#L-1045 su47
06/10/86

First Supplement to Memorandum 86-53

Subject: Study L-1045 - Estate and Trust Code (Definition of Community Property)

We have received a letter from Gus McClanahan concerning the definition of community property. (See Section 28 in the draft statute in Exhibit 1 attached to Memorandum 86-53.)

Mr. McClanahan's principal concern is that the language of subdivisions (b) and (c) of Section 28 is loose enough to include marital property in common law states that is treated in the same manner as community property only for purposes of divorce or dissolution. (See Exhibit 1, p. 2.) The definition of community property in Section 28 is relevant only to the disposition of property at death. Accordingly, the staff recommends that Section 28 be revised as follows:

§ 28. Community property

28. "Community property" means:

(a) Community property heretofore or hereafter acquired during the marriage by a married person while domiciled in this state.

(b) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired during the marriage by a married person while domiciled elsewhere, that is community property, or a ~~substantially equivalent type of marital property~~ is marital property that at the death of a spouse is treated in a manner substantially equivalent to community property, under the laws of the place where the acquiring spouse was domiciled at the time of its acquisition.

(c) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired during the marriage by a married person in exchange for real or personal property, wherever situated, that is community property, or ~~a substantially equivalent type of marital property~~ is marital property that at the death of a spouse is treated in a manner substantially equivalent to community property, under the laws of the place where the acquiring spouse was domiciled at the time the property so exchanged was acquired.

Mr. McClanahan also raises some policy issues. (See Exhibit 1, pp. 3-4.) The staff thinks it is appropriate to review the policies in this area, but this will not be a simple process. The Commission should consider contracting with a consultant, such as Professor Reppy, to prepare a background study before any attempt is made to change the law in this area.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

Exhibit 1

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June 4, 1986

John H. De Moully, Executive Secretary
California Law Revision Commission
4000 Middlefield road, Suite D-2
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Dear John:

This is to supplement the memo of William V. Schmidt, Team Captain, of May 14, 1986, commenting on LRC memo 86-51, Study L-1045, Estate and Trust Code Definitions.

As Bill Stated, I was concerned about the definition of community property in Section 28 (b) and (c). I would like to explain the reasons for my concern. I realize that this section is currently the law in Probate Code Section 28. I did not analyze these definitions when they were adopted by Chapter 842 in 1983.

I have long believed that community property brought to California from another "community property jurisdiction" (Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Puerto Rico), should be classified as community property in California. Yet for fifty years that property was included in California's definition of "quasi-community property."

It is when the statutory definition is expanded beyond property brought from a jurisdiction which is an actual, traditional community property jurisdiction, with a complete community property system or regime in its laws, that I become concerned.

If the language in 28 (b) and (c), "or a substantially equivalent type of marital property," was intended to include only states which may eventually adopt the "Uniform Marital Property Act" (UMPA for short), and if the definition were limited to such states, my concern would not be as strong.

While UMPA is not a community property statute, it is an act which adopts a full marital property system for the enacting state, which is quite similar to the traditional community property regime, but there are substantial differences.

The words "community property" and "separate property" are not mentioned in the Uniform Act. The terms used to describe property of married persons are "marital property" and "individual property". The definitions are similar to community and separate, but they are not the same. In addition to these two terms, UMPA contains other terms and concepts, such as "quasi marital property", "mixed property", "survivorship marital property", and "deferred marital property". A brief analysis of an early draft of the the Uniform Marital Property Act is contained in McClanahan, Community Property Law in the United States (1982), Section 14.5, and of the final draft, in 1984 supplement, Section 14.5

The only state which has adopted the Uniform Marital Property Act is Wisconsin; 1983 A.B. 200, adopted March 22, 1984, effective January 1, 1986. The Wisconsin act varies in some ways from UMPA, but includes the main principles and concepts of UMPA. A brief analysis of this act is found in McClanahan, op. cit., Section 14.4, and 1984 Supplement, Section 14.4.

If California's definition of community property was held to include "marital property" brought from Wisconsin (or other states which may adopt UMPA), I do not see any insurmountable problems in dealing with that property under California law, although there might be litigation as the Wisconsin concepts were integrated into the California concepts.

My principal concern is that the language of Section 28 (a) and (b) might be held to apply to so-called "marital property" brought to California from other common law states, which have adopted the concept of marital property into their statutes on divorce and dissolution, but in no other area of their law.

Following the lead of California in its Family Law Act of 1969, every common law state has now adopted some form of divorce without fault. And almost every common law state has now adopted in its laws on divorce and dissolution, the terms and concepts of "marital property" and "individual property," and a statutory scheme of division of this property in dissolution proceedings, in either "equal distribution" or "equitable distribution". Their schemes resemble the division in dissolution in community property states. In fact, in the leading cases in common law states, one will find almost as many citations of cases from community property states as from common law states.

It does not seem unlikely that a California court might construe Section 28 (b) and (c) to include property brought from a common law state which has "a substantially equivalent type of marital property"(in its divorce laws, but in no other area of its laws.) In my opinion this could cause a host of problems, including constitutional questions.

During the marriage, while that property was owned and held by the married persons in the common law state, it was not held as a "substantially equivalent type of marital property." There was no principle of shared ownership, there was no present, existing and equal interest of the spouses in it, no equal manage ment and control of it, no limitations as to gifts of it, no provision for disposition of part of it by the will of either spouse, etc. In other words, that property had no faint resemblance to community property during the marriage; it was only upon filing for divorce, that it became so-called "marital property."

If it were held that such property, when it crossed the Colorado River, became community property, with all the attributers attached to community property by California law, in my opinion serious questions as to validity of Section 28 (b) would arise. It appears to me that the same constitutional objections which were made to the original California statutes of 1917, which were upheld in Estate of Thornton, 1 Cal 2d 1,33P 2d 1, 92 ALR 1343 (1934), would apply to Section 28 (b). See: McClanahan, op. cit. Section 13.9

I do not believe we should adopt (or rather retain in the law) language which is so vague that it might be subject to such interpretation.

It seems to me that Section 28 (b) could be changed, starting in Line 3, to read:

> "xxx while domiciled in a jurisdiction whose laws include the community property system, which was community property in such state."

This would include property acquired and held in any of the other eight community property jurisdictions. It would leave property brought in from a common law jurisdiction to be classed as "quasi-community property," under Civil Code Section 4803, as it should be.

It would probably not inlude property brought from Wisconsin, since the Uniform Marital Property act as adopted in Wisconsin is not truly the "community property system" although it is substantially similar to it.

If it were decided, as a matter of policy, that property brought from Wisconsin (or other states which may adopt UMPA), should be or become community property when brought to California a clause could be added to the language recommended above, to read:

> "xxx or while domiciled in a jurisdiction which has adopted the Uniform Marital Property Act, which was held as marital property in such state."

I believe that such a statute would withstand constitutional attack, however, there might be litigation as the meaning, nature and attributes of the terms "marital property" and "individual property" in the laws of transferring state were compared with and contrasted to the meaning, nature and attributes of "community property" and "separate property" in California law. This would bring up the age old problem of "semantics." See McClanahan, op. cit., Sections 2.36, 2.37, 13.9.

It is suggested that the Commission and its staff review this subject in depth, including Probate Code Section 28, Civil Code Sections 687 and 5110, and any other statutes defining community property, with a view toward uniformity in all such definitions, and coordinating them with the statutes defining quasi-community property.

Respectfully submitted,

W.S. McClanahan

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P.S. I ask your indulgence for citing my book. It is just that I had said it before, and did not want to say it all over again.