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You have asked whether a surviving spouse with a probate homestead must pay either rent or the property's taxes and other current expenses. The surviving spouse need not pay rent. Very little authority exists on whether she must pay taxes and other current expenses. The best answer is that the court has the discretion to require the surviving spouse to do so.

## DISCUSSION

### 1. The surviving spouse need not pay rent.

Until 60 days after the inventory is filed, the decedent's surviving spouse and minor children are entitled to keep possession of the family dwelling, the family wearing apparel, household furniture, and the decedent's other property exempt from enforcement of a money judgment. Prob. Code § 6500. After the inventory is filed, the court may, on petition, set aside a probate homestead for the surviving spouse or minor children. *Id.*, §§ 6520, 6521. The court shall set apart the probate homestead only for a limited period, stated in the order, in no case beyond the surviving spouse's lifetime or the children's minority. *Id.*, § 6524. The court may place those terms and conditions on the probate homestead that it deems proper. *Id.*, § 6523(b)(2).

A surviving spouse occupying the family home under a probate homestead has no obligation to pay rent to the estate. *Robson v. Meder* (1944) 66 Cal.App.2d 47, 49-50. The statute's policy "'is protection of the family as a social unit in the home against demands of creditors, heirs and the family's own improvidence.'" *Id.*, at 49, quoting 11A CAL.JUR. 605. The survivor's payment of rent to the estate is inconsistent with this object. *Id.* The Legislature intended to provide for the family's support by permitting the surviving spouse and any minor children to remain in the family home without obligation to the estate for its use. *Id.*, at 49-50. The defendants in *Meder* possessed the homestead on order of the court, so the court's ruling is not limited to the statutory homestead that lasts until 60 days after the filing of the inventory.

**2. The court can probably condition the surviving spouse's use of the family home on payment of taxes and other current charges.**

**A. The statutory scheme**

Once a court grants a petition for a homestead and sets apart property for it, the Legal Estates Principal and Income Law ("LEPIP") governs the parties' rights to the extent applicable. Prob. Code § 6253, citing Civ. Code § 731, *et seq.* LEPIP applies "to all transactions by which a principal was established without the interposition of a trust on or after September 13, 1941, or is hereafter so established." Civ. Code § 731.01. For LEPIP's purposes, *principal* is property that

has been so set aside or limited by the owner thereof or a person thereto legally empowered that it and any substitutions for it are eventually to be conveyed, delivered, or paid to a person, while the return therefrom or use thereof or any part of such return or use is in the meantime to be taken or received by or held for accumulation for the same or another person.

*Id.*, § 731.02(a).

LEPIP governs “the ascertainment of income and principal and the apportionment of receipts and expenses between tenants and remaindermen in all cases where a principal has been established without the interposition of a trust . . . .” Civ. Code § 731.04. A *tenant* is the person “to whom income is presently or currently payable, or for whom it is accumulated or *who is entitled to the beneficial use of the principal presently and for a time prior to its distribution.*” *Id.*, § 731.02(c) (emphasis added). A *remainderman* is the person ultimately entitled to the principal. *Id.*, subd. (d). Thus the family home and any other property set aside for the surviving spouse as a homestead is the principal. The surviving spouse, who is entitled to its immediate beneficial use, is the tenant, and the heir, legatee, devisee, or beneficiary under a living trust, who will ultimately receive the property, is the remainderman.

LEPIP sets forth eleven categories of property, each with its own rules for allocating income and expenses. See Civ. Code §§ 731.05-731.15. Section 731.13 appears to apply to an economically nonproductive probate homestead such as the family residence. It governs

principal in the possession of a tenant [that] consists of realty or personalty which for more than a year and until disposed of as hereinafter stated has not produced an average net income of at least 1 percent per annum [(a)] of its inventory as fixed by the appraiser or appraisers regularly appointed by the court or[, ] in default thereof[, (b) of] its market value at the time the principal was established or [(c)] of its cost where purchased or otherwise acquired later . . .

*Id.*, § 731.13(a).

But a further qualification to the application of § 731.13 is that the tenant must have “a duty to change the form of the investment as soon as a reasonable price,

not representing an undue sacrifice of value, may be obtained and such change is delayed, but is made before the principal is finally distributed . . . .” *Id.* Because the surviving spouse has no such duty to “change the form of the investment,” the statute does not govern the probate homestead after all.

LEPIP is not the clearest statute on the books. The two quotations above from § 731.13(a) are just portions of a single 150-word sentence. How its various phrases and clauses are parallel with or modify each other is anyone’s guess. No courts have clarified LEPIP. Cf. *Conservatorship of Wemyss* (1971) 20 Cal.App.3d 877, 882-883. *Wemyss* is the only case to have cited it and then just to reject its application to conservatorships. See *Id.*

## **B. The case law**

Only one California case has discussed a surviving spouse’s liability to pay taxes on a homestead exemption. See *Estate of Vannucci* (1980) 103 Cal.App.3d 175, 182. The decedent and his wife, married late in life, owned a two-unit building as tenants in common; they lived in one flat and rented out the other. He left his share to other relatives by will. The probate court ordered that she stay in the one flat as a her probate homestead and that the rent from the other go to his legatees. She would pay one half the taxes and other expenses and the legatees the other.

The widow appealed on the grounds that those expenses, along with maintenance and utilities, would leave her with no financial benefit from the homestead. The court rejected both her math and her argument. *Estate of Vannucci*, 103 Cal.App.3d at 181-182. It pointed out that *Morrison v. Barham* (1960) 184 Cal.App.2d 267, 275-275, held that a former wife holding a homestead under a divorce decree had to pay the taxes on the land. *Estate of Vannucci*, 103

Cal.App.3d at 181-182. That homestead most closely resembled a life estate, in which the life tenant has all the duties and obligations incident to the ownership, enjoyment, and profit from the land. *Id.*, at 182, citing *Morrison*, 184 Cal.App.2d at 273, 275. The *Vanucci* court did not explicitly follow *Morrison*. Instead, it held that the probate court, even if it had the discretion to require the legatees to pay a greater share of taxes and costs, had not abused that discretion. *Id.* The widow still got a substantial monetary benefit from the homestead. *Id.*

As the *Morrison* court pointed out, under the majority rule the possessor of the probate homestead must pay the taxes on it. See *Morrison v. Barham*, 184 Cal.App.2d at 275, citing 5 Tiffany, LAW OF REAL PROPERTY (3d ed) § 1336, at 152; 40 AM.JUR. 2d, *Homestead* § 147, citing, along with *Morrison v. Barham*, 184 Cal.App.2d 267, *In re Walberg's Estate* (officially known as *Nordlund v. Dahlgren*) (1915) 130 Minn. 462, 153 N.W. 876; *In re Baker's Estate* (1937) 156 Or. 256, 67 P.2d 185, and *Sargeant v. Sargeant* (Comm'n App. 1929) 118 Tex. 343, 15 S.W.2d 589. All of these cases but *Morrison* based their decisions on the surviving spouse's vested right to occupy the land until death, so that the homestead not only resembled a life estate but was one. Thus, in Minnesota, the probate-homestead statute automatically creates a life estate in the surviving spouse, without any action by the court. *Nordlund v. Dahlgren*, 130 Minn. at 466, 153 N.W. at 878. In Texas, the Constitution and statute "guarantee[]" a homestead, which is an estate in land. *Sergeant v. Sergeant*, 118 Tex. at 351, 15 S.W.2d at 593. In Oregon, the court has the duty, upon filing of the inventory, to set aside the homestead. *Moody v. Baker* (1933) 142 Or. 559, 562, 20 P.2d 1069, 1070; see also *Carter v. Monarch* (Ky.App. 1916) 188 S.W. 379, 380 (surviving spouse is life tenant who must pay tax); *Hanna v. Palmer* (1901) 194 Ill. 41, 44-45, 61 N.E. 1051

(homestead is a life estate, so tenant must pay taxes); *Allen v. Russell* (1898) 59 Ohio St. 137, 145, 52 N.E. 121, 123 (probate homestead “owner” has a duty to pay taxes on it).

In California, unlike in these other states, the surviving spouse has no vested right to a probate homestead. *Estate of Murray* (1982) 133 Cal.App.3d 601, 605. Only the court’s order granting the probate homestead creates it. *Id.* The court grants the homestead privilege depending upon the conditions at the time of the petition. *In re Estate of Wyss* (1931) 112 Cal.App. 487, 497. In fixing its extent and duration, the court considers a variety of factors, including the surviving spouse’s needs, liens and encumbrances on the property, creditors’ claims, heirs’ and devisees’ needs, and the decedent’s intent with respect to the property. Prob. Code § 6523(a); *Estate of Murray*, 133 Cal.App.3d at 605.

Courts in other states that grant a homestead exemption only as a temporary privilege have held that the surviving spouse is not obligated to pay the tax. See *Crouse v. Crouse* (Iowa 1935) 259 N.W. 443, 446 (privilege ends when surviving spouse receives distributive share); *Branson v. Yancy* (1827) 16 N.C. 77, 82-83 (widow has no obligation to pay tax during year of temporary occupancy). But in California, unlike in these states, the probate homestead may survive the estate’s administration and even extend through the entirety of the surviving spouse’s life.

The *Crouse* and *Branson* rule probably governs the temporary homestead as of right under § 6500. But, after the inventory, § 6523(b)(1) allows the court, upon setting aside a homestead, to set conditions upon the surviving spouse’s occupancy. One of those conditions could well be the payment of taxes or, if the court so orders, rent.

## CONCLUSION

The surviving spouse has no obligation to pay rent on the homestead, whether created as of right on the decedent's death or granted by the court after the inventory. She probably has no obligation to pay taxes on the initial homestead. Once the court sets aside a homestead after the inventory, it probably may condition possession on the payment of taxes and other expenses and maybe even on the payment of rent.