#F-601 3/8/83

Memorandum 83-27

Subject: Study F-601 - Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage (Status of Assembly Bill 26)

Assembly Bill 26 (copy attached as Exhibit 1) implements the Commission's recommendation for division of joint tenancy and tenancy in common property at dissolution of marriage. The bill provides that where the spouses hold property as joint tenants or tenants in common, the dissolution court has jurisdiction to divide the property upon the request of either spouse, regardless whether the property is really community property or is true joint tenancy or tenancy in common property (i.e., really separate property). The bill permits the court to treat the property in the division just like community property--it may be physically divided between the parties on the basis of their interests or, in an appropriate case, it may be awarded to one of the parties and property of offsetting value awarded to the other party. In determining the interests of the parties in the property there is a presumption that the interests are equal, but the parties may overcome the presumption by showing an agreement as to their interests or by tracing the source of the funds by which the property is acquired.

This seems on its face to be a sensible recommendation, and in fact when it was distributed for comment as a tentative recommendation it received generally favorable comment from practicing lawyers. Nonetheless, we have now received substantial and significant opposition to the bill from the organized family law bar. Exhibit 2 is an extract of a letter from the Executive Committee of the Family Law Section of the Los Angeles County Bar Association expressing unanimous opposition to the recommendation. The staff also has met with the Executive Committee of the Family Law Section of the State Bar of California, which is likewise overwhelmingly opposed.

In light of this opposition, the Commission should give further consideration to its recommendation. This memorandum analyzes the problems that have been raised concerning the recommendation.

Should the Court Have Jurisdiction to Divide Non-Community Property?

Married persons frequently take title to property in joint tenancy form, and existing law is that this property may well be community

property, depending on the intent of the parties and numerous other factors. If an issue arises whether the property is community or true joint tenancy, the issue is resolved by reference to oral agreements, understandings of parties, etc. The Commission recommendation sidesteps this unsatisfactory state of affairs by simply giving the court jurisdiction to divide the property, if a party so requests. This not only avoids litigation over the character of the property but also eliminates the need for a later civil action for partition if the property is ultimately found to be true joint tenancy (i.e., separate rather than community) property.

The Los Angeles County Bar states flatly that the court should not have jurisdiction to divide property that is truly separate. "If the parties actually intended to create a joint tenancy or tenancy in common, thus altering the character of their property (either from community or the separate property of one of them) to separately owned joint interests, the court in the dissolution proceeding should not be given jurisdiction over separate property." The Los Angeles County Bar does not give any reasons for this position; certainly the property is subject to division in a partition action outside marital dissolution proceedings. Perhaps the reasoning is that the detailed procedures of partition are important protections for the interests of the owners. But this would imply that divisions in dissolution proceedings lack protections for the interests of the owners. Perhaps they do.

The State Bar has a somewhat different perspective. They believe it would be worthwhile to give the dissolution court jurisdiction also to partition true joint tenancy or tenancy in common property, in the few cases where the character of the property is an issue. But they do not believe this is a real problem. Their experience is that property in joint tenancy or tenancy in common form is routinely submitted to the court and divided as community property without question. Only one member of the Executive Committee present at the meeting attended by the staff has had a characterization issue in the past decade (since the inception of no-fault dissolution and equal division).

If the Court Has Jurisdiction to Divide Non-Community Property, Should It Be Able to Award the Property to One Spouse and Offsetting Property to the Other?

A major objective of the Commission's recommendation is to treat joint tenancy property as community property, with the result that the

total pool of marital assets is enlarged. This will better enable the court, for example, to award a community property family home to the custodial spouse and joint tenancy investment property of equal value to the other spouse. In this example, if the joint tenancy property is true joint tenancy, this will result in an exchange of the separate property interest of one spouse in the property for the community property interest of the other spouse in the family home.

The organized bar has two problems with this approach, one philosophical and the other related to income taxation. The philosophical problem is that a person's separate property interest is his or her own, the other spouse has no legitimate interest in it, and the interest should not be forcibly taken from the owner by the family law court. This concern has not troubled the Commission in the past--there is nothing sacred about separate property interests, the spouses voluntarily took the property as joint or common owners, and it is not inappropriate to treat the property as marital property. At most, this bar concern is an argument for making the legislation prospective only, as to property acquired after the operative date.

The taxation problem is that an exchange of an interest in separate property for an interest in community property may be a taxable event, which should not be encouraged. Whether or not such an exchange actually would be a taxable event is not clear. There is language in cases that gives lawyers concern; on the other hand, exchanges of interests in joint tenancy property in common law jurisdictions are not taxable, nor are there problems in community property jurisdictions such as Arizona and Nevada that require division of joint tenancy along with community property. Our tax consultant, Professor Wolk, believes that taxation is a concern, but that if a case arose a court would find the division to be not a taxable event. In an effort to mitigate the possible tax consequences, we have added language to the bill that, to the extent the interests of the parties are equal, the joint tenancy and tenancy in common property that is divided is deemed to be community property for the purposes of the division. In any case, if the property is not divided at dissolution but is relegated to a separate partition action, a sale of the property will certainly be a taxable event.

Should the Presumption of Equal Ownership in the Division Be Rebuttable by Tracing Contributions to the Acquisition of the Property?

A critical question is what may be used to rebut equal ownership of

joint tenancy property. Existing law is that a single-family residence acquired during marriage in joint tenancy form is presumed to be community property. Civil Code § 5110. A person who has contributed separate funds to the acquisition of the property may not rebut the community presumption by tracing the funds, but only by showing an agreement between the parties that the property was to retain its separate character. In re Marriage of Lucas, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980). In response to widespread dissatisfaction with the Lucas decision the Commission's recommendation permits the presumption of equal ownership to be rebutted by tracing the source of funds as well as by an agreement of the parties.

The State Bar generally favors tracing assets to a separate source, although they have a problem with the particular formula to be used, as discussed below. The Los Angeles County Bar, on the other hand, does not favor tracing to rebut the presumption. "By permitting rebuttal of the presumption of equal ownership by evidence of the source of funds alone, the cost of litigation of the character of property would be increased as a result of the need for additional discovery, greater use of expert witnesses and additional court time." According to the Los Angeles County Bar, a spouse who wishes to preserve a separate property interest should be required to take title in his or her name alone or to obtain an agreement that his or her separate interest is preserved. The source of funds used should not be permitted, by itself, to rebut the presumption of equal ownership.

This position is subject to criticism on both counts. First, as to the litigation-breeding aspect of tracing, one must ask whether it is more litigation-breeding to trace funds (a factual determination) or to determine whether there has been an agreement (express or implied, oral or otherwise). Experience under the law when the community-joint tenancy issue was important indicates that claims about the parties' intent and agreements were often fabricated and continually litigated. It may be that tracing is not a simple matter to prove, but at least it is a factual determination and seems preferable to litigation over purported statements during marriage that somehow amount to an agreement as to the character of the property.

Second, as to the steps the spouses should be required to take to preserve a separate property interest, the Los Angeles County Bar is

being unrealistic. Most spouses take title in joint tenancy without giving it much thought; if asked at the time whether they were making a gift of their property to the other spouse in the event of dissolution a short time later, they would probably say no. Most persons are unaware of the legal consequences of joint tenancy ownership. They may think it entails a right of survivorship, and they may think that this is the way married persons hold property, but that is about it. To expect them to know that in order to preserve their separate interest they must take title in their own name or secure an agreement from the other spouse, is asking too much. The law should conform to peoples' understanding and expectations.

Assuming the Presumption of Equal Ownership Can Be Overcome by Tracing, What is the Extent of the Unequal Ownership?

Under the Commission's recommendation, the parties' contributions to the acquisition of the joint tenancy property may be traced and their ownership of the property is in proportion to their contributions. This means that if the property has appreciated in value, they share in the appreciation proportionately. Likewise, if it has depreciated in value, they share in the depreciation proportionately. A number of questions, such as who gets the appreciation where the purchase has been leveraged by a loan, are not addressed but are left to case development. These are very tough and complex questions (or we would have resolved them), but our concern here was to establish the basic principle of proportionality for future development.

The State Bar Conference of Delegates has developed a different formula, which the Family Law Executive Committee lends its support to. Under the formula, the joint tenancy property is presumed to be community except to the extent separate property contributions can be traced. To this extent the parties are entitled to reimbursement upon dissolution of marriage, without appreciation, interest, or even adjustment for inflation. Under this scheme the reimbursement right would also apply even if the property depreciated in value. In essence, the community becomes a guarantor of the separate property investment.

There are a number of significant benefits from the reimbursement approach, from the perspective of the State Bar. To begin with, it preserves the concept of existing law that an asset is either separate or community, and contributions from a different source do not change the ownership of the asset but may create a reimbursement right. The

reimbursement approach also minimizes the potential tax problem by characterizing the asset as community in toto, with a reimbursement right for the separate contributions. The straight dollar-for-dollar reimbursement right is comparatively simple, avoiding issues of leveraged assets, maintenance costs, etc.; the asset is community and all the separate property is entitled to is reimbursement for actual contributions to the purchase price. Most important, in the case of an appreciating asset, it gives recognition over time to community ownership--the longer the marriage the more significant the community interest in the asset, the shorter the marriage the more significant the separate property contribution.

Apart from the obvious inequity of this scheme in the case of depreciating assets, is it fair in the case of an appreciating asset to deny any increase in value for the separate contribution? Take the family home acquired during marriage with a downpayment of separate funds, payments made the loan with community funds, followed by dissolution of marriage after a few years. The community has had the use of the house in exchange for the payment of the monthly loan amount, which is probably less than the reasonable rental value of the house. The community has had the benefit of any tax deductions for interest and taxes paid on the house. And now at dissolution, the house having appreciated in value, the community gets all the appreciation. From the perspective of the separate property, which is reimbursed for actual amounts contributed and no more, it has been placed in a bad investment for a number of years, to the benefit of the community. Essentially, the person contributing the separate property had made an inadvertent gift.

Obviously, there are alot of tough problems in this area and no one perfect solution. The State Bar in fact is divided in its support of the reimbursement principle. But, the majority of the Executive Committee members feel that reimbursement is overall perhaps the best solution in view of the difficulties.

Where Do We Go From Here?

The immediate question facing the Commission is how to proceed with Assembly Bill 26 in light of the strong opposition, reasonable or not, of the organized bar. We believe that at the heart of the bar's opposition is the feeling that, except for the Lucas case, there are not currently any substantial problems in dividing property, community or otherwise, held in joint tenancy form and that legislative tinkering can

only create problems. This is an understandable position, and of course it leads to legislation on a piecemeal basis to attack individual problems as they arise.

The staff believes that the Commission's recommendation is basically sound and offers a good overall restructuring of the law in this area. Our options are to proceed with the bill as is, to amend the bill to deal with problems raised by the bar, or to drop the bill.

Proceed with bill. In light of the dissatisfaction of the bar with the bill, the staff does not believe it makes sense to proceed with the bill as is. There is no great pressure for reform in this area, other than the Lucas problem; unless we can get some agreement that the proposed changes are worthwhile, we believe it would be unprofitable to proceed.

Amend bill to permit division if both parties consent. An amendment that keeps the substance of the bill but does not allow division except upon consent of both parties would cure most of the bar objections. However, a bill is not necessary for this purpose, since this is what happens under existing practice--if the parties submit the property to the jurisdiction of the court, the court divides it.

Amend bill to permit partition but not assignment of separate property to other spouse. The State Bar approves the concept of permitting a spouse to request partition of joint tenancy property in conjunction with dissolution. This would be a separate proceeding and the property would not be pooled with the community assets. While this would serve one of the purposes of the Commission to avoid a subsequent civil action for partition, it would not avoid the need to characterize the asset and it would not enable the flexibility in dividing marital assets the Commission seeks to achieve. The staff does not believe it would be worthwhile to obtain enactment of a bill amended in this form.

Amend bill to deal only with Lucas problem. The one matter that clearly requires legislation is the Lucas problem, and the bill could be revised to deal with this problem alone. The Commission has considered separate-community ownership principles at length in the past, including dollar-for-dollar reimbursement and proportionate ownership concepts. In this recommendation the Commission favored proportionate ownership, but this should be reviewed in light of the State Bar's support of reimbursement. If the Commission decides on reconsideration that reimbursement is preferable, then this bill is unnecessary, since the Con-

ference of Delegates bill is available to the Legislature. If the Commission decides that proportionate ownership is preferable, then the bill should remain before the Legislature.

Amend bill to expand community property presumption of Section 5110. Existing Civil Code Section 5110 presumes a joint tenancy single-family residence to be community property for purposes of division. Except for Lucas, this presumption appears to have worked well in practice, enabling division of the family home at dissolution with minimal litigation and avoiding tax problems. Instead of giving the court jurisdiction to divide true joint tenancy, the bill could be amended to expand the Section 5110 presumption so that all property held in joint tenancy form is presumed to be community. This would be a half-step in the direction the Commission is heading; it would still not permit division if the presumption were rebutted and the property found to be true joint tenancy. But if the means of rebuttal were limited, for example, to express written agreements of the parties, essentially the result sought by the Commission could be achieved. Separate property contributions that are traced would not rebut the community property presumption but would entitle the contributor to reimbursement, with or without appreciation, depending on the ultimate formula adopted. The staff believes this approach is not as good as the direct jurisdictional approach recommended by the Commission, but would have the same effect while also avoiding the objections of the bar.

Drop the bill. Another option before the Commission is simply to drop the bill, there being no agreement among the bar that any aspect of it is desirable. We have a number of other tentative recommendations in this general area, and it may be preferable to deal with the problem of division of joint tenancy property in the context of a more general treatment of joint tenancy property or of characterization of marital property.

This last point suggests a more fundamental problem we must face. In all the work we have been doing in the area of community property and joint tenancy recently, we have been adopting principles of tracing and proportionate ownership. If the organized bar is strongly opposed to these basic principles, the future of our work in this area does not appear promising. We need to see whether the bar has the same reaction

to application of these principles to community property as it does to joint tenancy property.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Exhibit 1

AMENDED IN ASSEMBLY FEBRUARY 22, 1983

AMENDED IN ASSEMBLY JANUARY 18, 1983

CALIFORNIA LEGISLATURE—1983-84 REGULAR SESSION

ASSEMBLY BILL No. 26

Introduced by Assemblyman McAlister

December 6, 1982

An act to amend Section 5110 of, and to add Section 4800.1 to, the Civil Code, relating to property.

LEGISLATIVE COUNSEL'S DIGEST

AB 26, as amended, McAlister. Division of marital property.

Existing law provides that the court in a dissolution of marriage or legal separation proceeding has jurisdiction to divide property held by the parties as community property and quasi-community property, but does not provide that the court has jurisdiction to divide property of the parties held in joint tenancy or tenancy in common, except in the case of a single-family dwelling acquired by the spouses during marriage in joint tenancy form, which is presumed to be community property for the purpose of division at dissolution or legal separation.

This bill would expressly provide that a court, in a proceeding for division of the community property and quasi-community property, has jurisdiction, at the request of either party, to divide any property ~~held~~ *title to which is taken during marriage* by the parties as joint tenants or tenants in common, as specified. This bill would also make conforming changes.

This bill would provide that the division of joint tenancy and tenancy-in-common property shall be subject to all rules applicable to the division of community and quasi-community

property. In addition, this bill would provide *(1)* that the interests of the parties in joint tenancy and tenancy-in-common property are presumed to be equal, but that the division of joint tenancy and tenancy-in-common property may be unequal if the proportionate contributions of the spouses to the acquisition of the property are unequal or if the spouses have agreed *in writing, as specified,* to their interest in the property, *(2) that if the interests of the property are equal, the property is deemed to be community property, and (3) if the interests are not equal, the property is deemed to be community property, except to the extent the interest of one party exceeds that of the other, as specified.*

The provisions of this bill would apply to proceedings for division of community property and quasi-community property commenced on or after January 1, 1984.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 4800.1 is added to the Civil Code, to read:

4800.1. Notwithstanding any other law:

(a) In a proceeding for division of the community property and the quasi-community property the court has jurisdiction, at the request of either party, to divide the interests of the parties in real and personal property, wherever situated ~~and whenever acquired, held~~ *, title to which is taken during marriage* by the parties as joint tenants or tenants in common. The division shall be made in the same manner and to the same extent, and subject to the same limitations, as community property and quasi-community property.

(b) For the purpose of ~~this section the~~ *division of property pursuant to this section:*

(1) The interests of the parties in the property are presumed to be equal. This presumption is a presumption affecting the burden of proof and is rebuttable by proof of different proportionate contributions of the parties to the acquisition of the property or by proof of ~~an~~ *a written*

agreement of the parties *in the title or otherwise* as to their interests in the property.

(2) If the interests of the parties in the property are equal, the property is deemed to be community property. If the interests of the parties in the property are not equal, the propery is deemed to be community property except to the extent the interest of one party exceeds the interest of the other party, and to the extent of the excess the property is deemed to be the separate property of the spouse having the greater interest.

(c) This section applies to proceedings commenced on or after January 1, 1984, regardless of whether the property was acquired before, on, or after January 1, 1984.

SEC. 2. Section 5110 of the Civil Code is amended to read:

5110. Except as provided in Sections 5107, 5108, and 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 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 presumption is that the same is her separate property, and if so acquired by the 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 any of the 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 the property 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 a 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 the 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 the conveyances, respectively.

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

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Exhibit 2

Family Law Section of the Los Angeles County Bar Association
617 SOUTH OLIVE STREET
LOS ANGELES, CALIFORNIA 90014
(213) 627-2727

February 18, 1983

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, California 94306

Re: Recommendation Relating To Division of Joint Tenancy And Tenancy In Common Property At Dissolution Of Marriage; Tentative Recommendations Relating To (1) Joint Tenancy And Community Property, (2) Continuation Of Support Obligation After Death of Support Obligor, and (3) Awarding Family Home To Spouse Having Custody Of Children

Dear Members:

The Executive Committee of the Family Law Section of the Los Angeles County Bar Association, which represents approximately 1,300 family law lawyers, has considered the above-referenced Recommendations promulgated by the Law Revision Commission. At a meeting held on February 15, 1983, the committee unanimously voted to voice its opposition to each of the recommendations.

1. Recommendation Relating To Division Of Joint Tenancy And Tenancy In Common Property At Dissolution Of Marriage.

The Recommendation, we believe, is unnecessary and inappropriate.

As the law now stands, such property may be divided as community property, if acquired with community funds by the unilateral act of one spouse or without the understanding or mutual consent of both spouses (Shindler vs. Shindler (1954) 126 Cal. App. 2d 597, 604, 272 P. 2d 566, 570; Thomasett vs. Thomasett (1953) 122 Cal. App. 2d 116, 133, 264 P. 2d 626, 637; Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 373-4, 125 Cal. Rptr. 804, 809). If the court concludes that the parties did not intend nor agree to alter the character of the property from community to a true joint holding, it may properly determine that the character

of the property remained community (Blankenship vs. Blankenship (1963) 212 Cal. App. 2d 736, 742, 28 Cal. Rptr. 176, 180; Martinelli v. California Pac. Title Ins. Co. (1961) 193 Cal. App. 2d 604, 14 Cal. Rptr. 542).

If the parties actually intended to create a joint tenancy or tenancy in common, thus altering the character of their property (either from community or the separate property of one of them) to separately owned joint interests, the court in the dissolution proceeding should not be given jurisdiction over separate property.

Contrary to the assertions set forth in the Recommendation, enactment of the proposed legislation would neither "eliminate litigation" over the community or separate character of the property nor "add flexibility" to a just division of marital property.

More litigation would be created by admitting evidence "of different proportionate contributions by the parties to the acquisition of the property", as proposed in Section 4800.1(b). Not only is such a provision contrary to the law expressed by the Supreme Court in Marriage of Lucas (1980) 27 Cal (3) 808, 166 Cal Rptr. 853, it is contrary to numerous cases decided before enactment of the Family Law Act, (e.g., Machado vs. Machado (1962) 58 Cal. App. 2d, 501, 25 Cal. Rptr. 87).

By permitting rebuttal of the presumption of equal ownership by evidence of the source of funds alone, the cost of litigation of the character of property would be increased as a result of the need for additional discovery, greater use of expert witnesses and additional court time.

As the court recently said in Marriage of Miller (1982) 133 Cal. App. 3d 988, 184 Cal. Rptr. 408, the party who wishes to preserve a separate property interest may do so by taking title in his or her name alone, or by securing his or her spouse's agreement that the separate interest will remain, commensurate with the contribution. The source of funds used should not be permitted, by itself, to rebut the presumption of equal ownership.

Flexibility would not be added; if the property is community or if the parties agreed to a different division than reflected in the title, the court already has jurisdiction to award the property accordingly (Marriage of Lucas, supra). If the property is truly separate property, the court should not have jurisdiction to divide it.