First Supplement to Memorandum 82-59

Subject: Study F-600 - Community Property (Disposition of Personal Property)

In connection with the discussion of limitations on the ability of a spouse to encumber community real property (the Mitchell case--see Memorandum 82-59), it may be useful for the Commission to consider the law relating to the disposition of community personal property by a spouse. The Commission has previously reviewed this area of the law and made a number of tentative decisions for change as part of its study of management and control of community property.

Existing law (Civil Code § 5125) gives either spouse the management and control of community personal property subject to a duty of good faith and subject to some specific limitations on the ability of a spouse to dispose of the property, including:

(1) Written consent of the other spouse is required for a gift of the property or disposition without valuable consideration. Civil Code § 5125(b).

(2) Written consent of the other spouse is required for a transaction involving the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children. Civil Code § 5125(c).

The first of these limitations--the anti-gift statute--the Commission decided is too restrictive. It is a relic of the time when the wife's interest in the community required protection from the husband's unchecked ability to manage and control the property as he saw fit. The Commission believed that the law should enable either spouse to make gifts of community property that are usual or moderate in amount in the circumstances of the particular marriage without the written consent of the other spouse.

The second limitation--written consent for a transaction involving household goods and personal effects--the Commission felt was likewise too restrictive and obsolete in an era of garage sales. The spouses are capable of protecting their interests in property of this sort from sale or conveyance if they so desire, either spouse having management and control of it. The Commission recognized two exceptions to this principle:

(1) An encumbrance of property of this type could be secret and cause problems; the law should continue to require joinder of both spouses for creation of non-purchase money security interests. (2) Sale, conveyance, or encumbrance of a personal property family dwelling such as a mobilehome should involve joinder of both spouses, just as for a real property family dwelling.

A draft of the Commission's tentative decisions on these matters is attached as Exhibit 1. If the Commission decides to submit legislation relating to joinder in transactions involving community real property it may be desirable to submit at the same time the provisions governing personal property so that the statute will be a complete scheme and can be drafted in a comprehensive form.

In this connection, there are additional problems the Commission should review. As with community real property, a gift by one spouse of community personal property without the written consent of the other spouse (in violation of Section 5125(b)) is nonetheless effective as to the interest of the donor spouse upon termination of the marriage by dissolution or death. See, e.g., Ballinger v. Ballinger, 9 Cal.2d 330, 70 P.2d 629 (1937). If the non-donor spouse seeks to set aside the gift during marriage, however, the spouse may recover the entire community personal property. See, e.g., Lynn v. Herman, 72 Cal. App.2d 614, 165 P.2d 54 (1946). The same rule does not apply to a disposition of household goods or personal effects without the written consent of the other spouse (in violation of Section 5125(c)); the non-joining spouse can recover the entire community personal property during or after marriage. See, e.g., Matthews v. Hamburger, 36 Cal. App.2d 182, 97 P.2d 465 (1939) (during marriage); Dynan v. Gallinatti, 87 Cal. App.2d 553, 197 P.2d (1948) (after death).

With respect to an encumbrance of household goods or personal effects, existing law appears sound. These necessaries are of a character that requires special protection and a spouse should not unilaterally be able to sever the community of them and dispose of his or her interest, whether effective during or after marriage.

With respect to a gift of community personal property, the staff sees no reason why a spouse should be precluded from making a valid gift of his or her interest in the property without the consent of the other spouse, so long as the household goods and personal effects are protected. Each spouse owns a half interest in the community property which the

spouse is entitled to receive at dissolution and which the spouse may encumber, sell, or give away by will. We can discern no policy that would argue against a spouse making a gift of his or her interest without the consent of the other, when the spouse can already do so many other things with the interest.

The staff would further revise the anti-gift statute to read:

> (a) A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, without the written consent of the other spouse, except in the following situations:
>
> (1) The gift or disposition is to the other spouse.
>
> (2) The gift or disposition is usual or moderate, taking into account the circumstances of the case.
>
> (b) Notwithstanding subdivision (a), a gift of community personal property, or disposition of community personal property without a valuable consideration, without the written consent of the other spouse is not invalid insofar as it relates to the interest of the spouse that makes the gift or disposition. This subdivision does not apply to a gift or disposition of the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children.
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> Comment. Subdivision (b) is added to overrule Lynn v. Herman, 72 Cal. App.2d 614, 165 P.2d 54 (1946), which held that the non-donor spouse may during marriage set aside gift of community personal property as to the interests of both spouses. Under subdivision (b) a gift of community personal property may be set aside only as to the interest of the non-donor spouse, whether during or after marriage. See, e.g., Ballinger v. Ballinger, 9 Cal.2d 330, 70 P.2d 629 (1937). This rule does not apply to a gift of household goods, however. Such a gift by one spouse acting alone may nonetheless be valid pursuant to subdivision (a) if the gift is usual or moderate (e.g., a donation of used property to a charitable organization).

When a non-donor spouse sets aside his or her half interest in a community property gift after the death of the donor, the result can be a serious disruption of the donor's estate plan. The donor can accommodate this possibility in the case of a gift made in a will by either expressly or by implication putting the surviving spouse to an election to take under the will or to take the surviving spouse's statutory share in the community property. See discussion in Memorandum 82-47 (Election to Take Against Will). In the case of an inter vivos gift or a testamentary gift made other than in a will, however, the donor may neglect to require an election in the will; in such a case an implied election will not readily be found. If the donor dies intestate, the surviving spouse may not only set aside his or her interest in the inter vivos gift but also take all of the donor's separate property and interest in the remaining community property.

The staff believes there should be some limitation on the ability of the surviving spouse after the death of the donor to set aside an interest in a gift of community property not made by will. Where the surviving spouse will be receiving a substantial amount of property from the decedent and the gift sought to be set aside is relatively modest in amount, the right to set the gift aside should be denied. The staff is not comfortable with an automatic election requirement in every case or a mechanical test based on a fixed proportion of the value of the gift to value of the property received. Even if relatively small in value, the gift may involve property that is unique or of special sentimental value to the surviving spouse. The court should have discretion to allow the gift to be set aside taking into account all the circumstances of the case.

This could be accomplished by adding something like the following language to the anti-gift statute:

> A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, without the written consent of the other spouse, except in the following situations:
>
> (1) The gift or disposition is to the other spouse.
>
> (2) The gift or disposition is usual or moderate, taking into account the circumstances of the case. <u>In making a determination pursuant to this paragraph after the death of the spouse that makes the gift or disposition, the court shall take into account, among other relevant factors, any amounts received by the other spouse by will, succession, gift, or other disposition, including insurance proceeds, joint tenancy, and inter vivos and testamentary trusts, and any special or unique character of the community personal property given or disposed of.</u>
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> <u>Comment.</u> The second sentence of paragraph (2) is intended to give the court discretion not to invalidate a gift of community personal property after the death of the donor where it appears inequitable to do so. This modifies the rule of cases such as <u>Ballinger v. Ballinger,</u> 9 Cal.2d 330, 70 P.2d 629 (1937), which allowed the surviving spouse to set aside a half interest in a gift after the death of the decedent as a matter of right.

Respectfully submitted,

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EXHIBIT 1

Staff Draft

Management and Control of Community Property
[Extracts]

Limitation on Disposition of Property

Gifts. Prior to 1891 California followed the Spanish rule that a manager spouse may without consent of the other make reasonable gifts of community property.[1] In 1891 the law was revised to require the written consent of the wife to a gift by the husband. The 1891 anti-gift statute[2] became necessary because at that time the husband was considered the sole owner of community property, the wife's interest in the community property being a mere expectancy, and the wife needed the ability to protect the community property from depletion by gifts of the husband.[3]

The reasoning upon which the anti-gift legislation was based is no longer applicable. Both spouses own the community property in equal shares,[4] and each may protect the property from dissipation by the other.[5] Moreover, tips given waiters, waitresses, and others, offerings given at church, United Fund contributions, and other gifts are routinely made without thought of written consent by the other spouse. If a case were to arise involving such a gift the courts would undoubtedly find a ground to validate the gift, through ratification, waiver, implied consent, or other means.[6] The law should clearly state the traditional

1. See, e.g., Lord v. Hough, 43 Cal. 581 (1872).

2. The statute is now codified as Civil Code Section 5125(b) and is applicable to gifts of community personal property by either spouse.

3. See discussion in W. Reppy, Community Property in California 191 (1980); Prager, The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975, 24 U.C.L.A. L. Rev. 1, 49-52 (1976).

4. Civil Code § 5105 (interests of husband and wife during marriage are present, existing, and equal).

5. Cf. Civil Code § 5125 (either spouse has management and control of community personal property).

6. See discussion in Bruch, Management Powers and Duties Under a California's Community Property Laws 18-19 (1980).

community property rule that a spouse may make a gift of the community property without the written consent of the other spouse if the gift is usual or moderate in the circumstances of the particular marriage.[7]

Family home. Existing law protects a family home that is real property from sale or other disposition without joinder of both spouses.[8] The law also protects the personal property household furniture, furnishings, or fittings from disposition by one spouse without the written consent of the other.[9] However, existing law fails to protect a personal property family home, such as a mobilehome or houseboat.

The policy of protecting the family home is important to the security and welfare of the family, and protection should be extended to a personal property family home as well as to a real property family home. The proposed law precludes sale or other disposition of a community personal property family home by a spouse without the joinder of the other spouse.

Household furnishings and personal effects. Section 5125(c) of the Civil Code precludes a spouse from selling, conveying, or encumbering the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children that is community personal property, without the written consent of the other spouse. Like the other statutory limitations on the ability of a spouse to unilaterally dispose of community property, this provision had its origins in a time when the husband had management and control of the community property and the wife needed some protection against mismanagement.[10]

The written consent requirement for sale or conveyance of household furnishings and personal effects is unrealistic in an era of garage sales; it is unlikely that written consent will be sought for a sale of used furniture or clothing. The statute that requires written consent in effect permits a spouse to seek relief from a transfer of community personal property in nearly every case. Broadly applied, the statute

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7. The requirement of written consent should likewise be inapplicable to a gift of community property between the spouses.

8. Civil Code §§ 1242 (homestead) and 5127 (community real property).

9. Civil Code § 5125 (community personal property).

10. Prager, The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975, 25 U.C.L.A. L. Rev. 1, 52-53 (1976).

would make it dangerous for a buyer to purchase any furniture or wearing apparel in a warehouse or shop without inquiring into marital status and authority.[11] This problem is compounded by the fact that a transfer without the written consent of the other spouse is void and not merely voidable. The result is that either spouse can rescind (possibly without the need to make restitution) and the transfer is not effective as to the transferor's interest even after the marriage has terminated by dissolution or death.[12]

The limitation on disposal of household furnishings and personal effects is unnecessary. Each spouse now has management and control of the community personal property and both should be able to protect their interests. This is particularly true in the case of household furnishings and personal effects--the very items to which the spouses are closest and with which they are most familiar. If one spouse mismanages property of this type, the general duty of good faith should be sufficient to protect the other spouse.[13]

The one statutory protection that should be retained is the requirement of joinder for an encumbrance of household furnishings. Such a requirement would not affect peoples' ordinary dealing with property and would protect the innocent spouse from a harmful transaction that could occur without the knowledge of the innocent spouse.

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11. 7 B. Witkin, Summary of California Law, Community Property § 68 (8th ed. 1974).

12. Dynan v. Gallinatti, 87 Cal. App.2d 553, 197 P.2d 391 (1948); W. Reppy, Community Property in California 197 (1980).

13. Civil Code § 5125(e).

Civil Code § 5125 (amended)

SEC. ___. Section 5125 of the Civil Code is amended to read:

5125. (a) Except as provided in subdivisions (b), (c), and (d) and Sections 5113.5 and 5128, either spouse has the management and control of the community personal property, whether acquired prior to or on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.

(b) A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, without the written consent of the other spouse ~~.~~ , except in the following situations:

(1) The gift or disposition is to the other spouse.

(2) The gift or disposition is usual or moderate, taking into account the circumstances of the case.

(c) ~~A spouse may not sell, convey, or encumber~~ Both spouses must join in a transfer of or creation of a security interest in community personal property used as the family dwelling or in the creation of a security interest, other than a purchase money security interest, in the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children which is community personal property ~~, without the written consent of the other spouse~~ .

(d) A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest.

(e) Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property.

Comment. Subdivision (b) of Section 5125 is amended to add the exceptions for gifts between spouses and usual or moderate gifts. The exception for usual or moderate gifts is drawn from comparable provisions in other jurisdictions and is consistent with the traditional community property rule applicable in California prior to 1891. See, *e.g.*, La. Civ. Code Ann. art. 2349 (usual or customary gifts of value commensurate with economic status of spouses); Lord v. Hough, 43 Cal. 581 (1872) (manager spouse may without consent of the other make reasonable gifts of community property).

Subdivision (c) is amended to delete the requirement of written consent for a sale or conveyance of personal effects or household goods and to add the limitation on disposition of personal property used as the family dwelling, such as a mobilehome. *Cf.* Code Civ. Proc. § 704.710(a) ("dwelling" defined).