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Memorandum 86-86

Subject: Study F-603 - Retroactive Application of Property Division Legislation (State Bar report)

At the Commission's September meeting in Sacramento the State Bar Family Law Section Executive Committee expressed its belief that the Commission's urgency legislation (to apply the joint tenancy property division legislation only to cases commenced on or after January 1, 1984) probably would not be held constitutional. In this event, in their opinion, the situation would be intolerable, with different property division rules applicable at dissolution of marriage depending upon the time of acquistion of the particular piece of property being divided.

The Commission requested the Executive Committee's advice on the best approach to this problem--the statutory solution suggested by Professor Reppy, other statutory approaches such as increasing the burden of proof, a possible constitutional amendment, or other ideas the Committee might have. The Executive Committee is meeting the weekend before the Commission's October meeting, and intends to take up this matter at that time. Their new liaison to the Commission, Linda Wisotsky, plans to attend the Commission's October meeting to report orally the Executive Committee's advice.

Meanwhile, attached to this memorandum as Exhibit 1 is another copy of the staff draft effort to embody Professor Reppy's suggested statutory solution.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Exhibit 1

Staff Draft

Civil Code § 4800.1 (amended)

SECTION 1. Section 4800.1 of the Civil Code [as amended by Assembly Bill No. 2897 (1986)] is amended to read:

4800.1. (a) The Legislature hereby finds and declares as follows:

(1) It is the public policy of this state to provide uniformly and consistently for the standard of proof in establishing the character of property acquired by spouses during marriage in joint title form, and for the allocation of community and separate interests in that property between the spouses.

(2) The methods provided by case and statutory law have not resulted in consistency in the treatment of spouses' interests in property which they hold in joint title, but rather, have created confusion as to which law applies at a particular point in time to property, depending on the form of title, and, as a result, spouses cannot have reliable expectations as to the characterization of their property and the allocation of the interests therein, and attorneys cannot reliably advise their clients regarding applicable law.

(3) Therefore, the Legislature finds that a compelling state interest exists to provide for uniform treatment of property; thus the Legislature intends that the forms of this section and Section 4800.2, operative on January 1, 1987, *or as amended thereafter,* shall apply to all property held in joint title regardless of the date of acquisition of the property or the date of any agreement affecting the character of the property, and that that form of this section and that form of Section 4800.2, *or as amended thereafter,* are applicable in all proceedings commenced on or after January 1, 1984. However, the form of this section and the form of Section 4800.2 operative on January 1, 1987, *or as amended thereafter,* are not applicable to property settlement agreements executed prior to January 1, 1987, or proceedings in which judgments were rendered prior to January 1, 1987, regardless of whether those judgments have become final.

(b) For the purpose of division of property upon dissolution of marriage or legal separation, *if* property *is* acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, tenancy by the entireties, or as community property:

(1) It is presumed ~~to be~~ *that the property is* community property *and that neither party has a sole and separate interest in the property*. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:

~~(1)~~ (A) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.

~~(2)~~ *(B)* Proof that the parties have made ~~a written~~ *an* agreement that the property is separate property.

(2) Regardless whether the property is determined to be community or separate, the joint form of acquisition creates equities in the property in favor of the parties that shall be recognized by division in the manner prescribed in Section 4800.2.

Note. Professor Reppy states that the first sentence of subdivision (b) which creates the community property presumption is unnecessary with the enactment of Civil Code Section 4800.4 (enabling division of joint tenancy and tenancy in common property); the community property presumption should be replaced by a presumption that neither spouse has a separate property interest. The staff believes, however, that the general community property presumption remains useful for cases not involving true joint tenancy or true tenancy in common, since the manner of division differs depending upon whether the property is truly separate or is in fact community. If the property is separate, the separate ownership is proportionate, increasing as the value of the property increases, whereas if the property is community, the separate ownership is simply entitled to reimbursement without sharing in any increase in value. Thus we have retained the community property presumption in the current draft. Professor Reppy's study raises the issue whether these types of property should be treated differently.

Rather than spelling out the precise manner of division of property here, as suggested by Professor Reppy, we have incorporated by reference the procedure of Section 4800.2.

Professor Reppy recommends applying this revised statute prospectively as well as retroactively. This would have the virtue of providing a single rule for all property regardless of the time of acquisition. However, it would still recognize orally created separate property interests in the future, though arguably giving them lesser effect than at present.

Civil Code § 4800.2 (amended)

SEC. 2. Section 4800.2 of the Civil Code is amended to read:

4800.2. ~~In the division of community property under this part unless a party has made a written waiver of the right to reimbursement or signed a writing that has the effect of a waiver, the party shall be reimbursed for his or her contributions to the acquisition of the property to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be~~ *(a) If a party has contributed separate property to the acquisition of joint tenancy, tenancy in common, or community property, the contribution creates an equity in the property in favor of the party that shall be recognized upon division of the property at dissolution of marriage or legal separation. A party who contributes separate property to the acquisition of the property shall be awarded an amount equal to the separate property contribution. To the extent the value of the property exceeds the amount of the separte property contributions, the property shall be divided equally between the parties.*

(b) For the purpose of this section, the amount of a separate property contribution awarded to a party shall be calculated without interest or adjustment for change in monetary values and shall not exceed the net value of the property at the time of the division. ~~As used in this section, "contributions to the acquisition of the property"~~ *The amount shall* include downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property but ~~do~~ *shall* not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property.

(c) The manner of division of property prescribed in this section is subject to an agreement of the parties that prescribes a different manner of division.

Note. Professor Reppy's proposal assumes that true joint tenancy and tenancy in common property are to be divided in the same manner as community property. We do not believe this is the intent of current Section 4800.4. The Commission should consider whether or not this approach is desirable public policy.

Civil Code § 4800.4 (amended)

SEC. 3. Section 4800.4 of the Civil Code is amended to read:

4800.4. (a) In a proceeding for division of the community property and quasi-community property, the court has jurisdiction, at the request of either party, to divide the separate property interests of the parties in real and personal property, wherever situated and whenever acquired, held by the parties as joint tenants or tenants in common. The property shall be divided together with, and in accordance with the same procedure for and limitations on, division of community property and quasi-community property.

(b) Where the property to be divided is a residence that has been occupied by one or both spouses, tenancy in common property is subject to division under this section even though the shares of the spouses are unequal and the tenancy in common is between the community estate and the separate estate of one spouse. In such a situation, the property is also divisible even though owned solely by one of the spouses as his or her separate property pursuant to agreement not appearing on the deed if the form of title on the deed creates a form of co-ownership between the spouses. In dividing property under this subdivision the greater property rights in the residence of one spouse shall be compensated, if the residence is awarded to the other spouse, by an offsetting award of other property that is distributable under Section 4800 or this section so that the net value of assets owned by the spouse is equal to the value of assets before the division of property.

~~(b)~~ *(c)* This section applies to proceedings commenced on or after January 1, 1986, regardless of whether the property was acquired before, on, or after January 1, 1986.

Note. The staff believes that subdivision (b) is not new law but is a clarification, as suggested by Professor Reppy, of one result subdivision (a) was intended to achieve. Perhaps general clarification of subdivision (a) would be preferable, with (b) becoming an illustrative portion of the Comment.