

Memorandum 83-66

Subject: Study F-660 - Awarding Temporary Use of Family Home

Attached to this Memorandum is a tentative recommendation relating to awarding temporary use of the family home to the spouse having custody of minor children, revised to reflect the Commission's decision at the June meeting to codify the general case law giving the court discretion to make such an award and to state factors that should be considered by the court in making the award. The Commission should decide whether to send the revised tentative recommendation out for comment, to submit the revised recommendation directly to the Legislature, or simply to drop the whole project.

As revised, the tentative recommendation accomplishes two useful purposes, in the staff's view. There is some advantage to lawyers and judges in having the authority to award temporary use of the family home codified, so that it is not necessary to search for and rely on case law. And the tentative recommendation reverses the case law rule that the award may not be modified or terminated if the custodial spouse remarries or commences cohabitation in the family home.

On the other hand, the staff wonders whether the Legislature will believe this is a worthwhile expenditure of resources for these modest improvements. The case law is largely adequate in this area, and the advantages of codification appear marginal.

Respectfully submitted,

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STAFF DRAFT

REVISED TENTATIVE RECOMMENDATION

relating toAWARDING TEMPORARY USE OF FAMILY HOME¹

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.

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

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 house as tenants in common. 84 Cal. App.3d at 366-67, 148 Cal. Rptr. at 553-54.

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.

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 milieu 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. Some judges are willing to leave the home in common ownership for a few years, but few are willing to let it remain unsold for any length of time.

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 authority of the court to authorize deferred sale and to award temporary use of the home to the custodial spouse in a case where the economic, social, and emotional benefits of such an award outweigh the detriments. The legislation should spell out the relevant factors to be considered by the court and the matters that should be included in the order, so that the court will have approved guidelines to follow. In particular, the legislation should make clear that an award of temporary use of the family home as an element of support is discretionary with the court, and that the court must consider the economic impact of such an award on the parties. The award must address details of the temporary use, such

8. 101 Cal. App.3d 152, 161 Cal. Rptr. 444 (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).

as maintenance responsibilities of the parties, means of mitigating the economic impact of the award on the non-custodial party, and grounds for modification or termination of the award. In this connection, the legislation should provide that it is proper to modify or terminate the award if the custodial spouse remarries or commences cohabitation in the family home.¹¹ The legislative codification of these rules will encourage and sanction the courts in the effort to fashion a fair but 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 add Section 4708 to the Civil Code, relating to family law.

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 for a reasonable period of time during the minority of the child. 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.

(b) In the exercise of its discretion pursuant to this section, the court shall weigh the benefits and detriments that would result from setting apart the family dwelling, giving due consideration to all relevant factors, including but not limited to the following:

(1) The economic circumstances of the parties, including their assets, earnings, and needs.

11. This overrules In re Marriage of Escamilla, 127 Cal.App.3d 963, 179 Cal. Rptr. 842 (1982), and is consistent with In re Marriage of Gonzales, 116 Cal.App.3d 556, 172 Cal. Rptr. 179 (1981).

(2) The economic hardship to the party for whose use the property is not set apart, including the value of the party's interest in the property and the adverse tax consequences that may result from deferred disposition of the property.

(3) The economic feasibility of obtaining other adequate housing for the parties, taking into account such factors as prevailing mortgage rates, availability of credit, real estate prices, availability of housing in the same neighborhood, and the impact of property taxes.

(4) The suitability of setting apart the family dwelling in satisfaction of the support obligation in whole or in part, taking into account such factors as the amount of support necessary for the minor child, the ability of the parties to pay support, and the comparative cost of setting apart the family dwelling and the cost of replacement housing for the minor child.

(5) The social and emotional circumstances of the minor child, including the child's age, the length of time the child has lived in the family dwelling, the stability of the neighborhood and school environment, the degree of disruption involved in a move, and the general noneconomic impact of a move on the family unit.

(c) An order setting apart the family dwelling pursuant to this section shall prescribe the period during which, and the terms and conditions upon which, the family dwelling is set apart, including but not limited to the following:

(1) Provisions governing the rights and responsibilities of the parties during the period the family dwelling is set apart, including maintenance and repair, payment of mortgages, taxes, and insurance, and risk of loss. The order may incorporate the law governing landlord and tenant, tenants in common, the Legal Estates Principal and Income Law (Chapter 2.6 (commencing with Section 731) of Title 2 of Part 1), or such other provisions as the court determines are appropriate under the circumstances of the particular case.

(2) Provisions governing the modification or termination of the order, which may include remarriage or cohabitation of the custodial spouse in the family dwelling, change in custody of the minor child, discontinuance of use of the property as the family dwelling, or any other change in the economic, social, or emotional circumstances of the parties that affects the benefits or detriments of the order.

(3) Provisions that appear proper to mitigate the economic detriment of the order to the party for whose use the property is not set apart, including refinancing, imposition of a lien, award of other assets, and allocating payments and credits for income tax purposes.

(4) Provisions that govern the disposition of the family dwelling after the period for which it is set apart, including allocation of changes in the value of the property during the period.

(d) An order setting apart the family dwelling under this section is made pursuant to the obligation to support the spouse and minor child, and shall be treated as a support order for all purposes including, but not limited to, modification, revocation, enforcement, and taxation. The court retains jurisdiction to resolve any dispute and make any further orders that may be appropriate to effectuate the order setting apart the family dwelling.

Comment. 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); In re Marriage of Herrmann, 84 Cal. App.3d 361, 148 Cal. Rptr. 550 (1978); In re Marriage of Duke, 101 Cal. App.3d 152, 161 Cal. Rptr. 444 (1980). As such, the order setting apart the family dwelling under this section is a support order. See subdivision (d). 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 or where it may be preferable not to divide the other community assets, such as a pension, immediately.

Section 4708 specifies factors to be taken into consideration by the court and matters to be covered in the court's order, drawn from existing case law. 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. The order may be specifically made modifiable or terminable upon the remarriage or cohabitation of the custodial spouse. This overrules In re Marriage of Escamilla, 127 Cal. App.3d 963, 179 Cal. Rptr. 842 (1982).