

First Supplement to Memorandum 83-65

Subject: Study F-640 - Marital Property Presumptions and Transmutations
(Additional Comments on Tentative Recommendation)

We have received a number of additional comments on the tentative recommendation relating to marital property presumptions and transmutions. The Family Law Section of the State Bar Association (Exhibit 1) approves the tentative recommendation, with the exception of the matters noted below. The Executive Committee of the Family Law Section of the Los Angeles County Bar Association (Exhibit 2) has not had time to adequately study and comment on the tentative recommendation, and is concerned about the potential for confusion the sweeping changes would make. They request additional time for comment, besides making a few preliminary observations that are analyzed below. The staff suggests that the Commission proceed with this project but inform the Los Angeles County Bar Committee that we will consider their comments, and make any necessary changes revealed by the comments, whenever received.

§ 5110.110. All property acquired during marriage is community

The Los Angeles County Bar Committee (Exhibit 2) points out that the definition of community property omits the words "domiciled in this state." We have noted the omission in the main memorandum and plan to make sure the language is included in the final draft.

§ 5110.620. Community property presumption

Both the State Bar and the Los Angeles County Bar groups (Exhibits 1 and 2) were confused by the community property presumption for property "owned" during marriage. In the main memorandum we suggest the confusion could be eliminated by recasting the presumption in another form, such as "Property owned by either spouse during marriage is presumed to be acquired during marriage." The State Bar offers another possible resolution--put the "owned" presumption in the same section with the rule that property acquired during marriage is community, so that the operation of the presumption can be seen more clearly. Of these two proposed solutions, the staff prefers recasting the presumption entirely.

§ 5110.640. Gift presumptions

The Los Angeles County Bar Committee (Exhibit 2) objects to Section 5110.640, which provides that a "gift" between spouses remains community and is not transmuted to separate property, unless the gift is personal in nature and not of substantial value. "New statutes should not be adopted which materially alter social policy." The staff believes this sort of dictum is not carefully considered. There is no point in disturbing existing social policy unless existing social policy creates problems. In this case, the problem we are attacking is the ease of transmutation and the litigation it generates at marriage dissolution over alleged "gifts" between the spouses. It is the Commission's experience that most gifts of this type, if substantial in value, are not intended by the spouses to be converted into the separate property of one of the spouses.

The State Bar Section (Exhibit 1) is troubled by the inherent ambiguity in the test that relates to property "substantial in value;" they suggest a definite monetary value be substituted. The staff believes such an approach would be workable. Judge Joseph B. Harvey (Lassen County--letter not reproduced) would eliminate the problem of vagueness by eliminating the substantial in value test altogether. "It seems to me that a gift from one spouse to the other of a tangible item of personal property that is intended to be used solely by the donee should be presumed separate." The Commission's feeling on this matter has been that some very valuable gifts, such as expensive jewelry, are really intended as investments of the community.

The State Bar Section also sees ambiguity in the "personal nature" standard. The Commission adopted this standard based on a growing practice in the estate planning field of using this language. It should acquire an accepted meaning over time. An alternative that the Commission should consider is to pick up the standard used for exemptions in the creditors' remedy area--"other personal effects." Code Civ. Proc. § 704.020.

§ 5110.699. Property acquired by married woman before January 1, 1975

Existing Civil Code Section 5110 contains presumptions relating to the effect of title in the name of both husband and wife. The Los Angeles County Bar Committee (Exhibit 2) believes these presumptions should not be eliminated, since elimination would serve no useful pur-

pose, create new bases of litigation, and unsettle existing title to property. "New statutes should not be added where existing law meets the needs of the public and the judicial system." The staff agrees; that is why we have continued the provision in question in Section 5110.699, as the Comment to Section 5110 indicates.

§ 5110.730. Form of transmutation

The State Bar Family Law Section (Exhibit 1) agrees with the basic thrust of Section 5110.730(b) to require transmutations of personal property to be in writing; "otherwise this becomes nothing more than a swearing contest in court leaving the judge to determine which of the parties are telling the truth. Requiring it to conform to the statute of frauds would eliminate this area of litigation between the parties."

For this reason also, the Section believes that oral transmutations should be allowed only for relatively minor items of a personal nature that are not of substantial value. The Section would use the same monetary definition of substantial value here as is adopted in the gift presumption area. The interrelation of these two provisions, and the writing requirement for larger gifts, should be pointed out.

§ 5110.920. Application of chapter

The State Bar Family Law Section (Exhibit 1) believes Section 5110.920 should be reviewed for a potential conflict in interpretation with Section 5110.930. The staff in the main memorandum proposes to eliminate this problem by giving the statute retroactive effect for all purposes.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Exhibit 1
FAMILY LAW SECTION
 OF THE STATE BAR OF CALIFORNIA

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September 14, 1983

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

Re: Marital Property Presumptions
 and Transmutations

Dear Mr. Sterling:

This letter is in response to the California Law Revision Commission's tentative recommendation relating to marital property presumptions and transmutations dated May 5, 1983.

On August 16, 1983 Jan Gabrielsen and I met with you in my office and discussed the position of the Family Law Section of the State Bar relating to the presumptions and transmutation.

At that time we on behalf of the Family Law Section made the following comments upon the tentative recommendation:

1. The Section suggests that the word "acquired" be substituted for the word "owned" at section 5110.620. The reason for the substitution is that the word acquired has a definite legal meaning where the word owned would probably require extensive definition in litigation.

2. Section 5110.110 should be combined with section 5110.620 so no conflict can be presumed between the two sections.

3. The words "substantial value" as used in section 5110.640 is ambiguous as is the word "personal nature". The Section suggests that definite monetary values be substituted.

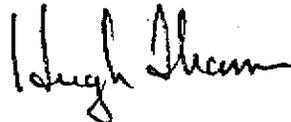
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4. The Section is of the opinion that oral transmutations as dealt with in section 5110.730(b) should only deal with transmutations of a substantial value. The monetary definition of substantial value as set forth in section 5110.640 could be substituted here for the words "substantial value". The reason for the Section's position is that although we recognize that oral transmutation is a fact of life, it should be limited to rather relatively minor items. The Section agrees that oral transmutation of major assets should be in writing otherwise this becomes nothing more than a swearing contest in court leaving the judge to determine which of the parties are telling the truth. Requiring it to conform to the statute of frauds would eliminate this area of litigation between the parties. The requirement of a writing should also be made part of section 5110.640(b).

5. Sections 5110.920 and 5110.930 should be reviewed for a potential conflict in the interpretation of the two sections.

With the above exceptions, the Family Law Section approves the tentative recommendation.

Very truly yours,



HUGH T. THOMSON

HTT/vk

cc: Jan Gabrielson
Sandra Musser
Connelly Oyler

Family Law Section of the Los Angeles County Bar Association	617 SOUTH OLIVE STREET LOS ANGELES, CALIFORNIA 90014 (213) 627-2727
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September 12, 1983

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

Re: Recommendations Relating To Marital
 Property Presumptions and Transmuta-
 tions and Disposition of Community
 Property (Promulgated May 5 and May 6,
 1983)

Dear Members:

The Executive Committee of the Family Law Section of the Los Angeles County Bar Association has studied the two tentative recommendations referred to above. Unfortunately, the time for study and comment on these subjects was so limited as to prevent a complete analysis or extensive comment. Because of the extensive and pervasive changes in the law embodied in the recommendations, we believe it to be in the best interests of the Bar, Bench, and the Public to permit additional time for comment from interested parties.

We believe, however, that you should consider the following comments as preliminary observations concerning these two recommendations:

1. Language should not be changed from existing statutes or case law where the purpose of the new statute is to codify existing law. To do so creates confusion rather than clarification. (e.g., proposed 5110.110 purports to continue the substance of former 5110, but uses

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entirely different language omitting "while domiciled in this state" leading to entirely different results; proposed 5110.620 uses "owned" rather than "acquired" thus creating a new concept.)

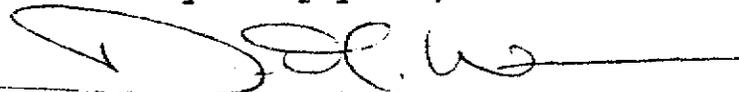
2. New statutes should not be added where existing law meets the needs of the public and the judicial system. (e.g., eliminating the effect of the presumptions contained in existing civil code section 5110 as to property acquired in the names of both husband and wife serves no useful purpose, creates new bases of litigation, and unsettles existing title to property.)

3. New statutes should not be adopted which materially alter social policy. (e.g., gifts from one spouse to another will not be recognized except for limited, specified items -- Civil Code §5110.640.)

4. New statutes should not create additional litigation, or interfere with the title to property. (e.g., CC §5125.225 permitting adding name to title to so-called community real property by declaration which can only be removed by quiet title litigation.)

In summary, the wide sweeping proposed changes create the potential for confusion amongst the Bench, Bar and Public and the substantive changes which materially alter long-established and traditional notions regarding the acquisition and disposition of property require more time for study and reflection by this body in order that our comments may serve to aid constructively in achieving the dual goals of systematic codification to reflect rational social policy with a minimum of disruption to the existing system.

Very truly yours,



Dennis M. Wasser,
1st Vice-Chair

DMW: jm