

## Memorandum 84-59

Subject: Study F-601 - Jurisdiction Over Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage (Staff Draft of Recommendation)

The Commission two years ago promulgated a recommendation to give the family law court jurisdiction to divide, along with the community property, separate property of the spouses if jointly held or if held as tenants in common. See Recommendation Relating to Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage, 16 Cal. L. Revision Comm'n Reports 2165 (1982). There was general support for this concept because it adds to the court's flexibility in devising a just property division and it avoids the need for a separate partition action to divide the property. However, the concept was ultimately put aside because of concerns expressed by the State Bar Family Law Section that including the separate property in the division could trigger a tax liability under some readings of federal tax law.

The tax problem was put to rest this summer by enactment of the Domestic Relations Tax Reform Act. The act adds to the Internal Revenue Code a new Section 1041, which provides:

SEC. 1041. TRANSFERS OF PROPERTY BETWEEN SPOUSES OR INCIDENT TO DIVORCE.

(a) GENERAL RULE.--No gain or loss shall be recognized on a transfer of property from an individual to (or in trust for the benefit of)--

- (1) a spouse, or
- (2) a former spouse, but only if the transfer is incident to the divorce.

(b) TRANSFER TREATED AS GIFT; TRANSFEREE HAS TRANSFEROR'S BASIS.--In the case of any transfer of property described in subsection (a)--

- (1) for purposes of this subtitle, the property shall be treated as acquired by the transferee by gift, and
- (2) the basis of the transferee in the property shall be the adjusted basis of the transferor.

(c) INCIDENT TO DIVORCE.--For purposes of subsection (a)(2), a transfer of property is incident to the divorce if such transfer--

- (1) occurs within 1 year after the date on which the marriage ceases, or
- (2) is related to the cessation of the marriage.

(d) SPECIAL RULE WHERE SPOUSE IS NONRESIDENT ALIEN.--Paragraph (1) of subsection (a) shall not apply if the spouse of the individual making the transfer is a nonresident alien.

The concept of expanding the court's jurisdiction to include other "marital" property such as separate property owned jointly or in common by the spouses remains a good one. Recent appellate cases indicate the problem is a continuing one. The case of In re Marriage of Lerversee, 156 Cal. App.3d 891 (1984), for example, involved a number of jointly held properties of the spouses, one of which was acquired a few months before marriage and therefore was separate property even though subsequent mortgage payments were made with community funds. For this reason, the Court of Appeal held the trial court lacked jurisdiction to deal with the property together with the other marital property, and the property would have to be divided in a separate partition action (which conceivably could be consolidated with the dissolution proceeding). The Court of Appeal also stated:

We note that in 1982 the California Law Revision Commission recommended to the Legislature that courts in dissolution proceedings be given jurisdiction over joint tenancy and tenancy in common property of spouses, at the request of either party, in order to "eliminate litigation over the community or separate character of the property, add flexibility to the formulation of a just property disposition, and avoid the need for a separate partition proceeding for the property." (Recommendation Relating to Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage (Sept. 1982) 16 Cal. Law Revision Com. Rep., pp. 2165, 2170-2171.) This recommendation was followed in the original draft of the bill enacting Civil Code Section 4800.1, but did not survive subsequent amendments to the bill. (See fn. 3, ante.) The present case demonstrates the wisdom of the Law Revision Commission's recommendation. In the interest of judicial economy and avoiding needless expenditures of legal fees and costs for parties such as the Lerversees, the Legislature should again consider the Law Revision Commission's recommendation.

[156 Cal. App.3d at 897-898]

The staff has attached to this memorandum the Commission's old recommendation to extend the family law court jurisdiction, updated to reflect changes in the law since 1982. You should review this draft to see whether you wish to renew this recommendation.

Respectfully submitted,

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STAFF DRAFT

## RECOMMENDATION

relating to

JURISDICTION OVER JOINT TENANCY AND TENANCY IN COMMON  
PROPERTY AT DISSOLUTION OF MARRIAGE

A husband and wife may hold property as joint tenants, tenants in common, or as community property.<sup>1</sup> Although the court in a dissolution or legal separation proceeding has jurisdiction to settle the property rights of the parties,<sup>2</sup> the jurisdiction is construed to extend only to the community property and not to include separate property held by the parties as joint tenants or tenants in common.<sup>3</sup> Such property must be divided in a separate partition action.<sup>4</sup>

The most significant consequence of this scheme is that the court in a dissolution proceeding may be unable to make the most sensible disposition of property because not all the marital property is available. For example, it may be desirable to award a community property business to the managing spouse and offset the value of the business by awarding real property to the other spouse. But because the spouses frequently hold their interests in real property as joint tenants, the court may be unable to accomplish this disposition. The result is that the business must be divided at dissolution and the real property divided in a later partition action. As a further example, it may be desirable to award temporary occupancy of the family home to the spouse awarded custody of

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1. Civil Code § 5104.
  2. Civil Code § 4351.
  3. Civil Code § 4800; In re Marriage of Lerversee, 156 Cal. App.3d 891, \_\_\_ Cal. Rptr. \_\_\_ (1984); Askren v. Askren, 84 Daily Journal D.A.R. 2224 (1984); Schindler v. Schindler, 126 Cal. App.2d 597, 272 P.2d 566 (1954); Walker v. Walker, 108 Cal. App.2d 605, 239 P.2d 106 (1952). See discussion in Porter v. Superior Court, 73 Cal. App.3d 793, 141 Cal. Rptr. 59 (1977) and Lichtig, Valuation and Division of Property, in 1 California Marital Dissolution Practice §§ 8.3, 8.6-8.7 (Cal. Cont. Ed. Bar 1981).
  4. Code Civ. Proc. §§ 872.010-874.240; see Code Civ. Proc. § 872.210 (partition permitted as to property other than community property).

the minor children; this can be done if the family home is the community property of the spouses<sup>5</sup> but not if it is the separate property of the spouses held as joint tenants.<sup>6</sup>

To cure these problems the Law Revision Commission recommends that the court at dissolution or separation be given jurisdiction to include in the property division separate property held by the parties as joint tenants and tenants in common,<sup>7</sup> at the request of either party. Other community property jurisdictions require disposition of the joint tenancy and tenancy in common property along with the community property.<sup>8</sup> California family law courts now dispose of such property in dissolution proceedings where both parties submit the property to the court<sup>9</sup> or later where the court reserves jurisdiction to divide community property (which becomes tenancy in common by operation of law).<sup>10</sup> In some courts joint tenancy property may be divided as a matter of practice. Express authority for the court to divide joint tenancy and tenancy in common property will minimize litigation over the community or separate character of the property, add flexibility to the formulation of a just property disposition, and avoid the need for a separate partition action for the property.

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5. See, e.g., In re Marriage of Duke, 101 Cal. App.3d 152, 161 Cal. Rptr. 444 (1980); In re Marriage of Herrmann, 84 Cal. App.3d 361, 148 Cal. Rptr. 550 (1978); In re Marriage of Boseman, 31 Cal. App.3d 372, 107 Cal. Rptr. 232 (1973).
  6. See, e.g., Carter v. Carter, 148 Cal. App.2d 845, 207 P.2d 630 (1975).
  7. See discussion in Sterling, Joint Tenancy and Community Property in California, 14 Pac. L.J. 927, 971-972 (1983), reprinted in 10 Community Property J. 157, 203 (1983).
  8. Ariz. Rev. Stat. § 25-318 (West Supp.1981); Nev. Rev. Stat. § 125.150 (1981).
  9. See, e.g., Allen v. Allen, 159 Cal. 197, 113 P. 160 (1911); Womack v. Womack, 242 Cal. App.2d 572, 51 Cal. Rptr. 668 (1966); Spahn v. Spahn, 70 Cal. App.2d 791, 162 P.2d 53 (1945).
  10. See, e.g., De Godey v. Godey, 39 Cal. 157 (1870); Marriage of Borges, 83 Cal. App.3d 771, 148 Cal. Rptr. 118 (1978); Comment, Post-Dissolution Suits to Divide Community Property: A Proposal for Legislative Action, 10 Pac. L.J. 825 (1979). Where the court fails to reserve jurisdiction to divide omitted or after-discovered community property a separate partition action is necessary since

This recommendation is the same in effect as an earlier recommendation of the California Law Revision Commission,<sup>11</sup> which was not enacted because of practitioners' concern about possible adverse tax consequences of dividing separate property.<sup>12</sup> Since then the tax law has been revised to eliminate the taxation problem,<sup>13</sup> and experience has shown the desirability of giving the family law court direct jurisdiction over joint tenancy and tenancy in common property. As the court stated in In re Marriage of Lerversee,<sup>14</sup> "The present case demonstrates the wisdom of the Law Revision Commission's recommendation. In the interest of judicial economy and avoidance of needless expenditures of legal fees and costs for parties such as the Lerversees, the Legislature should again consider the Law Revision Commission's recommendation."

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The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Section 4800.4 to the Civil Code, relating to division of marital property.

The people of the State of California do enact as follows:

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the property has become tenancy in common by operation of law, thereby causing the court to lose jurisdiction. See, e.g., Henn v. Henn, 26 Cal.3d 323, 605 P.2d 10, 161 Cal. Rptr. 502 (1980).

11. Recommendation Relating to Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage, 16 Cal. Law Revision Commission Reports 2165 (1982).
12. See California Law Revision Commission Report Concerning Assembly Bill 26, Senate Journal 4865, 4866 (July 14, 1983).
13. Int. Rev. Code § 1041 (transfers of property between spouses or incident to divorce).
14. 156 Cal. App.3d 891, 898, \_\_\_ Cal. Rptr. \_\_\_ (1984).

§ 4800.4 (added). Division of joint tenancy and tenancy in common property

SECTION 1. Section 4800.4 is added to the Civil Code, to read:

4800.4. (a) In a proceeding for division of the community property and the 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) If joint tenancy property is divided pursuant to this section, the judgment of dissolution of the marriage or the judgment decreeing the legal separation of the parties severs the joint tenancy.

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

Comment. Section 4800.4 reverses the rule that the court in a dissolution or separation proceeding has no jurisdiction over property of the parties other than community or quasi-community property. See, e.g., In re Marriage of Lerversee, 156 Cal. App.3d 891, \_\_\_ Cal. Rptr. \_\_\_ (1984); Askren v. Askren, 84 Daily Journal D.A.R. 2224 (1984); Schindler v. Schindler, 126 Cal. App.2d 597, 272 P.2d 566 (1954); Walker v. Walker, 108 Cal. App.2d 605, 239 P.2d 106 (1952); cf. Porter v. Superior Court, 73 Cal. App.3d 793, 141 Cal. Rptr. 59 (1977) (general discussion). Section 4800.4 supplements provisions governing community property held in joint tenancy form by extending the jurisdiction of the court to separate property held in joint tenancy form as well. It is consistent with the general rule that the court has jurisdiction to settle the property rights of the parties and with the principle that the court has jurisdiction to settle matters submitted to it by the parties. Section 4351 (jurisdiction of court); see, e.g., Allen v. Allen, 159 Cal. 197, 113 P. 160 (1911). It is also consistent with the rule that the court may reserve jurisdiction to divide community property that has become tenancy in common by operation of law upon dissolution or separation. See, e.g., Marriage of Borges, 83 Cal. App.3d 771, 148 Cal. Rptr. 118 (1978); Comment, Post-Dissolution Suits to Divide Community Property: A Proposal for Legislative Action, 10 Pac. L.J. 825 (1979).

Subdivision (a) supplements Section 4800 by giving the court express jurisdiction over joint tenancy or tenancy in common separate property submitted by a party in a property division proceeding under the Family Law Act. Property subject to division includes property acquired by the parties either before or during marriage. It also includes property acquired or situated either in this state or elsewhere. For a special rule governing treatment of real property situated in another state, see Section 4800.5 (community and quasi-community property). See also Section 4813 (jurisdiction where service is by publication). The jurisdic-

tion of the court extends only to the interests of the spouses, whether equal or unequal, and the court may not affect interests of third parties in the property. The interests of third parties may be subject to partition pursuant to Title 10.5 (commencing with Section 872.010) of the Code of Civil Procedure.

Subdivision (b) makes clear the time of severance of a joint tenancy where the property is divided pursuant to this section. Severance terminates the right of survivorship.

Under subdivision (c), the rule that separate joint tenancy and tenancy in common property may be divided in a community and quasi-community property division proceeding applies only to proceedings commenced after January 1, 1986.

It should be noted that division of property pursuant to this section is subject to the same limitations applicable to division of community property. Therefore, an express agreement of the parties waiving partition or otherwise governing their rights in the property prevails over this section. See Section 4800 (division of community property "except upon written agreement of the parties").