#F-660 10/25/83

Memorandum 83-96

Subject: Study F-660 - Awarding Temporary Use of Family Home (Comments on Revised Tentative Recommendation)

Attached to this memorandum is a copy of the Commission's revised tentative recommendation relating to awarding temporary use of the family home to the spouse having custody of minor children. As revised, the tentative recommendation codifies the discretion of the court in making such an award and lists factors to be considered in the exercise of its discretion and matters to be included in the award. The tentative recommendation also overrules the case of In re Marriage of Escamilla, 127 Cal. App.3d 963, 179 Cal. Rptr. 842 (1982), which held that an order setting aside the family home for temporary use of the custodial spouse cannot be terminated merely because the custodial spouse has remarried or commenced cohabitation in the family home.

We distributed the revised tentative recommendation for comment to a limited group, consisting of persons who had commented on the original tentative recommendation. We asked for comments within three weeks, and received the letters attached as Exhibits 1-6. The letters are summarized below.

Two of the letters approved the revised tentative recommendation. Charles A. Dunkel of Crocker Bank (Exhibit 1) approved the proposals without further comment. Dennis A. Cornell (Exhibit 3) believes the proposals are a needed addition to statutory law. Mr. Cornell would also add to the draft statute language to make clear that the non-possessory spouse may use his or her share in the family home as security for a loan.

Dawna J. Cole (Exhibit 6) takes the more limited position that the family home should be sold and the proceeds divided if that is the only asset, but if there are more assets, the family home should be awarded to the custodial spouse. The staff believes there is already adequate authority in the law to do what Ms. Cole wants. See Section 4800(b)(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.")

The remaining three letters opposed the revised tentative recommendation. The Executive Committee of the State Bar Family Law Section (Exhibit 2) was unanimously opposed, on the basis that codification of the court's discretion would serve no useful purpose and might be construed to do more than just codify existing law but actually change the character of the court's discretion. The Executive Committee did believe, however, that Escamilla should be overruled. Judge J.E.T. Rutter of the Orange County Superior Court (Exhibit 4) also saw no need for the proposed legislation. Judge Rutter believes that a statutory listing of factors to guide the judge in the exercise of discretion merely generates lengthy requests for a statement of decision on every factor. Howard K. Ekerling (Exhibit 5), like the State Bar Committee, is concerned that that listing of factors is more than a mere codification of existing law and would have the effect of further increasing the court's discretion in an area in which additional discretion is undesirable. Mr. Ekerling believes the proposed legislation would add uncertainty to the law and, by listing the factors for the exercise of discretion, would compel the parties to produce evidence on each factor, thereby increasing litigation costs.

Taken together, the letters suggest a number of alternatives available to the Commission: (1) submit the legislation as is; (2) submit the legislation with clarifying changes; (3) submit legislation only to overrule Escamilla; (4) submit no legislation on this matter. The staff believes it is best to submit no general legislation on this matter. The tentative recommendation generally purports merely to codify that which is already the law, and we can't even seem to get agreement either that it in fact codifies the law or that codification would serve a useful purpose. The staff wonders whether the Legislature will consider it a productive expenditure of resources to go through this exercise.

It would be possible just to overrule Escamilla. The staff is divided on whether this would be an appropriate subject for a Commission recommendation. One view is that since we are leaving this area to case-law development, we should not at the same time interfere and try to direct the development on one point, particularly a point that is so emotionally-loaded and on which the Commission can add nothing but its own biases and that is likely to generate controversy. The other view is that we have studied this area and found one aspect of it in need of reform, and it is appropriate that the Commission report this to the

Legislature; it is a narrow, equitable point, unlikely to be the subject of legislation otherwise, and thus is precisely the type of matter the Legislature looks to the Commission for guidance on. Does the Commission believe it is worthwhile to do further work in this area?

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

The Crocker Bank

Charles A. Dunkel
Vice President
Trust Officer

October 4, 1983

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

Re: F-660 - Revised Tentative Recommendation Relating to Awarding Temporary Use of Family Home

Gentlemen:

I approve the revised tentative recommendation dated 9-24-83.

Sincerely,

Charles A. Dunkel
Vice President and Trust Officer

CAD:BW

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111 Sutter Street
San Francisco, CA 94104
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October 5, 1983

Nathaniel Sterling, Esq.
California Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, California 94306

Re: Study F-660/Awarding Temporary Use of the Family Home

Dear Nat:

At its meeting of October 1, 1983, the Executive Committee of the State Bar Family Law Section discussed the general principles of Study F-660.

The sentiment was unanimous that codification of the Duke decision would serve no useful purpose. In addition, lawyers and judges reading the section might read into it more than was intended by the codification and unintended emphasis might be inferred.

On the other hand, the Committee approved by a vote of 6 - 1 the concept of overruling the Escamilla case to the extent it invalidates conditions of cohabitation and remarriage in Duke orders.

The revised study will be referred as soon as it is available to Property, Custody and Support for detailed scrutiny.

Best regards.

Sincerely,

JAN C. GABRIELSON

JCG/nm

LAW OFFICES OF

ALLEN, IVEY, CORNELL, MASON & CASTELLUCCI

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REPLY TO: Merced

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October 6, 1983

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

Gentlemen:

I received your Tentative Recommendation relating to the awarding of the temporary use of the family residence dated September 28, 1983. With the exception of clarifying some of the language, and the inclusion of a provision allowing the out spouse to use his share of the equity as security for a loan, I find the recommendation to be a needed addition to our statutory law. Thank you for the opportunity to comment.

Very truly yours,

ALLEN, CORNELL & MASON

By Dennis A. Cornell
DENNIS A. CORNELL

DAC:kf

Superior Court of the State of California
County of Orange
700 CIVIC CENTER DRIVE WEST
Santa Ana, California 92701

Chambers of
J. E. T. RUTTER
Judge of Superior Court

(714) 834-3734

October 14, 1983

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

Attn: Nathaniel Sterling, Assistant Executive Secretary

Re: Tentative Recommendation re Use of Family Home - Your Memo 9-24-83

Dear Mr. Sterling:

The undersigned is a member of the California Judges Association Family Law Committee. Over the last three years I have taught and lectured throughout the state and my subject at the annual mid-career education course for judges, which is held at Berkeley for a week each year, is usually "the family home".

My discussion of the proposed Civil Code §4708 is not extensive. I will assume that the summary of factors to be considered is adequate and I do not intend to discuss the body of the proposed amendment. I do take issue with the statement at page 3 that "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." (Isn't a few years a substantial length of time?)

The fact is that THERE IS NO NECESSITY FOR THIS LEGISLATION THAT I AM AWARE OF. If the paragraph quoted is intended to indicate that most judges are ordering the home sold before it should be sold and that this legislation is therefore necessary, I disagree with the statement. Has anyone done an analysis, survey, poll or study to determine in what percentage of cases the residence is sold over objection by one spouse, what factors were present, what weight they

were given and what weight they should have been given? I doubt it. (In fact, I'm darned sure of it because I would have heard about it.)

Every time we formularize the factors a judge should consider before exercising his discretion (which he already knew he had) we open the door to lengthy requests for a statement of decision on every factor so mentioned (or left out) because the court gave less weight to the need of the children's dog for a big back yard to run in than it did to father's need for the money to buy a condo near the children's school so he could enjoy joint custody.

WE DON'T NEED THIS LEGISLATION.

Very truly yours,

J. E. T. Rutter
Judge of the Superior Court

JETR:gl

HOWARD L. EKERLING, INC.
A PROFESSIONAL LAW CORPORATION
SHERMAN OAKS GALLERIA OFFICE TOWER
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SHERMAN OAKS, CALIFORNIA 91403
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October 11, 1983

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

Re: Awarding Temporary Use of Family Home

Greetings:

I have received a copy of your revised tentative recommendation relating to awarding temporary use of the family home to a spouse having custody of minor children. I have reviewed the same, and for the reasons set forth below, I believe that the proposal should not be adopted. In connection therewith, the following is submitted for your information.

Your proposal adds another area of "discretion" to an area of the practice already encumbered with such "discretion" that appeals from trial court decisions are difficult. In addition, such "discretion" makes prediction of result in a particular matter a near impossibility. This makes it increasingly difficult for counsel to advise clients prior to undertaking litigation of the likely outcome of such litigation with any degree of certainty. The result is to return the equity in divorce proceedings to a measurement by "the length of the Chancellor's foot." In a system of government by law and not by men, this temptation should be resisted.

Existing law does permit the award of a family residence to the custodial spouse under limited circumstances. I believe that those circumstances, defined in Escamilla (127 C.A.3d 963) and Thompson (96 C.A.3d 621) permit the custodial spouse to retain the family residence for a limited period of time, depriving the noncustodial spouse of his immediate enjoyment of such spouse's equity in the family residence, where the noncustodial spouse is

unable or unwilling to pay child support. I believe that this is the type of economic circumstance which the cases reflect as being the justification for an award of the family residence. In other words, where the equity in the family residence is modest, and where the noncustodial spouse would not be able to support the children, or to contribute to their support, in the event of a sale of the family residence, then such factors contribute towards the justification for retaining family residence as a home for the children.

But where the economic circumstances are such as to permit the noncustodial spouse to contribute towards the support of the children as would be the case absent a divorce, there is no justification for depriving such noncustodial spouse of the benefit of the equity in the family residence. This is especially true where the equity in the family residence is "substantial." Such equity may enable the custodial spouse to purchase another residence, and to receive a contribution towards the support of the children from the noncustodial spouse. The noncustodial spouse should be allowed to take advantage of similar equity in the family residence to purchase a new home, and to begin life anew. Your proposal does include "giving due consideration" to "economic circumstances". Nevertheless, the import of your proposal is clear in seeking to expand the number of cases where an immediate sale of the family residence is deferred.

Having in mind the intention of the legislature in adopting your proposed statute, as aforesaid, a trial court may overlook further delineation of the factors to be considered, as set forth in the proposed statute. A court should not have to be told about the economic hardship of being deprived of the use of one's property. The effect is obvious. And the burden on the noncustodial spouse of presenting evidence on the remaining factors included in the proposed statute may be too costly to present. For example, in a case where it may be presumed that large dollars are not available, the noncustodial spouse may not have the means with which to employ experts to present testimony concerning "adverse tax consequences," "prevailing mortgage rates," "availability of credit," and the numerous other factors described in the proposed legislation. The result, it is submitted, will be a sort of "rule of thumb" which individual judges will apply having in mind their own predisposition, and increasing the number

of decisions based upon "the exercise of discretion" which cannot be challenged on appeal. This should be discouraged by rejection of the proposed legislation.

The noble motives inherent in the proposal of attempting to preserve the former family residence for the children are recognized. However, the legislature should not attempt to impose economic sanctions upon the public as a means of curing the social problems resulting in divorce. The proposed legislation would do no more than penalize a divorcing, noncustodial spouse in the mistaken belief that this will somehow ameliorate the harm done to the children as a result of divorce. Such is not the case. In fact, absent a divorce, a unified family may decide to sell the family residence, and relocate the children to a new neighborhood, which would be no less upsetting to the children than a similar move occasioned by divorce. The law should not, because of a divorce, impose limits on the freedom of choice which would not exist absent a divorce, and for this reason, your proposal should not be adopted.

Very truly yours,

HOWARD L. EKERLING

HLE/gg

1001 Angelo Drive
Beverly Hills, California 90210
October 22nd, 1983

Mr. Nathaniel Sterling, Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, California 94306

Dear Mr. Sterling:

I am responding relative to the Commission's Tentative Recommendation Relating to Awarding Temporary Use of the Family Home.

I concur that if the only community asset is the family home, then the necessity of its being sold and divided equally seems valid.

However, where there are other community assets I am strongly in favor of the custodial parent being allowed to remain in the family residence until the youngest child reaches the age of eighteen.

As Chairman of Legislation for our Legal Study Society, it is my position to keep our forty members apprised of the latest laws, recommendations, and revisions.

Would you be so kind as to send me copies of the above so that I may present them at our monthly meetings in order that we may have the opportunity to express our viewpoints.

Thanking you very much, I remain,

Yours very truly,

Dawna J. Cole

Dawna J. Cole
Chairman of Legislation
Legal Study Society

1001 Angelo Drive
Beverly Hills, Calif. 90210

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

REVISED TENTATIVE RECOMMENDATION

relating to

AWARDING TEMPORARY USE OF FAMILY HOME

September 24, 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 RECEIVED BY THE COMMISSION NOT LATER THAN OCTOBER 24, 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 9/24/83

REVISED TENTATIVE RECOMMENDATION

relating to

AWARDING TEMPORARY USE OF FAMILY HOME[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 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 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. 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

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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 protective but fair 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:

8337

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 may, at the request of a party, 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.

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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).