

## Memorandum 88-7

Subject: Study L-2008 - AB 2779 (Urgency Bill--proposed amendment)

Last session's probate legislation included a recodification of the marital deduction gift statute. See Sections 21500-21541. The purpose of the statute is to save attempted marital deduction gifts that might otherwise fail. The statute accomplishes this objective by imposing rules of construction on a gift instrument to make the gift conform with federal requirements.

Thus, for example, Internal Revenue Code Section 2056(b)(3)(A) provides that no marital deduction is available if the instrument imposes a condition that the spouse must survive the decedent by more than six months in order to take the gift. If an attempted marital deduction gift would fail because the instrument includes a survival requirement that exceeds six months, the California legislation saves the deduction by limiting the survival requirement to six months. See Section 21525(a):

If an instrument that makes a marital deduction gift includes a condition that the transferor's spouse survive the transferor by a period that exceeds six months, other than a condition described in subdivision (b), the condition shall be limited to six months as applied to the marital deduction gift.

During the past few weeks we have received several phone calls, including a call from the Internal Revenue Service, concerned about the interpretation of this particular provision. The point at issue is an attempted marital deduction gift that includes a condition that the spouse survive the decedent until the occurrence of a certain event. For example, the instrument might require that the spouse survive the decedent until the date of distribution of the estate. The date of distribution could occur before six months, but it could also occur more than six months after the death of the decedent. Such a gift would not satisfy the Internal Revenue Code limitation. Would Section 21525(a), as set out above, convert such a condition to a six month limitation?

There appears to be no good indication of legislative intent precisely on point, although of course the general legislative intent of the whole statute is to save attempted marital deduction gifts to the extent possible. An article on the statute in the California Continuing Education of the Bar, Estate Planning & California Probate Reporter, written shortly after enactment of the statute in 1982 states that, "Furthering the legislature's attempt to protect estate planning attorneys from themselves, this section provides that if the will contains a marital deduction gift any survivorship requirement in the will as to the gift shall be limited to six months." 3 CEB Est Plan R 97 (1982). Professor Jerry A. Kasner was editor of the CEB reporter at that time, and we have spoken with him about this. He believes it was quite clear that the statute was intended to limit to six months any survival requirement such as the date of distribution. We have also spoken with Bob Mills, who was the draftsman of the statute. Mr. Mills says that even though there is no good evidence of legislative intent available, the statute was assumed to cover this situation.

Given the fact that the Internal Revenue Service is questioning this point, the staff believes it is worth clarifying by statute. This could be done fairly simply in the urgency bill. The staff would amend Section 21525(a) as follows:

Prob. Code § 21525 (amended). Survival requirement

21525. (a) If an instrument that makes a marital deduction gift includes a condition that the transferor's spouse survive the transferor by a period that exceeds or may exceed six months, other than a condition described in subdivision (b), the condition shall be limited to six months as applied to the marital deduction gift.

(b) If an instrument that makes a marital deduction gift includes a condition that the transferor's spouse survive a common disaster that results in the death of the transferor, the condition shall be limited to the time of the final audit of the federal estate tax return for the transferor's estate, if any, as applied to the marital deduction gift.

Comment. Subdivision (a) of Section 21525 is amended to make clear that a survival requirement that is not fixed in duration is limited to six months for a marital deduction gift, just as a survival requirement of fixed duration that exceeds six months. This clarification is a specific application of the general intent of the statute to save marital deduction gifts to the greatest extent practical; it is declaratory of, and not a change in, existing law.

It may also be worth stressing in statutory language in the bill, not just in the Comment, that this amendment "is declaratory of, and not a change in, existing law."

Respectfully submitted,

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