#F-660 5/23/83

Memorandum 83-35

Subject: Study F-660 - Awarding Family Home to Spouse Having Custody of Children (Comments on Tentative Recommendation)

In January the Commission distributed for comment its tentative recommendation relating to awarding the family home to the spouse having custody of the minor children. A copy of the tentative recommendation is attached to this memorandum. The tentative recommendation creates a presumption in favor of setting apart the family dwelling for use during the minority of the children as an award of child support. This strengthens the holding of In re Marriage of Duke, 101 Cal.App.3d 152, 161 Cal.Rptr. 444 (1980), which requires the court to weigh the relevant considerations but does not create a presumption, or at least not much of one. The tentative recommendation also creates a presumption in favor of awarding the family home outright to the custodial spouse as part of the property division at dissolution if there are sufficient marital assets to permit this.

We received nine letters commenting on the recommendation, which are attached to this memorandum as Exhibits, with the exception of the letter of Charles A. Kunkel, Vice President and Trust Officer for Crocker National Bank, who states simply that the tentative recommendation "meets with my approval as drafted." In addition to this letter there were two others that are in favor of the recommendation, both on the basis that it is necessary to protect children from emotional harm. See Exhibits 5 (Dawna J. Cole) and 8 (Timi L. Krissman).

The remaining six letters were strongly opposed to the tentative recommendation. The California Judges Association (Exhibit 7) noted that it is in the process of drafting a statement of reasons for opposition, and urges that the tentative recommendation not be adopted until it has had an opportunity to identify its specific concerns. The staff has informed them of the date of the June meeting, and we will supplement this memorandum with further information from them if it becomes available before the meeting.

The other commentators had numerous grounds for objection to the tentative recommendation. The major arguments are summarized below:

(1) The emotional harm to children of moving to another home is overstated. People with children move all the time, even when no move is necessary, and the children seem to survive all right. See Exhibits 4 (Howard L. Ekerling) and 6 (Robert D. MacFarlane).

(2) Awarding use of what is often the only siginificant asset of a marriage to the custodial spouse is unfair to the non-custodial spouse. The non-custodial spouse will receive no economic benefit from the asset, despite half ownership, for as long as 18 years. During this time the non-custodial spouse will be unable to pay off debts assigned in the division, will suffer a lower standard of living than the custodial spouse, and will be unable to buy a new home. This is in effect an unequal division of the community property. See Exhibits 1 (Family Law Section, Los Angeles County Bar Association), 2 (Kenneth D. Robin), 3 (Dennis A. Cornell), 4 (Howard L. Ekerling), and 6 (Robert D. MacFarlane).

(3) Awarding use of the family home to the custodial spouse will result in increased child custody litigation because of the injection of the substantial economic issue. See Exhibits 1 (Family Law Section, Los Angeles County Bar Association) and 6 (Robert D. MacFarlane).

(4) Existing case law is adequate to handle the problems that arise. Creating a presumption will limit the discretion of the court to fashion an appropriate order under the circumstances of the particular case. See Exhibits 1 (Family Law Section, Los Angeles County Bar Association), 2 (Kenneth D. Robin), and 3 (Dennis A. Cornell).

(5) The presumption would cause a number of other problems, including discouraging property settlements between the spouses (Exhibit 2--Kenneth D. Robin) and promoting dissolution of marriage and discouraging marriage and homeownership by men generally (Exhibit 6--Robert D. MacFarlane). It was also noted that such a presumption would discriminate against renters who could not take advantage of it and would result in problems of maintenance and repair of the property. Exhibit 6 (Robert D. MacFarlane).

There are a number of possible directions the Commission can take in light of these comments. They include:

Proceed with recommendation unchanged. Although there was some support for the Commission's recommendation as proposed, the staff believes that the arguments in opposition are sufficiently weighty that some change is called for.

Revise recommendation to specify standards. Mr. Cornell (Exhibit 3) suggests that the Commission could do a service by codifying the authority of the court to make an award of the family home to the custodial spouse (without a presumption) and specify what types of orders should be contained in such an award. For example, the court could be directed to take into account tax consequences of the award, the possibility of permitting the non-custodial spouse to obtain a loan on the equity in the home, allowing the non-custodial spouse a child support credit for the rental value of the home, and specifying grounds for termination of the order. Mr. Cornell states this "would provide real guidelines to the courts in handling this problem on a fair and equitable basis." This suggestion appears promising to the staff, although we would have to take care that such a listing of factors is not exclusive and does not affect the discretion of the court.

Do nothing. If we were to make no recommendation at all in this area, there would still be case law adequate to enable courts to fashion property awards in appropriate cases, in their discretion. The staff's inclination is that this may be one of the more preferable of the possible approaches.

Enact presumption for outright award of family home. An alternative would be to leave the law unchanged with respect to awarding temporary use of the family home to the custodial spouse, but to enact a presumption in favor of awarding the family home to the custodial spouse outright where the marital assets are sufficient to permit this. This aspect of the tentative recommendation received no adverse comment. However, this rule would have quite limited application to wealthy marriages. Moreover, in the few marriages where it would be applicable, the typical divison would be to award the family home to the wife and the husband's retirement fund to the husband. This sort of division would cause real problems in terms of leaving the husband no current assets and would deprive him of a real interest in property for a

speculative future interest in the retirement fund. This would be highlighted by such a recommendation and would be widely perceived as unfair.

Limit award of use of family home to cases where economically necessary. Mr. Ekerling (Exhibit 4) suggests that existing case law on awarding use of the family home be limited so that the home must be divided in the ordinary case. Only if the non-custodial spouse disappears or is unable to pay support should use of the home be awarded as a form of child support. Some of the same objections that were made to the tentative recommendation--that it unduly restricts the court's discretion to make an appropriate award depending on the circumstances of the case--would be made to the proposal to preclude such an award except where necessitated by economic circumstances.

Overrule Duke. A final suggestion is that the Commission overrule completely case law that permits awarding temporary use of the family home to the custodial spouse. Exhibit 6 (Robert D. MacFarlane). This suggestion is of course totally opposite to the basic policy of the Commission expressed in the tentative recommendation.

In summary, in light of the comments, the staff believes that the best course is either to attempt to draw statutory standards for consideration by the court in awarding the family home, or to submit no recommendation on this matter.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Family Law Section of the Los Angeles County Bar Association
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LOS ANGELES, CALIFORNIA 90014
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February 18, 1983

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, California 94306

Re: Recommendation Relating To Division of Joint Tenancy And Tenancy In Common Property At Dissolution Of Marriage; Tentative Recommendations Relating To (1) Joint Tenancy And Community Property, (2) Continuation Of Support Obligation After Death of Support Obligor, and (3) Awarding Family Home To Spouse Having Custody Of Children

Dear Members:

The Executive Committee of the Family Law Section of the Los Angeles County Bar Association, which represents approximately 1,300 family law lawyers, has considered the above-referenced Recommendations promulgated by the Law Revision Commission. At a meeting held on February 15, 1983, the committee unanimously voted to voice its opposition to each of the recommendations.

4. Awarding Family Home To Spouse Having Custody of Children.

Awarding the family dwelling or its use to the party to whom custody of minor children is awarded will create additional litigation with regard to custody. By providing a presumption favoring the award of the use of the dwelling during the minority of the children will create economic imbalance in many instances. The non-custodial parent in "single-asset" cases will be deprived of the economic benefit of one-half of the community property for extended periods of time in many instances. That result is often unfair, and should not be mandated. Rather than providing the court with additional discretion to make innovative distributions of property, these recommendations will lead to additional problems, rather than solving them.

Our committee stands ready to provide any additional input which you may desire concerning these or other proposals affecting the practice of family law.

Very truly yours,

Gerald E. Lichtig

GERALD E. LICHTIG

GEL:dsd
cc: Sybil Anne Davis, Chair
Martin E. Shucart, Legislative
Committee Chair

KENNETH D. ROBIN
ATTORNEY AT LAW
2204 UNION STREET
SAN FRANCISCO, CALIFORNIA 94123
(415) 563-2400

February 23, 1983

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94306

Re: Tentative Recommendation Relating to Awarding Family Home to Spouse Having Custody of Children

Dear Sir:

I believe that the tentative recommendation of the Commission is inappropriate and contains one major and glaring omission.

First of all, the comments make it clear that there is no need as a matter of law for any such statute. As the Recommendation notes, there is legislative and judicial authority for exempting the home from immediate equal division and, quite obviously, many judges have utilized that authority.

The Recommendation notes that, notwithstanding this authority, "few [judges] are willing to let [the home] remain unsold until small children attain majority". What is singularly missing is any attempt on the part of the Commission to explain why judges feel this way and without any such explanation one would be hard pressed to reach the conclusion the judges are wrong in those cases where they determined that equal division is not appropriate. It seems to me that the Commission has two choices in analyzing the situation: first, that judges are ignorant of the legislative and judicial authority they have for providing the exemption and that attorneys for the custodial spouses are also ignorant and are failing to provide the judges with citations to those authorities or effective argumentation for the application of that authority. Second, that judges and attorneys are aware of the authority but are for one reason or another not applying it. The first alternative is hardly accurate and the second one certainly requires more comment on the part of the Recommendation before it can be dispensed with. That is, if, as I suspect is the case, judges are looking at situations where there is a huge equity in the family home and are recognizing that it would simply be unfair to the supporting spouse to make him wait upwards

of eighteen years to recover his share thereof and to buy his own second home with his fair share of the proceeds thereof, and that the same really is not necessary because the upheaval in the home is going to be minimal just because both parties have to move to new homes, including the minor children along with the custodial parent, why is this necessarily a faulty analysis? Is not the trial judge in the best position to view whether or not in the specific case before him the economics and the level of disruption are such that the exemption should be or should not be applied? What is the purpose of a statute such as that recommended which, if anything, will simply lead to the judge ignoring what are otherwise relevant factors (either that, or applying the same law he did in the absence of the recommended statute---in which case, why have the statute at all!).

In passing, I would also think that the Recommendation, if enacted, would make settlements of dissolution cases much more difficult to obtain. I would think that it would be a rare case indeed where the noncustodial spouse would agree in advance that there would not be a sale of the family residence until the youngest of his minor children reached the age of majority. Further, if the supported custodial spouse feels that there is a substantial likelihood that she will be able to keep the family home and not have to pay for it until the oldest child reaches majority, I would think that she would have very little incentive to enter into a marital settlement agreement which would call for that. Since, as the recommendation makes very clear, the disposition of the home is often the most major financial item in the community's estate, I would think that the proposed law might very well preclude settlements in a very large number of cases.

Sincerely,

Kenneth D. Robin

KDR/mks

LAW OFFICES OF

ALLEN, IVEY, CORNELL, MASON [redacted]

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REPLY TO: Merced

TERRY L. ALLEN*
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*A PROFESSIONAL CORPORATION

March 29, 1983

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Re: Tentative recommendation relating to awarding family home to spouse having custody of children

Gentlemen:

I have reviewed your tentative recommendation regarding the awarding of the family home. I believe that the heavy presumptions in that recommendation are not only unwarranted but dangerous. The current state of the law allows the Court broad discretion in making such an award, and I believe that discretion has generally been exercised very wisely. If your tentative recommendation were enacted into law, the presumptions contained in that recommendation would virtually tie the hands of the court and create what is absolutely an unequal division of the community property.

Without making specific recommendations concerning the language of your proposed legislation, it is my opinion that the people would be better served if a law were enacted which provided the Court with the power to make such an award, but with no presumption. Further, it would be a great service if, when the Court made such an award, the statutory language outlined what types of orders should be contained in such an award. The lawyers in California frequently use what is called the "Andreen" order in these particular instances, and that order was passed upon with generally favorable results in the case cited by you, In re marriage of Escamilla. Outlining the specific provisions that should be contained in such an order would provide a great service, without endangering the discretion of the Court to make an appropriate award. Such an order should always take into account the adverse tax consequences to the spouse who is not receiving his share of the proceeds of the sale of the family residence immediately. That is a factor which was completely overlooked in your tentative recommendation. Also, another factor which was not considered is the ability of the "out space" to use the equity in the family residence to secure a loan so that he can obtain another residence.

Generally, such legislation should take into account the practical effects of the order. These practical effects include a lessoning of the ability of the "out spouse" to obtain other living quarters, the suffering of adverse tax consequences, the providing of a credit for child support to the "out spouse" as compensation for foregoing his realization of the community property, and, finally, the termination of such an award in the event of the remarriage of the spouse retaining custody of the family residence. These particular factors could be put into the legislation, and, with the removal of the presumption as suggested above, would provide real guidelines to the courts in handling this problem on a fair and equitable basis.

Very truly yours,

ALLEN, IVEY, CORNELL & MASON

By 

DENNIS A. CORNELL

DAC:kej

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April 14, 1983

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, California 94306

Re: Proposal Regarding Awarding Family Home to Spouse Having Custody of Children

Greetings:

I understand that you have before you a Tentative Recommendation relating to this subject dated January 21, 1983. I understand that comments are welcome on the proposal prior to April 30, 1983. In connection therewith, the following is submitted for your information.

For the reasons set forth below, I am opposed to the presumption in favor of awarding the family dwelling to the party awarded custody of the minor children. To the contrary, I believe that your commission should support a proposal which would prohibit such an award, absent a finding by the court that such an award of the family dwelling is required by reason of the economic circumstances of the parties which should be defined to include an inability of the supporting spouse to adequately contribute towards the support of the children in the custody of the spouse retaining the family dwelling. My conclusion is based upon my experience in practicing in this area, as outlined below.

The cases which have dealt with the proposition that the family residence should be awarded to the custodial spouse have, in large part, dealt with the economic necessity of making such an order. While the cases do also talk about the "emotional and social impact" of a sale, it seems evident from an analysis of the case that the primary consideration of the court in evaluating a possible sale of the family residence is the economic circumstances of the parties, including the economic detriment to the non-custodial party.

In fact, my experience has been that the custodial spouse always is of the mind that the family residence must be preserved for the children. It is not unusual to find a

dissolution of marriage matter with a family residence having an equity in excess of $200,000.00 being the principal community asset. This equity is certainly enough money to enable both of the parties, including the custodial spouse and the non-custodial spouse to make arrangements for suitable alternative housing without requiring the non-custodial spouse to forego the economic benefit of any of that substantial equity in order to conform with the custodial spouse's desire to have the children continue to live in their familiar circumstances.

The foregoing example is taken directly from a recent case which I handled only last year. Now, less than ten months after the interlocutory judgment was granted, the custodial spouse has come to the non-custodial spouse seeking his permission to sell the family residence. This arises in a case where the custodial spouse caused both parties to incur thousands of dollars worth of legal fees because of her desire to bring up the children in their familiar surroundings. Now, just a few months after the divorce is final, she has a new friend with whom she would like to take up residence, in his house. Her desire to have the children grow up in their familiar surroundings has been attenuated by her desire to continue her life in new surroundings. Apparently the detriment to the children from moving out of the "old homestead" is outweighed by the custodial spouse's desire to move into someone else's homestead.

In today's economy, most families have a substantial amount of their community wealth invested in the family residence. If the law requiring an equal division of the community property is to be followed, the family residence should be treated like any other piece of community property, and sold, if necessary, in order to accomplish an equal division of community property. The sole exception to this rule should be where the non-custodial spouse is unable to pay adequate child support by reason of his impoverished circumstances, or in an even more extreme case, where the non-custodial spouse has disappeared, or is otherwise out of touch with the custodial spouse and the children. Under these circumstances, the court should be allowed to make an order deferring a possible sale of the family residence, and taking this into account in fixing child support.

Some will argue that to require a sale of the family residence is unduly disruptive to the children. This is nonsense. Parents make decisions concerning the upbringing of their children, absent judicial intervention for specified and limited reasons. The range of permissible and reasonable conduct over the activities of the children is broad indeed. Parents may choose for any one of many reasons to sell the

family residence, while the family is together, and in complete harmony. Any of these reasons might require uprooting the children from their established surroundings, and moving them to new surroundings. These things are more traumatic to the children than a visit from Santa Clause at Christmastime, but the law should not use the possible effect of this uprooting as a rationale for depriving the non-custodial spouse of any of the economic benefits resulting from the accumulation of community property merely because such community property has been accumulated in the form of a family residence. Perhaps if the parties had been aware of this possibility, they would not have chosen to invest such a large proportion of their community wealth in the family residence, and might have left some community wealth outside of that asset.

The recommendation of your commission is intended to "encourage and sanction the courts in the effort to fashion a protective property division in cases where minor children are involved." I do not believe such to be a wise course of action. The parties have accumulated their community property, and the interests to be protected are those of the parties. Were the family to stay together, and choose to sell the family residence in favor of investing the proceeds in speculative oil drilling ventures or in commodity futures, the law would not permit intervention "in the best interests of the children", but the family residence would still have been sold, and the children uprooted. The law should not sanction any greater intervention in economic decision-making in the confines of a divorce case than would be permitted the harmonious family. I greatly appreciate your consideration of the foregoing views.

Very truly yours,

HOWARD L. EKERLING

HLE:as

1001 Angelo Drive
Beverly Hills, California 90210
April 28th, 1983

California Law Revision Commission
4000 Middlefield Road
Shite D2
Palo Alto, California 14306

Dear Sirs:

This is to advise you with regard to the following pending laws:

1) I am absolutely in favor of the custodial parent remaining in the home until the youngest child is eighteen years of age. As a registered nurse, I know and have seen, having worked with psychiatric patients, that the trauma of being removed from one's primal environment can indeed be devastating and especially to a young child. Perhaps I should illustrate an example of an analogy of this, with your indulgence. When my cat was struck by a car and given a 10% chance of living, the veterinarian said that the first and foremost thing that would enhance her chances of survival would be returning to her own environment. After five days of intensive care, I brought her home and today she is alive and well! Please vote for this ruling.

2) I am also 100% in favor of having the accumulation of profits garnered from purchases made with separate property considered as community property. Why should a woman who has given up her job to become a wife and mother not be allowed to share equally in a purchase because it was made with separate funds? It would seem more loving to have both parties share equally in whatever assets either one has at the time of marriage. In some marriage vows, the husband so states: "And with my worldly goods, I thee endow."
Why has this (marriage) become a business arrangement? Why are all of the many jobs that a wife does not accountable?
Having myself been made to sign a very binding pre-nuptial agreement (to have been abolished in six months and never done) as well as a quick claim deed on my place of residence(also to have been eradicated), I am filled with anguish that after fifteen years of marriage I have no community property, as well as being made to suffer physical abuse. I have been turned away from lawyers who said I have little or no position! Needless to say, I implore and beg you to vote in favor of this accrued equity being considered as community property.

Most sincerely,

Dawna J. Cole

Dawna J. Cole

ROBERT D. MACFARLANE
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April 29, 1983

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

RE: AWARDING FAMILY HOME TO SPOUSE HAVING CUSTODY OF CHILDREN

I am opposed to the recommendations set forth in bulletin number F660 regarding the award of the family home to the spouse having custody of the children for the reasons hereinafter set forth:

1. Where one former spouse retains in an interest in real property occupied by another, the occupying former spouse will not, and has not in my 23 years of experience in the practice of family law, maintain the property, even where it is necessary for structural integrity, including the removal of termites; nor will taxes be paid on time. In addition, the statute is silent as to who is to maintain the property, who is to pay the costs of enforcing an order for maintaining the property. Would the occupying spouse be entitled to attorney's fees under any such proceedings pursuant to Civil Code Section 4370(c). In my experience, the court will refuse to enforce an order to maintain the property against the wife.

2. If the custodial spouse is to have the use of the home, at a reduced rent, there will be a marked increase in custody proceedings with its detrimental effect on the children, not so much for the purpose of having the children alone, but for the purpose of occupying the home and receiving the benefit of the lower rent. A rent $300 per month lower than the market for a period of 10 years would amount to $36,000.

3. In most cases in which the proposed section would have an effect, the only means of paying the debts of the parties is from the sale of the home and most parties are heavily in debt at the time they file for dissolution of marriage. This means that their standard of living could not long continue at the same rate if they did not file for dissolution. The sale of the house offers an opportunity for most (but not all) to pay their debts and start over. If the house is not

to be sold, not only will the debts not be paid, but the parties position will continue to weaken and deteriorate. Their living expenses will increase, at the same time they incur an unusually large burden for attorney's fees, court costs, expert witnesses, while their income will, in the case of most commissioned salesmen and professionals, substantially decrease. In addition, there is an unequal division of property (what good is it to have property if you don't have it's use?) and by tying up the entire equity of the parties in property whose use is awarded to the custodial parent, but the non-custodial parent is prevented from getting started again. It should be noted that if he is not living in the house, he could not even file a homestead to protect it from bankruptcy proceedings.

4. The proposal will also discourage the purchase of a home by men who are aware of those provisions as they would know then that, unlike in the case of a rented home, they will be obligated to make house payments either as child or spousal support to a former spouse even though they are not living there. Knowledgable men will therefore become very weary of incurring any substantial obligation in regards to a home in which they live.

5. It will also discriminate against renters, as those who rent will not be protected. Why should the children of those who are wealthy enough to own homes be allowed to remain in them, while those who only rent should be forced to move?

6. Boseman[1] and Duke[2] both ASSUME that it would be traumatic and disruptive to the children to move to a new environment. They offer no citations to sociological or psychological studies to support this thesis. In the case of very young children, they are not likely to be aware of what neighborhood they live in or its significance. As the children leave elementary school they will be increasingly aware of the neighborhood in which they live, and of their friends and contacts in that neighborhood. However, absent a dissolution, the average length of time (prior to passage of proposition 13, property tax limitation, and double digit interest rates) that a family owned a particular house, was 8 years. Presumably at the end of that time, they not only sold the home but moved. This was not seen as having any detrimental effect on the children. If it does, perhaps legislation should be enacted to prevent people from moving from their family home after their children are born, or after the children reach a certain age. It should be noted that in the diplomatic service and in the military, as well as with many corporations, public utilities and federal and state agencies, especially those connected with law enforcement or regulatory activities, people routinely are moved, not just from a neighborhood, but to different cities and to different states, even different countries, all without traumatic or significant adverse effect on their children.

7. The effort to shield the spouse with custody of the children (almost always the wife) from any effects of the dissolution, may seem laudible, but on closer examination, will be seem to promote dissolution of marriage. Indeed, under the present law, she can, by kicking out her husband and filing for a dissolution of marriage, illiminate any household duties that might be associated with him, such as washing his clothes, fixing his meals, etc. If she is to live in the same house, she is going to need approximately the same amount of money to provide food for herself and the children, she normally receives the same furniture, and has the use of the same car, one must wonder what she gives up in the dissolution process, while the husband gives up virtually all access to the children, except for every other weekend, alternate holidays and usually a 30 day vacation in the summertime. In spite of joint custody, the cases make it clear that he has an insignificant role in determining the education and religious needs of the children, but maintains the responsibility for supporting the family. Escamilla[3], to the extent that it says that where one spouse is given the use of the home, it should not be sold when that spouse has a boyfriend, or a new spouse living in the home with her. It is not only wrong, it is inhuman. No person should be compelled to support or furnish support to an ex-spouses new spouse.

8. One key question the commission should ask itself is; "Why are so many people, the young, the old, the middle aged, the rich, the poor, the lame, the healthy, electing to live together without benefit of matrimony. If it is because of the burdens of marriage, or the unequal division of property in a dissolution of marriage, both real and imagined, that they do not want to incur, then perhaps we should look at lightning those burdens and illiminating the unequal division of property in a dissolution of marriage. And what other reason is there for people to refuse matrimony when living together? It obviously is not because they cannot terminate the marital relationship, as that can be terminated by simply giving 6 months notice in the proper form.

9. A short time ago, I asked an old friend of mine if he was ever going to remarry. Hisanswer was illuminate of the problem. He said, "Bob, I have been married three times, I have had three homes and lost them all. I now have a motorhome, which is mine. I am too old to start over."

In conclusion, I would recommend to the commission that it not adapt proposal Number F660 and that the holdings in Boseman[1] and Duke[2] relating to permitting a long term use of the family residence by one spouse, should by statute, be overruled. Escamilla[3] should also be overruled

Sincerely yours,

Robert D. MacFarlane

ROBERT D. MacFARLANE

RDM:lms

1. In re Marriage of Boseman, 31 Cal. App.3d 372, 375, 107 Cal. Rptr. 232, 234 (1973)
2. In re Marriage of Duke, 101 Cal. App.3d, 152, 161 Cal. Rptr. 444 modified, 102 cal. App.3d 619d (1980)
3. In re Marriage of Escamilla, 127 Cal.App.3d 963, 179 cal.Rptr 842 (1982).

CALIFORNIA JUDGES ASSOCIATION

Fox Plaza, Suite 416 • 1390 Market Street • San Francisco, California 94102 • (415) 552-7660

May 13, 1983

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94306

Gentlemen:

I am writing on behalf of the California Judges Association to express our views with respect to certain tentative recommendations circulated by the Commission.

This will advise you that we strongly oppose the proposal concerning awarding the family home to the spouse having custody of the children and the proposal regarding the continuation of spousal support after the death of the support obligor. With regard to both of these proposals our Family Law Committee is in the process of drafting a statement of our reasons for our opposition.

We urge that your tentative proposals not be adopted until we have had an opportunity to identify our specific concerns to you.

Sincerely,

Sue U. Malone
Executive Director

SUM:gk

cc: Hon. Ronald M. George
Hon. Donald B. King

To Whom it May Concern:

I am very much in favor of the Duke Law. I feel that our children have not been considered in the divorce court! They have been put in Day Care Centers, moved out of their homes, lost a two parent home - all at the same time. We wonder why we have a country with so many children in the psychiatrists' offices or out on the streets! We rob them of their stability but still expect them to land on their feet. Please vote for the Duke Law. Thank you

Tini Loomis Kriesman

#F-660 1/21/83

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

AWARDING FAMILY HOME TO SPOUSE HAVING CUSTODY OF CHILDREN

January 21, 1983

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN APRIL 30, 1983.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306

#F-660 1/21/83

TENTATIVE RECOMMENDATION

relating to

AWARDING FAMILY HOME TO SPOUSE HAVING CUSTODY OF CHILDREN[1]

The family home, an item owned by about half of all couples whose marriage is dissolved, has typically been the middle-income family's major asset. The legal tradition before no-fault dissolution and equal division of assets was to award the family home to the wife upon dissolution, both because it was assumed to be hers--in the sense that she organized, decorated, and maintained it--and because she was usually adjudged to be the innocent plaintiff and thus deserving of more than half of the community property. In addition, if the wife had child custody she needed the home to maintain a stable environment for the children.

With the absence of fault and the trend toward equal division, the number of homes being divided equally has increased, particularly where the home is the major community asset. In such a situation, "equal division" of the home can mean either that the two parties maintain common ownership after dissolution or that the home is sold and the proceeds divided equally. In most cases in which the home is divided, it is sold.

The equal division rule thus may force a sale of the home in a family that has no appreciable assets beyond its equity in the home. This is a matter of some concern, especially when there are minor children in the family.[2] Even the presence of minor children does not ensure that the person given custody of the children will be awarded the family home. Two-thirds of the couples who are forced to sell their homes have minor children.

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1. Portions of the following discussion are drawn from Weitzman, The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards, 28 UCLA L. Rev. 1181, 1204-07 (1981).

2. Id. at 1200. Couples with minor children are more likely to own homes than childless couples, regardless of marital duration and family income. Overall, 65% of the couples with minor children own homes, compared to 33% of the couples with no minor children.

The California Legislature did not intend that the family home be sold in order to meet the equal division requirement.[3] The 1970 Assembly Judiciary Committee Report on the Family Law Act states that a temporary award of the home to the spouse who has custody of minor children should be seen as a valid exception to the strict equal division rule:

> Where an interest in a residence which serves as the home of the family is the major community asset, an order for the immediate sale of the residence in order to comply with the equal division mandate of the law would, certainly, be unnecessarily destructive of the economic and social circumstances of the parties and their children.[4]

The California courts first addressed this problem in 1973 in In re Marriage of Boseman.[5] In that case, the only asset the parties had accumulated was their home. When the wife was awarded custody of the three minor children, ages thirteen, eleven, and three, the trial court properly ordered the house to remain in the wife's possession "for use and benefit of said minors"[6] until the youngest reached majority. Thereupon, the house was to be sold.[7]

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3. In re Marriage of Boseman, 31 Cal. App.3d 372, 375, 107 Cal. Rptr. 232, 234 (1973).

4. Cal. Assembly Comm. on the Judiciary, Report on Assembly Bill No. 530 and Senate Bill No. 252 (The Family Act), 1 Assembly J. 785, 787 (Reg. Sess. 1970).

5. 31 Cal. App.3d 372, 107 Cal. Rptr. 232 (1973).

6. Id. at 374, 107 Cal. Rptr. at 234.

7. The appellate court remanded the case for clarification of the disposition of the proceeds of the house sale but upheld the temporary award of the residence to the wife. Id. at 378, 107 Cal. Rptr. at 237.

   In re Marriage of Herrmann, 84 Cal. App.3d 361, 148 Cal. Rptr. 550 (1978), dealt with a substantially similar fact situation. The trial court awarded Mrs. Herrmann the house and, to satisfy the equal division rule, ordered her to deliver to Mr. Herrmann a promissory note for half of the value of the house at the date of the dissolution, bearing 7% interest per year and payable upon the sale of the residence. The house was ordered sold either when the child reached 15, the child or the mother died, the mother remarried or began living with a man, or the mother and child moved away for more than 60 days, or upon the agreement of the parties. The Court of Appeal approved the goal of maintaining the home for the children but disapproved the promissory note. Instead, it recommended the Boseman formula of awarding each party a half interest in the

The rationale for maintaining the home for the children is articulated in In re Marriage of Duke.[8] There, the trial court's refusal to defer the sale of the home was reversed on appeal. The appellate court said:

> Where adverse economic, emotional and social impacts on minor children and the custodial parent which would result from an immediate loss of a long established family home are not outweighed by economic detriment to the noncustodial party, the court shall, upon request, reserve jurisdiction and defer sale on appropriate conditions.
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> The value of a family home to its occupants cannot be measured solely by its value in the marketplace. The longer the occupancy, the more important these noneconomic factors become and the more traumatic and disruptive a move to a new environment is to children whose roots have become firmly entwined in the school and social mileu of their neighborhood.[9]

Despite the legislative and judicial authority for exempting the home from the immediate equal division of community property, the prevailing pattern is that the home is ordered sold with the proceeds divided upon dissolution. While some judges are willing to leave the home in common ownership for a few years, few are willing to let it remain unsold until small children attain majority.

The judicial practice of ordering immediate sale of the family home or of deferring sale only for a brief period has been noted by a number of observers.[10] Legislation is needed to codify the presumption in favor or awarding the home to the custodial spouse and to expressly authorize deferred sale. This will encourage and sanction the courts in

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house as tenants in common. 84 Cal. App.3d at 366-67, 148 Cal. Rptr. at 553-54. Other courts have maintained the family home for minor children by awarding the residence to the custodial spouse, while achieving an equal division by granting the full retirement pension to the husband. See, e.g., In re Marriage of Emmett, 109 Cal. App.3d 753, 760-61, 169 Cal. Rptr. 473, 477-78 (1980); In re Marriage of Marx, 97 Cal. App.3d 552, 560, 159 Cal. Rptr. 215, 220 (1979).

8. 101 Cal. App.3d 152, 161 Cal. Rptr. 444, modified, 102 Cal. App.3d 619d (1980).

9. Id. at 155-56, 161 Cal. Rptr. at 446 (italics omitted).

10. See, e.g., Weitzman, The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards, 28 UCLA L. Rev. 1181, 1207; Bruch, The Definition and Division of Marital Property in California: Towards Parity and Simplicity, 33 Hastings L.J. 769, 775 (1982).

the effort to fashion a protective property division in cases where minor children are involved.

The Commission's recommendation would be effectuated by enactment of the following measure.

An act to amend Section 4800 of, and to add Section 4708 to, the Civil Code, relating to marital property.

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

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Civil Code § 4708 (added)

SECTION 1. Section 4708 is added to the Civil Code to read:

4708. (a) In a proceeding in which the support of a minor child is at issue, the court has jurisdiction, at the request of a party, to set apart the community property or quasi-community property family dwelling for the use of the minor child and the party awarded custody of the minor child.

(b) The court has discretion whether to set apart the family dwelling pursuant to this section, including the period for which, and any terms and conditions upon which, it is set apart. In the exercise of its discretion the court shall be guided by a presumption in favor of setting apart the family dwelling for use during the minority of the child but shall give due consideration to all relevant economic, emotional, and social factors including, but not limited to, the economic detriment to the party for whose use the property is not set apart.

(c) An order setting apart the family dwelling pursuant to this section does not affect the disposition of the family dwelling in a proceeding for division of the community property and quasi-community property, other than to subject the family dwelling to a prior right of use during the period for which it is set apart. The rights of the parties during the period for which the family dwelling is set apart are governed, to the extent applicable, by the law governing tenants in common, by the Legal Estates Principal and Income Law, Chapter 2.6 (commencing with Section 731) of Title 2 of Part 1, or by such other rules as the court determines are appropriate under the circumstances of the particular case.

(d) An order setting apart the family dwelling pursuant to this section is made pursuant to the obligation to support the spouse and

minor child, and shall be treated as such for all purposes including, but not limited to, modification, revocation, enforcement, and taxation.

Comment. Subdivision (a) of Section 4708 codifies and clarifies the rule that the court may set apart the family dwelling for use during the minority of the children. See, e.g., In re Marriage of Boseman, 31 Cal. App.3d 372, 107 Cal. Rptr. 232 (1973). The authority of the court under this section is useful in cases where there are insufficient assets to award the family dwelling to the custodial spouse outright. See Section 4800(b)(1) and Comment thereto (family dwelling awarded to custodial spouse where economic circumstances warrant). As such, the order setting apart the family dwelling under this section is a support order. See subdivision (d).

Subdivision (b) codifies the presumption in favor of setting the family dwelling apart for the minority of the children. See, e.g., In re Marriage of Duke, 101 Cal. App.3d 152, 161 Cal. Rptr. 444 (1980). Subdivision (c) requires the court to specify the status of the parties and their rights during the period the family dwelling is set apart. Cf. Prob. Code §§ 660-666 (rules governing probate homestead). Subdivision (d) makes clear that a court order under this section is a support order for all purposes, and the reasonable rental value of the supporting spouse's interest in the property should be considered for purposes of determining dependency exemptions and for other taxation purposes. Moreover, the order is subject to modification to the same extent as any other support order, including the presumption of decreased need for support if the supported party is cohabiting with a person of the opposite sex. This overrules In re Marriage of Escamilla, 127 Cal. App.3d 963, 179 Cal. Rptr. 842 (1982).

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Civil Code § 4800 (amended)

SEC. 2. Section 4800 of the Civil Code is amended to read:

4800. (a) Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, the court shall, either in its interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties equally. For purposes of making such division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community property and the quasi-community property of the parties in an equitable manner.

(b) Notwithstanding subdivision (a), the court may divide the community property and quasi-community property of the parties as follows:

(1) Where economic circumstances warrant, the court may award any asset to one party on such conditions as it deems proper to effect a substantially equal division of the property. In the application of this paragraph the court shall be guided by a presumption in favor of awarding the family dwelling to the party awarded custody of the minor children.

(2) As an additional award or offset against existing property, the court may award, from a party's share, any sum it determines to have been deliberately misappropriated by such party to the exclusion of the community property or quasi-community property interest of the other party.

(3) If the net value of the community property and quasi-community property is less than five thousand dollars ($5,000) and one party cannot be located through the exercise of reasonable diligence, the court may award all such property to the other party on such conditions as it deems proper in its final judgment decreeing the dissolution of the marriage or in its judgment decreeing the legal separation of the parties.

(4) Educational loans shall be assigned to the spouse receiving the education in the absence of extraordinary circumstances rendering such an assignment unjust.

(c) Notwithstanding the provisions of subdivision (a), community property personal injury damages shall be assigned to the party who suffered the injuries unless the court, after taking into account the economic condition and the needs of each party, the time that has elapsed since the recovery of the damages or the accrual of the cause of action, and all other facts of the case, determines that the interests of justice require another disposition. In such case, the community property personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just, except that at least one-half of such damages shall be assigned to the party who suffered the injuries. As used in this subdivision, "community property personal injury damages" means all money or other property received or to be received by a person in satisfaction of a judgment for damages for his or her personal injuries or pursuant to an agreement for the settlement

or compromise of a claim for such damages, if the cause of action for such damages arose during the marriage but is not separate property as defined in Section 5126, unless such money or other property has been comingled with other community property.

(d) The court may make such orders as it deems necessary to carry out the purposes of this section.

Comment. Subdivision (b)(1) of Section 4800 is amended to codify the presumption in favor of awarding the family dwelling to the custodial spouse. Where economic circumstances do not warrant such an award, an order setting apart the family dwelling for use during the minority of the children may be appropriate. See Section 4708 (use of family dwelling); see, e.g., In re Marriage of Herrmann, 84 Cal. App.3d 361, 148 Cal. Rptr. 550 (1978).