#L-617 4/6/82

Memorandum 82-43

Subject: Study L-617 - Probate Law (Quasi-Community Property)

At the March meeting the Commission decided to recommend that quasi-community property be treated upon the death of the nonacquiring spouse as though it were community property under California law, including giving the nonacquiring spouse testamentary power over half of the acquiring spouse's quasi-community property. However, people who become newly domiciled in California should have a limited period of time in which to elect not to have the property so treated.

The staff was directed to examine whether such a change in California law may be constitutionally accomplished and particularly whether Paley v. Bank of America, 159 Cal. App.2d 500, 324 P.2d 35 (1958) (unconstitutional to give nonacquiring spouse testamentary power over half of acquiring spouse's quasi-community property), may no longer be good law. Both federal and state constitutional requirements were to be considered, and Professor Bruch was to provide a research memorandum to the staff on the constitutional question.

The research memorandum provided by Professor Bruch focuses on the "interest analysis" currently used by the court in determining whether retroactive changes in community property laws are constitutional. The memorandum addresses due process issues involving division of property at dissolution and does not attempt to apply these issues to rights of spouses in quasi-community property at death. The staff has spoken with Professor Reppy, who indicated that there would be significant differences between the two situations for purposes of consitutional analysis; Professor Reppy also saw nothing in the current status of the law that would imply that the Paley case is no longer good law. Professor Niles has mentioned to the staff that, apart from due process issues, constitutional law experts he has spoken with on this matter believe there may be serious privileges and immunities and right to travel questions (a point with which Professor Reppy does not agree).

Even if the law could be changed constitutionally to permit a nonacquiring spouse to dispose by will of quasi-community property of the surviving spouse, there are practical and policy problems in such a change that the Commission should consider. Professor Dukeminier has written to raise some of these problems. An excerpt of the relevant portion of his letter is attached as Exhibit 1.

The staff believes there may be some merit to the proposal to give the nonacquiring spouse greater rights in the quasi-community property of the other spouse. However, this is an area that will be quite controversial and will require both a careful review of the practical and policy considerations and a detailed and specific constitutional analysis. We may well wish to give the nonacquiring spouse not only testamentary rights in the quasi-community property but management and control rights as well--i.e., convert the property into community property for all purposes. The staff suggests that we make this matter part of our larger community property study, perhaps submitting it as separate recommendation, and not burden the Probate Code revision with it at this time.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

UNIVERSITY OF CALIFORNIA, LOS ANGELES

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

March 23, 1982

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear John:

. . . . I am having serious doubts about giving the power of testamentary disposition over quasi-community property to the first spouse to die. It seems to me this may cause a great many more injustices and problems than it will cure unless somehow or other this change in the status of property is brought home to the parties after they move to California. Take the following case:

> H and W live in Illinois. W is wage earner. H and W know under Illinois law that all property belongs to W. H and W move to California. H dies, leaving a will devising "all my property" to the children of H and W. H assumes his will only applies to his small amount of property inherited from his father, and that W is adequately cared for by "her own property". Under new proposed California statute, H's will devises to children one-half of property parties thought belonged to W. W now does not have enough property to support herself, having to give one-half to her children at H's death.

The result in this case seems to do a real injustice to W, and does not carry out H's intent. The case can get more complicated if we raise questions about which law applies in interpreting what H means by "all my property". If H executes his will in California, I assume there is no doubt that California law would apply (so one-half of the quasi-community would go to the children). If H executes his will in Illinois, before moving to California, I assume the words "all my property" would be construed by the law of the place of execution (Illinois). If H executes a codicil to the will after moving to California, the doctrine of republication by codicil may apply, invoking California law.

My basic assumption is that couples moving to California bring with them assumptions of who owns what based upon the law of their previous domicile. What bothers me is that this power to devise quasi-community property may come as a real surprise to the parties,

particularly the survivor. The longer the parties live in California and the more California community property they acquire the less a surprise it will be. I think, if this change is to be adopted, notice to H and W at the time of moving to California is essential. I think this was Jean Love's position. How can that notice be given? I don't see any realistic way. Perhaps the California Franchise Tax Board could send the couple a notice after receiving their first California tax return. But I expect the Board would object to doing this, because it doesn't relate to the collection of taxes.

Sincerely,

Jesse Dukeminier

JD:ij