First Supplement to Memorandum 88-47

Subject: Study F-641/L-1060 - Limitations on Disposition of Community Property (Comments of Richard S. Kinyon)

Attached to this memorandum as Exhibit 1 is a letter from Richard S. Kinyon of San Francisco commenting on issues relating to disposition of community property. The letter also includes a comment on problems involved with notice to a person named as a trustee; this matter will be addressed separately.

Rights and Obligations Associated with Employment Relationship

Mr. Kinyon observes that it is not clear whether a married person who is employed has primary management and control of his or her interests in various employee benefits and other rights and obligations with respect to the employment relationship. This may be particularly important where the employee is terminating the relationship and the employer is paying the employee off with respect to all the interests, rights, and obligations.

Mr. Kinyon suggests it may be appropriate to apply the rules governing management of a community property business to the employment relationship. "[I]t seems to me that the considerations relating to the management and control of a community personal property business operated or managed by one of the spouses are the same as to the spouse's employment relationship."

The staff agrees that the law is not clear in this area. We have spoken with our consultant, Professor Bill Reppy, who indicates there has been very little development in the law on this point until now. It has been more or less assumed that the employee spouse has management and control of employment benefits, even though the nonemployee spouse has a community property interest in them. See, e.g., Marriage of Brown, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976) (private pension plan). Yet at least one case declares that the nonemployee spouse has the right of equal management and control. Johns v. Retirement Fund Trust, 85 Cal. App. 3d 511, 149 Cal. Rptr. 551

(1978) (private pension plan). The conflict between the interests of the employee spouse and nonemployee spouse in selection of pension payment options and beneficiary designations is most apparent at dissolution of marriage, but may arise during marriage as well. The conflict is dealt with in some detail in In re Marriage of Gillmore, 29 Cal. 3d 418, 174 Cal. Rptr. 493, 629 P. 2d 1 (1981).

The case of Hawkins v. Superior Court, 89 Cal. App. 3d 413, 152 Cal. Rptr. 491 (1979), holds that a husband's sole enrollment, without the agreement or authorization of the wife, in a group medical plan that includes an arbitration clause nonetheless binds the wife. There is contrary authority on this point as well, however.

There may be individual statutes governing the right of the employee spouse acting alone to make employment benefit elections, or requiring the signature of the nonemployee spouse, in either state or federal law. We have not made a search for such statutes, but we are aware of currently pending legislation (SB 2679) that would affect public retirement systems:

> The sole purpose of this section is to notify the current spouse of the selection of benefits or change of beneficiary made by a member. Nothing in this section is intended to conflict with community property law. An application for a refund of the member's accumulated contributions, an election of optional settlement, or a change in beneficiary designation shall contain the signature of the current spouse of the member, unless the member declares, in writing under penalty of perjury, that either:
>
> (a) The member is not married.
>
> (b) The current spouse has no identifiable community property interest in the benefit.
>
> (c) The member does not know, and has taken all reasonable steps to determine, the whereabouts of the current spouse.
>
> (d) The current spouse has been advised of the application and has refused to sign the written acknowledgment.
>
> (e) The current spouse is incapable of executing the acknowledgment because of incapacitating mental or physical condition.
>
> (f) The member and the current spouse have executed a marriage settlement agreement pursuant to Chapter 6 (commencing with Section 5133) of Title 8 of Part 5 of Division 4 of the Civil Code which makes the community property law inapplicable to the marriage.

The staff concurs with Mr. Kinyon that this is a matter that needs attention. However, it is far from simple, and we would be reluctant to act without substantially more research and full consideration of the various alternatives. If the Commission agrees, we will schedule an in-depth memorandum on this for discussion at a future meeting.

Management and Control After Death of Spouse

We have also corresponded with Mr. Kinyon concerning the question of the right of a surviving spouse to continue to manage and control community property (or what used to be community property) after the death of the other spouse. Under existing law, if the surviving spouse takes community property by intestate succession or under the decedent's will, the surviving spouse owns the property without the necessity of administration (unless the surviving spouse elects to administer the property). The surviving spouse is free to manage, deal with, and dispose of the property as the survivor's own.

The problem is that a potential transferee of property from the surviving spouse may be unwilling to enter into the transfer for fear that the surviving spouse does not really have full power to dispose of the property. This can occur where the decedent made a will that gives the decedent's share of the community property to a person other than the surviving spouse. A person who wants to be secure in accepting a transfer may refuse to consummate the transaction until the surviving spouse obtains a court order confirming the surviving spouse's ownership of the property.

To cure this problem, Probate Code Section 13540 provides that after 40 days have elapsed since the death of the decedent, the surviving spouse has "full power" to sell, lease, mortgage, or otherwise deal with and dispose of community real property, "and the right, title, and interest of any grantee, purchaser, encumbrancer, or lessee shall be free of rights of devisees or creditors of the deceased spouse to the same extent as if the property had been owned as the separate property of the surviving spouse." The 40 day delay enables a person claiming an interest in the property to make that claim a matter of record and thereby preclude free transferability by the surviving spouse.

Mr. Kinyon points out that the anomalous result of the law is that the surviving spouse is free to transfer real property of potentially great value but is unable freely to transfer personal property no matter how small in value. As a practical matter, however, this may only be a problem for transfer of personal property of a type where title is evidenced by some sort of documentation, such as cars, stocks, accounts receivable, and the like, that can be quite substantial in value. Most tangible personal property is untitled and of relatively low value, and its transferability by the possessor is not ordinarily questioned.

Where there is documentary evidence of title to personal property, tangible or intangible, existing laws go a considerable way in protecting the security of a transaction involving the property entered into by the person in whose name title stands. Bona fide purchasers, for example, are ordinarily protected from adverse claims to property transferred by the person in whose name title stands.

A good illustration of this principal can be found in the provisions governing transfer of community property securities. The Corporations Code and the Commercial Code give considerable protection to the parties to a securities transfer. A certificated security is a negotiable instrument under Commercial Code Section 8105. Corporations Code Section 420 immunizes a corporation and its transfer agent and registrar for executing a securities transfer properly indorsed by the person to whom the securities are registered, even if the registration shows the securities are held as community property. Commercial Code Section 8302 provides that the transferee takes a security free of any adverse claim if the transferee is a bona fide purchaser for value in good faith and without notice of any adverse claim.

These provisions would seem to cover the usual securities transfer and would enable the surviving spouse in whose name the securities are registered to dispose of the securities in the ordinary course of business without impediment. These provisions do not, however, cover the situation where the transfer is not an open market transaction and the transferee has actual knowledge of the decedent's will giving the decedent's community property interest in the securities to a person other than the surviving spouse.

Should the law be expanded beyond the Commercial Code and facilitate the transfer in such a case? Mr. Kinyon believes it should, because of the basic uncertainty in the law that is caused by reliance on the bona fide purchaser doctrine. Also, special bona fide purchaser statutes such as that applicable to securities transfers do not cover every type of personal property whose transferability may be impaired.

The public policy question here is the balance between protecting possible devisees of the decedent and enabling property to pass between spouses with minimal delay and difficulty. The staff agrees with Mr. Kinyon that the balance favors effective nonprobate transfers between spouses, at least with regard to securities held in the name of the surviving spouse. A draft statute to implement the concept that a surviving spouse in whose name securities are registered has full power of disposition of the securities could read:

§ 13545. Securities

13545. (a) After the death of a married person, the surviving spouse, or the legal representative of the surviving spouse, has the same power to manage, pledge, assign, transfer, or otherwise deal with and dispose of community and quasi-community property securities registered in the name of the surviving spouse as the surviving spouse or legal representative would have if the deceased spouse had not died, and the right, title, and interest of any encumbrancer, assignee, transferee, or other person shall be free of the rights of devisees or creditors of the deceased spouse to the same extent as if the property had been owned as the separate property of the surviving spouse.

(b) Nothing in this section affects or limits the liability of a surviving spouse under Sections 13550 to 13553, inclusive.

Comment. Section 13545 is new. It gives the surviving spouse the same power to dispose of community and quasi-community property securities as the surviving spouse had before the death of the decedent. See generally Civ. Code § 5125. The recourse of a devisee of the deceased spouse's interest in securities sold after the deceased spouse's death is against the surviving spouse for the value of that interest. See Knego v. Grover, 208 Cal. App. 2d 134, 147-48, 25 Cal. Rptr. 158 (1962).

Section 13545 does not permit the surviving spouse to make a gift of community property securities. See Morghee v. Rouse, 224 Cal. App. 2d 745, 37 Cal. Rptr. 112 (1964).

The staff believes this extension of the law is warranted because it is useful to be able to rely on registered ownership and because securities are a special case where it may be necessary to act

quickly. Whether the law should be further extended to securities not registered in the name of the surviving spouse, or to other types of personal property, is more problematical in view of the potential harm to rightful successors. Mr. Kinyon argues that if the surviving spouse is not given the express right to deal with all types of community personal property, persons aware of the other spouse's death will be unwilling to deal with the survivor. The lack of authority "may even affect the surviving spouse's power to deal with his or her own separate property unless third parties who know of the other spouse's death can be convinced that the property is in fact the surviving spouse's separate property (which may be very difficult to do)."

Mr. Kinyon is also concerned that the surviving spouse might be absolutely liable for losses suffered by the decedent's successors in interest resulting from the survivor's management and control of the property on the grounds that the survivor had no right to deal with the property unilaterally. He believes the surviving spouse should be expressly given the right to deal with the community personal property subject to the survivor's fiduciary duty to the deceased spouse's successors in interest.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

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Re: Memorandum 88-47 (Study F-641 -- Disposition of Community Property (Revised Recommendation) dated June 3, 1988)

Dear Nat:

I have reviewed the above-referenced memorandum and am generally in agreement with your recommendations. I have the following comments for your consideration:

1. I suggest that Proposed new Article 3 (Community Personal Property Business) of Chapter 4 of the Civil Code (Management and Control) specifically apply to the various rights and obligations associated with a spouse's employment relationship. I am frequently asked whether an employee spouse has the primary management and control of his or her interests in various employee benefits and other rights and obligations with respect to the employee's employment relationship, particularly where the employee is terminating that relationship and the employer is paying the employee off with respect to all such interests, rights and obligations. The law is not clear in this regard, but it seems to me that the considerations relating to the management and control of a community personal property business operated or managed by one of the spouses are the same as to the spouse's employment relationship.

2. In the past I have corresponded with Bob Murphy and you regarding the problems I have encountered and envisioned in connection with the right of a surviving spouse to dispose of community property after the death of the other spouse. Enclosed are copies of some of that

correspondence. Even though a surviving spouse generally may not have difficulty dealing with third parties who are not aware of the other spouse's death, the question remains as to the surviving spouse's right to continue to manage and control both halves (or even his or her own half) of the community property. Following the death of a married individual, the community presumably is terminated, and the surviving spouse and the deceased spouse's successors-in-interest apparently own all the former community property and the deceased spouse's quasi-community property as tenants-in-common. See Probate Code §§ 100 and 101; Civil Code §§ 682, 685 and 686. Although the surviving spouse generally is given the right to dispose of community and quasi-community real property after 40 days from the death of of the deceased spouse (See Probate Code §§ 13540 through 13542), there is no comparable provision regarding the surviving spouse's right to dispose of community personal property, or even to manage and control the community property generally. This lack of authority may even affect the surviving spouse's power to deal with his or her own separate property unless third parties who know of the other spouse's death can be convinced that the property is in fact the surviving spouse's separate property (which may be very difficult to do).

I continue to think it would be very helpful if the law were clarified as to the surviving spouse's right to manage and control community personal property following the death of the other spouse and prior to the appointment of the deceased spouse's personal representative (or assertion of an interest in the property by the surviving spouse's other successors-in-interest). It seems to me that the surviving spouse should be given the right (as opposed to simply the power because of the third parties' lack of knowledge of the deceased spouse's death) to deal with the community personal property subject to the survivor's fiduciary duty to the deceased spouse's successors-in-interest. Otherwise, the surviving spouse might be absolutely liable for losses suffered by the decedent's successors-in-interest resulting from the survivor's management and control of such property on the grounds that the survivor had no right to deal with the property unilaterally.

Regarding another matter, where a trust is a beneficiary of an estate and notice is required to be given to the trust, the notice generally need be given only to the trustee. However, where the personal representative and the

trustee (or the person named as trustee) are the same person or persons, notice also must be given to each person who would be presently entitled to any payment if the trust were in effect, or if there is no such person, to each person who would be entitled to any distribution if the trust were terminated at the time the notice is required to be given. Probate Code § 1208. It seems to me that notice should be given to the trust beneficiaries where the person named as trustee (who is not the same as the personal representative) has not yet accepted the trusteeship. Otherwise, either the trust beneficiaries would not be protected or the person named as the trustee would seem to be subject to a duty to protect the interests of the trust beneficiaries before such person has agreed to act as trustee.

Please do not hesitate to call if you would like to discuss any of these matters with me further.

Sincerely yours,

Dick Kinyon

Richard S. Kinyon

RSK:pmd
Enclosures

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