

First Supplement to Memorandum 83-35

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

Attached to this supplementary memorandum as Exhibit 1 is a letter from Barrington A.S. Daltrey commenting on the tentative recommendation relating to awarding the family home to the spouse having custody of the minor children. The comments are of the same general tenor as the comments attached to the main memorandum, to the effect that the emotional harm of requiring children to move to another home is overstated, that awarding use of the home to one spouse is economically inequitable and will result in increased child custody litigation, and that numerous other problems will result.

Respectfully submitted,

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Comment to Tentative Recommendation, "Awarding Family Home to Spouse Having Custody of Children"

The proposed revision does not appear to take into account a number of factors which are relevant to parties seeking dissolution, even though the courts have shown themselves to be more sensitive to such problems.

1. It is substantially inequitable to allow one spouse the use of the family residence for a lengthy period of time where a great deal of the parties' equity is tied up in the residence. The proposed revision fosters an "all or nothing" dissolution: The party with the children gets the use of the existing equity for a lengthy period of time, and additionally, receives child support. The other party receives nothing, despite having worked to accumulate the equity, and additionally, is required to pay support.

Thus, the children become the key objective on the economic battlefield. He or she who has the children takes all. This results in an otherwise unnecessary custody battle, and may result in custody which is not in the best interest of the children.

Moreover, a non-working parent who receives sufficient support has no incentive to obtain employment. That party has a valuable home, income (and an opportunity to rub salt in the ex-spouse's wounds) so long as custody is maintained. In addition, a non-working spouse uses the very fact of non-employment to maintain custody that spouse has the time to care for the children while the other spouse does not.

2. The revision fails to indicate that the residence should be viewed as support, and that support otherwise payable shall be reduced. As a result, the non-custodial spouse is likely to pay double if that party is unfortunate enough to have invested in a home while married.

This<sup>is</sup> particularly significant under the current economic conditions, where the income of two spouses is necessary to pay mortgage payments. While each spouse is willing to put extra effort into that payment during marriage, the spouse naturally wishes to put his/her efforts into his/her own estate rather than that of his/her ex-spouse after separation. Absent two incomes, the supported spouse is likely to lose the residence through foreclosure. As a result, the court is likely to award higher support in order that the residence may be maintained.

If the residence is lost through foreclosure, both parties lose their equity.

3. The revision ignores current lifestyles. Californians are likely to move, and thus, "preserving the children's environment" is something of a sham argument. Additionally, the revision leaves the parties economically entangled for a lengthy period of time. In light of a trend toward remarriage (and even re-divorce) enormous problems can be created.

Similarly, the revision tends to create an entire set of "second class citizen" children. A reality of life is that divorced people get remarried, and that such marriages spawn children. Since the parent's equity is likely to be tied up in a prior residence, as is substantial support money, the new family will be less well supported. And by taking all the fruits of the non-custodial spouse's labor during marriage, that spouse is discouraged from further productivity. A "why bother" attitude may result in reduced ability to support the children.

4. The revision does not provide for appropriate results when (a) a custodial spouse cohabitates or remarries or (b) when a custodial spouse wishes to relocate.

In the more frequent scenario, ex-husbands are non-custodial parents. We can thus anticipate the creation of homes in which the wife and her ex-husband own the residence in which wife and husband live, while husband retains ownership, but no present interest in a home resided in by his ex-wife and her current husband. However, he makes payments against the wife's separate property home, and is therefore entitled to reimbursement at time of dissolution.

Thus, when the marriage dissolves, the children of the second marriage will reside in a home owned in part by the first husband, containing equity contributed by their father

with a mother who is looking for #3. This can only result in hopeless and needless complications. Dissolution is a fact of life, and must be faced as such, with each party entitled to seek a new existence. It seems erroneous to punish a non-custodial parent, particularly since the responsibility for the dissolution may very well rest with the custodial parent. The children must be properly supported, but children are resilient and loss of the family home is no more likely to produce permanent psychological damage than any of the other vicissitudes of life.

Cordially,

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