Date of Meeting: September 24-26, 1959

Date of Memo: September 15, 1959

Memorandum No. 5

Subject: Study No. 38 - Inter Vivos Rights

Attached are tentative recommendations and a proposed statute prepared by John McDonough relating to inter vivos rights in quasi-community property.

Also attached is a letter from Professor Marsh commenting on our recommendations and proposed statute. Professor Marsh will be meeting with us to discuss this matter on Saturday morning, September 26.

Respectfully submitted,

John H. DeMoully
Executive Secretary

UNIVERSITY OF CALIFORNIA

School of Law
Los Angeles 24, California

September 15, 1959

Mr. John H. DeMoully, Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Dear Mr. DeMoully:

I have reviewed the draft recommendation and the proposed bill relating to inter-vivos rights in foreign-acquired marital property enclosed with your letter of September 1, 1959. I have the following specific comments concerning the drafts.

In the proposed Section 172d, in the 9th and 10th lines on page 6, the phrase "of the husband" should be "of the spouse."

In the same Section 172d, the last portion of the second paragraph beginning with the words "and no action" in the 6th line should be deleted, unless it is intended to make the statute retroactive, which would undoubtedly be unconstitutional. This portion of the analogous community property section (C.C. § 172a) was included because the statute of limitations was added to the section after the joinder of the wife in a conveyance of community real property was required.

The inclusion in Section 164.1 of the requirement that both husband and wife become domiciled in this state and the provision that no rule or presumption be applied that the domicile of the wife is the same as that of her husband raises the question of the meaning of "while domiciled in this State" in proposed Section 164 in a case where only the husband or the wife moves to California. The authorities on this question are discussed in my book, Marital Property in Conflict of Laws, on pages 215-218.

The statement in the draft recommendation on page 11 in paragraph 8 that the amendment to Section 201.5 does not make any substantive change therein is erroneous. The change results from the striking out of the words "domiciled in this State" in Section 201.5 and the substitution in Section 164.1 of the provision that property remains "quasi-comminity property" so long as either spouse remains domiciled in this State. Therefore, this section now attempts to control in some cases the devolution of the personal property of a person dying domiciled in a foreign state. Of course, probably no other state in which any of his property is located would accept this attempt of California to control its devolution, but presumably California itself can do so with respect to any property "located" here. There is no indication in the draft

statutes as to how far California is attempting to go in this regard. For example, would the California courts prohibit the transfer of "quasi-community" stock in a California corporation to the legatees of its owner who dies domiciled in Florida, but who was domiciled here for six months ten years ago and whose surviving wife is still domiciled here? Would the corporation or its transfer agent be liable in damages to the surviving wife in this situation for making the transfer pursuant to a decree of the Florida probate court?

The provisions of Section 164.1 combined with those of Section 172c would require that the California court invalidate a gift of personal property made in a foreign jurisdiction by a domiciliary of that jurisdiction in some circumstances. For example, if a husband and wife move to California from New York and shortly thereafter the husband alone moves to Utah, leaving the wife in California, and the husband makes a gift to his brother in Utah of an automobile which was acquired with funds earned in New York, the wife could recover the automobile from the brother if he drove it into California. I have no doubt that the gift would be considered valid under the law of Utah and such a holding by California, aside from being in my opinion indefensible policy, would raise a serious constitutional question.

I would suggest that the first sentence under the heading "Basic Policy Considerations" on page 3 of the draft recommendation be revised. Of course, anything is "arguable", but surely no valid argument can be made for the statement there set forth. Nor is one attempted in the discussion which follows in the draft recommendation. The argument there made discusses only the situation where the spouses have moved to California, whereas the opening statement refers to whenever the question arises in a California court "without regard to where the acquiring spouse is domiciled at the time of acquisition or at the time of suit."

On page 6 of the draft recommendation in the second paragraph it is stated that Section 164.1 differs from the 1917 amendment in that it does not apply to real property in California acquired by a married person domiciled elsewhere unless and until he becomes domiciled in California. The California Supreme Court in its first opinion in the Thornton case said that the same thing was true of the 1917 amendment. Therefore, query whether there is any difference in this regard? See my original study for the Commission, page E-20.

The statement at the bottom of page 8 and the top of page 9 in the draft recommendation, implying that the changes in Section 164 only continue California's "long-standing policy" and only apply where property is purchased rather than earned directly by services, is in my opinion less than ingenuous. See my previous letters to Professor McDonough.

The statement at the bottom of page 14 in the draft recommendation that the only constitutional problem to be solved is the application of the various statutes to property acquired by a person while domiciled elsewhere and "brought to California when he moves here" seems to me to be inadequate. There is no requirement in any of these statutes that the property be "brought to California." On the contrary, they expressly apply to personal property "wherever situated."

On page 16 of the draft recommendation, it seems to me that some mention should be made of the Paley case, which recently confirmed and followed the reasoning of the Thornton case, although of course the recommendations of the Commission are not directly contrary to the holding of the Paley case.

In connection with the last sentence on page 17 of the draft recommendation, it seems pertinent to point out that it took 17 years to determine finally whether the 1917 amendment was constitutional. Since it applied to testamentary dispositions, its application was necessarily involved in the estate of every married decedent in California who owned any property acquired while domiciled in a foreign jurisdiction. The application of the proposed Sections 172c and 172d will arise less frequently in litigation. Therefore, it may be anticipated that probably upwards of 25 years will elapse before anyone knows for sure whether these statutes are constitutional. Is the Legislature also justified in leaving all practicing attorneys to speculate as to the rights of their clients until the courts decide the question "if and when the occasion arises" some 25 years from now? Obviously, a lawyer cannot afford to make a federal case out of it every time he is asked for advice in this regard.

I have not attempted in this letter to go into the questions previously raised with Professor McDonough, but I will of course be prepared to discuss any aspects of the proposed legislation with the Commission in San Francisco.

Sincerely yours,

HM:gv
Airmail

Harold Marsh, Jr.

P.S. --The question occurs to me as to whether it is intended to print my study along with the recommendation and proposed bill. The draft recommendation does not mention it at any point. From this some readers might conclude that the study merely supports the Commission's recommendations with more detailed analysis and neglect to read it. It seems to me that candor requires that the recommendation state that the study does not support the Commission's proposals, if the study is to be attached.

H.M., Jr.

(38) August 20, 1959

RECOMMENDATION OF CALIFORNIA LAW REVISION COMMISSION

relating to

Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere

Background

Married persons who move to California often bring with them property acquired during marriage while domiciled elsewhere. Such property is in some cases retained in the form in which it is brought to this State; in others, it is exchanged for real or personal property here. Other married persons who never become domiciled in this State purchase real property here with funds acquired during marriage while domiciled elsewhere. The Legislature and courts of this State have long been concerned with the problem of what rights, if any, the spouse of the person who originally acquired such property should have therein, or in property for which it is exchanged, both during the lifetime of the acquiring spouse and upon his death.

In 1957 the California Law Revision Commission made a number of recommendations as to what the rights of a surviving spouse in such property should be upon the death of the spouse who originally acquired the property. The bill which embodied these recommendations was passed by the Legislature and signed by the Governor, becoming Chapter 490 of the Statutes of 1957. At the same time the Commission requested and was

given authority to make a study to determine what the inter vivos rights of one spouse should be in property acquired by the other spouse during marriage while domiciled outside California.* This recommendation states the conclusions of the Commission on this subject.

The California Legislature's first attempt to deal with property brought here by married persons domiciled elsewhere at the time of its acquisition took the form of a 1917 amendment to Section 164 of the Civil Code which purported to convert such property into community property if it would not have been separate property had the owner been domiciled in California when it was acquired. However, in Estate of Thornton, decided in 1933, the California Supreme Court held the 1917 amendment unconstitutional under the due process clause of the Fourteenth Amendment to the United States Constitution on the ground that a spouse's ownership of property acquired while domiciled elsewhere could not be substantially modified during his lifetime merely because he moved to California and brought the property with him. Although the 1917 amendment has never been repealed, it has been tacitly assumed by both the bar and the courts to be a dead letter since Estate of Thornton was decided.

Legislation was enacted in 1935 and in 1957 which, in effect, treats property acquired by a married person while domiciled elsewhere substantially like community property upon his death. The constitutionality of this legislation has been tacitly assumed by both the bar and the courts because of the virtually plenary power which a State has to dispose of the assets of a decedent's estate. However, such property is generally

* Res. ch. 202, Statutes of 1957.

considered to be the separate property of the acquiring spouse prior to his death except insofar as Section 201.8 of the Probate Code, enacted in 1957, places limitations on the owner's power to make "will substitute" gifts of such property during his lifetime. The question with which this recommendation is principally concerned is whether such property should be treated like community property for at least some purposes during the lifetime of the acquiring spouse.

Basic Policy Considerations

It is arguable that all property acquired during marriage other than by gift, devise, bequest or descent should be treated substantially like community property whenever the question arises in a California court, without regard to where the acquiring spouse is domiciled at the time of acquisition or at the time of suit. Such an argument would run about as follows: The underlying theory of the community property system is that husband and wife are essentially a partnership insofar as the acquisition of property during marriage is concerned -- that both spouses contribute in substantial part to the effort by which such property is accumulated regardless of which of them is formally the recipient of the property. This theory is logically applicable to any property acquired by any married couple, without regard to where either spouse was domiciled at the time of acquisition. To take an example, suppose that a man and woman are married in New York and live there for 20 years, that they then move to California and live for a second 20 years and that at the end of the 40-year period they have $100,000 worth of property which was accumulated out of the the husband's earnings during the marriage. The wife's contribution to

the accumulation of the $100,000 would in all probability have been no greater during the second 20-year period than during the first. Why, then, should a California court in which the question arises treat the wife differently insofar as the property acquired before the parties moved to California is concerned than it treats her with respect to property acquired thereafter? To put the matter another way, why should she be treated differently than a wife who is otherwise similarly situated except that she lived in this State throughout her 40-year marriage.

It is true, of course, that under the law of New York the husband's earnings during the first 20-year period are regarded as his separate property. This was thought by the court which decided Estate of Thornton to preclude California from treating such earnings as community property. But solely as a matter of policy (leaving the constitutional question for discussion below), why should a State which has embraced the community property system view the equitable or moral claim of the wife to a share of her husband's earnings as turning upon where the parties were living when the joint and cooperative efforts by which the property was accumulated were expended?

The Law Revision Commission is not prepared to accept this argument in its most extreme form -- that is, to recommend that in all cases coming before the courts of this State property acquired during marriage be treated like community property whether or not the persons involved were ever domiciled in this State. The Commission believes that the argument is persuasive, however, as applied to those married persons in whom this State has a substantial and legitimate governmental

interest by virtue of their having become domiciled here after the property was acquired. Accordingly, it recommends that property acquired during marriage by a person who is then domiciled elsewhere be treated substantially like community property for a number of purposes (specified below) if and when the owner and the person to whom he was married at the time of its acquisition both become domiciled in California and that such property continue to be so treated so long as either of the spouses remains domiciled in California.

Proposed Legislation

The Commission does not recommend, however, that the Legislature undertake to accomplish this objective by the enactment of a single statutory provision similar to the 1917 amendment to Civil Code Section 164. Rather, it recommends that the various problems likely to arise with respect to such property be separately considered and that several narrowly drawn statutes dealing severally and specifically with these problems be enacted. Thus, the Commission makes the following recommendations:

1. A new Section 164.1 should be added to the Civil Code, providing that all real property situated in this State and all personal property wherever situated heretofore or after (a) acquired during marriage by either husband or wife or both while domiciled outside of this State which would have been the community property of the person acquiring it and his spouse had such person been domiciled in this State at the time of its acquisition or (b) acquired in exchange for real or personal property wherever situated and so acquired becomes quasi-

community property when, during such marriage, both spouses become domiciled in this State and, subject to the provisions of proposed new Sections 201.4 and 201.5 of the Probate Code (which provide for the termination of quasi-community property interests upon the death of the nonacquiring spouse and the acquiring spouse, respectively), remains quasi-community so long as either spouse remains domiciled in this State. Such a statute would establish a new and distinctively named category of marital property in California. However, the substantive effect of proposed Section 164.1 is very limited inasmuch as most of the rights and interests of various persons in quasi-community property are established by the several statutory provisions which are discussed below. Under these statutes quasi-community property is treated for many purposes like community property; in other respects, however, it is not. This particularized approach to the problem differs substantially, of course, from that made in the very broad 1917 amendment to Section 164 of the Civil Code.

It should be noted in passing that proposed Civil Code Section 164.1 is narrower than the 1917 amendment to Section 164 in several important respects: (1) Section 164.1 does not apply to real property in California acquired by a married person domiciled elsewhere unless and until such person and his spouse become domiciled in California; (2) under Section 164.1 the property in question is quasi-community property only so long as at least one of the spouses remains domiciled in this State whereas the transmutation of separate property into community property effected by the 1917 amendment was presumably intended to be permanent; and (3) under neither Section 164.1 nor Probate Code Section 201.5 is the non-acquiring spouse given testamentary power over quasi-community property.

Why should a new category of property, called "quasi-

community" property, be established? Under California law the property with which this recommendation is concerned is not, of course, either separate property nor community property. It is not separate property within the meaning of Sections 162 and 163 of the Civil Code because it includes property acquired during marriage other than by gift, bequest, devise or descent. It is not community property within the meaning of Section 164 of the Civil Code (apart from the 1917 amendment) because the courts of this State have held that Section 164 does not apply to property acquired by married persons while domiciled outside of this State. Yet from time to time our courts are faced with the question whether this kind of property should be treated as separate property or as community property within the meaning of various statutes in which those terms are used. In such cases the question has usually been resolved by treating the property as separate property simply because it is not community property. Many such decisions have been based on superficial analysis and have failed to consider carefully whether the purpose of the statute involved would have been better effectuated by treating the property as community property. The Law Revision Commission believes that adequate analysis of legal problems involving property brought here by married persons is impossible unless it is recognized that such property is different from both separate and community property. The Commission has concluded that such recognition will be best achieved by giving such property an independent status and a distinctive name. Having concluded that property of this character should be treated for many purposes substantially like community property during the lifetime of the acquiring spouse, the Commission recommends

that it be defined as "quasi-community property."

2. A technical amendment should be made to Section 161 of the Civil Code authorizing a husband and wife to hold property as quasi-community property.

3. Section 164 of the Civil Code, which defines community property, should be amended in three respects:

(a) The 1917 amendment should be repealed.

(b) Section 164 should define as community property only real property situated in this State and personal property wherever situated which is acquired during marriage by persons domiciled in this State. The Commission does not believe that California can properly assert the right to determine the nature of marital property interests acquired in real property located outside of this State. Nor does the Commission believe that California should undertake to give a married person a community property interest in property acquired by his spouse unless the acquiring spouse is domiciled in California at the time of acquisition, even if the property in question is real property situated in this State. California does not, in the opinion of the Commission, have sufficient interest in the marital property rights of nondomicilaries to justify the application of its community property system to them as against the marital property system of the state or country in which they live. Rather, our courts should continue to apply in such cases California's long-standing

policy of giving the nonacquiring spouse the same marital property interest in property acquired here as he or she had in the consideration paid for the property.

(c) The provisions of Section 164 relating to presumptions and to the period of limitations on actions to establish that real property acquired by a married woman is community property should be transferred to a new Section 164.3 of the Civil Code. This will not only simplify Section 164 but will also give the provisions relating to presumptions an independent status, thus making them applicable in all cases, not merely in those cases in which the property was acquired by a married person while domiciled in this State.

4. New Sections 172c and 172d of the Civil Code should be enacted to subject the spouse who originally acquired quasi-community property to the same limitations with respect to inter vivos transfers of such property as are applicable to the husband in respect of community property. In its deliberations on this matter the Commission considered whether the husband should be given the same powers of management and control with respect to all quasi-community property, including that originally acquired by the wife, as he enjoys with respect to all community property. To have so provided would, of course, have made quasi-community property more like community property than is the case under proposed Sections 172c and 172d. However, to have given the husband management and control of property originally acquired by the

wife would have involved a more direct clash with Estate of Thornton than will be precipitated by Sections 172c and 172d (see discussion of their constitutionality infra), does not seem to be necessary to provide adequate protection of the husband's marital property rights, and is a more substantial interference with the inter vivos rights of the wife in such property than the Commission believes would be justifiable.

It will be noted that proposed Sections 172c and 172d go considerably further by way of limiting the power of the acquiring spouse to make an effective inter vivos transfer of quasi-community property than does Probate Code Section 201.8 which was enacted upon the recommendation of the Commission in 1957. Probate Code Section 201.8 is, therefore, repealed by the legislation proposed by the Commission.

5. Sections 1238 and 1265 of the Civil Code should be amended to treat quasi-community property like community property insofar as declared homesteads are concerned. Since in the eyes of a community property state quasi-community property is regarded as having been accumulated through the joint efforts of the spouses it is logical to treat it for purposes of creating a homestead like other property held by them in one form or another of common ownership rather than like separate property. The 1957 legislation recommended by the Commission similarly revised Section 661 of the Probate Code which governs the creation of probate homesteads.

6. Section 146 of the Civil Code should be amended to authorize a divorce court to treat quasi-community property like community property for purposes of division or divorce. Here again the property in question, having been acquired during marriage, is more like community property

than separate property in the eyes of a community property state.

7. A new Section 201.4 of the Probate Code should be enacted to provide formally for the termination of the community property interest of the nonacquiring spouse upon his death prior to that of the spouse who acquired the property. No such provision has been necessary heretofore inasmuch as the nonacquiring spouse has no interest in quasi-community property during his lifetime if he predeceases the acquiring spouse (save some minimal interest may be throught to exist by virtue of the fact that Probate Code Section 201.8 inhibits the power of the acquiring spouse to make "will substitute" inter vivos transfers of such property). The effect of the new legislation herein proposed is to give the non-acquiring spouse a substantial "bundle of rights" in such property. It seems necessary or at least desirable to provide by statute for the termination of such rights upon his death. Probate Code Section 201.4 does this by restoring the property to its status as the separate property of the acquiring spouse.

8. Section 201.5 of the Probate Code should be amended to limit it in terms to the disposition of quasi-community property upon the death of the spouse who originally acquired it. Neither this amendment nor the substitution of the term "quasi-community property" for the lengthier provision heretofore necessary to define the scope of Section 201.5 is intended to make any substantive change therein.

9. Section 201.6 of the Probate Code should be amended to exclude quasi-community property therefrom. Thus, Section 201.5 rather than Section 201.6 will be applicable in such a situation as the following: H acquires property during marriage while domiciled in New

York; he and his wife then become domiciled in California and H acquires real property here with the funds brought from New York; H then leaves his wife and becomes domiciled in Florida but the wife remains domiciled in California; H dies leaving a will purporting to give the real property to his son A. Since the wife remained domiciled here California continues to have a substantial interest in treating the property as quasi-community property rather than relegating the wife to such right to claim against H's will as she would have under the law of Florida.

10. Probate Code Section 228 should be amended to make it applicable to quasi-community property of the decedent and a previously deceased spouse originally acquired by the previously deceased spouse. Here again the property in question, having been acquired during marriage, is in the eyes of a community property state more analogous to community property, to which Probate Code Section 228 is applicable, than it is to separate property which is governed in this respect by Probate Code Section 229. The Commission recommends, however, that neither Section 228 nor Section 229 be made applicable when the nonacquiring spouse predeceases the spouse who acquired the property. In this situation the later-dying spouse originally acquired the property as his then "separate" property and the Commission does not believe that the collateral heirs of the nonacquiring spouse should be given any rights in it. To put the matter another way, the basic purpose of the legislation herein proposed and that enacted in 1957 is to give the nonacquiring spouse most of the benefits of California's community property system. This purpose does not require that the relatives of the nonacquiring

spouse also be given the benefits of that system .

11. Sections 15301 and 15302 of the Revenue and Taxation Code should be amended to treat quasi-community like community property for purposes of the California gift tax. Since in the eyes of a community property state the nonacquiring spouse is regarded as having contributed substantially to the acquisition of such property, the same reasons which justify exemption of one-half of the property from tax in the case of a gift of community property by one spouse to the other would appear to be applicable to a similar gift of quasi-community property. Analogous reasoning justifies treating a gift of quasi-community property to a person other than either of the spouses as being made one-half by each spouse.

12. A new Section 15303.5 should be added to the Revenue and Taxation Code to exempt from the gift tax a transfer of quasi-community property into community property. The effect of the several recommendations made herein is to treat quasi-community property substantially like community property. This being so, the change made in the "bundle of rights" of either spouse by the conversion of the property into true community property would appear too insignificant to justify a gift tax.

13. Section 13555 of the Revenue and Taxation Code, which provides for the imposition of the inheritance tax on transfers of quasi-community property upon the death of the acquiring spouse, should be amended to make it inapplicable upon the death of the nonacquiring spouse. This reflects the distinction taken by Sections 201.4 and 201.5 of the Probate Code with respect to the effect of the death of the

nonacquiring spouse and of the acquiring spouse, respectively, on quasi-community property. Where the nonacquiring spouse dies first the property simply reverts to its original status as separate property by virtue of Section 201.4. This termination by death of the "bundle of rights" of the nonacquiring spouse does not appear to the Commission to be a substantial enough enhancement of the property rights of the surviving acquiring spouse to warrant the imposition of the inheritance tax.

14. Section 13554.5 of the Revenue and Taxation Code, which provides for the imposition of the inheritance tax on certain inter vivos transfers, should be amended insofar as it applies to quasi-community property to conform to the proposed revision of Section 13555 - that is, to exempt from the tax transfers made to the spouse who originally acquired the property by the other spouse.

Constitutionality of Proposed Legislation

The Law Revision Commission recognizes, of course, that doubt may be expressed by some as to whether the legislation which it proposes is constitutional in light of Estate of Thornton. This question can only be answered, the Commission believes, by analyzing separately each of the statutes which it recommends to determine whether the application of that statute to property acquired by a married person while domiciled elsewhere and brought to California when he moves here would be held invalid by the courts of this State or of the United States.

It seems too clear for argument that no substantial due process question would be presented by the enactment of proposed Civil Code

Section 164.3, Probate Code Section 201.4 or Revenue and Taxation Code Section 15303.5, by the proposed amendment of Civil Code Sections 161 and 164, Probate Code Sections 201.5, 201.6 and 228 or Revenue and Taxation Code Sections 13555, 13552.5, 13554.5, 15301 and 15302 or by the repeal of Probate Code Section 201.8. In none of these cases would a substantial disturbance of "vested rights" be involved. Nor, does the Commission believe, is it likely that any or all of these statutes would be held to violate the principle of equal protection of laws insofar as they treat quasi-community property differently than separate property or community property for specific purposes. The fact that quasi-community property is acquired during marriage by one domiciled outside this State and that the owner subsequently becomes domiciled in California differentiates such property from either separate property or community property and thus provides a rational basis for the classifications made in the statutes recommended by the Commission.

Little if any more substantial constitutional questions would apeear to be raised by the proposed amendment of Civil Code Sections 146, 1238 and 1265. While California does not presently divide separate property upon divorce other states do so and no one appears to have questioned the constitutionality of such state action. Similarly, while California has historically distinguished between community property and separate property insofar as the devolution upon death of declared homesteads is concerned, no reason appears why the State could not, consistently with due process, abolish this distinction and treat all types of property the same for this purpose. Treating quasi-community property like community property is merely a step in this direction. And

here, again, there would appear to be sufficient factual differences between separate property and quasi-community property to warrant the distinctions taken between them in the legislation proposed by the Commission insofar as the principle of equal protection of the laws is concerned.

There remains the question of the constitutionality of proposed new Sections 164.1, 172c and 172d of the Civil Code. These sections, taken together, establish the most substantial restrictions upon the ownership of quasi-community property during the lifetime of the acquiring spouse. Perhaps they would have been regarded as unconstitutional by the court which decided Estate of Thornton. But Estate of Thornton is the only case of which the Commission is aware on the point which it decided. The Commission and its research consultant have found no decision of the United States Supreme Court or of the courts of any other State which holds that a State may not constitutionally apply its marital property law to property brought to that State by a married person who deliberately chooses to become domiciled there. Moreover, it seems reasonably clear that the due process and equal protection clauses of the State and Federal Constitutions have considerably more restricted scope today, insofar as the invalidation of economic legislation is concerned, than they were thought to have in 1933 when Estate of Thornton was decided. The Law Revision Commission believes, therefore, that proposed Sections 164.1, 172c and 172d would not be unconstitutional if enacted. This seems particularly clear with respect to the application of these sections to cases in which property brought to this State by married persons is used to acquire property here at a time when the owner

is domiciled here. At most, the Commission believes, the constitutionality of proposed Sections 164.1, 172c and 172d of the Civil Code presents a close question which the Legislature would be perfectly justified in leaving to the courts to decide if and when the occasion arises.

(38)

8/18/59

Proposed Legislative Bill Relating to Inter Vivos Rights in Quasi-Community Property Tentatively Approved by Law Revision Commission at July 1959 Meeting

An act to add Sections 164.1, 164.3, 172c and 172d to the Civil Code, to amend Sections 146, 161, 164, 1238 and 1265 of said code, to add Section 201.4 to the Probate Code, to amend Sections 201.5, 201.6 and 228 of said code, to repeal Section 201.8 of said code, to add Section 15303.5 to the Revenue and Taxation Code and to amend Sections 13552.5, 13554.5, 13555, 15301 and 15302 of said 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 161 of the Civil Code is amended to read:

161. ~~May be joint tenants, etc.~~ A husband and wife may hold property as joint tenants, tenants in common, or as community property or quasi-community property.

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

164. All other real property situated in this State and all personal property wherever situated acquired ~~after~~ during 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.~~

As used in this section real property includes leasehold interests in real property.

SEC. 3. Section 164.1 is added to the Civil Code, to read:

164.1. All real property situated in this State and all personal property wherever situated heretofore or hereafter (a) acquired during marriage by either husband or wife or both while domiciled outside of this State which would have been the community property of the person acquiring it and his spouse had such person been domiciled in this State at the time of its acquisition or (b) acquired in exchange for real or personal property wherever situated and so acquired becomes quasi-community property when, during such marriage, both spouses become domiciled in this State and, subject to the provisions of Probate Code Sections 201.4

and 201.5, remains quasi-community property so long as either spouse remains domiciled in this State.

In determining the domicile of a wife under this section the court shall not apply a rule of law or presumption that the domicile of a wife is that of her husband.

As used in this section real property includes leasehold interests in real property.

SEC. 4. Section 164.3 is added to the Civil Code to read:

164.3. Whenever any real or personal property or any interest therein or encumbrance thereon is acquired by a married woman by an instrument in writing, there is a presumption that the same is her separate property. If such property is acquired by a married woman and any other person by an instrument in writing, there is a presumption that she takes the part acquired by her as a tenant in common, unless a different intention is expressed in the instrument; provided, that when any such property is acquired by husband and wife by an instrument in which they are described as husband and wife, there is a presumption that such property is the community property of the husband and wife, unless a different intention is expressed in the instrument.

The presumptions mentioned in this section 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 the acquisition of the property; in all other cases the presumptions are disputable.

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

SEC. 5. Section 172c is added to the Civil Code, to read:

172c. The spouse who originally acquired quasi-community personal property 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 furniture, furnishings, or fittings of the home, or clothing or wearing apparel of the other spouse or the minor children.

SEC. 6. Section 172d is added to the Civil Code, to read:

172d. The spouse who originally acquired quasi-community real property has the management and control of

such property, but the other spouse, either personally or by duly authorized agent, must join with the acquiring spouse 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 the husband 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 either spouse alone, executed by him 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 either spouse alone, which was executed by him alone and filed for record prior to the time this section 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. 7. 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, the quasi-community property 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. 8. 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, the quasi-community property 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 to 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. 9. 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 the quasi-community property 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 the quasi-community property 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 the quasi-community property shall be equally divided between the parties.

Three. If a homestead has been selected from the community property or the quasi-community property, 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 purpose of this section, the court may order a partition or sale of the property and a division or other disposition of the proceeds.

SEC. 10. Section 201.4 is added to the Probate Code to read:

201.4. Upon the death of any married person the surviving spouse holds any quasi-community property originally acquired by such surviving spouse free of any quasi-community property interest which the decedent had therein at the time of his death and such property becomes the separate property of the surviving spouse.

SEC. 11. Section 201.5 of the Probate Code is amended to read:

201.5. Upon the death of any married person ~~domiciled in this State~~ one-half of ~~the following property in his estate~~ any quasi-community property originally acquired by the decedent shall belong to the surviving spouse and the other one-half of such property is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse~~: all personal property wherever situated and all real property situated in this State heretofore or hereafter (a) acquired by the decedent while domiciled elsewhere which would have been the community property of decedent and the surviving spouse had the decedent been domiciled in this State at the time of its acquisition or (b) acquired in exchange for real or personal property wherever situated and so acquired.~~ All such property is subject to the debts of the decedent and to administration and disposal under the provisions of Division 3 of this code. ~~As used in this section personal property does not include and real property does include leasehold interests in real property.~~

SEC. 12. Section 201.6 of the Probate Code is amended to read:

201.6. Upon the death of any married person not domiciled in this State who leaves a valid will disposing of real property in this State which is not the community

property or the quasi-community property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in such property against the will of the decedent as though the property were situated in decedent's domicile at death. As used in this section real property includes leasehold interests in real property.

SEC. 13. Section 228 of the Probate Code is amended to read:

228. If the decedent leaves neither spouse nor issue, and the estate, or any portion thereof was community property of the decedent and a previously deceased spouse, or was quasi-community property of the decedent and a previously deceased spouse originally acquired by such previously deceased spouse, and belonged or went to the decedent by virtue of its community or quasi-community character on the death of such spouse, or came to the decedent from said spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead, or in a joint tenancy between such spouse and the decedent or was set aside as a probate homestead, such property goes in equal shares to the children of the deceased spouse and their descendants by right of representation, and if none, then one-half of such community or quasi-community property goes

to the parents of the decedent in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and their descendants by right of representation and the other half goes to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of said deceased spouse and to their descendants by right of representation.

SEC. 14. Section 201.8 of the Probate Code is hereby repealed.

SEC. 15. Section 15301 of the Revenue and Taxation Code is amended to read:

15301. In a case of a transfer to either spouse by the other of community property or quasi-community property ~~to either spouse~~ one-half of the property transferred is not subject to this part.

SEC. 16. Section 15302 of the Revenue and Taxation Code is amended to read:

15302. If any community property or quasi-community property 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. 17. Section 15303.5 is added to the Revenue and Taxation Code, to read:

15303.5. This part does not apply to quasi-community property which is transferred into community property.

SEC. 18. Section 13555 of the Revenue and Taxation Code is amended to read:

13555. Upon the death of any married person:

(a) No property to which Section 201.4 of the Probate Code is applicable is subject to this part.

~~(a)~~ (b) At least one-half of any property ~~in the decedent's estate~~ to which Section 201.5 of the Probate Code is applicable~~, except property restored to the estate under Section 201.8 of the Probate Code,~~ is subject to this part.

~~(b)~~ (c) The one-half of any property which, under Section 201.5 of the Probate Code, belongs to the surviving spouse whether or not the decedent attempted to dispose of it otherwise by will~~, and all of any property restored to the decedent's estate under Section 201.8 of the Probate Code are~~ is not subject to this part.

~~(c)~~ (d) All of any property in the decedent's estate to which Section 201.5 of the Probate Code is applicable passing to anyone other than the surviving spouse is subject to this part.

SEC. 19. Section 13552.5 of the Revenue and Taxation Code is amended to read:

13552.5. Whenever a married person dies having provided by will for his surviving spouse and having also made a testamentary disposition of any property to which Section 201.5 of the Probate Code is applicable ~~or having made an inter vivos transfer to which Section 201.8 of the Probate Code is applicable,~~ and the surviving spouse is required to elect whether to share in the estate under the will or to take a share of the decedent's property under Section 201.5 of the Probate Code, and the spouse elects to take under the will, the property thus taken up to a value not exceeding one-half of the value of any property to which Section 201.5 of the Probate Code is applicable ~~and the full value of any property which the surviving spouse might have required to be restored to the decedent's estate under Section 201.8 of the Probate Code~~ is not subject to this part.

SEC. 20. Section 13554.5 of the Revenue and Taxation Code is amended to read:

13554.5. Where quasi-community property ~~to which Section 201.5 of the Probate Code is or would have been applicable~~ is transferred ~~from one spouse to the other~~ by the spouse who originally acquired the property to the other spouse within the provisions of Chapter 4 of this part other

than by will or the laws of succession, the property transferred is subject to this part up to a value not exceeding one-half of the clear market value thereof.

Where quasi-community property is transferred to the spouse who originally acquired the property by the other spouse within the provisions of Chapter 4 of this part other than by will or the laws of succession, the property transferred is not subject to this part.