#66 1/24/69

Memorandum 69-26

Subject: Study 66 - Quasi-Community Property

At the last meeting, the Commission revised the tentative recommendation on quasi-community property and approved the recommendation subject to obtaining the views of Professor Marsh who served as our consultant on the original recommendation. Attached is a copy of the tentative recommendation as revised at the last meeting.

I wrote to Professor Marsh asking for his views on the tentative recommendation. His reply and my letter are attached as Exhibit I. He states that "the proposal is unobjectionable and would probably be a desirable clarification." He apparently takes the view that the proposal probably is merely a clarification, rather than a change, in existing law.

In view of the fact that the tentative recommendation has been approved by two members of the faculty at Boalt Hall and by Professor Marsh as being a desirable clarification that causes no other problems, the staff suggests that it be approved for distribution to interested persons (including the State Bar) for comment with a view to submitting it to the 1970 Legislature.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 69-26

EXHIBIT I

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January 22, 1969

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law, Stanford University
Stanford, California 94305

Dear John:

I have reviewed the draft proposal enclosed with your letter of January 17, 1969, relating to the definition of "quasi-community property". It seems to me that the proposal is unobjectionable and would probably be a desirable clarification.

Sincerely yours,

Harold Marsh, Jr.

HM:jr

January 17, 1969

Professor Harold Marsh, Jr.
School of Law
University of California
Los Angeles, California 90024

Dear Harold:

You will recall that you served as the Commission's consultant on the quasi-community property study. I am hoping that you will be willing to give the Commission your reactions to the enclosed tentative recommendation. The tentative recommendation would correct one technical defect and make one substantive change. The Commission hopes that you will be willing to carefully study the tentative recommendation and advise us whether you can see any problems that it might create.

If there are any problems you see, we would like to give them careful study before we make a general distribution of the tentative recommendation for comment.

The Commission discussed whether Section 201.5 should be limited to property acquired "by the decedent" or whether the section should apply to property acquired "by either spouse." The Commission concluded that the section is satisfactory in this respect, but requested that I ask you your opinion on this matter.

The Commission would like to submit a recommendation to the 1970 Legislature. We could do this, if after the February meeting, we could distribute the tentative recommendation to interested persons for comment. Accordingly, since our February meeting will be held during the first week of February, we need your comments by January 28, if possible.

I personally appreciate your many contributions to the work of the Commission, and I hope you will be able to cooperate in the matter.

Sincerely,

John H. DeMoully
Executive Secretary

JHD:km
enc.

Revised January 15, 1969

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

QUASI-COMMUNITY PROPERTY

Married persons who move to California have often acquired property during the marriage while they were domiciled elsewhere which would have been treated as community property had they been domiciled here when it was acquired. This property is in some cases retained in the form in which it was first acquired; in other cases, it is exchanged for real or personal property here. The Legislature and the courts of this state have long been concerned with the problem of what rights, if any, the spouse of the person who originally acquired such property should have therein, or in the property for which it is exchanged, both during the lifetime of the acquiring spouse and upon his death.

The first legislation enacted to deal with these problems took the form of a 1917 amendment to Section 164 of the Civil Code which purported to treat as community property for all purposes all property acquired during the marriage by either husband or wife while domiciled elsewhere which would not have been separate property had the owner been domiciled in California when it was acquired. This amendment was held unconstitutional, however, in Estate of Thornton,[1] decided in 1934. Subsequently in 1935, legislation, much narrower in scope, was enacted which attempted to deal only with the disposition upon death of personal property acquired by a married person while domiciled elsewhere.[2] Finally, upon

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[1] 1 Cal.2d 1, 33 P.2d 1 (1934).

[2] Cal. Stats. 1935, Ch. 831, p. 2248. See In re Miller, 31 Cal.2d 191, 187 P.2d 722 (1947).

recommendation of the California Law Revision Commission, more comprehensive legislation was enacted in 1957 relating to the rights of a surviving spouse in property acquired by a decedent while domiciled elsewhere[3] and in 1961 relating to inter vivos rights in property acquired by a husband and wife while domiciled elsewhere.[4] This legislation, where appropriate, embraced not only personal property but also real property situated in California. Moreover, as indicated above, it dealt not only with disposition upon death but also with treatment of the property in the event of divorce or separate maintenance, with homestead rights, and with treatment of the property for gift tax purposes. In these areas, this legislation basically was intended to provide equal treatment for married persons who acquire property elsewhere and then become domiciled here with those persons who make their acquisitions while domiciled here. The constitutionality of this legislation has been upheld.[5] A number of years have passed since its enactment, and the Commission knows of no instance where the purpose of the legislation has been thwarted. Nevertheless, the Commission has been made aware of a technical defect in certain sections enacted[6] and believes that, in the area of divorce and separate maintenance, the coverage of the 1961 statute can and should be broadened.

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3 Cal. Stats. 1957, Ch. 490, p. 1520; see Recommendation and Study Relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere, 1 Cal. L. Revision Comm'n Reports at E-1 (1957).

4 Cal. Stats. 1961, Ch. 636, p. 1838; see Recommendation and Study Relating to Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere, 3 Cal. L. Revision Comm'n Reports at I-1 (1961).

5 Addison v. Addison, 62 Cal.2d 558, 43 Cal. Rptr. 97, 399 P.2d 897 (1965); Estate of Rogers, 245 Cal. App.2d 101, 53 Cal. Rptr. 572 (1966).

6 See 1 Armstrong, California Family Law 91-93 (Cum. Supp. 1966).

Accordingly, the Commission makes the following recommendations:

1. Civil Code Section 140.5 defines "quasi-community property" as meaning

> all personal property wherever situated and all real property situated in this state heretofore or hereafter acquired:
>
> (a) By either spouse while domiciled elsewhere which would have been community property of the husband and wife had the spouse acquiring the property been domiciled in this state at the time of its acquisition; or
>
> (b) In exchange for real or personal property, wherever situated, acquired other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere.

Subdivision (b) of Section 140.5 might be construed to make certain property quasi-community property even though it would be separate property if acquired by a California domiciliary. This is because property acquired during marriage "other than by gift, devise, bequest, or descent" is not precisely equivalent to community property. For example, the phrase "other than by gift, devise, bequest, or descent" does not exclude such separate property as the earnings and accumulations of either spouse after an interlocutory decree of divorce[7] or decree of separate maintenance,[8] of the husband after an unjustified abandonment by the wife,[9] and of the wife while she is living separate from her husband.[10] The property potentially now embraced within the language of subdivision (b) that would be considered separate property if acquired by a California domiciliary is not generally of major significance. Moreover, given the obvious purpose of the legislation, a court faced with making a decision regarding such property would most likely give effect to this intent despite the inexactness of the language used in Section 140.5.[11]

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7 Civil Code Section 169.2.

8 Civil Code Section 169.1.

9 Civil Code Section 175.

10 Civil Code Section 169. See also Civil Code Sections 163.5 and 169.3.

11 See Armstrong, supra note 6.

Nevertheless, the flaw exists and can and should be remedied by conforming the operative description in subdivision (b) with that contained in subdivision (a). The identical defect is also present in Section 1237.5 of the Civil Code, Section 201.5 of the Probate Code, and Section 15300 of the Revenue and Taxation Code, and these sections should therefore also be amended in the same fashion.

2. Civil Code Section 140.5 is significant only with respect to divorce or separate maintenance actions.[12] The section now limits quasi-community property to "all personal property wherever situated and all real property situated in this state." However, in the context of an action for divorce or separate maintenance, the exclusion of real property located in another state seems undesirable and constitutionally unnecessary. Real property located in another state may often be an important or even the primary asset acquired by a couple from earnings during their marriage while residing outside of California. But Section 140.5 might be construed to preclude the court from making an appropriate allocation of this marital property in a California action for divorce or separate maintenance.

Real property situated in another state acquired by a California domiciliary with community funds is treated under present California law--by application of the tracing principle--as community property for

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[12] The section also has applicability in certain support actions but its significance there is limited at most to establishment of a priority of liability. Whether treated as "separate" or "quasi-community" property, the property in question would still be subject to the support orders of the court. See Civil Code Sections 143 and 176.

the purpose of division of the property in a divorce or separate maintenance action.[13] By a parity of reasoning, similar property acquired by a spouse while domiciled elsewhere with funds which would have been community property had the spouse acquiring the property been domiciled in California at the time of acquisition should be treated as quasi-community--not separate--property upon divorce or separate maintenance. Such treatment would create no constitutional problems. The concept would be applicable only if a divorce or separate maintenance action is filed after at least one of the spouses has become domiciled here and the court has personal jurisdiction over the other. In these circumstances California has an interest more than sufficient to provide for a fair and equitable distribution of all the marital property,[14] and it is unreasonable that the distribution should be controlled by the fortuity of when or where the property was initially acquired. Accordingly, the Commission recommends that Section 140.5 be amended to embrace all marital property wherever situated.

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13 See, e.g., Rozan v. Rozan, 49 Cal.2d 322, 317 P.2d 11 (1957). The 1961 amendment of Section 164 of the Civil Code did not affect this rule. See Recommendation and Study Relating to Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere, 3 Cal. L. Revision Comm'n Reports at I-12 and I-13 (1961).

14 See Addison v. Addison, 62 Cal.2d 558, 43 Cal. Rptr. 97, 399 P.2d 897 (1965). See also Schreter, "Quasi-Community Property" in the Conflict of Laws, 50 Cal. L. Rev. 206, 238 (1962). It should, however, be noted that, where real property is located in another state, a California court is limited to a declaration of the rights in that property of the parties properly before it; and, though its decree is entitled to full faith and credit in the situs state, California may not directly affect the title to the land. Rozan v. Rozan, 49 Cal.2d 322, 317 P.2d 11 (1957).

The Commission's recommendations would be effectuated by the enactment of the following measure:

An act to amend Sections 140.5 and 1237.5 of the Civil Code, Section 201.5 of the Probate Code, and Section 15300 of the Revenue and Taxation Code, relating to property acquired by married persons.

The people of the State of California do enact as follows:

Civil Code Section 140.5 (amended)

Section 1. Section 140.5 of the Civil Code is amended to read:

140.5. As used in Sections 140.7, 141, 142, 143, 146, 148, 149, and 176 ~~of this code~~ , "quasi-community property" means all real or personal property , wherever situated , ~~and all real property situated in this state~~ heretofore or hereafter acquired:

(a) By either spouse while domiciled elsewhere which would have been community property of the husband and wife had the spouse ~~acquiring~~ who acquired the property been domiciled in this state at the time of its acquisition; or

(b) In exchange for real or personal property, wherever situated, ~~acquired other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere~~ which would have been community property of the husband and wife had the spouse who acquired the property so exchanged been domiciled in this state at the time of its acquisition .

~~For the purposes of this section, personal property does not include and real property does include leasehold interests in real property.~~

Comment. The definition of "quasi-community property" in Section 140.5 is amended to include all property, wherever situated, which would have been treated as community property had the acquiring spouse been domiciled in California at the time of acquisition. This insures that the division upon divorce or separate maintenance of marital property of California domiciliaries will not be controlled by the fortuity of when or where the property was initially acquired. Under prior law, real property situated in another state was excluded from the definition and was subject therefore to characterization and treatment as separate property, even though it was acquired with what would have been community funds had the spouse acquiring the property been domiciled in California at the time of acquisition. This undesirable disparity has been eliminated.

Subdivision (b) is also amended to equate more precisely its definition of quasi-community property to what would have been the community property of a spouse domiciled in California. The amendment makes clear that property described in Civil Code Sections 163.5, 169, 169.1, 169.2, 169.3, and 175 is not quasi-community property.

Civil Code Section 1237.5 (amended)

Sec. 2. Section 1237.5 of the Civil Code is amended to read:

1237.5. As used in this title:

(a) "Quasi-community property" means real property situated in this state heretofore or hereafter acquired:

(1) By either spouse while domiciled elsewhere which would have been community property of the husband and wife had the spouse ~~acquiring~~ who acquired the property been domiciled in this state at the time of its acquisition; or

(2) In exchange for real or personal property, wherever situated, which would have been community property of the husband and wife had the spouse who acquired the property so exchanged been domiciled in this state at the time of its acquisition ~~acquired other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere~~ .

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

Comment. See the second paragraph of the Comment to Section 140.5.

Probate Code Section 201.5 (amended)

Sec. 3. Section 201.5 of the Probate Code is amended to read:

201.5. Upon the death of any married person domiciled in this state one-half of the following property in his estate shall belong to the surviving spouse and the other one-half of such property is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse: all personal property wherever situated and all real property situated in this state heretofore or hereafter acquired:

(a) By the decedent while domiciled elsewhere which would have been the community property of the decedent and the surviving spouse had the decedent been domiciled in this state at the time of its acquisition; or

(b) In exchange for real or personal property, wherever situated, which would have been community property of the decedent and the surviving spouse had the decedent been domiciled in this state at the time the property so exchanged was acquired ~~acquired other than by gift, devise, bequest or descent by the decedent during the marriage while domiciled elsewhere~~ .

All such property is subject to the debts of the decedent and to administration and disposal under the provisions of Division 3 of this code.

As used in this section personal property does not include and real property does include leasehold interests in real property.

Comment. See the second paragraph of the Comment to Civil Code Section 140.5.

Revenue and Taxation Code Section 15300 (amended)

Sec. 4. Section 15300 of the Revenue and Taxation Code is amended to read:

15300. For the purposes of this chapter, property is "quasi-community property" if it is heretofore or hereafter acquired:

(a) By either spouse while domiciled elsewhere and would have been the community property of the husband and wife had the spouse ~~acquiring~~ who acquired the property been domiciled in this state at the time of its acquisition; or

(b) In exchange for real or personal property, wherever situated, which would have been community property of the husband and wife had the spouse who acquired the property so exchanged been domiciled in this state at the time of its acquisition ~~acquired other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere~~ .

Comment. See the second paragraph of the Comment to Civil Code Section 140.5.