#L-625 10/20/82

Memorandum 82-109

Subject: Study L-625 - Probate Law and Procedure (Recapture of Gifts of Quasi-Community Property)

At the last meeting, the Commission thought there might be occasional unfairness in the California rule which permits the surviving spouse to recapture inter vivos gifts of quasi-community property made to others by the decedent where the decedent has retained some ownership or control of the property. Prob. Code § 201.8. There was some sentiment to give the probate court discretion to disallow recapture when recapture would be inequitable.

Professor Niles argued that if there is to be recapture, fairness requires a setoff by deducting from the surviving spouse's claim the value of other property received from the decedent as is done in Idaho. The Commission asked the staff to look at the Idaho statute, a copy of which is attached as Exhibit 1.

No Recapture if Gift of Quasi-Community Property is Usual or Moderate

In the draft of a Tentative Recommendation Relating to Disposition of Community Property, attached to Memorandum 82-104 for this meeting, the Commission proposes to validate a gift of community personal property made without written consent of the other spouse "if the gift or disposition is usual or moderate, taking into account the circumstances of the case." See proposed Civil Code Section 5125.230. The staff recommends that the same rule be applied to gifts of quasi-community personal property. This may be accomplished by revising proposed Section 110.030 (to be renumbered) as follows:

110.030. ~~If a married person dies domiciled in this state who has made a transfer to a person other than the surviving spouse, without receiving in exchange a consideration of substantial value, of property in which the surviving spouse had an expectancy under Section 110.020 at the time of the transfer, the surviving spouse may require the transferee to restore to the decedent's estate one-half of such property, its value, or its proceeds, if the decedent had a substantial quantum of ownership or control of the property at death. All property restored to the decedent's estate under this section belongs to the surviving spouse pursuant to Section 110.020 as though the transfer had not been made.~~ (a) The decedent's surviving spouse may require the transferee of property in which the surviving spouse had an expectancy under Section 110.020 at the time of the

transfer to restore the property to the decedent's estate if all of the following conditions are satisfied:

(1) The decedent dies domiciled in this state.

(2) The decedent made a transfer of the property to a person other than the surviving spouse without receiving in exchange a consideration of substantial value.

(3) The decedent had a substantial quantum of ownership or control of the property at death.

(b) Property shall be restored to the decedent's estate pursuant to this section to the same extent as though the property were community property. All property restored to the decedent's estate pursuant to this section belongs to the surviving spouse pursuant to Section 110.020 as though the transfer had not been made.

This revision could be accomplished now and submitted as a part of the wills and intestate succession recommendation, or deferred and submitted later as a part of the community property proposal. The advantage of submitting it later as part of the community property proposal is that the Comment to Section 110.030 can discuss the proposed new community property rules which Section 110.030 will incorporate.

Should There Be a Setoff for Other Property Received by the Surviving Spouse?

Idaho gives the surviving spouse half of the "augmented" quasi-community property estate, which includes quasi-community property in the probate estate plus certain incomplete and near-death transfers by the decedent. See Idaho Code § 15-2-203 (Exhibit 1). There is a right of recapture (id. § 15-2-202), but there is applied first to satisfy the surviving spouse's share certain property which the surviving spouse has received from the decedent (id. §§ 15-2-203, 15-2-207). Thus the surviving spouse may disrupt the decedent's dispositive pattern by recapture only if he or she will otherwise receive less than half of the quasi-community property in the aggregate. See Peterson, Idaho Uniform Probate Code: Time for Some Changes, 13 Idaho L. Rev. 11, 14 (1976).

There is disagreement among the staff and among our consultants as to whether a setoff like that used in Idaho is desirable in California. Professor Niles favors a setoff, but Professor Bruch does not. The writer of this Memorandum recommends against setoff because it is inconsistent with treating quasi-community property as nearly like community property as may be done. There is no setoff against the surviving spouse's recapture of gifts of community property: The surviving spouse has a present one-half ownership interest in each item of community

property, and to require a setoff for other property received by the surviving spouse from the decedent would be inconsistent with that ownership interest. See Peterson, supra at 14.

Both the California Legislature and the Commission have consistently sought to go as far as constitutionally permissible in giving the surviving spouse the same rights in quasi-community property as in community property. California's first legislation on the subject purported to treat quasi-community property as though it were community property for all purposes. See 1917 Cal. Stats. ch. 581; 1 Cal. L. Revision Comm'n Reports at E-15, E-16 (1957). This legislation was later held unconstitutional, and the present more limited recapture of quasi-community property is the result of trying to draw a statute that is constitutional. However, legislative history "indicates quite clearly that the Legislature has desired for some years to treat such marital property as nearly like community property as may be done under the State and Federal Constitutions." 1 Cal. L. Revision Comm'n Reports at E-16 (1957).

Similarly, the Commission decided at the March 1982 meeting that quasi-community property should be treated fully as though it were community property (subject to further consideration of constitutional issues). This would be included in the community property study rather than the probate study. Consistent with this decision, at the May 1982 meeting the Commission rejected a staff recommendation to change the community property rule concerning the surviving spouse's election against the decedent's will (presumed that election not required) to conform it to the quasi-community property rule (presumed that election is required). Instead, the Commission decided to do the opposite and conform the quasi-community property rule to the community property rule, and the present wills and intestate succession draft does this.

Finally, most other noncommunity property states have recapture rules to protect the surviving spouse's rights of dower, curtesy, or their modern counterparts, and these rules do not provide for setoff. See 1 Cal. L. Revision Comm'n Reports at E-7, E-8, E-16, E-17 (1957); Kurtz, The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share, 62 Iowa L. Rev. 981, 993-1011 (1977). The present California rules for recapture of quasi-community property were drawn from the comparable rules in noncommunity property

states. 1 Cal. L. Revision Comm'n Reports at E-7, E-8 (1957). If constitutional limits prevent California's rules for recapture of quasi-community property from being as protective of the surviving spouse as the rules for recapture of community property, those rules should be at least as protective as the comparable rules in noncommunity property states. Hence, setoff should not be required.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

EXHIBIT 1

Idaho Provisions

PART 2. SUCCESSION OF QUASI-COMMUNITY PROPERTY—
ELECTIVE SHARE OF SURVIVING SPOUSE

15-2-201. Quasi-community property. — (a) Upon death of a married person domiciled in this state, one-half (½) of the quasi-community property shall belong to the surviving spouse and the other one-half (½) of such property shall be subject to the testamentary disposition of the decedent and, if not devised by the decedent, goes to the surviving spouse.

(b) Quasi-community property is all personal property, wherever situated, and all real property situated in this state which has heretofore been acquired or is hereafter acquired by the decedent while domiciled elsewhere and 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 plus all personal property, wherever situated, and all real property situated in this state, which has heretofore been acquired or is hereafter acquired in exchange for real or personal property, wherever situated, which would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time the property so exchanged was acquired, provided that real property does not and personal property does include leasehold interests in real property, provided that quasi-community property shall include real property situated in another state and owned by a domiciliary of this state if the laws of such state permit descent and distribution of such property to be governed by the laws of this state.

(c) All quasi-community property is subject to the debts of decedent. [I.C., § 15-2-201, as added by 1972, ch. 201, § 4, p. 510.]

15-2-202. Augmented estate. — Whenever a married person domiciled in the state has made a transfer of quasi-community property to a person other than the surviving spouse without adequate consideration and without the consent of the surviving spouse, the surviving spouse may require the transferee to restore to the decedent's estate one-half (½) of such property, if the transferee retains such property and, if not, one-half (½) of its proceeds or, if none, one-half (½) of its value at the time of transfer, if:

(a) The decedent retained, at the time of his death, the possession or enjoyment of or the right to income from the property;

(b) The decedent retained, at the time of his death, a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;

(c) The decedent held the property at the time of his death with another with the right of survivorship; or

(d) The decedent had transferred such property within two (2) years of his death to the extent that the aggregate transfers to any one (1) donee in either of the years exceeded three thousand dollars ($3,000). [I.C., § 15-2-202, as added by 1972, ch. 201, § 4, p. 510.]

15-2-203. Elective right to quasi-community property and augmented estate. — (a) The right of the surviving spouse in the augmented quasi-community property estate shall be elective and shall be limited to one-half (½) of the total augmented quasi-community property estate which will include, as a part of the property described in section 15-2-201 and section 15-2-202, of this code, property received from the decedent and owned by the surviving spouse at the decedent's death, plus the value of such property transferred by the surviving spouse at any time during marriage to any person other than the decedent which would have been in the surviving spouse's quasi-community property augmented estate if that spouse had predeceased the decedent to the extent that the owner's transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or moneys worth. This shall not include any benefits derived from the federal social security system by reason of service performed or disability incurred by the decedent and shall include property transferred from the decedent to the surviving spouse by virtue of joint ownership and through the exercise of a power of appointment also exercisable in favor of others than the surviving spouse and appointed to the surviving spouse.

(b) The elective share to the quasi-community estate thus computed shall be reduced by an allocable portion of general administration expenses, homestead allowance, family allowance, exempt property and enforceable claims.

(c) Property owned by the surviving spouse at the time of the decedent's death and property transferred by the surviving spouse is presumed to have been derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source. [I.C., § 15-2-203, as added by 1978, ch. 350, § 2, p. 914.]

15-2-204. Right of election personal. — The right of election of the surviving spouse may be exercised only during his lifetime by him. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending, after finding that exercise is necessary to provide adequate support for the protected person during his probable life expectancy. [I.C., § 15-2-204, as added by 1972, ch. 201, § 4, p. 510.]

15-2-205. Proceeding for elective share — Time limit. — (a) The surviving spouse may elect to take his elective share in the augmented net estate by filing in the court and mailing or delivering to the personal representative a petition for the elective share within six (6) months after the publication of the first notice to creditors for filing claims which arose before the death of the decedent. The court may extend the time for election as it sees fit for cause shown by the surviving spouse before the time for election has expired.

(b) The surviving spouse shall give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented net estate whose interests will be adversely affected by the taking of the elective share.

(c) The surviving spouse may withdraw his demand for an elective share at any time before entry of a final determination by the court.

(d) After notice and hearing, the court shall determine the amount of the elective share and shall order its payment from the assets of the augmented net estate or by contribution as appears appropriate under section 15-2-207 of this code. If it appears that a fund or property included in the augmented net estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he would have been if relief had been secured against all persons subject to contribution.

(e) The order or judgment of the court may be enforced as necessary in suit for contribution or payment in other courts of this state or other jurisdictions. [I.C., § 15-2-205, as added by 1972, ch. 201, § 4, p. 510; am. 1973, ch. 167, § 6, p. 319.]

15-2-206. Effect of election on benefits by will or statute. — (a) The surviving spouse's election of his elective share does not affect the share of the surviving spouse under the provisions of the decedent's will or intestate succession unless the surviving spouse also expressly renounces in the petition for an elective share the benefit of all or any of the provisions. If any provision is so renounced, the property or other benefit which would otherwise have passed to the surviving spouse thereunder is treated, subject to contribution under subsection 15-2-207(b), as if the surviving spouse had predeceased the testator.

(b) A surviving spouse is entitled to homestead allowance, exempt property and family allowance whether or not he elects to take an elective share and whether or not he renounces the benefits conferred upon him by the will except that, if it clearly appears from the will that a provision therein made for the surviving spouse was intended to be in lieu of these rights, he is not so entitled if he does not renounce the provision so made for him in the will. [I.C., § 15-2-206, as added by 1972, ch. 201, § 4, p. 510.]

15-2-207. Liability of others. — (a) In a proceeding for an elective share, property which passes or has passed to the surviving spouse by testate or intestate succession and property included in the augmented estate which has not been renounced is applied first to satisfy the elective share and to reduce the amount due from other recipients of portions of the augmented estate.

(b) The remaining amount of the elective share is equitably apportioned among beneficiaries of the will and transferees of the augmented estate in proportion to the value of their interest therein.

(c) Only original transferees from, or appointees of, the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time it is considered in computing the augmented estate. [I.C., § 15-2-207, as added by 1972, ch. 201, § 4, p. 510; am. 1978, ch. 350, § 3, p. 914.]

15-2-208. Waiver. — The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" (or equivalent language) in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement. [I.C., § 15-2-208, as added by 1972, ch. 201, § 4, p. 510.]

15-2-209. Election of nondomiciliary. — Upon the death of any married person not domiciled in this state who dies leaving a valid will disposing of real property in this state which is not the community property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in such property against the will of the decedent as though the property was situated in the decedent's domicile at death. [I.C., § 15-2-209, as added by 1972, ch. 201, § 4, p. 510.]