Distributed May 4, 1960

Memorandum No. 46 (1960)

Subject: Study No. 38 - Inter Vivos Rights.

This memorandum presents various policy matters to the Commission for decision.

Policy Questions Presented by Attached Draft

Attached as Appendix I is a draft of a bill designed to carry out the recommendations of the consultant. The draft includes the substance of the revisions made by the Commission at its April 1960 meeting. The draft presents the following policy decisions for approval or rejection by the Commission.

(1) Section 164 of the Civil Code is amended to delete the portion of that section held unconstitutional in Estate of Thornton and to substitute language specifically indicating what is required as far as domicile is concerned in order that property be community property.

Our consultant had recommended that the unconstitutional portion be deleted but that no attempt be made to state the extent of domicile required to make property community property. He took this position because of his concern that revision of Section 164 might be interpreted as a legislative attempt to make the "tracing principle" no longer applicable. Our recommendation could state that our revision is not

intended to have this effect.

(2) Amendments to existing law are made and a new section created so that the declaration of a homestead in quasi-community property will have the same effect as the declaration of a homestead in community property. See new Section 1237.5 added to Civil Code, Sections 1238 and 1265 of Civil Code and Sections 661 and 663 of the Probate Code (Sections 2 through 6 of attached bill). An alternative form of new Section 1237.5 is contained in Appendix II, attached.

(3) Amendments are made to Sections 146, 148 and 149 of the Civil Code to authorize the court in the case of a divorce for any cause to divide quasi-community property in such manner as the court deems just. This treats quasi-community property differently than community property. This bill will not require the court, for example, to give half of the wife's separate quasi-community property to the husband when a wife obtains a divorce from the husband on the grounds of desertion. If the property were treated the same as community property, the husband would be entitled to one-half of the property in such case. See Sections 7, 8 and 9 of attached bill.

(4) Sections 15301 and 15302 of the Revenue and Taxation Code are amended and Section 15303.5 is added to the Revenue and Taxation Code so that a gift of quasi-community property is treated as a gift of one-half by each spouse at the election of both of the spouses and, with this modification, quasi-community property is treated as community property for the purposes of the gift tax.

(5) No change is made in existing law as far as the right to management and control of quasi-community property is concerned.

(6) No change is made in the existing law as far as the rights of creditors in quasi-community property are concerned.

(7) No change is made in the existing law as far as inter vivos gifts of quasi-community property are concerned.

(8) No change is made in the existing law as far as inter vivos transfers for value of quasi-community property are concerned.

Inter vivos Transfers.

Under Section 201.5 of the Probate Code a spouse is given a nonbarrable interest in the quasi-community property owned by the other spouse at the time of death. However, this nonbarrable interest is cut off by an inter vivos transfer for value or by an inter vivos gift unless the gift is in effect a will substitute. The pertinent statutory provision is Section 201.8 of the Probate Code, adopted in 1957 upon recommendation of the Commission. In recommending the enactment of Section 201.8 of the Probate Code, which does not require consent to all transfers but only to gifts which are in effect will substitutes, the Commission stated that it was attempting to "balance

two competing considerations: (1) a desire to preserve to the surviving spouse the benefits intended to be conferred by Section 201.5; and (2) a desire to avoid undue interference with the owner's control during his lifetime of Section 201.5 property which is, until his death, his sole property."

Two of the policy questions are:

(1) If the acquiring spouse dies domiciled in this State, should the joinder of the nonacquiring spouse be required for all inter vivos gifts of Section 201.5 property, not just for gifts that are in effect will substitutes?

(2) If the acquiring spouse dies domiciled in this State, should the joinder of the nonacquiring spouse be required for an inter vivos transfer of Section 201.5 real property for value?

If the above two questions are answered in the affirmative, the amendments to Section 201.8 of the Probate Code (attached as Appendix III) will serve as a starting point for discussion.

If joinder is required for an inter vivos transfer of 201.5 property, technical adjustments will need to be made to Sections 1435.1 to 1435.17 of the Probate Code. These sections relate to the procedure for obtaining joinder for a transfer of a homestead or community property where one or both spouses are incompetent.

Note that under Section 201.8 of the Probate Code, set out in Appendix III, the section provides protection against inter vivos transfers of Section 201.5 property only if the decedent dies domiciled in California. No protection is provided if the decedent dies not domiciled in California. California could constitutionally provide protection against inter vivos transfers of Section 201.5 real property located in California even though the decendent did not die domiciled in California. Protection is already provided under Probate Code Section 201.6 if the decedent dies not domiciled in California but owning real property in California. Section 201.6 provides:

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 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 the decedent's domicile at death. As used in this section real property includes leasehold interests in real property.

Note that the protection provided by Section 201.6 is limited to the case where the decedent has not made an inter vivos transfer of the property. If he has made an inter vivos transfer of the property, neither Section 201.6 nor Section 201.8, as amended, will provide protection where the decedent dies not domiciled in California.

The basic policy decision is:

Is protection to be provided against cutting off the right of restoration under Section 201.8 where the decedent dies not domiciled in California but has transferred real property in California in which the surviving spouse had an expectancy under Section 201.5?

If this question is answered in the affirmative:

(1) To what extent is protection to be given if the decedent does not leave a valid will which makes provision for the surviving spouse?

(2) To what extent is protection to be given if the decedent leaves a valid will which makes provision for the surviving spouse?

Respectfully submitted,

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Executive Secretary

APPENDIX I

An act to add Section 1237.5 to Chapter 1, Title 5, Part 4, Division 2 of the Civil Code, to amend Sections 146, 148, 149, 164, 1238 and 1265 of said code, to amend Sections 661 and 663 of the Probate Code, to add Section 15303.5 to the Revenue and Taxation Code and to amend Sections 15301 and 15302 of said code, all relating to property acquired by married persons.

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

SECTION 1. Section 164 of the Civil Code is amended to read:

164. All other real property situated in this State and all other personal property wherever situated acquired [~~after~~] during marriage by [~~either husband or wife, or both,~~] a married person [~~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 husband and wife 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. 2. Section 1237.5 is added to Chapter 1, Title 5, Part 4, Division 2 of the Civil Code, to read:

1237.5. As used in this title:

(1) "Property" includes any freehold title, interest or estate in real property which vests in the claimant the immediate right of possession, even though such a right of possession is not exclusive.

(2) "Quasi-community property" means property situated in this State heretofore or hereafter (a) acquired by either spouse while domiciled elsewhere which would have been community property of the husband and wife had the spouse acquiring the property 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.

(3) "Separate property" does not include quasi-community property.

SEC. 3. Section 1238 of the Civil Code is amended to read:

1238. If the claimant be married, the homestead may be selected:

1. From the community property [,] ; or

2. From the quasi-community property; or

3. From the separate property of the husband; or [,]

4. Subject to the provisions of Section 1239, from (a) the property

held by the spouses as tenants in common or in joint tenancy or [~~from~~] (b) 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. 4. 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 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. 5. Section 661 of the Probate Code is amended to read:

661. If no homestead has been selected, designated and recorded, or in case the homestead was selected by the survivor out of the separate property as defined in Section 1237.5 of the Civil Code of the decedent, the decedent not having joined therein, the court, in the manner hereinafter provided, must select, designate and set apart and cause to be recorded a homestead for the use of the surviving spouse and the minor children, or, if there be no surviving spouse, then for the use of the minor child or children, out of the community property or property to which Section 201.5 of this code is applicable or out of real property owned in common by the decedent and the person or persons entitled to have the homestead set apart, or if there be no community property or property to which Section 201.5 of this code is applicable and no such property owned in common, then out of the separate property of the decedent. If the property set apart is the separate property of the decedent, other than property to which Section 201.5 of this code is applicable, the court can set it apart only for a limited period, to be designated in the order, and in no case beyond the lifetime of the surviving spouse, or, as to a child, beyond its minority; and, subject to such homestead right, the property remains subject to administration.

SEC. 6. Section 663 of the Probate Code is amended to read:

663. If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, other than a married person's separate homestead, was selected from the community property or quasi-community property, or from the separate property of the person selecting or joining in the selection of the same, 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 homestead vests, on the death of either spouse, absolutely in the survivor.

If the homestead was selected from the separate property of the decedent without his consent, or if the surviving spouse has conveyed the homestead to the other spouse by a conveyance which failed to expressly reserve homestead rights as provided by Section 1242 of the Civil Code, the homestead vests, on death, in his heirs or devisees, subject to the power of the court to set it apart for a limited period to the family of the decedent as hereinabove provided. In either case the homestead is not subject to the payment of any debt or liability existing against the spouses or either of them, at the time of the death of either, except as provided in the Civil Code.

For the purposes of this section, the terms "quasi-community property" and "separate property" have the meanings given those terms in Section 1237.5 of the Civil Code.

SEC. 7. 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 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 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.

Five. 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.

As used in this section:

(1) "Quasi-community property" means all personal property wherever situated and all real property situated in this State heretofore or hereafter (a) acquired by either spouse while domiciled elsewhere which would have been community property of the husband and wife had the spouse acquiring the property 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. As used in this paragraph, personal property does not include and real property does include leasehold interests in real property.

(2) "Separate property" does not include quasi-community property.

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. 8. Section 148 of the Civil Code is amended to read:

148. The disposition of the community property, of the quasi-community

property described in Section 146 and of the homestead, as above provided, is subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the Court.

SEC. 9. Section 149 of the Civil Code is amended to read:

149. When service of summons is made pursuant to the provisions of Sections 412 and 413 of the Code of Civil Procedure upon a spouse sued under the provisions of this chapter, the court, without the aid of attachment thereof or the appointment of a receiver, shall have and may exercise the same jurisdiction over:

(a) The community real property of the spouse so served situated in this State as it has or may exercise over the community real property of a spouse sued under the provisions of this chapter and personally served with process within this State.

(b) The quasi-community real property of the spouse so served situated in this State as it has or may exercise over the quasi-community real property of a spouse sued under the provisions of this chapter and personally served with process within this State. As used in this section "quasi-community real property" means real property that is quasi-community property described in Section 146.

SEC. 10. 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.

As used in this section, "quasi-community property" means all personal property wherever situated and all real property situated in this State heretofore or hereafter (a) acquired by either spouse while domiciled elsewhere which would have been the community property of the husband and wife had the spouse acquiring the property 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. As used in this paragraph, personal property does not include and real property does include leasehold interests in real property.

SEC. 11. Section 15302 of the Revenue and Taxation Code is amended to read:

15302. If any 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.

If any quasi-community property as defined in Section 15301 of this code is transferred to a person other than one of the spouses, all of the property transferred is subject to this part, and:

(a) The spouse owning the property is the donor; or

(b) At the election of both of the spouses, each spouse shall be considered to be a donor of one-half.

SEC. 12. Section 15303.5 is added to the Revenue and Taxation Code, to read:

15303.5. This part does not apply to quasi-community property as defined in Section 15301 of this code which is transferred into community property.

APPENDIX II

At the April 1960 meeting of the Commission, the staff was directed to attempt to improve the drafting of the definition of "quasi-community property" in subsection (2) of Section 1237.5 of the Civil Code, created by Section 2 of the proposed draft. It was pointed out that the language of this definition conforms to Section 201.5 of the Probate Code which was drafted by the Commission and that any revision of the definition of quasi-community property here would require a corresponding revision of other sections of the proposed draft and also a conforming revision in Section 201.5 of the Probate Code.

The following is a possible revision of the definition of quasi-community property:

(2) "Quasi-community property" means property situated in this State heretofore or hereafter acquired:

(a) By either spouse while domiciled elsewhere which would have been community property of the husband and wife had the spouse acquiring the property been domiciled in this State at the time of its acquisition; or

(b) In exchange for real or personal property, wherever situated, acquired by either spouse while domiciled elsewhere which would have been community property of the husband and wife had the spouse acquiring the property been domiciled in this State at the time of its acquisition.

APPENDIX III

Revision of Section 201.8 of the Probate Code.

SEC.____. Section 201.8 of the Probate Code is amended to read:

201.8. (1) Subject to subsection (3) of this section, 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 personal 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 not joining in 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~~].

(2) Subject to subsections (3), (4) and (5) of this section, whenever any married person dies domiciled in this State who has made a transfer to a person other than the surviving spouse of real property in this State in

which the surviving spouse had an expectancy under Section 201.5 of this code at the time of such transfer, the surviving spouse not joining in 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.

(3) If the decedent has provided for the surviving spouse by will, [~~however,~~] the surviving spouse cannot require [~~such~~] restoration under subsection (1) or (2) of this section unless the surviving 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.

(4) The surviving spouse cannot require restoration under subsection (2) of this section if the transfer was made to a transferee who acted in good faith without knowledge of the marriage relation.

(5) Restoration cannot be required under subsection (2) of this section unless the surviving spouse, before the expiration of one year from the filing for record of the instrument effecting the transfer in the recorder's office in the county in which the land is situate, files for record a notice of her expectancy under Section 201.5 of this code in the property transferred in the recorder's office in the county in which the land is situate.

(6) All property restored to the decedent's estate [~~hereunder~~] under this section shall go to the surviving spouse pursuant to Section 201.5 of this code as though such transfer had not been made.