

Third Supplement to Memorandum 82-103

Subject: Study F-640 ~ Marital Property Presumptions and Transmutations

Exhibit 1 contains comments from a subcommittee of the State Bar Estate Planning, Probate and Trust Law Section concerning the draft of the tentative recommendation relating to marital property presumptions and transmutations, attached to Memorandum 82-103.

One comment concerns interspousal transfers as fraudulent conveyances. We are revising the fraudulent conveyance statute to provide that a transfer of personal property between members of the same household without an actual and continued change of possession raises a presumption of fraud that is not conclusive but is rebuttable. See Section 3444 of the draft. The commentator points out that although the draft refers to a transfer of property between members of the same household, the preliminary discussion and Comment speak in terms of a transfer between family members within the household. The commentator notes that unrelated persons may share the same household and suggests that the statute make clear that the provisions protects transfers between "two or more persons permanently occupying the same residential unit." The staff believes this is a good point, but rather than attempting to define a "household," we would simply broaden the discussion in the preliminary part and Comment to include unrelated persons living together.

A more substantial problem is raised concerning the proposed scheme of presumptions. Under the draft of the tentative recommendation, property owned by a spouse during marriage is presumed to be community and the form of title to the property creates no contrary presumption. While these rules cure problems in existing law governing the rights between the spouses and as to third persons both during marriage and at dissolution, the State Bar subcommittee points out that the rules could cause problems upon the death of a spouse. If property acquired by a married person before marriage is still owned at the time of the death of the other spouse, the community property presumption would seem to require probate of the property. Likewise, if separate property title creates no presumption as to the separate character of

the property, a probate hearing may be necessary to establish its separate character even though no one asserts that the property is anything other than indicated in the title.

The staff believes these are valid points and that the draft of the tentative recommendation must be revised to accommodate them. We would revise the general community property presumption so that it applies only to property acquired during marriage. We would also revise the form of title provision so that at the death of a spouse property is presumed to be owned in the manner stated in the title; absent an express indication of community or separate character, property held in the names of both spouses would be presumed community and property held in the name of one spouse would be presumed separate. This would probably preserve existing law. However, unlike existing law, the presumption as to the character of the property would be rebuttable by tracing to the source of the property as well as by showing a contrary agreement of the spouses.

One other point, not raised in the subcommittee comments, should be mentioned at this time. Given the concern of the practicing family law bar with the problem of tracing contributions to property held in joint tenancy (see Memorandum 83-27, Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage), the staff believes the whole approach we have been taking of proportionate ownership of marital assets (rather than reimbursement of separate or community contributions) requires further consideration by the Commission. See the First and Second Supplements to Memorandum 82-103. This is not to imply that we should change our approach, only that we should review it in light of the concerns expressed by the family law specialists.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Exhibit 1

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January 28, 1983

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Dear John:

As I mentioned last Saturday, our Committee members expressed some concern about the community property presumptions contained in Memorandum 82-103.

Enclosed are copies of some comments.

Generally speaking, the concern is with the presumption that property owned during marriage is community property without regard to title. The question is what is required to rebut the presumption?

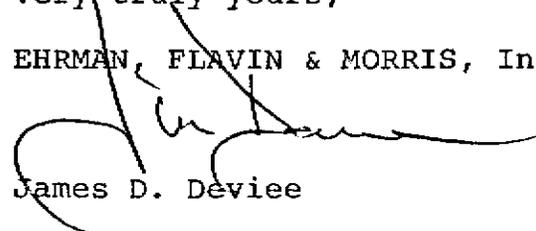
For example, a wife acquires property in her own name before marriage. She subsequently marries and her husband dies. What must be done to rebut the presumption that her husband had a community interest in the property? Suppose it was registered as "a married woman as her separate property". When you have a provision that the form of title does not overcome the presumption, it would appear you need some sort of court determination.

These concerns are expressed in more detail in the enclosures. I have also enclosed some comments on 82-104.

Thank you again for the courtesy you have shown Bill and me.

Very truly yours,

EHRMAN, FLAVIN & MORRIS, Inc.


James D. Devine

JDD:dv
Enclosures

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OUR FILE NUMBER

129,611-1

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Re Pre-Death Estate Planning Techniques Subcommittee

Dear Chuck:

Enclosed are Charles W. Jamison's written comments regarding AB 24. As we discussed earlier today, the other subcommittee members who commented on this Assembly Bill expressed their overall support.

As we discussed, several members of the subcommittee have expressed their concern regarding Law Revision Commission Memorandum 82-103 as it affects the testamentary disposition of property and probate administration. Generally, the subcommittee members have raised the following considerations:

1. Does the reference to "property owned . . . during marriage" in proposed Section 5110.520 create a presumption of community property for property acquired prior to marriage which is retained and thereby owned during the marriage? If such a presumption is created and the non-owning spouse is the first to die, will a probate be required at the non-owning spouse's death to clear the presumption?

2. Does the presumption of community property have the practical effect of precluding the use of the survivorship provisions of joint tenancy as a means of testamentary disposition without court administration? For example, if the decedent purchased property with a third party in joint tenancy form, will this property now be subject to probate administration as presumed community property? If the presumption

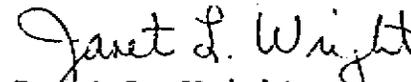
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is not rebutted, will the decedent's one-half interest (assuming equal contribution) be controlled by Probate Code Sections 200 - 201.5?

3. Pursuant to proposed Section 5110.550 the form of title would not create a presumption or inference as to the character of the property and would not be sufficient evidence to rebut the presumption. At least for testamentary situations, it may be advisable to provide that the form of title will affect the burden of proof in order to avoid a probate hearing to establish the character as the "form of title" when there is no assertion as to a different character.

As we discussed, our subcommittee would like the opportunity to give further consideration to the effect of these provisions on the testamentary disposition of property.

Very truly yours,


Janet L. Wright
for O'MELVENY & MYERS

JLW:dm

Enclosure

cc: Kenneth M. Klug, Esq.
Francis J. Collin, Jr., Esq.

FURTHER COMMENTS
MEMORANDA 82-103

Subject: Study F-640 - Community Property (Title and Gift Presumptions and Transmutations)

It appears that ambiguities exist in the phrase "members of the same household" in proposed C.C. 3444 (page 10).

The section comments indicate that the basic intent is to assist in situations of transfer of ownership not apparent to third persons without "actual and continued change of possession". It seems that this intent should be broadly served.

But, the case cited in the comment to this section, *Menick v. Goldy*, involves parent and child. The preliminary discussion (pp. 8-9) equates "household members" with "family setting". In a narrower interpretation the term might, thus, be limited to husband and wife, ancestors and descendants, or at least blood relatives. A much broader range of "households" exist. Notable examples include cohabitation without marriage and single non-relatives sharing a house or apartment. Creditors would strive for the narrowest interpretation while property transferees in various living arrangements would seek protection under this section.

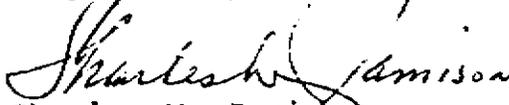
This would lead to a multiplicity of lawsuits. To remove ambiguity, maintain consistency within the intent of the section and preclude needless litigation, I recommend consideration of a precise definition of the phrase, "members of the same household".

Adding a sentence at the end of Section 3444 would accomplish this purpose. The wording might be as follows:

|| The phrase "members of the same household" shall be defined as two or more persons permanently occupying the same residential unit.

Limitations based on marriage status or blood lines would appear to improperly stifle the basic intent of this section and be more difficult to define.

Respectfully submitted,


Charles W. Jamison