

Memorandum 91-44

Subject: Study F-3050/L-3050 - Donative Transfers of Community Property  
(Initial Staff Draft)

Attached to this memorandum is an initial staff draft to implement the Commission's policy decisions on donative transfers of community property made at the June meeting. The staff has found drafting in this area to be very tough going, with many intricacies and opportunities for error. We hope the Commissioners and interested persons will review this draft very carefully.

Staff Notes following a number of the sections raise policy issues for Commission review. We have also side-stepped a number of related issues in the hope of coming to an agreement on the basic statute to deal with the MacDonald problem of the estate of the deceased spouse disrupting the previously-consented-to estate plan of the spouses. The other issues we have identified will be dealt with separately as soon as we can reasonably get to them.

Respectfully submitted,

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SECTION 1. Part 1 (commencing with Section 5000) of Division 5 of the Probate Code is repealed.

SEC. 2. Part 1 (commencing with Section 5000) is added to Division 5 of the Probate Code, to read:

PART 1. GENERAL PROVISIONS

CHAPTER 1. PROVISIONS RELATING TO EFFECT OF DEATH

§ 5000. Nonprobate transfer at death

5000. (a) A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is not invalid because the instrument does not comply with the requirements for execution of a will, and this code does not invalidate the instrument.

(b) Included within subdivision (a) are the following:

(1) A written provision that money or other benefits due to, controlled by, or owned by a decedent before death shall be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(2) A written provision that money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand.

(3) A written provision that any property controlled by or owned by the decedent before death that is the subject of the instrument shall pass to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(c) Nothing in this section limits the rights of creditors under any other law.

Comment. Section 5000 continues former Section 5000 without change. This section is intended broadly to validate written instruments that provide for nonprobate transfers on death. The listing in the section of types of written instruments is not exclusive, and the section would also validate, for example, nonprobate transfers in partnership agreements, stock redemption plans, buy-sell agreements, powers of appointment, and the like.

§ 5001. Property subject to nonprobate transfer

5001. Except as otherwise provided by statute, a provision for a nonprobate transfer on death in a written instrument described in Section 5000 may dispose of the following property:

(a) The transferor's separate property.

(b) The one-half of the community property that belongs to the transferor under Section 100.

(c) The one-half of the transferor's quasi-community property that belongs to the transferor under Section 101.

(d) The one-half of the community property and of the transferor's quasi-community property that belongs to the transferor's surviving spouse under Sections 100 and 101, to the extent the surviving spouse joins in, or gives written consent to, the provision.

Comment. Subdivisions (a)-(c) of Section 5001 parallel Section 6101 (property which may be disposed of by will). They codify case law that a married person may make a nontestamentary transfer of the married person's one-half interest in community property effective on death. See, e.g., *Tyre v. Aetna Life Ins. Co.*, 54 Cal. 2d 399, 353 P.2d 725, 6 Cal. Rptr. 13 (1960) (beneficiary designation in community property life insurance policy); *Estate of Wilson*, 183 Cal. App. 3d 67, 227 Cal. Rptr. 794 (1986) (Totten Trust account for benefit of third party).

Subdivision (d) ensures that the section does not impliedly invalidate a married person's disposition of the surviving spouse's one-half interest in community and quasi-community property if made with the joinder or written consent of the surviving spouse. See Chapter 2 (commencing with Section 5010) (nonprobate transfers of community property); see also Section 102 (recapture by surviving spouse of certain quasi-community property). A nonprobate transfer of community property without the necessary spousal consent is voidable, not void, and is effective absent an act by the nonconsenting spouse to set the transfer aside. Cf. Section 5150 (nonprobate transfer made without joinder or written consent).

Section 5001 does not deal with the formal requirements for an effective nonprobate transfer. This may be the subject of a controlling statute or regulation, or may be a matter of contract between the transferor and the fiduciary holding the property. Nor does Section 5001 authorize a disposition of community or other property by nonprobate transfer to the extent statutes governing the property provide otherwise. see Section 5020 (controlling provisions of transfer, consent, instrument, or law).

Property effectively disposed of by nonprobate transfer is not part of the decedent's probate estate and does not pass by intestate succession under Section 6400 (property subject to intestacy provisions). Section 5001 does not address the issue whether a will may override a nonprobate transfer or vice versa. This is governed by law other than this section. See, e.g., Sections 5140 (revocability of

joinder or written consent); 5302(e) (survivorship right, beneficiary designation, or P.O.D designation in multiple-party account cannot be changed by will).

Relevant definitions include Sections 28 ("community property"), 45 ("instrument"), 66 ("quasi-community property"), and 81 ("transferor").

§ 5002. Limitation on authority to make nonprobate transfer

5002. Nothing in this part requires a fiduciary holding property under a written instrument described in Section 5000 to receive, or to transfer property in compliance with, a provision for a nonprobate transfer on death executed by a person who has an interest in the property if either (i) the person is not authorized by the terms of the written instrument to make a transfer of the property, or (ii) the provision does not otherwise satisfy the terms of the written instrument.

Comment. Section 5002 is added to make clear that this part is not a substantive grant of authority for a person to demand a nonprobate transfer of the person's interest in property where such a transfer is not authorized by the terms of the written instrument under which the property is held. Thus, for example, a nonemployee spouse under an employee benefit plan, or a noninsured spouse under an insurance policy, is not authorized by this part to make a nonprobate transfer of the spouse's community property interest, if any, in the plan or policy. Although this chapter does not authorize such a nonprobate transfer, the fiduciary may be required by federal law, by other state law, or by the terms of the written instrument itself to recognize the property interest of a spouse.

§ 5003. Protection of fiduciary

5003. (a) A fiduciary holding property under a written instrument described in Section 5000 may transfer the property in compliance with a provision for a nonprobate transfer on death that satisfies the terms of the written instrument, whether or not the transfer is consistent with the beneficial ownership of the property as between the transferor and surviving spouse or their successors.

(b) The protection provided by subdivision (a) does not extend to a transfer made after the fiduciary has been served with a court order restraining transfer. No other notice or any other information shown to have been available to the fiduciary affects its right to the protection provided by subdivision (a).

(c) The protection provided by this section has no bearing on the rights of the transferor and surviving spouse in disputes between themselves or their successors concerning the beneficial ownership of the property held by the fiduciary.

(d) The protection provided by this section is not exclusive of any protection provided the fiduciary by any other provision of law.

Comment. Section 5003 is drawn from portions of Section 5405 (protection of financial institution under California Multiple-Party Accounts Law); see also Health & Saf. Code § 18102.3 and Veh. Code §§ 5910.7 and 9916.7 [SB 271]. A fiduciary that holds property that is the subject of a nonprobate transfer is not obligated to ascertain the respective separate, community, and quasi-community property interests in the property of participant and nonparticipant, or employee and nonemployee, or covered and noncovered, or insured and noninsured, spouses. The fiduciary may transfer the property in accordance with the terms of the written instrument, and any adverse rights of a spouse or beneficiaries must be asserted against the estate of the transferor or against the transferee, not against the fiduciary. See Sections 5021 (governing provisions) and 5150 (nonprobate transfer made without joinder or written consent).

## CHAPTER 2. NONPROBATE TRANSFERS OF COMMUNITY PROPERTY

### Article 1. Definitions and Rules of Construction

#### § 5010. Application of definitions and rules of construction

5010. Unless the provision or context otherwise requires, the definitions and rules of construction in this article govern the construction of this chapter.

Comment. Section 5010 limits the definitions and rules of construction to this chapter, even though the defined terms are also used elsewhere in the code.

#### § 5013. Fiduciary

5013. "Fiduciary" means a fiduciary holding community property under a written instrument described in Section 5000.

Comment. Section 5013 is intended to simplify drafting.

#### § 5016. Nonprobate transfer

5016. "Nonprobate transfer" means a provision for a nonprobate transfer on death in a written instrument described in Section 5000.

Comment. Section 5016 is intended to simplify drafting.

§ 5019. Transitional provision

5019. This chapter applies to a nonprobate transfer on the death of a person who dies on or after January 1, 1993.

Comment. Section 5019 limits the rule stated in Section 3 (general transitional provision). Because this chapter changes the law governing the rights of successors of a person who joins in or gives written consent to a nonprobate transfer by the person's spouse, this chapter does not seek to apply the change in law to rights that vested as a result of a death that occurred before the operative date of the chapter.

Article 2. General Provisions

§ 5020. Controlling provision of transfer, consent, instrument, or law

5020. A provision of this chapter, otherwise applicable to a nonprobate transfer of community property, is subject to all of the following:

(a) A contrary expression of intent of the parties in the nonprobate transfer or in a written consent to the nonprobate transfer.

(b) Contrary terms of the written instrument under which the nonprobate transfer is made.

(c) Contrary state or federal law governing the written instrument under which the nonprobate transfer is made.

Comment. Section 5020 establishes the principle that the rules provided in this chapter only apply in the absence of other governing principles.

Subdivision (a) makes clear that an expression of intent of the parties in making a nonprobate transfer of their interests in community property prevails over the default rules in this chapter.

Subdivision (b) recognizes that the terms of the written instrument may define the rights of the parties. See also Section 5021 (governing provisions).

Subdivision (c) makes clear that this chapter is not intended to override contrary state law, and cannot override preempting federal law.

§ 5021. Governing provisions

5021. A provision of this chapter concerning rights between married persons is relevant only to controversies between the persons and their successors and has no bearing on the obligation of a fiduciary to hold and transfer the property in the manner required by the terms of the written instrument under which nonprobate transfer of the property is made.

Comment. Section 5021 is drawn from Section 5201 (multiple-party accounts). See also Section 5003 (protection of fiduciary).

§ 5022. Waiver of rights in community property

5022. (a) Nothing in this chapter limits the effect of a person's waiver of rights in community property under Chapter 1 (commencing with Section 140) of Part 3 of Division 2.

(b) A waiver of a right to a joint and survivor annuity or survivor's benefits under the federal Retirement Equity Act of 1984 is not a transmutation of the community property rights of the person executing the waiver.

Comment. Subdivision (a) of Section 5022 recognizes an alternate procedure for releasing rights of a surviving spouse in community property. Subdivision (b) makes clear that a waiver for federal tax purposes is not a transmutation within the meaning of Section 5110.710 of the Civil Code.

Article 3. Joinder or Consent to Nonprobate Transfer

§ 5030. Joinder or written consent required

5030. A person may not make a nonprobate transfer of community property other than to the surviving spouse without the joinder or written consent of the surviving spouse.

Comment. Section 5030 parallels Civil Code Section 5125(b). It codifies the case law rule that the statutory community property gift limitations apply to nonprobate transfers such as beneficiary designations in trusts and accounts. See, e.g., *Tyre v. Aetna Life Insurance Co.*, 54 Cal. 2d 399, 353 P. 2d 725, 6 Cal. Rptr. 13 (1960) (beneficiary designation in bank trust account); *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964) (beneficiary designation under United States Savings Bonds).

Staff Note. We wonder whether this section is sound, in light of our decision that a nonprobate transfer made without joinder or written consent is voidable only as to the one-half interest of the nonconsenting spouse. The gift rule, requiring consent and making an unconsented to gift voidable in its entirety during marriage, really is not relevant to a nonprobate transfer, which by definition does not impact community property rights during marriage but only at death. In fact, the Commission has made a policy decision that during the marriage, an unconsented to nonprobate transfer may be revoked only as to the one-half interest of the nonconsenting spouse; but this decision has little practical impact since the nonconsenting spouse ordinarily will not learn of the nonprobate transfer until the transferor's death. The net effect of these rules is that either spouse may make a nonprobate transfer of that spouse's one-half interest in community property without the consent of the other spouse.

In view of these considerations, the staff does not believe this section serves a useful purpose. A cross-reference to the general rule set out in Section 5001 above (property subject to nonprobate transfer)



would be more appropriate. If anything, this section should state that a spouse may not make a nonprobate transfer of the other spouse's interest in community property without the consent of the other spouse.

§ 5131. Effect of joinder or written consent

5131. (a) Joinder or written consent of a person to a nonprobate transfer of community property is a nonprobate transfer of the person's one-half interest in the community property.

(b) Joinder or written consent of a person to a nonprobate transfer of community property is not a transmutation of the person's one-half interest in the community property into separate property of the person's spouse. Nothing in this chapter affects a joinder or written consent that satisfies Section 5110.710 of the Civil Code; such a joinder or consent is a transmutation and is governed by the law applicable to transmutions and not by this chapter.

Comment. Subdivision (a) of Section 5131 implements the concept that joinder or written consent to a nonprobate transfer is treated in the same way as the initiation of a nonprobate transfer of community property.

Subdivision (b) is consistent with the result in Estate of MacDonald, 51 Cal. 3d 262 (1990). A joinder in or consent to a nonprobate transfer is in effect a consent to a future gift of the person's interest in community property, and is subject to the legal incidents provided in this chapter. Until the gift is complete, however, it remains community property and is part of the community estate for purposes of division of property at dissolution of marriage. See Section 5140 (revocability of joinder or written consent). However, if the joinder or consent specifies a clear intent to transmute the property, the expression of intent controls over this section. See Section 5020 (express written intent controls).

§ 5132. Effect of change in terms of nonprobate transfer

5132. If after a person has joined in or given written consent to a nonprobate transfer of community property, the person's spouse, without the person's joinder or written consent, revokes the nonprobate transfer, names a different beneficiary, or elects a different benefit or payment option:

(a) If done during the lifetimes of the spouses, the change in terms revokes the person's joinder or consent to the nonprobate transfer and is effective only as to the one-half interest of the person's spouse in the community property.

(b) If done after the person's death, the change in terms is effective as to the interests of both spouses in the community property.

Comment. Subdivision (a) of Section 5132 treats a change in terms of a nonprobate transfer during the lifetimes of the spouses as a new nonprobate transfer, for which the living spouse may give consent if so desired. If the living spouse does not have legal capacity to consent at the time, consent may be obtained through substituted judgment procedures. Section 2580 (substituted judgment).

Subdivision (b) is consistent with the rule of Section 5140 (revocability of joinder or written consent).

Staff Note. The Commission discussed, at the June meeting, the issue of what happens when the donor spouse revokes a beneficiary designation, or changes its terms, after the death of the consenting spouse. The Commission was unable to reach a resolution of this issue. Under consideration at that time were:

(1) The surviving spouse has full authority to revoke or change the terms of the nonprobate transfer (Halbach approach).

(2) The actions of the surviving spouse do not affect the decedent's consent, which is itself a nonprobate transfer of one-half the community property to the consented to beneficiary on the consented to terms (Kasner approach).

(3) Revocation or change by the surviving spouse revokes the decedent's consent and the decedent's one-half interest in the property passes through the decedent's estate to the decedent's general beneficiaries (staff approach).

(4) Revocation or change by the surviving spouse is precluded by the death of the consenting spouse (alternate approach).

(5) Revocation or change by the surviving spouse is permissible if consented to by the decedent's legal representative on a substituted judgment theory (modified alternate approach).

Each of these approaches has obvious advantages and disadvantages, discussed in previous memoranda and at previous meetings; no one solution is perfect, although it is possible there is a better solution that has not yet occurred to us.

If we remind ourselves that what we are doing here is to draft default rules that apply absent a clear indication of intent by the consenting spouse, it may help to resolve the issue. The consenting spouse can always indicate in the consent what happens to the property in the event of a revocation or change in terms after the consenting spouse's death. The Commission discussed somewhat the concept of providing optional consent forms that would be more clear on the terms of the consenting spouse's consent.

Short of that, what would a typical consenting spouse want? The staff has come around to the Halbach position that the consenting spouse in the ordinary case most likely has confidence in the judgment and integrity of the donor spouse, and would want the donor spouse to be making decisions regarding disposition of the consenting spouse's share of the community property in light of the changing situation after the consenting spouse's death. If a different beneficiary appears more in need, the surviving spouse should be allowed to shift the property there. In other words, the situation is somewhat analogous to a general power of appointment given to the surviving spouse. If we keep in mind that we are only trying to deal with a

typical case, not the unusual case, and that a consenting spouse who has concern can specify some other treatment, then the staff believes the Halbach approach is probably best. It, incidentally, would also resolve the problem discussed in the next Staff Note immediately below.

Staff Note. At the June meeting the Commission discussed at some length the issue of the rights of heirs of the consenting spouse between the death of the consenting spouse and the death of the donor spouse. The other side of the coin is the rights of the donor spouse to deal with the property between during that time, including possible fiduciary duties of the donor spouse. The Commission discussed a number of different options, including the possibility that the death of the consenting spouse in effect enables the donor spouse freedom to change beneficiaries or consume the asset before death, and the possibility that the donor spouse has complete control over the asset but the estate of the nondonor spouse is entitled to offsetting property equal to the nondonor's one-half interest in the asset.

After giving some thought to these issues, both the staff and Professor Kasner have reached the conclusion that they should be deferred for later consideration, since, while they are important and have a great practical impact, they do not affect the narrow issue of the nonprobate transfer of the property that remains at the death of the spouse.

#### Article 4. Revocation of Joinder or Consent

##### § 5140. Revocability of joinder or written consent

5140. (a) Joinder or written consent of a person to a nonprobate transfer of community property is revocable during the marriage.

(b) On termination of the marriage by dissolution, the joinder or written consent is revocable and the community property is subject to division under Section 4800 of the Civil Code or other order within the jurisdiction of the court.

(c) On death of either spouse, the joinder or written consent is irrevocable.

Comment. Section 5140 is subject to express terms to the contrary. See Section 5020 (controlling provision of transfer, consent, instrument, or law). If the joinder or consent is not by its terms irrevocable but is part of a mutual estate plan, nothing in this section precludes enforcement of the mutual estate plan by appropriate remedies, including an injunction affecting revocation.

Subdivision (c), to the extent it relates to the death of the joining or consenting spouse, overrules the effect of Estate of MacDonald, 51 Cal. 3d 262 (1990). The joinder or consent of a person to disposition of the person's one-half interest in the community property controls over a contrary disposition in the person's will. The person's personal representative may not revoke the joinder or consent to a nonprobate transfer and impose a different estate plan on the decedent's property.

§ 5141. Form and delivery of revocation

5141. Revocation of joinder or written consent of a person to a nonprobate transfer of community property is not effective unless made in writing and delivered before the death of either spouse to both the person's spouse and any fiduciary holding the property.

Comment. Section 5141 is consistent with the Section 5132.5(c) (joinder or written consent irrevocable on death).

Staff Note. *As drafted, nothing in this section would preclude a person from revoking in a will and making a different disposition of the person's one-half interest in the community property, so long as a copy of the will is properly delivered before death.*

§ 5142. Effect of revocation

5142. On revocation of joinder or written consent of a person to a nonprobate transfer of community property, the one-half interest of the person in the property does not pass by the nonprobate transfer but is part of the person's estate and is subject to disposition at death by testate or intestate succession from, or nonprobate transfer by, the person.

Comment. Section 5142 is subject to contrary terms of the written instrument and to overriding federal and state law governing the obligation of a fiduciary holding the community property to deal with the property under the particular type of instrument. See Section 5020 (controlling provision of transfer, consent, instrument, or law). However, the substantive rights of the spouses in the community property are governed by this section, notwithstanding overriding contractual and legal requirements that bind a fiduciary holding the community property. See Sections 5003 (protection of fiduciary), 5021 (governing provisions).

Article 5. Nonprobate Transfer without Joinder or Consent

§ 5150. Effect of transfer

5150. (a) A nonprobate transfer of community property by a person without the joinder or written consent of the person's spouse is voidable as to the one-half interest of the person's spouse.

(b) A court order pursuant to subdivision (a) shall set aside the nonprobate transfer of community property as to the one-half interest of the person's spouse, subject to such terms and conditions or other remedy as appears equitable under the circumstances of the case, taking into account the rights of all the parties.

(c) Nothing in this section affects any remedy the person's spouse may have against the person's estate for a nonprobate transfer of community property made without the joinder or written consent of the person's spouse.

Comment. Subdivision (a) of Section 5150 is consistent with the rule applicable to present gifts of community property at termination of the marriage by dissolution or death. See, e.g., *Ballinger v. Ballinger*, 9 Cal. 2d 330, 70 P. 2d 629 (1937); *Gantner v. Johnson*, 274 Cal. App. 2d 869, 79 Cal. Rptr. 381 (1969). It implements the concept that a nonprobate transfer is a will substitute, and that a person has the right to make a transfer of the person's one-half interest in the community property at death, with or without the spouse's consent. See, e.g., Sections 100-102 (effect of death of married person on community and quasi-community property), 6101 (property which may be disposed of by will), 5001 (property subject to nonprobate transfer).

Under subdivision (b) the court has discretion to fashion an appropriate order, depending on the circumstances of the case. The order may, for example, require restitution for the beneficiary, or provide for recovery of the value of the property instead of the property.

Subdivision (c) makes clear that this section does not provide the exclusive remedy where a person has made a nonprobate transfer of community property without the joinder or written consent of the other spouse. It may be proper, for example, simply to allow the surviving spouse an offset for the value of the property transferred out of the share of the decedent, or to give the surviving spouse a right of reimbursement.

Staff Note. *The Commission deferred decision on whether there should be a statutory limitation period for voiding an unconsented to nonprobate transfer of community property. The Commission's 1983 recommendation on the community property gift statute provided that an unconsented to gift is voidable upon order of the court in an action commenced by the spouse before the earlier of (i) one year after the spouse had actual or constructive notice of the disposition or (ii) three years after the disposition was made.*

*The Commission's report states, "To give some assurance of transactional security, an action by a spouse to avoid a transaction for failure of joinder or consent should be limited to one year after the spouse had notice (actual or constructive) of the transaction or three years after the transaction was made, whichever occurs first." The report notes that this is consistent with the existing one year period to avoid a disposition of community real property made without joinder or written consent and the general three year statute of limitations for recovery of personal property.*

*But this is different from a transfer at death. At death all affairs are examined, all transfers become known, etc. One year after death seems more reasonable.*

*But even during the one year period following death, hardship situations may arise. A transferee may spend the money. Bona fide purchasers may take assets from a transferee in ignorance of their source as an unconsented to nonprobate transfer of community property. Rather than a rigid scheme to deal with these problems, the draft above*

gives the court flexibility to fashion an appropriate remedy. The court might consider laches, for example, in whether to avoid the transfer at all.

The present draft addresses avoidance of the transfer after it has occurred, i.e., a spouse has died leaving community property that is the subject of an unconsented to transfer. If the other spouse is aware of the purported transfer during the marriage, can the other spouse force a change in the beneficiary designation before death? This may not be a real problem, since in the ordinary case the other spouse will not be aware of the beneficiary designation. If the other spouse is aware and does not object, or tacitly consents, should this be considered a waiver of the right to object? The Commission considered this issue before and concluded that there should be a written consent before the other spouse is bound to a nonprobate transfer of community property.

In this connection it is worth noting that some written instruments require an acknowledgement that the other spouse is aware of the beneficiary designation. Beneficiary designations under the Public Employees' Retirement Law require the signature of the nonemployee spouse or the reason why not. "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." Gov't Code § 21209. This section became operative on January 1, 1990, so it is too soon to tell whether it is a workable and useful concept that might be expanded to other types of nonprobate transfers.

Staff Note. The Commission adopted the policy that a nonconsenting spouse may retrieve only the spouse's one-half interest in the community property. It should be noted that the Commission's 1984 recommendation on community property gifts would allow the court discretion to set aside the entire gift. The Commission's report on this states that the unconsented to gift of community property should ordinarily be set aside only as to the interest of the spouse who did not join in or consent to the transaction. "However, the court should have discretion to set aside the transaction as to all interests in special circumstances, such as where it is desirable to award the family home to the spouse who has custody of the children or as a probate homestead." The staff does not now recommend such a provision. It would appear to engraft probate procedures onto nonprobate transfers, which should remain clean and simple. If the Commission is interested in the concept, it should be investigated through the mechanism of the "augmented estate" used in other jurisdictions, where a probate proceeding can pull in nonprobate assets where needed for family protection.

#### § 5151. Right of nonconsenting spouse in community property

5151. A nonprobate transfer of community property made without the joinder or written consent of a spouse does not affect the right of the spouse to make a disposition at death of the spouse's one-half interest in the community property by testate or intestate succession or by nonprobate transfer.

Comment. Section 5151 does not affect the principle that a fiduciary may execute a nonprobate transfer as specified in the written instrument. Section 5003 (protection of fiduciary). But this does not affect rights between the spouses and their successors. Section 5021 (governing provisions).

CONFORMING CHANGES

Prob. Code § 141 (amended). Rights that may be waived

SEC. 3. Section 141 of the Probate Code is amended to read:

141. (a) The right of a surviving spouse to any of the following may be waived in whole or in part by a waiver under this chapter:

...

(10) An interest in property that is the subject of a nonprobate transfer under Part 1 (commencing with Section 5000) of Division 5 of the Probate Code.

(b) Nothing in this chapter affects or limits the waiver or manner of waiver of rights other than those referred to in subdivision (a), including but not limited to the right to property that would pass from the decedent to the surviving spouse by nonprobate transfer upon the death of the decedent such as the survivorship interest under a joint tenancy, a Totten trust account, or a pay-on-death account.

Comment. Paragraph (10) is added to Section 141(a) for purposes of cross-referencing the provisions on nonprobate transfers. See also Section 5022 (waiver of rights in community property). Paragraph (10) is a specific instance of the general rule stated in subdivision (b).