F-600 4/29/82

Second Supplement to Memorandum 82-59

Subject: Study F-600 - Community Property (Title Presumptions and Transmutations)

The area of community property law the Commission has decided to give top priority to is the definition of community property and particularly the effect of title presumptions and transmutations on the classification of property as community or separate. One aspect of this matter is dealt with in Memorandum 82-32 relating to joint tenancy and community property. There are other aspects of title presumptions and transmutations that are also in need of attention.

Property acquired during marriage is community as a general rule, unless acquired with separate funds. Thus there is a presumption that property of a married person is community, but the married person can rebut the presumption by tracing to separate funds. These rules can be altered by agreement of the spouses. In particular, the spouses can indicate their intent with respect to the character of the property initially by specifying the form of title in which it is held, and thereafter the spouses can transmute the character of the property as between each other (and to some extent as it affects third parties). See generally Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity 82-84 (1981).

Civil Code Section 5110, in addition to stating the basic rule that all property acquired during marriage is community unless acquired with separate funds, also states a number of exceptions based on presumptions drawn from the form of title to property. The title presumptions stated in Section 5110 are:

(1) Property acquired by a married woman by an instrument in writing prior to January 1, 1975, is presumed to be her separate property. This presumption dates from the time when the husband had management and control of community property (prior to January 1, 1975) and does not apply to property over which the wife had management and control. In re Marriage of Mix, 14 Cal.3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975). The presumption can be rebutted both by tracing to a community property source and by evidence of a contrary understanding or agreement of the parties. In re Marriage of Rives, 82 Daily Journal D.A.R. 995 (1982).

(2) Property described in paragraph (1) that is acquired with another person is presumed to be held as tenants in common. However, if

the other person with whom the married person acquires property is her husband and the instrument describes them as husband and wife, the presumption is that the property is community. This presumption was enacted to overcome the rule of Dunn v. Mullan, 211 Cal. 583, 296 P. 604 (1931), that husband and wife acquisitions were presumptively half community and half the separate property of the wife. The presumption is now restricted to pre-January 1, 1975, property. It cannot be rebutted by tracing to a source of separate property but only by evidence of a contrary understanding or agreement of the parties. In re Marriage of Cademartori, 119 Cal. App.3d 970, 174 Cal. Rptr. 292 (1981).

(3) A single-family residence acquired by husband and wife during marriage as joint tenants is presumed to be community for the purpose of division upon dissolution of marriage. This presumption cannot be rebutted by tracing to a source of separate property but only by evidence of a contrary understanding or agreement of the parties. In re Marriage of Lucas, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980). The wisdom of this rule is discussed in Memorandum 82-32 (Joint Tenancy).

In addition to the title presumptions stated in Section 5110, there is another important consequence of title found in the cases. If title is taken in the name of one spouse alone, and if the other spouse was aware of the state of title and acquiesced or did not object, there is an implication or inference that a gift has been made and the property is the separate property of the spouse in whose name title stands. See, e.g., In re Marriage of Lucas, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 583 (1980).

The case law inference of a gift, like the statutory presumption of the separate property of the wife, dates from a time when the husband had management and control of the community property. At that time it was logical to find a gift when the husband allowed title to stand in the wife's name alone. However, this logic is no longer apt, now that either spouse has management and control of the community property. The Legislature limited the separate property statutory presumption to pre-January 1, 1975, property when it enacted equal management and control, but the courts have failed to overturn the corresponding separate property case law gift implication.

In the Lucas case, for example, title to a mini-motorhome acquired in part with community funds and in part with separate funds of the wife was taken in the wife's name alone; the husband did not object to the form of title. The court found the mini-motorhome to be the separate

property of the wife based on the case law inference that a gift is created by title in the wife and the husband's failure to object, despite evidence tracing the source of the funds.

Professor Reppy points out that under equal management the husband had no reason or right to make such an objection. The wife was entitled to manage the community property funds and could purchase property with them in her own name if she wished to do so.

> The Lucas decisions will result in thousands, perhaps millions, of transmutations because there is simply no reason why one spouse, living happily with the other and not contemplating a divorce, would "object" when the other spouse exercises the statutory equal management powers. Indeed, Lucas seems contrary to public policy, as it penalizes the husband for acceding to his wife's exercise of equal management powers. Rather the opinion interjects disharmony into marriage by encouraging husbands to demand that their wives carry on management powers only in the husband's or both partner's names. [Reppy, Debt Collection From Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 157 (1981).]

Professor Bruch also believes the gift presumption is of dubious continuing utility:

> Under a regime of equal management and control, convenience, happenstance, or concerns with insurance, taxation or probate may be more likely to dictate which spouse purchases or takes title to a given item or makes payments on a continuing obligation than is an independent decision as to ownership. [Bruch, Management Powers and Duties Under California's Community Property Laws 60 (1980).]

Civil Code Section 5110 needs to be revised not only to eliminate the title presumptions but also to overrule the title inferences of separate property. These presumptions and inferences were intended to protect the interest of the wife in an era when her rights in the community were minimal, but the presumptions and inferences are now obsolete. Section 5110 should continue to state the basic rule that all property acquired during marriage is community unless traced to a separate property source. The form of title should not create a separate property presumption or inference but should simply be evidence, like any other, of the intent of the spouses as to the manner of holding the property. Professor Bruch recommends further that if separate property interests are desired, a statement of that intent and formal disclaimer of intent to hold as community property should be required. Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity 93 (1981).

The staff suggests revision of Section 5110 in generally the following form:

5110. (a) Except as provided in Sections 5107, 5108, and ~~5109,~~ 5126, all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state ~~, and property held in trust pursuant to Section 5113.5,~~ is community property ~~; but~~ . As used in this subdivision, personal property does not include and real property does include leasehold interests in real property.

(b) Property owned by a married person is presumed to be community property. The presumption established by this subdivision is a presumption affecting the burden of proof. The presumption is rebuttable by proof that the property is not community property as defined in subdivision (a) or by proof of an agreement by the spouses that the property is not community property. The form of title to the property does not rebut the presumption unless the form of title includes an express statement of the separate character of the property.

(c) Notwithstanding subdivision (b), whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired prior to January 1, 1975, by a married woman by an instrument in writing, the following presumptions apply, and are conclusive in favor of any person dealing in good faith and for a valuable consideration with the married woman or her legal representatives or successors in interest, regardless of any change in her marital status after acquisition of the property:

(1) The presumption is that the same is her separate property ~~, and if~~ .

(2) If so 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~~ .

(3) 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 the husband and wife. ~~When a single family residence of a husband~~

~~and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single/family residence is the community property of the 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 the 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 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.~~

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

Comment. Subdivision (a) of Section 5110 is amended to replace the reference to former Section 5109 with a reference to Section 5126, which includes the provision formerly found in Section 5109. The reference to community property held in trust is deleted because it is unnecessary. See Section 5113.5. The language relating to leasehold interests is relocated from the end of Section 5110 to subdivision (a), to which it relates. Under subdivision (a) property acquired during marriage is community except to the extent the source of funds for its acquisition can be traced to separate property or the property can otherwise be shown to be separate. See, e.g., Lichtig, Characterization of Property, 1 Calif. Marital Dissolution Practice §§ 7.16, 7.45 (Cal. Cont. Ed. Bar 1981).

Subdivision (b) codifies the case law community property presumption, rebuttable by agreement or tracing. See, e.g., See v. See, 64 Cal.2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966). It also makes clear that the form in which title to property acquired by married persons is taken does not create a presumption or inference contrary to the basic community property presumption. This overrules cases that held, for example, that where title to property acquired with community funds is taken in the name of one spouse alone with the knowledge of and without objection by the other spouse, there is an inference of a gift of community property to the person in whose name title is taken. See, e.g., In re Marriage of Lucas, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980). Under subdivision (b) the form of title is merely evidence of the character of the property, the weight of which depends on the circumstances of the case. The form of title is not of itself sufficient to rebut the basic community property presumption. Where the spouses adopt

a form of title, however, that expressly states the separate character of the property, an inference is created that the character of the property is as stated in the form of title, notwithstanding the general community property presumption. These rules govern not only the property rights of the spouses between each other but also as to third parties such as creditors except to the extent a different rule is provided by statute. See, e.g., Section 5127 (transaction by spouse with person in good faith without knowledge of the marriage relation in reliance on form of title).

Subdivision (c) is amended to relocate for drafting purposes the provisions relating to the conclusive effect of the title presumptions on third persons. The provisions of Section 5110 relating to a single family residence held in joint tenancy are superseded by Section _____. The provisions relating to actions to invalidate a conveyance of real property acquired by a married woman prior to May 19, 1889, are superseded by Section 5127.

The staff plans to split the three subdivisions of Section 5110 into separate sections when preparing a tentative recommendation for comment.

Apart from the effect of the form of title in creating presumptions or inferences as to the character of marital property, there is a body of law governing agreements between the spouses to change community property to separate and separate property to community; agreements of this type are known as transmutations. Under California law it is incredibly easy for spouses to transmute both real and personal property; a transmutation can be found based on oral statements or implications from the conduct of the spouses. A transmutation can affect not only the rights of the spouses between each other but also the rights of third persons such as creditors of the spouses. The law is analyzed in some detail in Professor Reppy's study for the Commission, Debt Collection From Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143 (1981).

The question of the ability of the spouses to affect rights of creditors by transmutation is raised in Memorandum 82-33 (Liability of Marital Property for Debts and Obligations). As a related matter, Professor Reppy raises the question whether existing law is sound that permits an oral transmutation of real property from separate to community notwithstanding the statute of frauds. See, e.g., Woods v. Security First National Bank, 46 Cal.2d 697, 299 P.2d 657 (1956). He states that transmutation is dangerously easy. "Is it fair to say California transmutation law--for no good reason--invites perjury by a spouse after the marriage has ended or at least the twisting of passing comments into

'agreements'? Should more proof of intent to transmute be required where assets worth millions of dollars are at issue compared to that required where an asset of little value has allegedly been transmuted?" W. Reppy, Community Property in California 39 (1980). Professor Reppy points out that no community property state other than California has a clearly established rule dispensing with the statute of frauds in land transmutation cases.

Professor Bruch believes the existing California rule permitting oral transmutation of real property is sound. She states:

> Rarely, of course, will spouses deal with each other at arm's length and rarely will their agreements be concluded in writing. Accordingly, should there be a contract dispute between them, proof will often turn upon statements as to what was said or intended and evidence of actions taken by them. Precisely because the likelihood of informal transactions between family members is high, the benefit of presumptions or writing requirements that might avoid such disputes is low. Absent factual or policy bases to presume that people do not in fact enter certain contracts, rules that preclude proof of such agreements may empty courtrooms but not serve any equitable purpose. [Bruch, Management Powers and Duties Under California's Community Property Laws 56 (1980).]

The policy issue here is plainly presented for the Commission's determination. Does the danger of fraud and increased litigation caused by the rule permitting oral transmutations outweigh the convenience of and practice of informality recognized by the rule? The staff believes that there is ordinarily sufficient formality in dealing with real property in terms of deeds, recording, tax reporting, etc., that the public expects to make transfers of real property in writing in the ordinary course of events; most people would find an oral transfer, even between spouses, to be suspect. This fact, combined with the experience of extensive litigation in dissolution proceedings generated by the easy transmutation rule, leads the staff to conclude that the statute of frauds should apply to transmutations of real property at least, and perhaps to transmutations of any property where there is documentary evidence of title, such as automobiles, bank accounts, and shares of stock.

Other transmutation issues, including issues surrounding the ability of the spouses to make prenuptial agreements that affect the charac-

ter of the property, and issues involving tracing and commingling of separate and community property will be dealt with in subsequent memoranda.

Respectfully submitted,

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