

## Memorandum 82-38

Subject: Study L-604 - Probate Law (Item or Aggregate Theory in Community Property)

Aggregate Theory; Item Theory

At dissolution of marriage in California, each spouse is entitled to half of the community property. Civil Code § 4800. However, it is not necessary to divide each asset. If "economic circumstances warrant," the court may make an overall equal division by awarding some community assets to one spouse and some to the other. Id. This is called the "aggregate theory."

On the death of one spouse, the surviving spouse is entitled to half or more of the community property. See Prob. Code § 201. However, the aggregate theory does not apply. Instead, the interest of the surviving spouse is one-half of each item of community property. *Dargie v. Patterson*, 176 Cal. 714, 169 P. 360 (1917). If the decedent has given community property to others (whether by will or by inter vivos gift), the surviving spouse becomes a tenant in common with the person to whom the property was given. See id. This is called the "item theory." W. Reppy & W. deFuniak, *Community Property in the United States* 444 (1975).

Problems Caused By Item Theory

Application of the item theory at death may cause problems in some cases. For example, suppose the husband operates a business which is a sole proprietorship and is community property. The wife's will gives her half interest in the business to her son from a prior marriage. After the wife's death, the husband and the wife's son will be tenants in common in the business. Partition is not an adequate remedy because a stranger may purchase the business at the partition sale. Perhaps the husband should be able to ask the probate court to award the business to him, provided either that an offsetting award to the son is made out of the estate or that the husband pay the wife's son the fair market value of the interest taken from the latter.

Or, suppose that the husband's will leaves the family residence (community property) to his paramour. On the husband's death, the wife becomes a tenant in common with the paramour. The court can set aside the residence to the wife for life as a probate homestead, but in such

a case the wife would be under a duty not to commit waste and might be subject to a right of the paramour to enter the property to inspect for waste. See 3 B. Witkin, Summary of California Law Real Property § 201, at 1936, § 327, at 2032 (8th ed. 1973). This creates a potentially difficult situation. Perhaps the probate court should have the authority to award the residence to the wife in fee and either award other property to the paramour or require the wife to pay for the interest taken.

#### Consultants' Recommendations

Professor Carol Bruch has recommended legislation to permit the probate court to use an aggregate theory for division of community property at death generally, citing recent legislation that was introduced in Wisconsin but failed to pass the Wisconsin Legislature. C. Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity 133 (July 29, 1981) (unpublished study on file with the Law Revision Commission). The Wisconsin bill provided:

PROPERTY RIGHTS OF SURVIVING SPOUSE: CHOICE OF PROPERTY. As an alternative to retaining an undivided 50% interest in each item of marital property under sub. (1), a surviving spouse may elect his or her one-half share of the marital property from the aggregate of marital property except as to specific property from the decedent's share which has been otherwise disposed of by will.

Professor Reppy has orally informed the staff that in his view the greatest need for an aggregate-theory division is with respect to the two kinds of property described in the examples above (community property business and family residence).

At present, only Arizona appears to use an aggregate theory for division of community property at death. W. Reppy & W. deFuniak, supra. In Arizona, if the deceased spouse has made a testamentary disposition to the surviving spouse, or if there is other provision for the surviving spouse by will, joint tenancy, intestacy, or trust instrument which gives the surviving spouse at least half of the community and other jointly acquired property, then there has been no "fraud" on the rights of the surviving spouse, and testamentary gifts by the deceased spouse to third persons are given effect. Id. at 443-44. In Professor Reppy's view, the difficulty with the Arizona system is that it permits the deceased spouse to determine which community assets will remain for the surviving spouse. Instead, this power should be in the hands of the surviving spouse if an aggregate-theory division is to be made, and this is what the Wisconsin legislation provides.

An argument against an aggregate-theory division is that it requires the court to value all the community assets assigned to one party or another. The item theory requires no valuation, but, if an item is later partitioned by appraisal, valuation will be required at that time. See Code Civ. Proc. §§ 873.910-873.980.

Staff Draft of Aggregate Theory Legislation

The Commission should consider whether to recommend a provision such as the following, which authorizes an aggregate theory division at the election of the surviving spouse:

Probate Code § 690 (added). Award to surviving spouse of specific items of community property

690. (a) On petition of the surviving spouse, the court may award to the surviving spouse the entire interest in one or more items of the following kinds of community property:

(1) Community real property, including the family residence.

(2) A community property business being operated or managed by the surviving spouse.

(3) Community personal property which has sentimental or psychological value to the surviving spouse.

(b) If the court makes an order under this section, the court shall determine, as of the date of the award, the fair market value to be awarded to the surviving spouse, and shall make its order subject to the condition that the order will be given effect only if the surviving spouse pays, within the time fixed in the order, to the person whose interest is taken the fair market value of that interest. The person whose interest is taken may agree to accept the surviving spouse's interest in other items of property in the estate in full or partial satisfaction of the amount to be paid under this subdivision. The fair market value of such other items may be determined by agreement or by the court.

Comment. Section 690 is new and may be used to avoid practical difficulties arising from the general rule that if the decedent's will purports to dispose of community property to someone other than the surviving spouse, the surviving spouse and the beneficiary under the will become tenants in common as to each item of community property. See *Dargie v. Patterson*, 176 Cal. 714, 169 P. 360 (1917) (inter vivos gift); *W. Reppy & W. deFuniak, Community Property in the United States* 444 (1975).

If the family dwelling is awarded to the surviving spouse under this section, the surviving spouse becomes the absolute owner of the property in fee. This is in contrast to the probate homestead which terminates no later than the death of the surviving spouse or when the children reach majority. Prob. Code § 661.

Respectfully submitted,

Robert J. Murphy III  
Staff Counsel