8/31/83

#F-633

Memorandum 83-83

Subject: Study F-633 - Division of Pensions

Attached is a letter from Judge Joseph B. Harvey. He comments first on the Lucas case, a case that is the subject of a Commission recommendation to the 1983 session and 1983 legislation. His comments should be of interest to the Commission.

Judge Harvey also expresses dissatisfaction with the practical effect of the existing rules on division of pension benefits that are payable periodically. You should read his letter and the attached portion of the Aispuro opinion he sent. He suggests:

> But, it would be far fairer to both parties, would obviate the need to employ expert actuaries in every case, and permit the equal division of the community property in every case if this court were authorized to divide the community property retirement benefits when they contractually become payable and to divide them at that time simply by an arithmetical calculation of how long those retirement benefits were earned during marriage and how long they were earned outside the marriage. If the wife dies first, she should be able to leave her share of the property to her heirs or devisees, for, after all, it is her property and she ought to be able to leave it to whom she will. Instead we have a complex system of division that never results in an equal division of the community property.
>
> Moreover, it appears to be the worst of all possible worlds from a tax standpoint....

The staff is persuaded that this is a sound suggestion. You should read Judge Harvey's letter and attached opinion for further development of the problem and solution.

Respectfully submitted,

John H. DeMoully
Executive Secretary

SUPERIOR COURT OF LASSEN COUNTY
COURTHOUSE, SOUTH LASSEN STREET
SUSANVILLE, CALIFORNIA 96130

JOSEPH B. HARVEY
JUDGE

(916) 257-5534

August 3, 1983

California Law Revision Commission
Stanford University
Stanford, CA

Re: Family Law

Gentlemen:

I note from the Los Angeles Daily Journal that you are undertaking a study of certain family law problems. I do not know the scope of your study, but this letter is to let you know of certain problems I have encountered in the area of family law so that, if they are within the scope of your study, you might take into consideration some of the comments made here.

The first problem concerns the common use of joint tenancy deeds and the acquisition of other forms of property where title documents are customary. Enclosed with this letter is judge Manuel's opinion in Marriage of Lucas, where the former cases are discussed at 27 Cal 3d 808, 812-815. He mentions the legislative attempt to solve part of the problems where single family residential property is involved. That legislative reform was far too narrow, however.

I enclose also an opinion that I wrote in Marriage of Gindlesperger, Lassen County, no. 13961, and another opinion I wrote in Marriage of Bever, Shasta County, no. 64946, both of which I decided shortly before Judge Manuel wrote Marriage of Lucas. I mailed a copy of these opinions to Judge Manuel (we had known each other since law school), and he replied with the enclosed letter of October 31, 1980, together with his opinion in Marriage of Moore--I had relied on the Court of Appeal decision in Marriage of Moore in the Bever opinion.

I sent the letters to Judge Manuel because I think he came to the wrong conclusion. I point out in my opinions (Gindlesperger, pp. 3-8, Bever, pp. 3-12) some of the reasons why I think the Lucas decision is wrong in principle.

The lay public regards joint tenancy deeds as being simply a means of disposing of property at death without probate; they

do not regard joint tenancy deeds as necessarily creating co-equal interests. When one party contributes 75% of the purchase price and another contributes 25% of the purchase price, but they both intend to use the property during their joint lives, and they both want the survivor to have the property on death, they do not understand why they cannot use a joint tenancy deed to do so without affecting the nature of their current investments in the property--nor do I.

In Gindlesperger, I was dealing with both property taken in one name and property taken in both names, but the parties had the same intentions toward both parcels of property. Disparate results were required by the decision in Lucas simply because of the accident of the form of title. Disparate results are commonly required in the disposition of property acquired by an instrument of title when both names are mentioned, as distinguished from major items of property that do not involve an instrument of title. The disparate results are not contemplated by the parties. It is simply that, inasmuch as title must be taken by an instrument of title, they believe they should put it in joint names as a means of transmitting the property on death.

Judge Manuel's rationale at page 815 is totally unrealistic. The common experience is that one of the spouses will have a large amount of separate property by inheritance (as in Gindlesperger) or from a previous marriage (as in Bever) and the other spouse has nothing. If you will review the cases in which this problem has come up, that is the consistent pattern. Judge Manuel's suggestion that the spouse with nothing "has no opportunity to attempt to preserve the joint ownership of the property by making other financing arrangements" is just totally unrealistic. The parties are using one spouse's separate property because that is the only available source for a cash down payment. The other party is not being treated unfairly, because the bulk of the value of the property is being financed by community property funds--the debt.

The parties commonly regard this situation as grossly unfair to the spouse with the separate property or the inheritance when, after a short marriage, that spouse finds that her separate property contribution of five, ten, or $20,000 has suddenly been stripped from that spouse and converted to community property simply by a form of deed that, the parties understood, simply provided for disposition of the property on death.

In other words, tracing should be the rule of preference if it is possible to do. It is the rule invariably followed where there is no title document involved simply because it is the fair rule to apply. Because the portion of the purchase price

financed by debt is community property, both spouses nevertheless have an interest in the property. To determine the extent of the respective interests, some rule other than tracing should be applied only if the parties have reached a specific agreement to that effect.

Moreover, courts should be empowered to divide all joint tenancy property, or any other jointly owned property, on dissolution of marriage as well as community property. In the marriage dissolution action, the court should be empowered to dispose of all of their joint problems. It should be unnecessary to "presume" such property to be community as an excuse for division. The courts should simply be empowered to divide the property--in the same ratio as their investment if tracing is possible, and equally if tracing is not, unless of course they have agreed to some other division.

[I understand some of the foregoing problems may have been solved by legislation this year; but I haven't seen the legislation and do not know how far-reaching it is.]

The other problem I wish to call to your attention relates to pension rights. I call your attention to my opinion in Marriage of Aispuro, no. 15328. As a matter of policy, the courts should be striving for equal division of the community property in fact, not simply in actuarial theory. In the area of pension rights, as the result of a variety of Supreme Court opinions, pension rights are never divided equally in fact.

Let me illustrate with an example the actuary gave when he testified in Aispuro. He stated that if a party had the right on one day to win a dollar by a flip of a coin on the following day, that right (on the day prior to the coin flip) would be worth 50¢. That is determined simply because of the fact that there is a 50-50 chance of winning the dollar on the coin flip. If the right is divided between the parties, the party retaining the right to the coin flip will have to pay the other party 25¢ to equalize the division. This theoretical equality of division results in an actual unequal division of the community property in 100% of the cases: If the party retaining the right to the coin flip wins the following day, he will receive a net of 75¢ while the other party receives 25¢. If the party retaining the right to the coin flip loses the following day, he will have paid 25¢ for absolutely nothing.

This is precisely what happens when the actuarial value of future pension rights is paid out currently. Unless all parties live precisely to their life expectancies, the theoretical equality of division will in fact result in an unequal division of the pension rights.

In Aispuro, an even worse result was achieved. Under the Supreme Court cases, I was required to give the wife in excess of 50% of the current pension payments if, hypothetically, such pension payments were being paid currently. If you follow the discussion in my opinion at pages 2-8, you will note that the rules declared by the Supreme Court now require most wives to receive more than half of the pension payments--but always in the name of equality of division.

At page 8, I suggest the obvious remedy: divide the pension payments equally when they contractually become payable, and permit the wife dying first to leave any unpaid portion of her community interest in the pension rights to her heirs. Also, he should have the right to leave his share of the community interest in her survivor's rights to his heirs. The more often that the division of property can be effectuated by simple arithmetic and by actual division of property on hand, and as received, the fairer will be the result for all parties in the long run.

The present scheme has a theoretical fairness about it that in fact results in an unequal division of the community property in virtually every case. The resort to current actuarial values for division purposes should be an exception resorted to only when simple arithmetic cannot be used.

Very truly yours,

JOSEPH B. HARVEY

JBH:ra

Encls

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LASSEN

VICTORIA M. AISPURO,

Plaintiff,

v.

BERNIE H. AISPURO,

Defendant.

NO.: 15328

MEMORANDUM OF INTENDED DECISION

This is an action for dissolution of marriage. The status of marriage was terminated by interlocutory judgment entered February 3, 1982, and a final judgment of dissolution entered April 5, 1982, the court reserving jurisdiction over all issues other than the termination of status. The disputed issues were tried on March 11, March 12, and March 31, 1982, and this decision is upon those issues.

The parties were married on May 22, 1958, and separated on May 28, 1981, after a marriage of twenty-three years. The petitioner-wife is 53, has an eleventh grade education, and has worked only sporadically at unskilled jobs during the course of the marriage. The respondent is the Superintendent of the California Correctional Center at Susanville, California, is

55 years of age, and has worked for the California Department of Corrections since July 1, 1945.

The major assets of the parties consist of the respondent-husband's retirement, real property in Lassen County, California, real property in Gonzales, Monterey County, California, two vehicles and household funishings. This court is required to divide those assets equally between the parties. The debts also are to be allocated between the parties so that the net value of the assets awarded to each party are equal. In re Marriage of Schultz (1980) 105 Cal.App.3d 846, 853; In re Marriage of Fonstein (1976) 17 Cal.3rd 738, 748.

Although equal division of net assets is the rule mandated by statute (Civ. Code § 4800) and case law (In re Marriage of Fonstein, supra, In re Marriage of Schultz, supra), the Supreme Court has mandated a major exception to that rule where a retirement allowance payable in periodic installments is concerned.

First, where the employee-spouse* is eligible to retire (as here) the nature of the retirement undergoes a fundamental change upon dissolution of the marriage. During the marriage, the employee-spouse has a right to determine whether or not he

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*For ease of reference, the employee-spouse will sometimes be referred to hereinafter as the husband and the nonemployee-spouse as the wife, for that is the situation in this case.

will retire and receive his retirement allowance, and until the decision to retire is made, neither spouse has the right to receive any of the retirement allowance. This is necessarily so because of the contractual nature of the retirement allowance and the contract entered into by the employee-spouse with the retirement agency. On dissolution, however, the Supreme Court has held that the nonemployee-spouse is entitled to immediate payment for her interest in the retirement. In re Marriage of Gillmore (1981) 29 Cal.3rd 418. If the husband pays his wife for her share of the retirement benefits, and then dies before retiring, it is obvious that only the wife may be compensated for much of the retirement benefits.* By converting a conditional

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*The court is aware that pension (or deferred compensation) plans take a variety of forms. Under some, if the employee dies before retirement, he will simply be repaid his accumulated contributions. Under others, his contributions may be forfeited. If he dies shortly after retirement, there may also be forfeiture of the unrepaid contributions, or the employee's contributions may be refunded, but the employer's contributions (considered in determining the value of the nonemployee-spouse's interest) are not paid. There are other variable forms of deferred compensation plans also. But Gillmore required present payment to the non-employee based on actuarial values that may never actually be paid. Cf. In re Marriage of Brown (1976) 15 Cal.3d 838,848, where the court suggests dividing pension payments as they are paid to avoid computing present value and to equalize the risk of nonpayment.

right--conditional on retirement, which was in the control of the employee-spouse--into an unconditional, presently payable right, the Supreme Court has managed to conceive of a scheme where, in many cases, only the nonemployee-spouse will be fully compensated for the value of the retirement benefits. Simultaneously, the Supreme Court has converted payments intended for subsistence during nonproductive years (see Waite v. Waite (1972) 6 Cal.3d 461, 473) into an immediately payable sum during the parties' productive years so far as the nonemployee spouse is concerned. Of course, the actuarial value of the wife's interest may be paid immediately in cash or other assets. But, in many cases, the actuarial value of the retirment benefits will be so large that there can be no possibility of dividing the assets of the parties so that the nonemployee-spouse can be immediately compensated for the value of her share of the pension rights. In such a case, the court is forced to order periodic payments of the retirment benefits. Where the employee-spouse is eligible to, but chooses not to retire, the court in Gillmore requires the employee-spouse to make retirement payments as if he had retired even though he has not.

The foregoing might be tolerable but for the interaction of that rule with the rule stated in Waite v. Waite (1972) 6 Cal.3d 461. In that case a trial judge was faced with the problem of what to do if, after retirement of the employee-spouse, the nonemployee-spouse dies before the employee-spouse. Obviously, in this type of situation, where the payments being made during their joint lives are community property, the nonemployee-spouse's share of the payments to be made after that spouse's death must be disposed of in some way. The trial judge made the very logical

decision that, since the nonemployee-spouse's share will continue to accrue for so long as retirement payments are made, that share can be paid to the heirs of the nonemployee-spouse. The Supreme Court reversed and held that the entire pension payments following the death of the nonemployee-spouse must be made to the employee-spouse. The employee-spouse must receive the other's share of the community. Because this would result in an unequal division of the community property, however, the Supreme Court held that the nonemployee-spouse may be compensated by computing the actuarial value of the probability that the nonemployee-spouse will die first, and the nonemployee-spouse may be compensated on the division of the community property for that value. 6 Cal.3rd at 474, fn. 9.

The court can take judicial notice of the fact that women have longer life expectancies than men. Hence, a majority of wives will outlive their husbands. In the case before the court, the nonemployee wife is 53, and the employee husband is 55. His life expectancy is substantially shorter than hers. Nevertheless, there is some slight probability that she will die first and that, under the force of Waite v. Waite, some of her portion of the pension payments must be paid to him. Under the Supreme Court's decision, this court is required to compensate her for that slight probability. Thus, where the community share of the retirement benefits is paid by installments (as will usually be the case where, as here, the actuarial value of the retirement benefits is so large that the wife cannot be "cashed out"), the wife must receive more than half of the retirement installments or the presently divisible community property in

order to provide her compensation for the small probability that she might die first. Thus, as a practical matter, where retirement benefits will be paid in installments, all wives must receive more than half of the retirement benefits or presently divisible community property simply because a small percentage of wives will die first.

By these two decisions, the Supreme Court has forbidden an equal division of the community property that can be calculated by simple arithmetic. Instead, they have substitued a system of dividing retirement benefits where most wives will receive a majority of the community property, and where the employment of expert actuaries testifying as to probabilities (at high cost to the litigants) is necessarily required in order to provide the court with evidence of the actuarial values involved.

The unfairness of these rules is amply illustrated by the case before the court. The respondent-husband is 55, is in good health, and has a life expectancy of 21 or 22 years. The petitioner-wife is 53 and has a life expectancy of approximately 28 years. Thus, the overwhelming likelihood is that the respondent-husband will die first. Inasmuch as he is relatively young, vigorous, and in good health, he does not expect to retire. If the petitioner-wife remained married to the respondent, all she could expect to receive until actual retirement would be her support as a wife. A retirement allowance would not be received until the respondent-husband actually decided to, and did, retire; for retirement is intended to, and does, simply provide support during the years following active employment.

Under Gillmore, petitioner-wife is entitled to be paid for her

share of the retirement allowance now even though the respondent has not retired, the non-active years have not begun, the contractual condition precedent to its payment has not occurred, and neither party now has any need for retirement payments. The experts valued the present actuarial value of the petitioner's interest in the retirement fund from $85,500 to $119,000. The community assets are not sufficient to "cash out" the petitioner-wife even if she received everything. Hence, she must receive her share of the pension rights periodically beginning now, even though the respondent-husband has not retired and does not intend to do so.

If the respondent-husband retired at the present time, an equal division of the accruing retirement payments would require him to pay $857 per month to the petitioner-wife. Because her life expectancy is substantially longer than his, in the vast majority of cases, the payment of $857 per month to the wife will in fact result in an equal division of the retirement allowance. But, because there is a slight probability that she will die first, the Supreme Court in Waite has required that the actuarial value of that probability be determined and that she be compensated for that value. The only expert testimony on this probability and the value thereof is that given by the petitioner's expert and his opinion is that she must be paid 54.31 percent of the accruing retirement installments, or $930 per month, in order to compensate her for the slight probability that she will die first.

Of course, the overwhelming probability is that she will not die first. The overwhelming probability is that most wives in

like situations will not die first. Yet all must be paid more than half of the accruing installments.

Respondent's counsel suggested that, because the payment of more than half of the accruing retirement allowance is required by the slight probability that the wife will die first, the court should retain jurisdiction so that if both parties survive past the respondent-husband's current life expectancy, the payments to the wife can then be reduced below half in the hope that the respondent-husband might be able to recoup for the over-payments to the wife. This makes some sense, but it will permit the employee-husband to recoup only in a very small percentage of cases. In at least half of the cases, he will die before his current life expectancy, and in many more he will not survive past his life expectancy long enough to recoup the over-payment to the wife. A better result might be achieved if the reduction occurs after the end of the parties' current joint life expectancy of 17.5 years.

But, it would be far fairer to both parties, would obviate the need to employ expert actuaries in every case, and permit the equal division of the community property in every case if this court were authorized to divide the community property retirement benefits when they contractually become payable and to divide them at that time simply by an arithmetical calculation of how long those retirement benefits were earned during marriage and how long they were earned outside the marriage. If the wife dies first, she should be able to leave her share of the property to her heirs or devisees, for, after all, it is her property and she ought to be able to leave it to whom she will. Instead

we have a complex system of division that never results in an equal division of the community property.

Moreover, it appears to be the worst of all possible worlds from a tax standpoint. So long as the respondent-husband remains employed and is required to pay spousal support as an employed husband (as he would if they remained married), his spousal support payments would be fully deductible by him and reportable as income by the wife. It appears likely that his "retirement" payments to the wife, because they are not in fact division of retirement payments, are simply purchase payments for her interest in the retirement benefits. As purchase payments, it seems likely that they are not deductible by him, but it seems likely, too, that they are fully reportable as income to her. Hence, there is a "double" tax. Husband's earned income is fully taxed, and then his nondeducitble purchase payments to wife are taxed again to her as income. If the pension payments were divided and paid when actually payable, each would then pay tax only on the net amount actually received.

Nevertheless, under the force of Waite and Gillmore, this court will require the respondent-husband to begin making payments to the petitioner-wife as of April 1, 1982, in the amount of $930 per month. This sum will be increased two percent as of April 1, 1984, and two percent annually thereafter on the first day of April. These payments will continue for so long as both of the parties are alive. They will cease upon the death of either party. The court will retain jurisdiction to recompute the amount payable to the petitioner-wife when 17.5 years have elapsed. At that time, the payments should be recomputed so

that, over the parties' then life expectancies, the respondent-husband might recoup for the payments made to the wife in excess of her fifty percent share of the community property.

So far as the remainder of the parties' properties are concerned,

[PORTION OF OPINION OMITTED.]

The foregoing orders will equalize the division of the community property. There remains for decision only the matter of spousal support and attorney fees.

Respondent's gross monthly salary is $4,211. He is the Superintendent of the California Correctional Center, and holds the position by virtue of a gubernatorial appointment. Had

petitioner not chosen to take retirement currently, but had chosen to rely for current support solely on the court's award of spousal support, the court believes that she would be entitled to support at a level commensurate with the respondent's position as a gubernatorial appointee. See In re Marriage of Andreen (1978) 76 Cal.App. 3d 667. Plainly, if the parties remained married, the petitioner would continue to be supported at that level unless the respondent retired. If he retired, the petitioner's circumstances would be reduced to that commensurate with the circumstances of a wife of a retired superintendent. The retirement allowance is designed to provide support for the employee-spouse and his spouse after the end of the active employement years. Waite v. Waite (1972) 6 Cal. 3d 461, 473.

Inasmuch as the petitioner-wife has elected to receive her share of the retirement currently, the court believes that her level of spousal support should also be based upon a standard of living commensurate with that which she would have if the respondent were retired. If she were entitled to spousal support based upon respondent's position as an active employee, she would be enjoying advantages she could not possibly enjoy had the marriage continued--receipt of the retirement allowance plus support at a level commensurate with that of an actively employed gubernatorial appointee-spouse. She should not have her cake and be able to eat it, too. Accordingly, the court believes that, inasmuch as petitioner has elected to receive her retirement benefits currently, the level of support to be provided by the respondent should be that commensurate with what his status would be if he currently retired.

The evidence showed that if the respondent currently retired, his retirement allowance would be $2,736. Under the court's preceding determinations, the petitioner will receive $930 of this sum. If husband were now retired that $930 would be excludable from his income because it is not his. After deduction of federal and state withholding taxes, based on a single person with one deduction with a gross monthly income of $1,806 the respondent will have a net income of $1,345.10. Upon the basis of this income, the court believes that it is appropriate to award to the petitioner the sum of $200 per month, effective as of April 1, 1982. Petitioner's gross support (retirement and spousal support) will thus be $1,130 per month. For each two dollars in take home pay (after deduction of state and federal taxes based upon one exemption and any retirement deductions) that the respondent earns during a calendar month, the spousal support ordered herein shall be reduced by one dollar. To effectuate this order, spousal support obligations accruing on the first day of each month shall be paid on or before the tenth. As of the end of each month, the petitioner shall report to the respondent the amount of her earnings received during that calendar month. The payment to be made on the tenth shall be adjusted by the respondent accordingly.

There remain the issues of moving expenses and litigation costs. Since the properties are being divided equally between the parties, the court can see no reason to compel one of the parties to pay for the other's moving expenses.

Attorney fees and litigation costs are awarded to a party to enable a person who otherwise would be unable to afford counsel

to adequately litigate that party's case. Each party here is receiving thousands of dollars upon the division of the community property. It is obvious that both will have ample funds to pay their own attorneys. Accordingly, the court makes no award of attorney fees or litigation costs.

Respondent's attorney shall prepare a judgment in accordance with this decision.

Dated April 19, 1982.

Judge of the Superior Court