#F-633 4/11/84

First Supplement to Memorandum 84-9

Subject: Study F-633 - Division of Pensions (Policy Issues--Comments Received)

The Commission directed the staff to solicit comments from interested persons on the issues raised in Memorandum 84-9 (division of pensions at dissolution of marriage). The staff has done so, but so far has received only the comments attached as Exhibits 1 (State Bar Family Law Section) and 2 (Professor Paul J. Goda). In summary:

Present division v. reservation of jurisdiction. The memorandum adopts the requirement that jurisdiction to divide an employee pension benefit plan be reserved unless the parties agree to present division. The State Bar Family Law Section was unanimously against removing the court's discretion to decide between the two approaches. The Section felt there should be no preference in the law favoring either approach. (Their reading of the law is that present division is currently favored.)

Time rule. The memorandum requires that the community interest in an employee pension benefit plan be valued based on the proportionate time worked by the employee during and outside marriage. The State Bar Family Law Section favors the time rule but feels that existing law is clear and easily found and there is no need to codify it. We understand that the Section may be having second thoughts about the need for codification in light of new Civil Code § 4800.2 (AB 26), which could be read to require that contributions to the plan made outside marriage must be traced and reimbursed.

Overruling Gillmore. The memorandum would overrule the Gillmore case, which requires that division of an employee pension benefit plan under the reservation of jurisdiction approach be made at the time the plan matures rather than at the time benefits under the plan are actually received. The State Bar Family Law Section would not repeal Gillmore, but would leave the time of division to the discretion of the court rather than the discretion of the nonemployee spouse.

Terminable interest rule (death of employee spouse). The memorandum would overrule the Benson v. City of Los Angeles branch of the terminable interest rule. This case holds that if the employee spouse has remarried, the nonemployee spouse has no interest in the death

benefits payable under the employee pension benefit plan to the surviving spouse. The State Bar Family Law Section unanimously favors overruling Benson.

Terminable interst rule (death of nonemployee spouse). The memorandum suggests that the nonemployee spouse should be able to pass his or her community interest in an employee pension benefit plan to heirs. This would overrule the Waite v. Waite branch of the terminable interest rule, which terminates the interest of the nonemployee spouse upon his or her death. The State Bar Family Law Section unanimously supports this. Professor Goda disagrees--"[I]f the non-acquiring spouse dies first, the communitarian notion of protection of those who need the pension and for whom it was meant should come first. To give the right of testamentary disposition over a pension is to do what not even the acquiring spouse can do." There are also practical probate problems in allowing the nonemployee spouse to pass the property before it is paid, but so far we have received no comments from our probate experts on this matter.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Exhibit 1

FAMILY LAW SECTION
THE STATE BAR OF CALIFORNIA

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JOHN H. PAULSEN, *Auburn*
PAMELA E. PIERSON, *San Francisco*
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February 22, 1984

Nathaniel Sterling, Esq.
California Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, California 94306

Re: Study F-663-Division of Pensions

Dear Nat:

On February 4, 1984, the State Bar Family Law Section discussed and took positions on the Commission's proposed legislation regarding dividing pensions.

The Committee unanimously supports ending the terminable interest rule.

The Committee was unanimously against removing the court's discretion to decide between a present valuation and a payout when the benefits are received.

The Committee voted 12 to 3 that there should be no preference in the law favoring either approach. This would change existing law to the extent that a present valuation and buyout appears to be favored by existing law.

The Committee favors the time rule but feels that existing law is clear and easily found and there is no need to codify it.

The Committee does not approve statutory repeal of the Gillmore rule but favors putting it within the court's discretion rather than the discretion of the non-employee spouse.

The Committee unanimously favored adding death benefits to the definition.

The members of the Executive Committee are now receiving your family law materials and it has been a big help in involving the members in actively reviewing and intelligently commenting on your work. I received many comments from Executive Committee members about the fine quality of your memoranda and even about its usefulness in their practices.

Sincerely,

JAN C. GABRIELSON

JCG/nm

THE UNIVERSITY OF SANTA CLARA

SCHOOL OF LAW
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January 11, 1984

Mr. Nathaniel Sterling, Assistant Executive Director
California Law Revision Commission
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Palo Alto, California 94306

Dear Nat:

A quick note as I am trying to organize myself for the second semester. First, let me congratulate you on Study F-663, Division of Pensions (Policy Issues). It is really very well done.

I write briefly to voice my disagreement with only one aspect of the study, the suggested overturning of the terminable interest rule.

I happen to agree with the rule of Waite v. Waite. My reason is based on the paradox of all legal policy, the individual and the community. Current law emphasizes the right of the individual and this is correct, I believe, insofar as the greater incidence of divorce makes for more single heads of families where there are children and thus for a greater incidence of poor women, based on our current economics.

But there is also a communitarian aspect that underlies our economics. Waite implicitly uses this notion insofar as pensions were traditionally structured to support the retired couple--and it really wasn't enough anyway. I am in total agreement that the pension should be divided if it is community property between the non-acquiring spouse and the acquiring spouse as long as both are alive. But if the non-acquiring spouse dies first, the communitarian notion of protection of those who need the pension and for whom it was meant should come first. To give the right of testamentary disposition over a pension is to do what not even the acquiring spouse can do.

Sincerely,

Paul J. Goda, S.J.

PJG:jb