8/15/60

Memorandum No. 65 (1960)

Subject: Study No. 38 - Inter vivos Rights.

Attached is a draft of the recommendation and proposed statute relating to inter vivos rights. The statute includes the changes made by the Commission at its July 1960 meeting. The recommendation has been substantially revised to include a discussion of the constitutionality of the Commission's recommendations.

Even if we send this recommendation to the State Bar following our August meeting, we will not receive the views of the State Bar prior to the time we must print our pamphlet for this recommendation and study. It would be desirable to send the recommendation to the State Bar as soon as possible, however, since we will need to have the views of the State Bar prior to the convening of the 1961 legislative session.

Respectfully submitted,

John H. DeMoully
Executive Secretary

(38)

August 15, 1960

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford, California

T E N T A T I V E

RECOMMENDATION AND PROPOSED LEGISLATION

Relating to

INTER VIVOS MARITAL PROPERTY RIGHTS IN PROPERTY ACQUIRED WHILE DOMICILED ELSEWHERE

NOTE: This is a tentative recommendation and proposed statute prepared by the California Law Revision Commission. It is not a final recommendation and the Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature. This material is being distributed at this time for the purpose of obtaining suggestions and comments from the recipients and is not to be used for any other purpose.

LETTER OF TRANSMITTAL

In 1957 the California Law Revision Commission made a number of recommendations relating to the rights of a surviving spouse in property acquired by a decedent during marriage while domiciled elsewhere. The bill which embodied these recommendations was enacted as law, becoming Chapter 490 of the Statutes of 1957. At the same legislative session the Commission was authorized to make a study as to whether the law relating to inter vivos rights of one spouse in property acquired by the other spouse during marriage while domiciled outside California should be revised (Resolution Chapter 202 of the Statutes of 1957). The Commission herewith submits its recommendation relating to this subject and the study prepared by its research consultant, Mr. Harold Marsh, Jr. of the School of Law, University of California at Los Angeles.

(38)

T E N T A T I V E

RECOMMENDATION OF THE 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 personal property which was acquired during the marriage while they were domiciled elsewhere and which would have been community property had they been domiciled here when it was acquired. This property is in some cases retained in the form in which it is brought to this State; in other cases 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 the 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 the property for which it is exchanged, both during the lifetime of the acquiring spouse and upon his death.

The first legislation enacted 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 treat such property as 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,[1] decided in 1934, the California Supreme Court held the 1917 amendment unconstitutional under the due process and privileges and immunities clauses of the Fourteenth Amendment to the United States Constitution on the ground that a spouse's ownership of property acquired while domiciled elsewhere cannot be substantially modified during his lifetime merely because he moves to California and brings 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 1957 which, in effect, treats property acquired other than by gift, devise, bequest or descent by a married person while domiciled elsewhere substantially like community property upon his death.[2] However, such property heretofore has been 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. This study and recommendation is concerned with whether and to what extent such property should no longer be treated as separate property during the owner's lifetime.

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[1] 1 Cal.2d 1, 33 P.2d 1 (1934).

[2] There is believed to be no valid constitutional objection to this legislation in its present form in view of the plenary power of the state over a decedent's property. See Recommendation and Study relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere, 1 Cal. Law Revision Comm'n Rep., Rec. & Studies E-1 et seq. (1956).

Recommendation

The Law Revision Commission believes that property acquired by a married person while domiciled in a noncommunity property state should continue to be treated as his separate property during his lifetime for most purposes. This probably conforms to the owner's expectation and in most cases little, if any, useful purpose would be served by treating the property differently. Furthermore, any general attempt to convert such property into community property not only might be thought to raise constitutional issues in view of Estate of Thornton but would also create practical difficulties.

The Commission has concluded, however, that there are certain specific purposes for which property acquired during marriage other than by gift, devise, bequest or descent by a married person while domiciled elsewhere should no longer be treated as that person's separate property during his lifetime. The three most important of these are:

(1) Treatment of the property in case of divorce or separate maintenance;

(2) Declaration of a homestead during the lifetime of the spouse who acquired the property; and

(3) Treatment of the property for gift tax purposes.

The Commission recommends that special statutory provisions be enacted to deal specifically with each of these situations. In addition, various other revisions of the law, indicated below, should be made. Accordingly, the Commission makes the following recommendations:

1. Identification as "Quasi-Community Property." The Commission recommends that property acquired other than by gift, devise, bequest or descent by a married person while domiciled elsewhere should be referred to as quasi-community property in the special statutory provisions that treat such property differently from other separate property.[3] To this end the recommended statute includes several definitions of quasi-community property, each carefully phrased to cover the particular situations to which it is applicable.

A major advantage of the quasi-community property label is that it makes it possible to draft statutes without repeating interminably the phrase "property acquired other than by gift, devise, bequest or descent by a married person while domiciled elsewhere." In addition, this designation calls attention to the fact that the property is being given a unique status for some purposes and suggests that for these purposes the property is more analogous to community property than to separate property.

2. Divorce or Separate Maintenance. Under existing law a court has no authority to divide separate property in divorce or separate maintenance cases. Hence, a court lacks authority to divide quasi-community property in such cases, for such property is separate property. The Civil Code should be amended to provide for the division of quasi-community property in the same manner as community property when a divorce or decree of separate maintenance is granted.

The underlying theory of the community property system is that

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[3]Of course, in situations not covered by the special statutes recommended herein such property will continue to be, and to be referred to as, separate property.

husband and wife are essentially a partnership insofar as the acquisition of property during marriage is concerned. Community property states take the view 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 and that both should, therefore, be regarded as having substantial rights of ownership in it.

The Commission believes that when property is acquired by married persons living elsewhere other than by gift, devise, bequest or descent California is justified in regarding such property as having been jointly acquired by them in the same sense as community property is jointly acquired by California spouses. Even though such property was technically conveyed or paid to only one spouse and even though he acquired "title" thereto under the law of his domicile at the time of its acquisition, the acquisition is as attributable to the contribution of both spouses to the joint marital enterprise upon which they were then engaged as in the case of community property. If this view be sound it follows that such property should be treated like community property for the purpose of division between the spouses when a decree of divorce or separate maintenance is granted.

The basic California theory of division of property on divorce is that each spouse retains his own property save when exceptional circumstances warrant taking property of one spouse and giving it to the other. Thus, each spouse retains his own separate property upon divorce in all cases. Similarly, the community property, being jointly acquired and owned, is divided evenly between the spouses. The only exception to this treatment of property on divorce occurs when a divorce

is granted on the ground of adultery, extreme cruelty or insanity, in which event the divorce court is authorized to divide the community property in such proportions as the court, from all the facts of the case and the condition of the parties, may deem just.

There is no reason why California should treat quasi-community property differently from community property on divorce or separate maintenance; the relationship of the spouses to it is far more analogous to their relationship to community property than to separate property. To take an example, suppose 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 period they have $100,000 worth of property which was accumulated out of the husband's earnings over the forty years involved. 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.

The question may be raised whether the husband would be unconstitutionally deprived of his property in such a case because under the law of New York his earnings during the first 20-year period were regarded as his separate property. The Commission believes that he would not be. The statutes of a large number of states have long granted to the divorce court the power to divide the separate property of the husband or wife or both between the spouses. These statutes have been applied for many years without any question being raised or suggested as to their constitutional validity insofar as the Commission is aware. Moreover, the recommended statute does not require that quasi-community property be divided in a discriminatory or unreasonable manner. All that the court is authorized to do is to assign

the quasi-community property of both spouses 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" if the divorce or separate maintenance is granted on the ground of adultery, incurable insanity or extreme cruelty and to divide it equally between them if divorce or separate maintenance is granted on any other ground. If this is a reasonable method for division of the community property, it would not seem to be unreasonable as applied to quasi-community property. That California would have a legitimate interest in applying its own law in such a case and would not be merely intermeddling in the concerns of other states would be assured by the fact that at least one spouse must be a resident of this state before a divorce action may be filed.

Similarly, in enforcing a decree, judgment or order rendered in an action for divorce or separate maintenance, the court should resort to the quasi-community property for the payment of temporary and permanent alimony, child support and counsel fees and costs before it resorts to the separate property of the party required to make such payments. To effectuate this recommendation, Sections 141, 142, 143 and 176 of the Civil Code are amended in the recommended statute.

3. Homestead. Quasi-community property should be treated like community property insofar as declared homesteads are concerned. Under existing law, quasi-community property is considered separate property for this purpose. Therefore, the wife, but not the husband, can declare a homestead in the quasi-community property of the other spouse without that spouse's consent; and, if such a declaration is made, the property goes on the husband's death to his heirs and devisees rather than to the surviving wife or children. In contrast, either spouse can declare a homestead upon community property whether or not the other spouse joins in the declaration and when such a declaration has been made the property goes on the death of either spouse to the surviving spouse or the children.

Quasi-community property should be treated like community property for the purpose of a declared homestead for the same reason as it should be treated like community property in the case of divorce or separate maintenance -- i.e., because both spouses have contributed to the acquisition both should have substantial rights with respect to such property. Quasi-community property already is treated substantially the same as community property for probate homestead purposes.

The principal effects of this recommendation are that upon the death of the acquiring spouse a quasi-community property homestead will vest in his surviving spouse or children rather than in his heirs or devisees and that a husband will be able to declare a homestead in the quasi-community property of his wife without her consent.

Where the right of one spouse to a declared homestead or probate homestead in community property or separate property otherwise exists, the fact that the other spouse is not domiciled in California or died not

domiciled here does not prevent the creation of the homestead. The same principle should apply in the case of quasi-community property. Accordingly, the Commission recommends (1) that a quasi-community property homestead created during the lifetime of the acquiring spouse be treated like a community property homestead, whether or not the spouse who originally acquired the homestead property is domiciled in California at the time of the declaration or thereafter and (2) that Section 661 of the Probate Code be amended to eliminate the present requirement that the decedent be domiciled here at the date of death.

To effectuate these recommendations, the recommended statute includes the following provisions:

(a) A new Section 1237.5 is added to the Civil Code and amendments are made to Sections 1238 and 1265 of the Civil Code to permit either spouse to declare a homestead in the quasi-community property of either spouse during the lifetime of the acquiring spouse and to treat such homestead the same as a homestead selected from community property.

(b) Section 661 of the Probate Code is amended to delete the references to Section 201.5 of the Probate Code; this will eliminate the present requirement that the decedent be domiciled here at the time of his death.

(c) A technical amendment is made to Section 663 of the Probate Code.

The Commission believes that no serious constitutional question would be precipitated by permitting the husband to declare a homestead in the quasi-community real property of his wife without her consent. It is true that one effect of the declaration of a homestead is that concurrence of both spouses is thereafter required to convey or encumber the homestead. But California now permits the wife to declare a homestead on the separate

property of her husband without his consent and to so restrict his right to convey or encumber his property. No case has been found where the constitutionality of this restraint on alienation has even been questioned. Furthermore, homestead statutes in other states permit the selection of a homestead from the separate property of one or both of the spouses. These statutes very often require the concurrence of both spouses to convey or encumber the homestead. Their constitutionality has been upheld, even where the homestead property was acquired before the passage of the homestead law.[4]

Nor does the Commission believe that any substantial constitutional question is raised by its recommendation that on the death of the acquiring spouse a homestead selected from quasi-community property goes to the surviving spouse or children rather than to the heirs or devisees of the acquiring spouse. It is well established that the State has virtually plenary power over the property of a decedent.

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[4] 26 Am. Jur. Homesteads, § 132. The leading case is Bushnell v. Loomis, 234 Mo. 371, 137 S.W. 257, 36 L.R.A. (NS) 1029 (1913). Two very early cases upheld the application of the 1851 Homestead Act to homesteads acquired before its enactment. Cook v. McChristian, 4 Cal. 23 (1854); Moss v. Warner, 10 Cal. 296 (1858). See also, Cohen v. Davis, 20 Cal. 187 (1862) and Gluckauf v. Bliven, 23 Cal. 312 (1863).

4. Gift Tax. New sections should be added to the Revenue and Taxation Code and other sections of that code should be amended to treat quasi-community property substantially like community property for purposes of the California gift tax. For inheritance tax purposes, quasi-community property is now treated substantially like community property. Accordingly, the recommended statute includes these provisions:

(a) A new Section 15300 is added to the Revenue and Taxation Code to define quasi-community property.

(b) Section 15301 of the Revenue and Taxation Code is amended to exclude one-half of the property from the gift tax in the case of a gift of quasi-community property by one spouse to the other. The same reasons that justify exclusion 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.

(c) Analogous reasoning justifies the enactment of new Section 15302.5 of the Revenue and Taxation Code giving the spouses the election to treat a gift of quasi-community property to a person other than either of the spouses as being made one-half by each spouse. Unless both spouses make such an election, however, the gift will continue to be considered as a gift made by the spouse who originally acquired the property. The Commission has provided for an election to treat the gift as being made one-half by each spouse because to treat it the same as a gift of community property would

require the nonacquiring spouse who had no control over the gift to pay one-half of the gift tax. In addition, in a case where the donee is a close relative of the spouse who originally acquired the property and is not a relative of the other spouse, the gift tax on the gift might be increased if the gift were required to be considered as being made one-half by each spouse.

(d) A new Section 15303.5 is added to the Revenue and Taxation Code to exclude from the gift tax a transfer of quasi-community property into community property. For inheritance tax purposes, quasi-community property is now treated substantially like community property upon the death of the acquiring spouse. Thus, under the present law if the acquiring spouse wishes to convert his quasi-community property into true community property during his lifetime, he must pay a gift tax; and, upon his death, his surviving wife pays the same inheritance tax she would have paid had no conversion been made. To avoid this, the Commission recommends that no gift tax be imposed when quasi-community property is converted into true community property. It is necessary, however, to enact one special provision to forestall an opportunity for tax evasion. Upon the death of the husband, one-half of any community property or quasi-community property which goes to the surviving wife is subject to the inheritance tax. Similarly, upon the death of the wife one-half of her quasi-community property which goes to the surviving husband is subject to the inheritance tax. However, all community

property in the wife's estate which goes to her surviving husband is excluded from the inheritance tax. Thus, in the absence of a special provision a tax on a transfer of quasi-community property from the wife to the husband could be avoided by transmuting it into community property during her lifetime. To prevent this the Commission recommends that upon the death of the wife one-half of any quasi-community property owned by the wife that was converted into community property be taxed under the gift tax law as a gift from the wife to her surviving husband at the time of her death.

The recommended changes in the gift tax law are favorable to the taxpayer and it is unlikely that any question concerning their constitutionality will ever be raised. In any case, the Commission is convinced that the recommended changes are constitutional.

5. Community Property Definition. Section 164 of the Civil Code, which defines community property, should be amended in two respects.

First, the 1917 amendment thereto which was held unconstitutional in Estate of Thornton should be eliminated inasmuch as the Commission has recommended above that property acquired by married persons while domiciled elsewhere be treated like community property during the lifetime of the acquiring spouse only for certain limited purposes.

Second, language should be added to Section 164 to limit the definition of community property which it expresses to

real property situated in this State and personal property wherever situated which is acquired during marriage by a married person while he or she is domiciled in this State. Unless it is so amended Section 164 would, after the elimination of the 1917 amendment, be literally a directive to California courts to treat all property acquired by married persons during marriage as community property, without regard to whether the property is real property or personal property, whether it is located in this State or elsewhere, or whether the acquiring spouse is domiciled in California or in another State or country at the time of its acquisition. As interpreted and applied by our courts, however, Section 164 has never been given such broad application. For example, it has long been held, in the teeth of the broad language of Section 164, that when real property in California is purchased by a married person domiciled elsewhere the property is separate property rather than community property even though the funds used to make the purchase were accumulated from earnings during marriage; in these cases a "tracing principle" is applied to give the person acquiring the property the same interest therein which he had in the funds used to make the purchase.[5] Again, although there is no authority on the point, it seems exceedingly unlikely that our courts would hold that real

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5. Estate of Warner, 167 Cal. 686, 140 P. 583 (1914).

property acquired in a separate property state by a married person domiciled in California is community property by virtue of Section 164 even if the purchase were made with community funds. Rather, our courts, applying the universally accepted choice of law rule that the law of the situs of real property governs the nature of the interests acquired therein, would take the position that it is for the situs state to define the kinds of estates in real property which exist there and to determine which of these is acquired in consequence of a purchase by a married person domiciled in California.[6]

The Commission believes that application of the very broad language of Section 164 should continue to be limited by long established and generally accepted choice of law principles

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6. In Tomaier v. Tomaier, 23 C.2d 754, 146 P.2d 905 (1944) and Rozan v. Rozan, 49 C.2d 322, 317 P.2d 11 (1957), it was held that when real property is acquired in another state with community funds the nonacquiring spouse has an equitable interest therein which will be recognized by the courts of this State. Those courts did not say, however, that such real property is community property. They said only that the interest of the other spouse survives to the extent of enabling that spouse to follow her community property interest in the money into the real property purchased with it. The proposed amendment of Section 164 of the Civil Code would, of course, have no effect on the application of this well established "tracing" principle.

stated in its proposed amendment thereto[7] and that it is desirable that Section 164 should reflect these limitations on its face for the guidance of all who may have occasion to consider its application in a situation involving persons or property located in other states or countries.

6. Adjustment of Section 201.5 of the Probate Code.

Section 201.5 of the Probate Code should be revised to clarify the section and to make its form consistent with the other definitions of quasi-community property in the statute recommended by the Commission.

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7. Under Section 164, as revised by the Commission, the character of real property acquired in this State in exchange for services rendered here will be determined according to the marital property system of the state or country in which the spouse rendering the services is domiciled. Some cases in other jurisdictions suggest that under these circumstances the real property would be community property although it would have been separate property if acquired in exchange for separate property -- i.e., cash instead of services. The Commission sees no justification for making a distinction as to the marital interests in real property acquired in this State by a person domiciled in another state depending upon whether the property is acquired directly in exchange for services or in exchange for money paid for such services. No California case has been found which makes this distinction.

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

An act to add Sections 140.5, 140.7 and 1237.5 to the Civil Code, to amend Sections 141, 142, 143, 146, 148, 149, 164, 176, 1238 and 1265 of said code, to amend Sections 201.5, 661 and 663 of the Probate Code, to add Sections 15300, 15302.5 and 15303.5 to the Revenue and Taxation Code and to amend Sections 15301 and 15306 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 the marriage by [~~either husband or wife, or both,~~] a married person 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 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.

As used in this section, personal property does not include and real property does include leasehold interests in real property.

SEC. 2. Sections 140.5 and 140.7 are added to Article 4 of Chapter 2 of Title 1 of Part 3 of Division 1 of the Civil Code, to read:

140.5. As used in Sections 140.7, 141, 142, 143, 146, 148, 149 and 176 of this code, "quasi-community property" means all personal property wherever situated and all real 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 other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere.

For the purposes of this section, personal property does not include and real property does include leasehold interests in real property.

140.7. As used in Sections 141, 142, 143, 146, 148, 149 and 176 of this code, "separate property" does not include quasi-community property.

SEC. 3. 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 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 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 dispostion of the proceeds.

SEC. 4. Section 148 of the Civil Code is amended to read:

148. The disposition of the community property, of the quasi-community property 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. 5. 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.

SEC. 6. Section 141 of the Civil Code is amended to read:

141. In the enforcement of any decree, judgment or order rendered pursuant to the provisions of this article, the court must resort:

1. To the community property; then,

2. To the quasi-community property; then,

[2.] 3. To the separate property of the party required to make such payments.

SEC. 7. Section 142 of the Civil Code is amended to read:

142. When the prevailing party in the action has either a separate estate, or is earning his or her own livelihood, or there is community property or quasi-community property sufficient to give him or her alimony or a proper support, or if the custody of the children has been awarded to the other party, who is supporting them, the court in its discretion, may withhold any allowance to the prevailing party out of the separate property of the other party. Where there are no children, and either party has a separate estate sufficient for his or her proper support, no allowance shall be made from the separate estate of the other party.

SEC. 8. Section 143 of the Civil Code is amended to read:

143. The community property, the quasi-community property and the separate property may be subjected to the support and education of the children in such proportions as the Court deems just.

SEC. 9. Section 176 of the Civil Code is amended to read:

176. The wife must support the husband, when he has not deserted her, out of her separate property, when he has no separate property, and there is no community property or quasi-community property, and he is unable, from infirmity, to support himself.

For the purposes of this section, the terms "quasi-community property"

and "separate property" have the meanings given those terms by Sections 140.5 and 140.7 of this code.

SEC. 10. Section 1237.5 is added to Chapter 1 of Title 5 of Part 4 of Division 2 of the Civil Code, to read:

1237.5. As used in this title:

(1) "Quasi-community property" means real 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 other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere.

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

SEC. 11. 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. 12. 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, except in the case of a married person's separate homestead, 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. 13. 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 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]~~ quasi-community property 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]~~ quasi-community property 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.

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.14. 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. 15. Section 15300 is added to Chapter 3 of Part 9 of Division 2 of the Revenue and Taxation Code, to read:

15300. For the purposes of this chapter, property is "quasi-community property" if it is heretofore or hereafter acquired:

(a) By either spouse while domiciled elsewhere and 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) In exchange for real or personal property, wherever situated, acquired other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere.

SEC. 16. Section 15301 of the Revenue and Taxation Code is amended to read:

15301. In the 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. 17. Sections 15302.5 and 15303.5 are added to the Revenue and Taxation Code, to read:

15302.5. If any 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:

(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 the donor of one-half.

15303.5. A transfer of quasi-community property of either spouse into community property of both spouses is not subject to this part; but if the property so transferred is the property of the wife and upon her death and survival by her husband the entire community property passing to her husband is not subject to Part 8 (commencing with Section 13301) of this division, one-half of the separate property so transferred 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.

SEC. 18. Section 15306 of the Revenue and Taxation Code is amended to read:

15306. As against any claim made by the State for the tax imposed by this part, there is no presumption that property acquired by a spouse after marriage is community property or quasi-community property. Any person who claims that any property acquired after marriage is community property or quasi-community property has the burden of proving that it is such.

SEC. 19. 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 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 acquired:

(a) [~~acquired~~] By the decedent while domiciled elsewhere which would have been the community property of the 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 other than by gift, devise, bequest or descent by the decedent during the marriage while domiciled elsewhere.

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.