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1/8/86

Second Supplement to Memorandum 86-1

Subject: 1986 Legislative Program (Civil Code Sections 4800.1
and 4800.2)

The Commission has recommended legislation to deal with problems caused by the Supreme Court case of In re Marriage of Buol, 39 Cal. 3d 751, 705 P.2d 354, 218 Cal. Rptr. 31 (1985), which held that legislation governing the manner of division at dissolution of community property held in joint tenancy form cannot be retroactively applied. The Commission's recommendation has two aspects: (1) a provision that applies the governing legislation only to cases commenced on or after January 1, 1984, and (2) a provision that reserves to the Legislature the power to apply future changes in the law retroactively.

Our original intent was to introduce a single bill incorporating both aspects of the Commission's recommendation. However, before the bill was introduced we learned that the State Bar Family Law Section is in support of Part 1 of the recommendation but is opposed to Part 2 of the recommendation. In order to expedite passage of Part 1 (the operative date provisions), which we need to get enacted on an urgency basis, we have made two separate bills out of the recommendation.

Part 1 has been amended into a pending bill--AB 625--authored by Assemblyman McAlister. The bill was heard and approved by the Assembly Judiciary Committee on January 7. An urgency clause was adopted by the Committee (making the bill effective on the date signed rather than on January 1, 1987), and a report was adopted incorporating the Commission's recommendation as evidence of legislative intent.

Part 2 (the reserved power provisions) has been put in draft form by the Legislative Counsel and is awaiting introduction by Assemblyman McAlister as a separate bill. The State Bar Family Law Section is concerned that the reserved power provision opens the door to retroactively changing settled and agreed property rights at

"legislative whim." They believe that "parties entering into a marriage should be able to plan in advance." See letter attached as Exhibit 1.

The staff believes the Family Law Section's concern is overstated. We think it highly unlikely, knowing what we know of the legislative process, that the Legislature will act whimsically in applying property division legislation to existing marriages. We believe it is important for rational legislative policy in the future that the Buol-type reasoning be effectively negated by a reservation of power.

The Family Law Section notes that if the Commission feels it is important to proceed with a reserved power provision, the power should be subject to contrary written agreements of the parties. "It is important for parties to be able to at least protect, by written contract, their intent, exclusive of all legislative changes." They would revise the reserved power provision in substance as follows:

4800.10. The Legislature finds and declares that a fair and just division of marital property is of fundamental importance and that the fairness and justice of the manner of division may change with changes in social conditions, as indicated by experience in the application of the law. For this reason the Legislature reserves the power to revise the laws governing division of marital property, whether community, quasi-community, separate, or mixed, at any time and absent a written agreement to the contrary to apply the revised laws immediately if appropriate, in the interest of fairness, justice, and equality of treatment for all litigants, regardless of the date of marriage, the date of acquisition of the property, the date of any agreement affecting the property, the date of commencement of a proceeding for dissolution or legal separation, or the date of trial. The parties to a marriage acquire property and make agreements affecting the property subject to this reserved power of the Legislature, absent a written agreement to the contrary, and do not, by virtue of the law in effect at the time of acquisition of the property or at the time of an agreement affecting the property or at any other time, acquire any vested rights in property for purposes of division of property upon dissolution or legal separation.

Comment. Section 4800.10 is added to state expressly the reserved power of the Legislature to make immediately applicable changes in the law governing division of marital property. The parties to a marriage cannot acquire "vested" rights in marital property for the purpose of division of the property at dissolution or legal separation or otherwise except by express written agreement, notwithstanding language to that effect in earlier cases. See, e.g., In re Marriage of Buol, 39 Cal.3d 751, 705 P.2d 354, 218 Cal. Rptr. 31 (1985).

Section 4800.10 expresses but one aspect of the authority of the Legislature to make immediately applicable changes in the law that affect family law property rights for the general welfare. See, e.g., In re Marriage of Bouquet, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976); Addison v. Addison, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965). The section deals only with the reserved power of the Legislature with respect to division of marital property. Nothing in the section should be deemed to limit the ability of the Legislature to make retroactive changes in the law in any other family law matter for the general welfare, including but not limited to changes in the law affecting child or spousal support, the management and control rights of the spouses, and rights at death.

The staff is not completely thrilled with this approach. It creates problems concerning what agreements will be recognized as valid for purposes of the section (formalities, contents, etc.). It also seems to require every written agreement to include language along the lines of "This agreement applies notwithstanding any changes in law made after the date of the agreement." If there is virtue in protecting the sanctity of a written marital property agreement, and the staff believes there is, this can better be done directly by simply adding a sentence along the following lines to the reserved power section:

This section does not apply to the extent the parties make a written agreement governing division of marital property that is valid at the time the agreement is made.

Respectfully submitted,

Nathaniel Sterling,
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Re: Law Revision Commission

Dear Nat:

The Family Law Section discussed the matter of legislative change in response to the Buol case.

As I discussed with you by phone, we approved the tentative recommendation as drafted by the staff, with respect to Civil Code Sections 4800.1 and 4800.2.

We disapproved in its entirety, Section 4800.10. The reason is that we believe that parties entering into a marriage should be able to plan in advance, not subject to legislative whim, their property rights. We believe that 4800.10, opens the door to changing the property rights with respect to separate, community, quasi-community property.

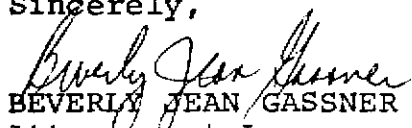
If the Commission feels it is important to proceed with giving a reserved power to the legislature to make retro-active changes effecting the division of property, and decides to recommend this change, we request that you make some changes in the present wording.

It is important for parties to be able to at least protect, by written contract, their intent, exclusive of all legislative changes. We would, therefore, make the additions that I have written in on the copy of the draft enclosed.

If there is to be any further discussion of this matter, please keep me informed.

Thank you for the communications that we have had to date.

Sincerely,


BEVERLY JEAN GASSNER
Attorney at Law

Enclosure

cc: Pam Pierson, Esq.

The Commission's recommendation would be effectuated by enactment of the following measure.

An act to add Section 4800.10 to the Civil Code, and to amend Section 4 of Chapter 342, of the Statutes of 1983, relating to family law, and declaring the urgency thereof, to take effect immediately.
The people of the State of California do enact as follows:

Civil Code § 4800.10 (added). Reserved power of Legislature to make retroactive changes affecting division of property

SECTION 1. Section 4800.10 is added to the Civil Code, to read:

4800.10. The Legislature finds and declares that fair and equitable division of marital property is of fundamental importance and that the fairness and equity of the manner of division may change with changes in social conditions, as indicated by experience in the application of the law. For this reason the Legislature reserves the power to revise the laws governing division of marital property, whether community, quasi-community, separate, or mixed, at any time and to apply the revised laws retroactively, in the interest of fairness and equality of treatment for all litigants, regardless of the date of marriage, the date of acquisition of the property, the date of any agreement affecting the property, the date of commencement of a proceeding for dissolution or legal separation, or the date of trial. The parties to a marriage acquire property and make agreements affecting the property, *absent written agreement to the contrary*, subject to this reserved power of the Legislature, and do not, by virtue of the law in effect at the time of acquisition of the property or at the time of an agreement affecting the property or at any other time, acquire any vested rights in property for purposes of division of property upon dissolution or legal separation.

Comment. Section 4800.10 is added to state expressly the reserved power of the Legislature to make retroactive changes in the law governing division of marital property. The parties to a marriage cannot acquire "vested" rights in marital property for the purpose of division of the property at dissolution or legal separation or otherwise, notwithstanding language to that effect in earlier cases. See, e.g., In re Marriage of Buol, 39 Cal.3d 751 (1985).