Minutes

Date of Meeting: May 15-16, 1959
Date of Memo: May 8, 1959

Memorandum No. 4

Subject: Study No. 38 - Inter Vivos Rights in Probate Code Section 201.5 Property.

As is shown by the minutes of the meetings of May, 1958 and April, 1959, the Law Revision Commission has decided to recommend that the 1917 amendment to Civil Code Section 164 be repealed and that Probate Code Section 201.5 property be treated like community property for the following purposes:

1. Inter vivos transfers of both real and personal property, whether gratuitous or for value.
2. Declaration of homestead and effect thereof.
3. Division on divorce.
4. The California Gift Tax.

The staff was directed to draft the necessary legislation to effectuate these decisions. Accordingly, there is set forth below for the Commission's consideration a bill drafted for this purpose. There is appended to this memorandum as Appendix A the text of several existing code sections which you may wish to consider in studying the draft bill.

It will be noted that in the legislation proposed below relating to inter vivos transfers of 201.5 property we have not complied literally

with what the April 1959 minutes state was the Commission's decision -- i.e., to treat 201.5 property for this purpose "like community property." Literal compliance would have required that proposed new Sections 172b and 172c speak in terms of the husband's management and control of and right to transfer all 201.5 property including that acquired by the wife while domiciled elsewhere. The staff believes, however, that the Commission would not desire to recommend more than that certain conveyances made by the wife of such property be subject to attack by the husband for a limited time unless he joins in them. Proposed Sections 172b and 172c are drafted accordingly.

S.B. [A.B.] _____

An act to repeal Section 201.8 of the Probate Code, to enact Sections 172b and 172c of the Civil Code, to amend Sections 146, 164, 1238, 1239 and 1265 of said Code and to amend Sections 15301, 15302 and 15303 of the Revenue and Taxation Code, all relating to property acquired by persons during marriage at a time when they were not domiciled in this state.

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

SECTION 1. Section 201.8 of the Probate Code is hereby repealed.

SEC. 2. Section 164 of the Civil Code is amended to read:

164. All other property acquired after marriage by either husband or wife, or both, while domiciled in this State, ~~including real property~~

~~situated-in-this-State-and-personal-property-wherever-situated,-heretofore-or-hereafter-acquired-while-domiciled-elsewhere,-which-would-not-have-been the-separate-property-of-either-if-acquired-while-domiciled-in-this State,~~ is community property but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by the husband and wife while domiciled in this State by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of said property.

In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889 the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

SEC. 3. Section 172b is added to the Civil Code, to read:

172b. A married person domiciled in this State who owns personal property in which his spouse has an expectancy under Section 201.5 of the Probate Code has the management and control of such property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot, without the written consent of the other spouse, make a gift of such property, or dispose of the same without a valuable consideration, or sell, convey, or encumber any such property which constitutes the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the spouse or minor children.

SEC. 4. Section 172c is added to the Civil Code, to read:

172c. A married person domiciled in this State who owns real property in which his spouse has an expectancy under Section 201.5 of the Probate Code has the management and control of such property, but his spouse, either personally or by duly authorized agent, must join with him in executing any instrument by which such real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that (a) nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife and (b) the sole lease, contract, mortgage or deed of such married person, holding the record title to such real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid. No action to avoid any instrument

mentioned in this section affecting any property standing of record in the name of such married person alone, executed by such married person alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of such married person alone, which was executed by such married person alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.

SEC. 5. Section 1238 of the Civil Code is amended to read:

1238. If the claimant be married, the homestead may be selected from the community property, or from any property as to which either of the spouses has an expectancy under Section 201.5 of the Probate Code at the time of selection or the separate property of the husband or, subject to the provisions of Section 1239, from the property held by the spouses as tenants in common or in joint tenancy or from the separate property of the wife. When the claimant is not married, but is the head of a family within the meaning of Section 1261, the homestead may be selected from any of his or her property. If the claimant be an unmarried person, other than the head of a family, the homestead may be selected from any of his or her property. Property, within the meaning of this title, includes any freehold title, interest, or estate which vests in the claimant the immediate right of possession, even though such a right of possession is not exclusive.

SEC. 6. Section 1239 of the Civil Code is amended to read:

1239. The homestead cannot be selected from the separate property of the wife, other than property as to which the husband has an expectancy under Section 201.5 of the Probate Code at the time of selection without her consent, shown by her making or joining in making the declaration of homestead.

SEC. 7. Section 1265 of the Civil Code is amended to read:

1265. From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, or from property as to which either of the spouses has an expectancy under Section 201.5 of the Probate Code at the time of selection or from the separate property of the spouse making the selection or joining therein and if the surviving spouse has not conveyed the homestead to the other spouse by a recorded conveyance which failed to expressly reserve his homestead rights as provided by Section 1242 of the Civil Code, the land so selected, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this title; in other cases, upon the death of the person whose property was selected as a homestead, it shall go the heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent, but in no case shall it, or the products, rents, issues or profits thereof be held liable for the debts of the owner, except as provided in this title; and should the homestead be sold by the owner, the proceeds arising from such sale to the extent of the value

allowed for a homestead exemption as provided in this title shall be exempt to the owner of the homestead for a period of six months next following such sale.

SEC. 8. Section 146 of the Civil Code is amended to read:

146. In case of the dissolution of the marriage by decree of a court of competent jurisdiction or in the case of judgment or decree for separate maintenance of the husband or the wife without dissolution of the marriage, the court shall make an order for disposition of the community property and of any property as to which either spouse has an expectancy under Section 201.5 of the Probate Code at the time of such judgment or decree and for the assignment of the homestead as follows:

One. If the decree is rendered on the ground of adultery, incurable insanity or extreme cruelty, the community property and any property as to which either spouse has an expectancy under Section 201.5 of the Probate Code at the time of such decree shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just.

Two. If the decree be rendered on any other ground than that of adultery, incurable insanity or extreme cruelty, the community property and any property as to which either spouse has an expectancy under Section 201.5 of the Probate Code at the time of such decree shall be equally divided between the parties.

Three. If a homestead has been selected from the community property or any property as to which either spouse ~~has~~ had an expectancy under Section 201.5 of the Probate Code at the time of ~~the decree~~ selection, it may be

assigned to the party to whom the divorce or decree of separate maintenance is granted, or, in cases where a divorce or decree of separate maintenance is granted upon the ground of incurable insanity, to the party against whom the divorce or decree of separate maintenance is granted. The assignment may be either absolutely or for a limited period, subject, in the latter case, to the future disposition of the court, or it may, in the discretion of the court, be divided, or be sold and the proceeds divided.

Four. If a homestead has been selected from the separate property of either, in cases in which the decree is rendered upon any ground other than incurable insanity, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the party to whom the divorce or decree of separate maintenance is granted, and in cases where the decree is rendered upon the ground of incurable insanity, it shall be assigned to the former owner of such property, subject to the power of the court to assign it to the party against whom the divorce or decree of separate maintenance is granted for a term of years not to exceed the life of such party.

This section shall not limit the power of the court to make temporary assignment of the homestead at any stage of the proceedings.

Whenever necessary to carry out the purposes of this section, the court may order a partition or sale of the property and a division or other disposition of the proceeds.

SEC. 9. Section 15301 of the Revenue and Taxation Code is amended to read:

15301. In the case of a transfer <u>to either spouse by the other</u>

of community property ~~to either spouse~~ or of property as to which either spouse has an expectancy under Section 201.5 of the Probate Code at the time of such transfer, one-half of the property transferred is not subject to this part.

SEC. 10. Section 15302 of the Revenue and Taxation Code is amended to read:

15302. If any community property or property as to which either spouse has an expectancy under Section 201.5 of the Probate Code at the time of such transfer is transferred to a person other than one of the spouses, all of the property transferred is subject to this part, and each spouse is a donor of one-half.

SEC. 11. Section 15303 of the Revenue and Taxation Code is amended to read:

15303. If the separate property of either spouse is transferred by agreement into the community property of both spouses:

(a) One-half of the property transferred is subject to this part as a gift from the spouse whose property it was to the other spouse, and the other one-half is not subject to this part.

(b) The one-half which is subject to this part is the one-half of the community property which is not subject to Part 8 of this division on the death of the spouse whose separate property is transferred.

(c) If the wife is the spouse whose separate property is transferred, and upon her death and survival by her husband the entire community property passing to her husband is not subject to Part 8 of this division,

the one-half of the separate property not subject to this part under subdivision (a) is subject to this part upon the death of the wife as a gift from the wife to her surviving husband at the time of her death.

Neither this section nor this part applies to property as to which either spouse has an expectancy under Section 201.5 of the Probate Code at the time of its transfer into community property.

APPENDIX A

§ 201.8 - Probate Code

Whenever any married person dies domiciled in this State who has made a transfer to a person other than the surviving spouse, without receiving in exchange a consideration of substantial value, of property in which the surviving spouse had an expectancy under Section 201.5 of this code at the time of such transfer, the surviving spouse may require the transferee to restore to the decedent's estate one-half of such property, its value, or its proceeds, if the decedent had a substantial quantum of ownership or control of the property at death. If the decedent has provided for the surviving spouse by will, however, the spouse cannot require such restoration unless the spouse has made an irrevocable election to take against the will under Section 201.5 of this code rather than to take under the will. All property restored to the decedent's estate hereunder shall go to the surviving spouse pursuant to Section 201.5 of this code as though such transfer had not been made.

§ 172 - Civil Code

The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.

§ 172a - Civil Code

The husband has the management and control of the community real property, but the wife, either personally or by duly authorized agent, must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the

record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, executed by the husband alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.

Minutes

UNIVERSITY OF CALIFORNIA

School of Law
Los Angeles 24, California

May 11, 1959

John R. McDonough, Jr., Esq.
Executive Secretary
California Law Revision Commission
Stanford, California

Dear John:

In reply to your letter of May 8, 1959, I am not sure that I have anything worthwhile to add to the material in the draft study. However, I will summarize my views as follows:

It seems to me that the Commission should not recommend legislation to reenact a measure declared unconstitutional by the Supreme Court unless (1) there is a forceful argument that either (a) the decision was wrong and is opposed by weightier authority from other states or (b) the proposed measure can validly be distinguished from the one held unconstitutional, and (2) there is a vital need for the legislation.

As to the first point, so far as I know there is no authority opposed to the Thornton case, and while an argument can of course be made that it is wrong (as there can about every constitutional decision), none that I have heard impresses me as being clearly more forceful than those which can be made in support of it. Certainly it is not a distinguishing feature of this legislation that it proposes to apply all of the rules regarding community property to this property piecemeal rather than in one section. Ignoring the question of creditors' rights as relatively unimportant since such rights are virtually the same already, and putting aside the staff's overruling of the Commission regarding "management and control", the only possible distinction between this legislation taken as a whole and the 1917 amendment to Section 164 is the fact that nothing in this legislation purports to give to the wife a power of testamentary disposition over the husband's Section 201.5 property when he dies first. While this could conceivably be a valid distinction, it was never mentioned in either opinion in the Thornton case, which on the contrary emphasized the curtailment of the rights of the husband during the lifetime of both spouses.

Furthermore, this distinction did not exist in 1917, since the wife was only given a power of testamentary disposition over community property in 1923. And the Supreme Court did not say that the statute became unconstitutional in 1923 but that it was unconstitutional from the beginning. If this had been the only infirmity, it would seem that the

court should have denied the application of the 1923 amendment to this property and left the original 1917 amendment intact.

So far as the need for the legislation is concerned, no reported case has arisen involving any of these problems except the question of division of the property on divorce. This would appear to indicate that the matter is not of great significance. The reason, of course, is obvious --in 99 cases out of 100 cases where the problem might otherwise arise, it is impossible to prove what portion of the husband's property was acquired in the foreign state and therefore all of it is presumed to be community property and treated as such. It is only in connection with a retired couple moving to California, so that it is easy to show that all of the husband's property must be derived from what he had before he came here, and then only in connection with the disposition of the husband's or wife's estate, that any question has arisen with sufficient frequency to constitute a problem.

In short, it seems to me that it could be said that legislation is being recommended which on its face is probably unconstitutional merely from a desire for abstract symmetry in the law.

I realize that the foregoing argument would be more appropriate if I were a member of the Commission rather than merely a consultant, but it is submitted for whatever weight the Commission may want to give it.

With regard to the draft legislation, I would strike out "while domiciled in this State" which has been inserted twice in Section 164. This language would reverse the rule that the character of real property acquired in a foreign state in exchange for services is determined by the law of the situs (Trapp v. United States, 177 F. (2d) 1 (10th Cir., 1949); Hammonds v. Commissioner, 106 F. (2d) 420 (10th Cir., 1939); Estate of Hale, 2 Cof. 191 (S. F. Super. Ct. 1906)), a subject which has not even been considered in connection with this proposed legislation. With regard to the phrase "property as to which either of the spouses has an expectancy under Section 201.5 of the Probate Code" used in the other sections, I would prefer the phrase "property described in Section 201.5 of the Probate Code" simply as being less awkward. The two possible misinterpretations of this language, that it does not describe any property before the death of the owner and that it describes property owned by a non-domiciliary before he moves to California, could be negatived in the Report of the Commission and this, it seems to me, would remove any danger that the courts would adopt them.

Sincerely yours,

S/ Harold
Harold Marsh, Jr.

HMJ:bas