#L-3004

ns56g
06/19/89

Memorandum 89-59

Subject: Study L-3004 - Rights of Estranged Spouse

BACKGROUND

A troublesome problem in probate law that has been brought to the Commission's attention on several occasions in recent years relates to the rights of a surviving spouse where there was a pending proceeding for dissolution of the marriage at the time of the decedent's death. Traditionally, a "surviving spouse" is a person lawfully married to the decedent at the time of death, regardless of the state of relations between the survivor and the decedent at the time of death, so long as a final order of dissolution had not yet been entered at the time of death.

The traditional rule has been criticized. In 1984, for example, legislation was enacted in California to lower the priority of a surviving spouse for appointment as administrator of the decedent's estate if the surviving spouse was living apart from the decedent at the time of death and litigation to change their marital status was pending between them at the time. This legislation is carried over in Probate Code § 8463:

> If the surviving spouse is a party to an action for separate maintenance, annulment, or dissolution of the marriage of the decedent and the surviving spouse, and was living apart from the decedent on the date of the decedent's death, the surviving spouse has priority next after brothers and sisters and not the priority prescribed in Section 8461.

In 1984 the Commission also received correspondence from a person whose mother had died suddenly while divorce litigation was pending. See Exhibit 1. The only liquid asset in the estate, the wife's public retirement fund, was awarded to the surviving husband under a surviving spouse determination even though the wife had filed a change of beneficiary designation and also had disinherited the husband in her will. Our correspondent claims the estranged husband had used delaying tactics during the dissolution litigation.

> Mom had been teaching for sixteen years in California, and she was married to that man for only slightly less than six years when she died, but STRS ruled that the surviving spouse receive the benefits. I not only find this unfair, but downright infuriating...
>
> It never occurred to us that Mom would die, as she succumbed to this tumor very rapidly, nor that Mr. Price would not be out of her life after all those months, thanks to the foot-dragging judge in the divorce, and that Mr. Price would walk away with the only cash asset in the estate...
>
> That I am bitter and angry is quite evident in this letter. I try not to let it run my day-to-day existence, but there are very few times when the harsh realities of the last eighteen months aren't driven home with the force of a sledge hammer in my day-to-day life.
>
> If I can be of ANY assistance at all in the formulation of new laws or amendments to prevent such injustices from happening to other innocent people, please do not hesitate to ask.

In 1988 the Court of Appeal for the Fourth Appellate District (San Diego) forwarded to the Commission a copy of its opinion in the case of Estate of Blair, 199 Cal. App. 3d 161 (1988). See Exhibit 2. In Blair the spouses separated in June 1985 and the wife petitioned for legal separation and for division of the family home (which was held in joint tenancy form but alleged to be community property); the husband's response requested dissolution and confirmation of community and separate assets; the wife made a new will in December 1985 disinheriting the husband; and the wife died in January 1986 before trial in the dissolution action. The husband recorded a joint tenancy affidavit in February 1986 and sold the family home to a bona fide purchaser in September 1986. The wife's estate sought to recover half of the proceeds of sale on the theory that the property was community rather than joint tenancy; the Court of Appeal held that the property belongs to the husband as survivor unless a prior severance of the joint tenancy or a prior transmutation to community property is demonstrated. The court commented, however:

> We think it is illogical that parties such as Nancy and Ray, awaiting the court's division of property acquired during marriage, would envision or desire the operation of survivorship. An untimely death results in a windfall to the surviving spouse, a result neither party presumably intends or anticipates. This unfairness occurs in the context of a chameleon-like community property presumption which appears upon the filing of a dissolution action, disappears upon

death, and potentially reappears upon intestate succession. Such a result is not only contrary to the certainty which should be associated with legal process, but contravenes the policy considerations which form the basis of family law matters.

Our role, however, is only to decide this case. The concerns we have expressed are more properly addressed by the Legislature which can provide that the community property presumption under section 4800.1 applies to those cases in which a spouse holding joint tenancy property dies during the pendency of a dissolution proceeding.

199 Cal. App. 3d at 169 (footnotes and citations omitted).

A copy of Blair was also forwarded to us by Bob Mills, with the remark, "I think that filing a dissolution petition should sever joint tenancy, although others may differ and there are obviously other 'cures.'"

ANALYSIS

There are a number of rights the law grants to the surviving spouse of a decedent. The matters mentioned above relate to three of them--priority for appointment as administrator of the decedent's estate, qualification for death benefits under a public pension plan, and acquisition of the decedent's share in joint tenancy property by right of survivorship. There are other rights as well--an intestate share of the community property and of the decedent's separate property, the right to temporary possession of the family home and household goods, qualification for set aside of the decedent's exempt property or small estate (under $20,000), and qualification for a probate homestead and family allowance. And, of course, the right to express testamentary and nontestamentary dispositions by the decedent to the decedent's surviving spouse.

Definition of Surviving Spouse

The mere filing of a dissolution proceeding does not generally affect these rights under existing law. "Surviving spouse", for purposes of the Probate Code, is defined as follows:

78. "Surviving spouse" does not include any of the following:

(a) A person whose marriage to the decedent has been dissolved or annulled, unless, by virtue of a subsequent marriage, the person is married to the decedent at the time of death.

(b) A person who obtains or consents to a final decree or judgment of dissolution of marriage from the decedent or a final decree or judgment of annulment of their marriage,

which decree or judgment is not recognized as valid in this state, unless they (1) subsequently participate in a marriage ceremony purporting to marry each to the other or (2) subsequently live together as husband and wife.

(c) A person who, following a decree or judgment of dissolution or annulment of marriage obtained by the decedent, participates in a marriage ceremony with a third person.

(d) A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

Although this provision does not address the pending dissolution issue directly, the plain implication to be drawn from the rather specific exclusions is that a final order of dissolution is necessary to disqualify a person as a surviving spouse. This conclusion is bolstered by the Comment to Uniform Probate Code Section 2-802, from which Section 78 is drawn: "Although some existing statutes bar the surviving spouse for desertion or adultery, the present section requires some definitive legal act to bar the surviving spouse. Normally, this is divorce."

Other Jurisdictions

As the UPC Comment indicates, a few other states do deny surviving spouse status where the marriage is foundering. North Carolina, for example, provides that a married person loses the rights of a surviving spouse on a number of grounds, including:

(1) A spouse who voluntarily separates from the other spouse and lives in adultery and such has not been condoned.

(2) A spouse who willfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of such spouse's death.

N.C. Gen. Stat. § 31A-1(a)(2)-(3).

New York likewise excludes from the definition of a surviving spouse a number of situations, including:

(1) A spouse abandoned the deceased spouse, and such abandonment continued until the time of death.

(2) A husband failed or refused to provide for his wife, unless such marital duty was resumed and continued until the death of the wife.

N.Y. E.P.&T.L. § 5-1.2(5)-(6).

New Hampshire law provides:

> If, at the time of the death of either husband or wife, the decedent was justifiably living apart from the surviving husband or wife because such survivor was or had been guilty of conduct which constitutes cause for divorce, such guilty survivor shall not be entitled to any interest or portion in the real or personal estate of said decedent, except such as may be given to such survivor by the will of the deceased. N.H. Rev. Stat. Ann. § 560:19.

Policy

Laws of this type, and the California statute to lower the priority of the surviving spouse, recognize that even though a marriage may not have ended *de jure*, it may have ended *de facto*, and the equities favor the natural heirs and devisees of the decedent over the estranged spouse, who is a spouse only in name and not as a practical or emotional matter. The argument is that the law should effectuate the decedent's probable intent, which would otherwise be thwarted by the legal technicality that no final order for dissolution was entered before the decedent's death.

However, it is not necessarily clear what the decedent's intent would have been. Some decedents, particularly where there are minor children of the marriage, might want the property to go to the surviving spouse who will use it to take care of the children, without being wasted by the administrative expense of an estate-consuming guardianship for the children.

If the decedent had wanted to disinherit the estranged spouse, the decedent could have done this at any time, but did not. However, some rights granted the surviving spouse by law are not subject to disinheritance (see, e.g., Exhibit 1). Moreover, an ordinary person, or even an ordinary lawyer, may not be sufficiently alert to promptly tend to all instruments that require a beneficiary change. In fact, the Blair court comments on this very problem:

> We believe that applying the common law presumption in this type of case places an unnecessary legal task on the family law practitioner. The lawyer representing a party in a dissolution proceeding is now obligated to promptly partition all community property held in joint tenancy to avoid what occurred in this case. The lawyer's malpractice exposure is exacerbated by the difficulties in obtaining relevant information from the nonmanaging spouse who

> frequently has inaccurate knowledge of the extent or title to marital property. These legal services place an additional financial burden on the client.
> 199 Cal. App. 3d at 169.

Technical Problems

The staff sees two significant problems in attempting to formulate possible legislation in this area: (1) how to satisfactorily describe the situations that should precipitate denial of surviving spouse rights, and (2) how to determine what specific surviving spouse rights should be subject to loss and what rights should be preserved regardless of the condition of the marriage.

The existing law takes the clear and simple approach that there must generally be a final order for dissolution of marriage before surviving spouse status will be denied. The virtue of this approach is that this is an easily ascertainable fact that is susceptible of ready proof. Litigation will rarely be required.

The existing California administration priority statute uses a two-pronged test--a petition for dissolution has been filed and the parties are living apart. Although this test requires a determination of whether parties are living apart, it is a fairly easy factual determination and one that is commonly used in the family law area. The staff believes this is a sound standard.

Once we get into more nebulous areas, such as those involved in the North Carolina, New York, and New Hampshire statutes (adultery that is not condoned, abandonment or failure to provide, justifiably living apart because of conduct that is cause for divorce), proof becomes more problematical and destructive litigation more likely. In addition, standards such as these would be inappropriate in California, with its no-fault dissolution law based on irreconcilable differences.

It can be argued that any statute based on any condition of the marriage short of final dissolution is somewhat short-sighted, since parties can and do reconcile; a final order of dissolution is the only proper standard. However, the possibility of reconciliation is speculative, and we are dealing with the situation that actually exists at death, not with potential changes that would have occurred had one of the parties not died. The possibility of reconciliation would become important if a statute were to provide, for example, that the

mere filing of a dissolution petition severs a joint tenancy. Such an approach could clearly have undesired consequences, and any statute should be drawn based only on status at death and not on intermediate circumstances.

The joint tenancy problem also opens up a different area of inquiry--just what rights of a surviving spouse should be affected by deterioration of the marriage. The right of survivorship in joint tenancy property, for example, is not ordinarily thought of as being based on marriage--any two or more persons may be joint tenants with right of survivorship. As a practical matter, however, the vast majority of joint tenancies are spousal (most of the remainder are parent/child), and spouses whose marriage is actually dissolved would not ordinarily want the property to pass to the survivor. In fact, title and ownership of joint tenancy property is ordinarily dealt with in the dissolution proceeding. But if a joint tenant dies during pendency of the proceeding, then the Blair problem arises. Even if the Commission decides not to tackle the estranged spouse problem generally, it may be appropriate for the Commission to devise a solution to the joint tenancy problem, either as a probate or as a community property matter.

A number of other rights of the surviving spouse, such as the family allowance and the probate homestead, are basically support rights. They are the equivalent of what would have been awarded to the estranged spouse if the dissolution had proceeded to judgment before the decedent's death. It makes some sense not to attempt to terminate these rights regardless of the status of the marriage at the time of death.

Should a decedent's will be affected by the pendency of dissolution? Existing California law provides that a final dissolution or annulment of the marriage terminates testamentary gifts to the former spouse (legal separation that does not terminate the status of husband and wife does not affect the will). Probate Code Section 6122. Ordinarily a married person engaged in marital status litigation will have the opportunity to make any codicils that appear appropriate, so it may be assumed that a failure to do so shows an intent to retain the estranged spouse as a beneficiary. However, the need to change a

will is even less likely to occur to an ordinary person (or lawyer) than changing property title, since property title is more directly involved in property division litigation. Is it a significant difference that the decedent died the day before, rather than the day after, entry of a final order of dissolution or annulment? The law could be revised to provide that a gift in a will to a spouse is terminated if at the time of death the spouses were living apart and litigation for dissolution or annulment was pending.

Nonprobate transfers probably should be treated the same as wills. A nonprobate transfer is a will substitute--a beneficiary designation on an insurance policy, pension plan, bank account, etc. If a will is not revoked until entry of a final order of dissolution, the same rule should apply to nonprobate transfers. The rationale is that if a person wishes to change the beneficiary designation, this can easily be done. Of course, the same concern arises that the spouse may not think of doing this until it is too late; the response is, that's what lawyers are for. There may also be a question of competency of the spouse to make a beneficiary change; ordinarily this will not be an issue, although the situation could arise. Relevant to this issue would be whether an incompetent spouse could commence dissolution proceedings, and whether the conservator of an incompetent spouse may change beneficiaries under the doctrine of substituted judgment.

Intestate succession is probably the single most important area where an estranged spouse rule would be effective. Given the fact that California law already reduces the priority for appointment of a surviving spouse as administrator, logic would dictate a reduction in the intestate share of the surviving spouse. After all, the rules governing priority for appointment follow the intestate succession pattern--administration is generally awarded to the person who has the greatest interest in the estate.

CONCLUSION

The Commission needs to make a basic policy decision whether to address the problem of a death that occurs during the pendency of marital dissolution litigation. Although the issue does not arise frequently, when it does it is quite upsetting to the parties

involved. If the Commission is inclined to act in this area, the most promising test, in the staff's opinion, is whether dissolution was pending and the parties were living apart at the time of death; this is already the standard in the existing California statute governing the priority of an estranged spouse for appointment as administrator.

Any statute to deny rights to the estranged spouse should except from its operation rights such as the family allowance and probate homestead that are based on a support theory. And if the Commission decides not to pursue this matter, the Commission should nonetheless take a closer look at the joint tenancy/community property problem highlighted in the Blair case, perhaps to extend the family law community property presumption to probate, as the court suggests.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

P.O. Box 23242
Santa Barbara, California 93121
September 23, 1984

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

Attention: John H. DeMoully

Dear Mr. DeMoully:

Ironically today would have been my mother's sixtieth birthday.

Thank you for your letter of September 10th asking my input regarding the unfairness we encountered in the disposition of my mother's estate (copy attached). This has been a very difficult year for a number of people who were caught in the fallout of these problems, and, as I mentioned in my letter to Senator Hart, the stories of other people in similar circumstances that have reached me over this past year have numbered in the dozens. There are some definite holes in the laws at this particular time, and it has been pointed out to me by Senator Hart that plugging some of these holes will be very difficult. However, I would love to see someone try. I didn't deserve to lose everything, nor did my children, simply because I chose to support my mother emotionally and financially at what turned out to be the most inopportune time. I am not certain I would have done it any differently, given 20/20 hindsight, because I loved my mom very much. So a person can be penalized for loving someone at the wrong time.

To try to answer your questions:

(1) My mother's retirement benefits were California State Teachers' Retirement System benefits. The STRS ruled that the entire fund be payed out to my stepfather, from whom my mother was not quite divorced at the time of her untimely death. Divorce proceedings had been initiated, and Mr. Price (her husband) had countersued, dropped, and countersued again at the time my mother went into the hospital for surgery of a cancerous brain tumor, from which she did not survive. To add to the mess, Mr. Price has a history of mental instability, when it behooves him to be unstable, and he pulled out all the stoppers to delay things, hoping that either my very ill grandmother would die and increase Mom's property before the final settlement, or that Mom would die and he would get it all. He got his way, as he always did. Mom HAD changed the beneficiary on her STRS records to reflect her children, but STRS would not recognize this.

Mom had been teaching for sixteen years in California, and she was married to that man for only slightly less than six years when she died, but STRS ruled that the surviving spouse receive the benefits. I not only find this unfair, but downright infuriating. Mom was one of the true Calvinists in this world, and the Protestant work ethic meant everything to her. Her husband only worked when it suited him, and her children gave their all in her efforts to free her from a destructive marriage, and the wrong people lost out. As it was, at the time of her death, the ONLY liquid asset Mom had was the STRS fund. Because Mr. Price was assigned those funds, Mom died broke. That is quite an unkind cut for a woman like her. She was quite a lady, a real woman, and I can give you a couple hundred testimonies on that. The STRS is giving the beneficiaries Mom had listed the death benefit, a couple hundred dollar insurance benefit, but they keep losing the paperwork we have submitted SIX times, and after over a year we still have not received that money to try an clear up some of Mom's debts. Mr. Price has been enjoying his funds for some months now. It would appear that the law benefits Mr. Price even further, in that he is not responsible for any of her debts, even the ones incurred before the separation.

(2) As far as the disposition of Mom's share of their community property, as I mentioned before, they were only married six years, and Mr. Price did not work much. Mother had possessed a complete household of furniture and so on before the marriage, and there was little actual community property to be considered. They had purchased a house a couple years before the separation, and we had to buy him out of his interest in the house. We made absolutely no profit in selling the house, as we had three mortgages and back payments to clear. This legal maneuver also found my brother and my children and me out on the street scrambling for a place to live, as we had moved in with Mom and spent a combined thousands of dollars on conversion and renovation so we could all live in one dwelling with some privacy. (An aside, this conversion of her garage has become the standard for the area.)

There is no money in the estate to pay my brother and I back for the money we put into this, and my share was my oldest child's college fund. Now he cannot go to college for some years, unless some job or financial aid comes through. It never occurred to us that Mom would die, as she succumbed to this tumor very rapidly, nor that Mr. Price would not be out of her life after all those months, thanks to the foot-dragging judge in the divorce, and that Mr. Price would walk away with the only cash asset in the estate. Mother's will not only specifically named only her children as her beneficiaries, but it specifically disclaimed Mr. Price by name. Oh, I am sitting here with an apartment full of her furniture and kitchen things and her clothes, which I plan to sell in a garage sale next weekend in cooperation with the executor of the estate, but we will be lucky to get pennies on the dollar of their actual worth, and then this will be divided among the heirs. I figure I ought to have enough to buy a new dress, providing I go to Sears or Penney's.

That I am bitter and angry is quite evident in this letter. I try not to let it run my day-to-day existence, but there are very few times when the harsh realities of the last eighteen months aren't driven home with the force of a sledge hammer in my day-to-day life.

If I can be of ANY assistance at all in the formulation of new laws or amendments to prevent such injustices from happening to other innocent people, please do not hesitate to ask. I will address anyone/anything, in person or in letter, I can, when necessary, get off my soapbox and stick to the bare facts. I can't, however, guarantee that I will not cry when speaking to someone about this. I can't even think about these injustices without tears forming in my eyes for what my mother would have thought, had she been able to see what had happened to those she loved. If you need any further information, again, do not hesitate to ask. I have this thing about injustice, against me, against you, against a total stranger, I don't care; I hate it all.

Truly yours,

Robin Leigh Anderson

Robin Leigh Anderson

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, *Governor*

CALIFORNIA LAW REVISION COMMISSION
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September 10, 1984

Robin Leigh Anderson
P.O. Box 23242
Santa Barbara, CA 93121

Re: Disposition of community property at death

Dear Ms. Anderson:

Senator Hart has sent this office a copy of your letter concerning disposition of your mother's community property to her estranged husband upon her death. The California Law Revision Commission is currently studying and recommending changes in the laws governing community property and probate.

The problem you identify in your letter--disposition of community property where death occurs during a period of separation or during pendency of a dissolution proceeding--is one the Commission has not yet reviewed, but it is a problem that has concerned other people as well as you.

I will bring your letter to the attention of the Commission in connection with its study of this area of the law. In order to assist the Commission on this matter, could you please send us additional information on two specific points:

(1) You refer to the teacher's retirement benefits that passed to your mother's husband. Was this a public or private fund, and if public, was it the State Teachers' Retirement System? Do you know whether your mother had the right to designate a different beneficiary?

(2) You comment that your mother's will was unable to prevent the passage of her property to her husband. As you may know, a married person has the right to dispose of one-half of the community property and all of his or her separate property by will. Do you know the reason why your mother's will was ineffective (e.g., the will was not properly executed, the will did not deal with separation, the property was held in joint tenancy, etc.)?

Thank you for your assistance.

Sincerely,

John H. DeMoully
Executive Secretary

JHD:jcr

cc: Gary K. Hart

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