71

72 §17527

73 (a) The court may by order modify the term or conditions of the trust homestead right or terminate
74 the trust homestead right at any time prior to final termination of the trust if in the court's discretion to do so
75 appears appropriate under the circumstances of the case.

76 (b) A petition for an order under this section may be filed by any of the following:

77 (1) The person for whose use the trust homestead is set apart.

78 (2) The testate or intestate successors of the deceased settlor or other successors to the property set
79 apart as a trust homestead.

80 (3) Persons having claims secured by liens or encumbrances on the property set apart as a trust
81 homestead.

82 (c) Notice of the hearing on the petition shall be given to all the persons listed in subdivision (b) as
83 provided in Section 17203.

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85 §17528

86 Nothing in this chapter terminates or otherwise affects a declaration of homestead by, or for the
87 benefit of, a surviving spouse or minor child of the deceased settlor with respect to the community, quasi-
88 community, or common interest of the surviving spouse or minor child in property in the deceased settlor's
89 trust.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

Existing Law: Only property within the decedent's estate and for which an inventory has been filed is subject to be set aside as a probate homestead and a surviving spouse and/or minor children cannot reach real property held by an intervivos trust to be set aside as a homestead.

This Resolution: This language would allow the court to use property which is held in a deceased settlor's intervivos trust to be set aside for a trust homestead.

The Problem: A probate homestead is designed to provide a residence for the decedent's surviving spouse and/or minor children after the decedent's death. Many times a decedent will transfer title to the property where he or she resided into an intervivos trust thereby leaving no real property to be set-aside for a probate homestead from the decedent's estate and thereby leaving the minor children and/or surviving spouse without a home. This happens often when there is a second marriage and the decedent has previously created an intervivos trust, which transferred all his or her separate property into that trust, provided for the benefit of his or her children from a prior marriage but has since failed to amend the trust to provide for a subsequent spouse and/or minor children. In this case, the surviving spouse is entitled to a statutory share of the decedent's estate which includes property both in the decedent's estate and the decedent's intervivos trust, but the surviving spouse and/or minor children have no claim for a probate homestead. This may happen particularly in cases of older couples who have had prior marriages and desire their new spouse to continue to live in the residence subsequent to the decedent's death, but fail to make any

provisions in their trust to memorialize their desires. The proposed language would allow the surviving spouse and/or minor children to petition the court for a trust homestead from real property held by the deceased settlor's inter vivos trust when there is no real property in an estate.

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

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COUNTER ARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

A probate homestead often runs contrary to the wishes of decedent. For example, a decedent who adequately under the law provides for his wife and children may wish to leave his home to an aging parent, or to have it sold to distribute to the children of a prior marriage. With a homestead, the wife and children could take their share and homestead the residence, frustrating the intent of decedent. The encroachment of the seldom needed and rarely used probate homestead into an area where decedent has demonstrated a superior level of estate planning and probate-avoidance intent is unwarranted. Dependent's can choose to take a statutory share, without frustrating the intent of the Trustor.