#F-641/L-3020

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Memorandum 90-9

Subject: Study F-641/L-3020 - Disposition of Community Property (Rights and Obligations Associated with Employment Relationship)

Richard S. Kinyon of San Francisco has written to us with the observation 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 recently enacted legislation affecting public retirement systems (see Government Code §§ 21209, 31760.3):

> 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:
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> (a) The member is not married.
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> (b) The current spouse has no identifiable community property interest in the benefit.
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> (c) The member does not know, and has taken all reasonable steps to determine, the whereabouts of the current spouse.
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> (d) The current spouse has been advised of the application and has refused to sign the written acknowledgment.
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> (e) The current spouse is incapable of executing the acknowledgment because of incapacitating mental or physical condition.
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> (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. We have also received a report from Study Team 1 of the State Bar Probate Section that such a study would be worthwhile. 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. This

could be done as part of the donative transfers project (the MacDonald case discussed in Memorandum 89-106 is a pension plan/IRA case) or as a separate study.

Respectfully submitted,

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