F-600 5/6/82

Third Supplement to Memorandum 82-59

Subject: Study F-600 - Community Property (The Mitchell Case--Another Approach)

Memorandum 82-59 contains two staff proposals for dealing with the holding in Mitchell v. American Reserve Ins. Co., 110 Cal. App.3d 220, 167 Cal. Rptr. 760 (1980), that a spouse may unilaterally encumber his or her interest in the community real property home, effective during marriage. The first staff proposal is narrowly drawn to overturn Mitchell by providing that joinder of both spouses is required to affect the interest of either spouse in the family home. The second staff proposal is to deal more broadly with the management and control of community real property by expressly authorizing either spouse to enter into transactions affecting the spouse's own interest in the property, other than the family home, effective during or after marriage.

Garrett H. Elmore (Exhibit 1) disagrees with these staff proposals, stating that neither presents an adequate solution to the problems. He proposes instead that the existing joinder requirement of Civil Code Section 5127 be preserved, with the addition of the following provision:

> In an action involving the validity or effect of a sale, conveyance, encumbrance, lease or other transaction not made in conformity with this section, the court may find the instrument or transaction void or voidable, in whole or in part, or may affirm the instrument or transaction, according to the circumstances and considerations of equity; provided, if the real property is the family residence, the instrument or transaction shall be affirmed only to the extent that an attachment or execution lien could have been obtained on the property, after claim of exemption.

Mr. Elmore states that this would have the effect of retaining the existing joinder requirements which serve a useful purpose, without overturning much law retroactively, and would be to a large extent self-executing.

The staff disagrees with Mr. Elmore's assessment. His proposed statute would nullify existing joinder rules and disrupt established case law by allowing either spouse unilaterally to make binding transactions affecting the interest of either or both spouses in community real property. His proposed statute offers no guidance either to the parties or the courts in determining when a transaction will be given

effect and to what extent. The staff believes that clear rules, such as those we have proposed, are essential in this area of the law.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

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May 4, 1982

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, Ca. 94306
Re; May Agenda Item 6- Study F-600- Community Property-Memo. 82-59
Dear Commissioners And Staff:

The undersigned respectfully disagrees with the staff views in favor of legislation responding to the decision of a court of appeal in the Mitchell case.

Briefly, in the opinion of the undersigned,neither staff proposal presents an adequate solution to problems caused by Civ. C. 5127 and its predecessors.

As to the second, broader staff proposal,i. e., a new section that replaced §5127,and amended Code Civ. Proc. §872.210 (permitting partition of community property during marriage except for community real property family dwelling (and except for community personal property)),

1-The proposal is unnecessary to meet the problems of the Mitchell case.
2-The proposal, as presented is piecemeal. Staff indicates a different treatment may be urged for community personal property.
3-The proposal makes a far reaching change in California community property estates so far as real property is concerned, by providing in effect either spouse can convey for consideration, give away, encumber community real property*, except the family dwelling. It permits partition, with the exception mentioned. The relationship to the Family Law Act protections is not covered or discussed-a serious problem.

As to the first, the drafting consists merely of adding ten words to Sec. 5127 that, on their face are redundant. The intent however is to repeal the possible effect of cases on effect of dissolution or death (see Comment) where family residence is involved. The change could be interpreted by courts hereafter to hold that in other situations involving real property, the Mitchell holding continues, i. e., the conveyance (etc.) is valid as to the grantor's interest.

The undersigned notes the Memo. (p.5) suggests doubts as to a pending Commission proposal (repeal of the homestead statute) if Mitchell is not "overruled."It is suggested that its position on

* ("his or her interest in such property")

repeal of the homestead statute might be re-examined (if it is not too late). Is the Commission not being inconsistent in advocating repeal of the (protective) homestead declaration and then limiting salutary provisions in Civ. C. § 5127 to a family residence (if the present staff proposal is adopted)?

As many are aware, there are all sorts of protections in the Civil Code to prevent a declared homestead from being wiped out by unilateral acts or "high pressure."

If the two matters mentioned are separated, and made to stand on their own bottoms, as should be the case in important legislative proposals, it seems to the undersigned that 1) the Mitchell case is not apt to be as unfortunate or significant as some appear to feel; 2) its effect can be lessened, without overturning much law, retroactively, by an amendment to Civ. C. § 5127 that would read (in rough wording):

(Add at end as new paragraph) An an action involving the validity or effect of a sale, conveyance, encumbrance, lease or other transaction not made in conformity with this section, the court may find the instrument or transaction void or voidable, in whole or in part, or may affirm the instrument or transaction, according to the circumstances. and considerations of equityprovided, if the real property is the family residence, the instrument or transaction shall be affirmed only to the extent that an attachment or execution lien could have been obtained on the property, after claim of exemption.

The same pattern appears suited for gifts under Civ. C. 5125 and other prohibited dispositions.

The vehicles for enforcing Civ. C. 5125 and 5127 (apart from title company requirements, requirements of life insurers, to mention two) are limited. It is believed the present format is to a large extent self executing. Further, the undersigned agrees with Professor Prager (Memo. p. 4-5, 24 UCLA L. R. at 80) on the need for retaining the requirements.

I do not know whether Civ. C §§ 5125, 5127 have been studied in depth by the Commission or aides as part of the "Community Property" project, with a view to finding a solution on a long term, rather than "emergency" basis. If not, should not such a study be made before acting on the staff proposals of Memo. 82.59?

Respectfully submitted,

Garrett H. Elmore

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