

## Memorandum 83-9

Subject: Study F-660 - Awarding Family Home to Spouse Having Custody of Children (Staff Draft of Tentative Recommendation)

A problem that has concerned the Commission in the past is the extent to which the family home can be assigned at dissolution to the spouse given custody of the minor children. The Commission has made one recommendation to the 1983 Legislature attacking this problem--giving the court jurisdiction at dissolution to dispose of joint tenancy property. This is not a complete solution, however, since in many cases the family home is the only substantial asset of the marriage and must be sold to achieve an equal division.

One remedy the Commission has felt might prove useful in this situation is to defer sale of the family home and meanwhile give the spouse having custody of minor children temporary use of the home. This would be a form of support. In fact, existing law permits and even requires this sort of an award, but the report by Lenore Weitzman that the Commission reviewed on the economics of divorce indicates that this occurs relatively infrequently. Dr. Weitzman implies, and the Commission's consultant Professor Bruch expressly recommends, that the situation would be improved by codification and clarification of the case law to encourage awarding the family home to the spouse given custody of the minor children.

Attached to this memorandum is a staff draft of a tentative recommendation to accomplish this objective. One aspect of the draft the Commission should particularly note of is that the court is permitted to set apart for the use of the custodial spouse and minor children the family home even if the family home is the separate property of the noncustodial spouse. Arguably existing law already permits this to be done, since the separate property of the noncustodial spouse is liable for both spousal and child support. Civil Code §§ 4805, 4807. Also worthy of note is Civil Code § 5202, which protects the right of a spouse in a dwelling that is the separate property of the other spouse. However, it has been held that the court has no jurisdiction to award a life estate in the separate property of a spouse to the other spouse. *Robinson v. Robinson*, 65 Cal. App.2d 118, 150 P.2d 7 (1944); see Bruch,

The Definition and Division of Marital Property in California: Towards Parity and Simplicity, 33 Hastings L.J. 769, 775 (1982).

One other matter the Commission should consider is not included in the staff draft. Professor Bruch recommends that the ability of the court to set apart the family dwelling should be extended to include use awards in appropriate cases without regard to the presence of minor children. "This provision would be especially important following lengthy marriages or when the home has been especially adapted for a handicapped adult child or spouse's special physical needs." Bruch, *id.* at 484, n.321. This would be somewhat analogous to a probate homestead, where the surviving spouse is given what may amount to a life estate in the homestead; here the marriage is terminated by dissolution rather than death. One obvious difference between the two situations is that in the case of dissolution both spouses remain alive and both may have need for the property, particularly if it is the only substantial asset of the marriage.

After reviewing the draft, the Commission should decide whether it is suitable to distribute for comment.

Respectfully submitted,

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STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

AWARDING FAMILY HOME TO SPOUSE HAVING CUSTODY OF CHILDREN<sup>1</sup>

The family home, an item owned by about half of all couples whose marriage is dissolved, has typically been the middle-income family's major asset. The legal tradition before no-fault dissolution and equal division of assets was to award the family home to the wife upon dissolution, both because it was assumed to be hers--in the sense that she organized, decorated, and maintained it--and because she was usually adjudged to be the innocent plaintiff and thus deserving of more than half of the community property. In addition, if the wife had child custody she needed the home to maintain a stable environment for the children.

With the absence of fault and the trend toward equal division, the number of homes being divided equally has increased, particularly where the home is the major community asset. In such a situation, "equal division" of the home can mean either that the two parties maintain common ownership after dissolution or that the home is sold and the proceeds divided equally. In most cases in which the home is divided, it is sold.

The equal division rule thus may force a sale of the home in a family that has no appreciable assets beyond its equity in the home. This is a matter of some concern, especially when there are minor children in the family.<sup>2</sup> Even the presence of minor children does not ensure that the person given custody of the children will be awarded the family home. Two-thirds of the couples who are forced to sell their homes have minor children.

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1. Portions of the following discussion are drawn from Weitzman, The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards, 28 UCLA L. Rev. 1181, 1204-07 (1981).

2. Id. at 1200. Couples with minor children are more likely to own homes than childless couples, regardless of marital duration and family income. Overall, 65% of the couples with minor children own homes, compared to 33% of the couples with no minor children.

The California Legislature did not intend that the family home be sold in order to meet the equal division requirement.<sup>3</sup> The 1970 Assembly Judiciary Committee Report on the Family Law Act states that a temporary award of the home to the spouse who has custody of minor children should be seen as a valid exception to the strict equal division rule:

Where an interest in a residence which serves as the home of the family is the major community asset, an order for the immediate sale of the residence in order to comply with the equal division mandate of the law would, certainly, be unnecessarily destructive of the economic and social circumstances of the parties and their children.<sup>4</sup>

The California courts first addressed this problem in 1973 in In re Marriage of Boseman.<sup>5</sup> In that case, the only asset the parties had accumulated was their home. When the wife was awarded custody of the three minor children, ages thirteen, eleven, and three, the trial court properly ordered the house to remain in the wife's possession "for use and benefit of said minors"<sup>6</sup> until the youngest reached majority. Thereupon, the house was to be sold.<sup>7</sup>

3. In re Marriage of Boseman, 31 Cal. App.3d 372, 375, 107 Cal. Rptr. 232, 234 (1973).
4. Cal. Assembly Comm. on the Judiciary, Report on Assembly Bill No. 530 and Senate Bill No. 252 (The Family Act), 1 Assembly J. 785, 787 (Reg. Sess. 1970).
5. 31 Cal. App.3d 372, 107 Cal. Rptr. 232 (1973).
6. Id. at 374, 107 Cal. Rptr. at 234.
7. The appellate court remanded the case for clarification of the disposition of the proceeds of the house sale but upheld the temporary award of the residence to the wife. Id. at 378, 107 Cal. Rptr. at 237.

In re Marriage of Herrmann, 84 Cal. App.3d 361, 148 Cal. Rptr. 550 (1978), dealt with a substantially similar fact situation. The trial court awarded Mrs. Herrmann the house and, to satisfy the equal division rule, ordered her to deliver to Mr. Herrmann a promissory note for half of the value of the house at the date of the dissolution, bearing 7% interest per year and payable upon the sale of the residence. The house was ordered sold either when the child reached 15, the child or the mother died, the mother remarried or began living with a man, or the mother and child moved away for more than 60 days, or upon the agreement of the parties. The Court of Appeal approved the goal of maintaining the home for the children but disapproved the promissory note. Instead, it recommended the Boseman formula of awarding each party a half interest in the

The rationale for maintaining the home for the children is articulated in In re Marriage of Duke.<sup>8</sup> There, the trial court's refusal to defer the sale of the home was reversed on appeal. The appellate court said:

Where adverse economic, emotional and social impacts on minor children and the custodial parent which would result from an immediate loss of a long established family home are not outweighed by economic detriment to the noncustodial party, the court shall, upon request, reserve jurisdiction and defer sale on appropriate conditions.

The value of a family home to its occupants cannot be measured solely by its value in the marketplace. The longer the occupancy, the more important these noneconomic factors become and the more traumatic and disruptive a move to a new environment is to children whose roots have become firmly entwined in the school and social milieu of their neighborhood.

Despite the legislative and judicial authority for exempting the home from the immediate equal division of community property, the prevailing pattern is that the home is ordered sold with the proceeds divided upon dissolution. While some judges are willing to leave the home in common ownership for a few years, few are willing to let it remain unsold until small children attain majority.

The judicial practice of ordering immediate sale of the family home or of deferring sale only for a brief period has been noted by a number of observers.<sup>10</sup> Legislation is needed to codify the presumption in favor or awarding the home to the custodial spouse and to expressly authorize deferred sale. This will encourage and sanction the courts in

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house as tenants in common. 84 Cal. App.3d at 366-67, 148 Cal. Rptr. at 553-54. Other courts have maintained the family home for minor children by awarding the residence to the custodial spouse, while achieving an equal division by granting the full retirement pension to the husband. See, e.g., In re Marriage of Emmett, 109 Cal. App.3d 753, 760-61, 169 Cal. Rptr. 473, 477-78 (1980); In re Marriage of Marx, 97 Cal. App.3d 552, 560, 159 Cal. Rptr. 215, 220 (1979).

8. 101 Cal. App.3d 152, 161 Cal. Rptr. 444, modified, 102 Cal. App.3d 619d (1980).

9. Id. at 155-56, 161 Cal. Rptr. at 446 (italics omitted).

10. See, e.g., Weitzman, The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards, 28 UCLA L. Rev. 1181, 1207; Bruch, The Definition and Division of Marital Property in California: Towards Parity and Simplicity, 33 Hastings L.J. 769, 775 (1982).

the effort to fashion a protective property division in cases where minor children are involved.

Legislation should also make clear that a separate property family home as well as a community property family home may be preserved for the support of the minor children and custodial spouse. This is an incident of the basic rule that, "The community property, the quasi-community property and the separate property may be subject to the support, maintenance, and education of the children in such proportions as the court deems just."<sup>11</sup>

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

An act to amend Section 4800 of, and to add Section 4708 to, the Civil Code, relating to marital property.

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

Civil Code § 4708 (added)

SECTION 1. Section 4708 is added to the Civil Code to read:

4708. (a) In a proceeding in which the support of a minor child is at issue, the court has jurisdiction, at the request of a party, to set apart the family dwelling for the use of the minor child and the party awarded custody of the minor child. The family dwelling may be set apart pursuant to this section regardless whether it is community property, quasi-community property, or the separate property of either party.

(b) The court has discretion whether to set apart the family dwelling pursuant to this section, including the period for which, and any terms and conditions upon which, it is set apart. In the exercise of its discretion the court shall be guided by a presumption in favor of setting apart the family dwelling for use during the minority of the child but shall give due consideration to all relevant economic, emotional, and social factors including, but not limited to, the economic detriment to the party for whose use the property is not set apart.

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11. Civil Code § 4807; see also Civil §§ 4805 (enforcement of support), 5102 (separate property dwelling); Bruch, id. at 775, 849.

(c) An order setting apart the family dwelling pursuant to this section does not affect the disposition of the family dwelling in a proceeding for division of the community property and quasi-community property, other than to subject the family dwelling to a prior right of use during the period for which it is set apart. The rights of the parties during the period for which the family dwelling is set apart are governed, to the extent applicable, by the law governing tenants in common, by the Legal Estates Principal and Income Law, Chapter 2.6 (commencing with Section 731) of Title 2 of Part 1, or by such other rules as the court determines are appropriate under the circumstances of the particular case.

(d) An order setting apart the family dwelling pursuant to this section is made pursuant to the obligation to support the spouse and minor child, and shall be treated as such for all purposes including, but not limited to, modification, revocation, enforcement, and taxation.

Comment. Section 4708 codifies and clarifies the rule that the court may set apart the family dwelling for use during the minority of the children. See, e.g., In re Marriage of Boseman, 31 Cal. App.3d 372, 107 Cal. Rptr. 232 (1973). The authority of the court under this section is useful in cases where there are insufficient assets to award the family dwelling to the custodial spouse outright. See Section 4800(b)(1) and Comment thereto (family dwelling awarded to custodial spouse where economic circumstances warrant). As such, the order setting apart the family dwelling under this section is a support order. See subdivision (d).

Subdivision (a) makes clear that the jurisdiction of the court extends to the separate property of a spouse in a case where the separate property is used as the family dwelling. See, e.g., Section 4807 (separate property may be subjected to support of children as court deems just). This is an exception to the general rule that the court has no jurisdiction to award use of separate property to the other spouse. See, e.g., Robinson v. Robinson, 65 Cal. App.2d 118, 150 P.2d 7 (1944). Subdivision (b) codifies the presumption in favor of setting the family dwelling apart for the minority of the children. See, e.g., In re Marriage of Duke, 101 Cal. App.3d 152, 161 Cal. Rptr. 444 (1980). Subdivision (c) requires the court to specify the status of the parties and their rights during the period the family dwelling is set apart. Cf. Prob. Code §§ 660-666 (rules governing probate homestead).

Civil Code § 4800 (amended)

SEC. 2. Section 4800 of the Civil Code is amended to read:

4800. (a) Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, the court shall, either

in its interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties equally. For purposes of making such division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community property and the quasi-community property of the parties in an equitable manner.

(b) Notwithstanding subdivision (a), the court may divide the community property and quasi-community property of the parties as follows:

(1) Where economic circumstances warrant, the court may award any asset to one party on such conditions as it deems proper to effect a substantially equal division of the property. In the application of this paragraph the court shall be guided by a presumption in favor of awarding the family dwelling to the party awarded custody of the minor children.

(2) As an additional award or offset against existing property, the court may award, from a party's share, any sum it determines to have been deliberately misappropriated by such party to the exclusion of the community property or quasi-community property interest of the other party.

(3) If the net value of the community property and quasi-community property is less than five thousand dollars (\$5,000) and one party cannot be located through the exercise of reasonable diligence, the court may award all such property to the other party on such conditions as it deems proper in its final judgment decreeing the dissolution of the marriage or in its judgment decreeing the legal separation of the parties.

(4) Educational loans shall be assigned to the spouse receiving the education in the absence of extraordinary circumstances rendering such an assignment unjust.

(c) Notwithstanding the provisions of subdivision (a), community property personal injury damages shall be assigned to the party who

suffered the injuries unless the court, after taking into account the economic condition and the needs of each party, the time that has elapsed since the recovery of the damages or the accrual of the cause of action, and all other facts of the case, determines that the interests of justice require another disposition. In such case, the community property personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just, except that at least one-half of such damages shall be assigned to the party who suffered the injuries. As used in this subdivision, "community property personal injury damages" means all money or other property received or to be received by a person in satisfaction of a judgment for damages for his or her personal injuries or pursuant to an agreement for the settlement or compromise of a claim for such damages, if the cause of action for such damages arose during the marriage but is not separate property as defined in Section 5126, unless such money or other property has been comingled with other community property.

(d) The court may make such orders as it deems necessary to carry out the purposes of this section.

Comment. Subdivision (b)(1) of Section 4800 is amended to codify the presumption in favor of awarding the family dwelling to the custodial spouse. Where economic circumstances do not warrant such an award, an order setting apart the family dwelling for use during the minority of the children may be appropriate. See Section 4708 (use of family dwelling); see, e.g., In re Marriage of Herrmann, 84 Cal. App.3d 361, 148 Cal. Rptr. 550 (1978).