

Second Supplement to Memorandum 88-47

Subject: Study F-641 - Limitations on Disposition of Community Property
(Comments on Draft)

Attached to this supplementary memorandum as Exhibit 1 is a State Bar Team 1 report on issues raised concerning limitations on disposition of community property. We have also been promised comments of the State Bar Family Law Executive Committee on this matter, and will forward them when received.

§ 5125.240. Gifts

At the September meeting the Commission requested research on the issue whether a gift of community property made by one spouse without the written consent of the other spouse may be revoked by the nonconsenting spouse. There are a number of cases on this point that hold clearly that the nonconsenting spouse may revoke the gift in its entirety during marriage and may revoke the gift as to that spouse's one-half interest after the death of the donor spouse. See, e.g., *Britton v. Hammell*, 4 Cal. 2d 690, 52 P. 2d 221 (1935) (revocation of entire gift of community real property during marriage); *Lynn v. Herman*, 72 Cal. App. 2d 614, 165 P. 2d 54 (1946) (revocation of entire gift of community personal property automobile during marriage); *Ballinger v. Ballinger*, 9 Cal. 2d 330, 70 P. 2d 629 (1937) (recovery of one-half of gift of community property stock after death); *Trimble v. Trimble*, 219 Cal. 340, 26 P.2d 477 (1933) (recovery of one-half of gift of community real property after death). These remedies are subject to the ordinary statutes of limitation for recovery of property--three years in the case of personal property, five years in the case of real property. *Spreckels v. Spreckels*, 172 Cal. 775, 158 Pac. 537 (1916); Code Civ. Proc. §§ 318, 338.

The draft of the tentative recommendation affects these principles in several ways. First, subdivision (b) of Section 5125.240 validates a gift made without the written consent of the other spouse if the gift is "usual or moderate" taking into account the circumstances of the

marriage. Second, the remedies provided in Section 5125.270 for the nonconsenting spouse are modified so that (1) a good faith donee is given some protection, (2) the statute of limitations for rescission runs within one year after the nonconsenting spouse had knowledge of the gift (or three years after the gift was made, whichever is earlier), and (3) the court may subject the rescission remedy to terms and conditions, or apply an alternate remedy, if it appears equitable taking into account the rights of all the parties.

Rights and Obligations Associated with Employment Relationship

State Bar Team 1 (Exhibit 1) agrees that an in-depth analysis of this issue raised by Dick Kinyon (see the First Supplement to Memorandum 88-47) would be worthwhile.

Management and Control After Death of Spouse

State Bar Team 1 (Exhibit 1) agrees with Dick Kinyon (see the First Supplement to Memorandum 88-47) that consideration should be given to management and control problems after death of all types of community personal property, not just securities registered in the name of the surviving spouse. The team suggests that one approach might be to allow the surviving spouse to dispose of assets after 40 days, as with real property.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION THE STATE BAR OF CALIFORNIA

Chair D. KEITH BILTER, San Francisco Vice-Chair IRWIN D. GOLDRING, Los Angeles

Advisors KATHRYN A. BALLSUN, Los Angeles HERMIONE K. BROWN, Los Angeles THEODORE J. CRANSTON, La Jolla LLOYD W. HOMER, Campbell KENNETH M. KLUG, Fresno JAMES C. OPEL, Los Angeles LEONARD W. POLLARD, II, San Diego JAMES V. QUILLINAN, Mountain View WILLIAM V. SCHMIDT, Costa Mesa HUGH NEAL WELLS, III, Los Angeles JAMES A. WILLETT, Sacramento

Section Administrator FRES ZABLAN-SOBERON, San Francisco



666 FRANKLIN STREET SAN FRANCISCO, CA 94102 (415) 561-8200

Executive Committee D. KEITH BILTER, San Francisco IRWIN D. GOLDRING, Los Angeles JOHN A. GROMALA, Eureka LYNN F. HAET, San Francisco ANNE E. HILKER, Los Angeles WILLIAM L. HOISINGTON, San Francisco BEATRICE LAIDLAY-LAWSON, Los Angeles JAY BOGS MacMAHON, San Rafael VALERIE J. MERRITT, Los Angeles BARBARA J. MILLER, Oakland BRUCE S. ROSS, Los Angeles STERLING L. ROSS, JR., Mill Valley ANN E. STODDEN, Los Angeles MICHAEL V. VOLLMER, Irvine JANET L. WRIGHT, Fresno

September 6, 1988

20 ERIC REP. COMMUN

SEP 06 1988

RECEIVED

John H. DeMouilly Executive Director California Law Revision Commission 4000 Middlefield Road, Room D-2 Palo Alto, CA 94303

Re: LRC Memo 88-47 Limitations on Disposition of CP LRC Memo 66-52, Filing Fees in Probate

Dear John:

I have enclosed copies of Bill Schmidt's reports on the two memos noted. The reports represent the opinions of Team 1 only. The reports have not been reviewed by the Executive Committee. The reports are to assist in the technical and substantive review of those sections involved.

Very truly yours,

Handwritten signature of James V. Quillinan

James V. Quillinan Attorney at Law

JVQ/hl Encls.

cc: Chuck Collier Jim Opel Valerie Merritt Keith Bilter Terry Ross Irv Goldring Ted Cranston

R E P O R T

TO: JAMES V. QUILLINAN
D. KEITH BILTER
IRWIN D. GOLDRING
JAMES D. DEVINE
JAMES C. OPEL
CHARLES A. COLLIER, JR.
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT, STUDY TEAM NO. 1

DATE: September 2, 1988

SUBJECT: FIRST SUPPLEMENT TO LRC MEMORANDUM 88-47 (Limitations
on Disposition of Community Property)

IN LAW OFF. COMMUN.
SEP 06 1988
RECEIVED

Study Team No. 1 held a telephone conference on September 1, 1988. Charles A. Collier, Jr., Richard S. Kinyon, Sterling L. Ross, Jr., Lynn P. Hart, and William V. Schmidt participated. Michael V. Vollmer did not participate. We have the following comments:

Rights and Obligations Associated with Employment Relationship

On the top of page 3, the staff states that if the Commission agrees, it will schedule an in-depth memorandum on this matter for discussion at a future meeting. We agree that an in-depth memorandum is worthwhile and we would like to see such a memorandum prepared.

Management and Control After Death of Spouse

We assume that this subject matter would be a part of the same memorandum, or perhaps a separate memorandum. In either event, we feel that consideration should be given to the



management and control of all types of community personal property, not just securities registered in the name of the surviving spouse. New proposed Section 13545 limits itself to such securities.

Our Study Team had an interesting discussion. Richard S. Kinyon and other members of the team felt that there should be some legislation on this matter to authorize a surviving spouse to deal with community personal property so that a potential transferee from the surviving spouse will be willing to enter into a transaction with the surviving spouse.

On the other hand, Lynn P. Hart and other members of the team pointed out that the deceased spouse has a right to dispose of his or her one-half of community property to a person other than the surviving spouse, and the rights of the potential transferees of this one-half community property interest are jeopardized if the surviving spouse has unlimited power to act over such property. All members of the Study Team seemed to agree that there were conflicting policies and that some balance or compromise between the two policies was appropriate.

Perhaps an appropriate solution is to require the surviving spouse to wait a period of time, such as 40 days, before he or she can have the power to sell, lease, mortgage or otherwise deal with and dispose of community personal property. Charles Collier suggests that we use 40 days to be consistent with the treatment of community real property. Generally, our team agrees. He further points out that current Sections 13100 and 13151 have adopted a 40-day rule. One member of our Study Team felt that a 40-day wait may be too long in the case of perishable property, or perhaps even depreciating property.

Perhaps also the potential transferees (other than the surviving spouse) of the decedent's one-half of the community

personal property should have some way of asserting their rights within 40 days and thereby preventing the surviving spouse from having absolute power of the property. In the case of real property, the recording of a lis pendens affords this protection.

We hope that these thoughts are helpful to the staff.

Respectfully submitted,

STUDY TEAM NO. 1

By:


William V. Schmidt,
Captain