

## Memorandum 91-53

Subject: Study F-3050/L-3050 - Nonprobate Transfers of Community  
Property (Draft of Tentative Recommendation)

Attached to this Memorandum is a staff draft of a tentative recommendation relating to nonprobate transfers of community property, implementing decisions made at the Commission's July meeting.

There are a few staff notes following sections in the draft. The staff would make two additional points:

(1) The Commission had suggested that we criticize the Ablamis decision in our report on this matter. Instead, the staff has deemed it more prudent simply to note the existence of the decision and that the Commission will be giving the matter of federal preemption and state response further study. See the discussion of "Federal Preemption" at page 7.

(2) Professor Halbach has suggested to the staff that our attempt to cover all types of nonprobate transfers with one set of rules may be ill-conceived, particularly with respect to the right of a surviving spouse to modify beneficiary designations in life insurance policies as opposed to pension plans. The staff has asked Professor Kasner for his perspective on this, and Professor Kasner thinks that one rule is adequate but that the Commission has settled on the wrong rule. It is clear that we need further consideration of this matter. The staff suggests we put the tentative recommendation out for comment and revisit the issue after we receive comments.

Our objective at this meeting is to review the draft of the tentative recommendation to see whether any further revisions should be made. The staff observes that if we are to have legislation for the 1992 session, which is our goal, we need to approve a tentative recommendation for comment at this meeting.

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

Staff Draft  
TENTATIVE RECOMMENDATION  
relating to  
NONPROBATE TRANSFERS OF COMMUNITY PROPERTY

INTRODUCTION

A married person may dispose of the person's one-half interest in community property<sup>1</sup> by will or by nontestamentary transfer effective at death.<sup>2</sup> Case law has extended the statutory limitation on lifetime gifts of community property<sup>3</sup> to donative transfers at death: A married person may not make a transfer of community property effective at death without the written consent of the person's spouse; after the death of the transferor, a donative transfer made without the required consent

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1. See Prob. Code § 100. A married person may also make a testamentary disposition of the person's interest in the person's quasi-community property. See Prob. Code § 101. This recommendation does not deal with a nonprobate transfer of quasi-community property, however, since such a transfer may present different policy considerations. The Commission has reserved this matter for future review.

2. While the ability of a married person to will the property is statutory (Prob. Code § 6101), to determine the existing law on nonprobate transfers requires both a close reading of the statutes and a knowledge of the cases. 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).

So fundamental a principle--that a married person may make a nonprobate transfer of the person's one-half interest in community property--should be clear, and the Commission's recommendations on nonprobate transfers of community property will have the incidental effect of clarifying the matter.

3. Civ. Code § 5125(b) ("A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, without the written consent of the other spouse.").

may be set aside as to the one-half interest of the nonconsenting spouse.<sup>4</sup>

This rudimentary framework of statute and case law governing nonprobate transfers of community property has proved to be inadequate to handle this increasingly important area of law. Typical problems are revealed in two recent cases--*Estate of MacDonald*<sup>5</sup> in the California Supreme Court and *Ablamis v. Roper*<sup>6</sup> in the United States Court of Appeals for the Ninth Circuit.

*MacDonald* involved a husband who moved community property from an employee pension plan to an Individual Retirement Account (IRA), naming as beneficiary under the IRA a trust for his children from a former marriage. The wife signed a written consent to the beneficiary designation, but after her death and while her husband was still alive her personal representative revoked the consent and sought to recover the wife's one-half interest in the community property for the wife's estate. The California Supreme Court held that the wife's consent to a beneficiary designation was not a transmutation of the wife's interest in the community property into the husband's separate property, with the result that the consent remained revocable and the revocation could be exercised after the wife's death by her personal representative.

*Ablamis* also involved a wife's interest in her husband's community property pension plans. In that case the wife did not consent to any particular disposition of the property, and died leaving her interest in community property to a trust for her children of a former marriage. When the wife's personal representative claimed a one-half interest in each of the husband's pension plans, the United States Court of Appeals (9th Circuit) held that the federal Employee Retirement Income Security Act of 1974 (ERISA) preempts state community

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4. See, e.g., *Travelers' Insurance Co. v. Fancher*, 219 Cal. 351, 26 P. 2d 482 (1933) and *Blethen v. Pacific Mutual Life Insurance Co.*, 198 Cal. 21, 243 P. 431 (1926) (beneficiary designation under life insurance policy); *Estate of Wilson*, 183 Cal. App. 3d 67, 227 Cal. Rptr. 794 (1986) (Totten trust accounts).

5. 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990).

6. \_\_\_ F.2d \_\_\_ (9th Cir. 1991) (89-15352).

property laws and precludes the wife's estate from asserting its interest in the community property pensions.

These cases illustrate a paradox in the law governing this area: The wife's estate in *MacDonald* could recover the wife's community property interest despite the wife's consent to the husband's disposition, whereas the wife's estate in *Ablamis* could not recover the wife's community property interest even though the husband's disposition was made without the wife's consent. The cases also demonstrate both the confusion in the law over the relevant legal principles that control a nonprobate transfer of community property and a spousal consent to a transfer, and the need for statutory clarification. The cases have caused consternation in the estate planning bar over the inability of a spouse to make a coherent estate plan using standard nonprobate transfer techniques with any assurance that the law will honor the proposed disposition.

#### RECOMMENDATIONS

The California Law Revision Commission recommends codification of the general principles governing nonprobate transfers of community property. This is an area of law that is assuming major importance as increasing amounts of wealth are passed through nonprobate devices such as beneficiary designations in employee benefit plans, life insurance policies, living trusts, multiple party bank accounts, and the like.<sup>7</sup> The law has not caught up with practice in the area, and cases have developed on a piecemeal and inconsistent basis. Codification of the general principles will benefit both practitioners and the courts in dealing with this area of law.

The Commission has adhered to the following general principles in developing specific recommendations for legislation to govern nonprobate transfers of community property:

(1) As an equal owner of community property, each spouse should have an equal right to control disposition of half the property at death.

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7. Typical nonprobate transfer devices are cataloged in Probate Code Section 5000.

(2) A spouse's written expression of intent should control over contrary statutory default rules governing disposition of a spouse's interest in community property at death.

(3) A third party acting under the terms of a nonprobate transfer instrument should be protected in making the transfer notwithstanding the existence of contrary rights in the property. Thus, for example, a pension plan trustee may make a transfer under the terms of the plan, whether or not the transfer corresponds to community property rights of spouses and beneficiaries. Disputes should be resolved among the interested parties and should not involve the neutral stakeholder.

#### Spousal Consent Requirement

Existing case law recognizes that a nonprobate transfer of community property at death is a donative transfer, and as such treats it in a manner similar to a gift of community property.<sup>8</sup> The Commission recommends express codification of the gift rule for nonprobate transfers of community property. Thus a donative transfer of community property is voidable as to the one-half interest of the donor's spouse if made without the written consent of the spouse.

While existing law governing gifts provides for recovery of one-half of the community property gift on the death of a spouse, this remedy is unduly restrictive. The Commission recommends that for nonprobate transfers of community property made without consent, the court should have discretion to fashion an appropriate remedy, depending on the circumstances of the case. The court may, for example, order return of the value of the property instead of the property itself, or may order return of a particular item of property while allowing an item of offsetting value to pass. Likewise, the spouse should be able to proceed against the donor's estate rather than against the beneficiary of the nonprobate transfer. It may be proper, for example, simply to allow the surviving spouse a setoff for the

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8. See discussion at notes 3 and 4, above.

value of the property transferred out of the share of the decedent or to give the surviving spouse a reimbursement right.

Effect of Consent

The *MacDonald* case points out that a spousal consent to a nonprobate transfer of community property does not transmute the consenting spouse's community interest into separate property of the other spouse. A person who consents to a particular disposition of community property on death of the persons's spouse is consenting only to its disposition at death. Until then, the property retains its community character and is subject to all incidents of community property, including division at dissolution of marriage. This rule should be codified, but would not preclude a spouse from making a transmutation of community property if so desired by an express declaration of intent.<sup>9</sup>

Since a nonprobate transfer of community property, like a will, is not intended to take effect until death, it should remain revocable until that time.<sup>10</sup> To impose some structure on the revocation process and because the original consent is in writing, a revocation should only be revocable in writing. Revocation should not be effective unless the other spouse is informed of the revocation before death; this will ensure that any corresponding changes in the spouse's estate plan necessitated by the revocation can be made.<sup>11</sup>

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9. See Civ. Code § 5110.730(a) ("A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined, consented to, or accepted by the spouse whose interest in the property is adversely affected.").

10. This rule would not apply to a consent that by its terms is irrevocable.

11. Where the written revocation is made in the consenting spouse's will, the additional requirement should be imposed that the will is admitted to probate before the death of the other spouse. This replaces the delivery requirement: It ensures that the revocation contained in the will is the consenting spouse's last word on the matter, and that the other spouse receives notice (through the estate administration process).

After the donor spouse dies, the ability of the consenting spouse to revoke and make a different disposition of the community property should terminate. The donative transfer has become a completed gift at this point, beyond the spouses' power to change.

Effect of Death of Consenting Spouse

The most difficult issues involve the situation presented in *MacDonald*--rights among the parties after the death of the consenting spouse but before the death of the donor spouse. May the consenting spouse's successors revoke the consent before the nonprobate transfer becomes a completed gift? May the donor spouse make changes in the terms of the gift that conflict with the terms consented to by the deceased spouse?

The court in *MacDonald* did not reach the issue of exercise of the revocation right by the consenting spouse's personal representative after the consenting spouse's death. The Commission believes the consent of a spouse to a nonprobate transfer of community property is itself a nonprobate transfer, and should become irrevocable on the death of the consenting spouse. The consenting spouse's successors should not, after the spouse's death, be permitted to undo the decedent's estate plan for their own benefit. The recommended law would honor the clearly expressed written intent of the deceased spouse with respect to disposition of the decedent's interest in the community property.

During the interim period between the death of the consenting spouse and the death of the donor spouse, the donor spouse may seek to change the terms of the proposed nonprobate transfer, for example by designating a different beneficiary or by revoking the transfer in whole or in part. In this case, the Commission recommends that the law recognize the authority of the surviving spouse to deal with and dispose of both halves of the property. The deceased spouse is no longer able to give consent to changed terms,<sup>12</sup> whereas the surviving

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12. If the donor spouse makes a change in terms during the lifetime of the consenting spouse, on the other hand, the consenting spouse is in a position to respond. In this situation the proposed law provides that the change in terms revokes the consent, unless the consenting spouse gives further consent to the changed terms.

spouse is in a position to judge the needs of potential beneficiaries as circumstances change in the interim period. The proposed law adopts the premise that by consenting, the spouse expresses confidence in the survivor. This default rule will correspond with the actual situation in most cases. Where the consenting spouse does not wish to leave the survivor with freedom to change the terms of the proposed disposition, the consenting spouse may provide otherwise.

#### Federal Preemption

The Commission recommends enactment of the foregoing principles as part of California law. However, it is clear from the *Abiamis* case that the California rule permitting a nonemployee spouse to make a separate disposition of a one-half interest in a community property pension plan may not be applied to employee pension plans under ERISA.<sup>13</sup> At this time the Commission recommends only that California law recognize federal preemption in the area. The Commission plans to give this matter further review.

#### Retroactivity

Before *MacDonald*, a person who executed a consent to a nonprobate transfer of community property would ordinarily have assumed that the consent would dispose of the person's interest in the community in the manner consented to. Such a consent should be saved to the greatest extent possible, and an estate plan should not be destroyed by allowing the heirs of the consenting spouse to overturn it after the spouse's death. For this reason the Commission recommends that codification of the law governing nonprobate transfers of community property should also be applied to a spousal consent executed before the operative date of the codification.

Retroactive operation would be subject to an exception that where the consenting spouse died before the operative date of the

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13. See 29 U.S.C. § 1056(d) (19\_\_\_) (assignment or alienation of benefits under a covered retirement plan precluded).

codification, former law continues to apply. This would preserve rights of the decedent's successors that may have vested under the *MacDonald* doctrine and cannot constitutionally be disturbed.<sup>14</sup>

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14. Cf. *In re Marriage of Buol*, 39 Cal. 3d 751, 705 P. 2d 354, 218 Cal. Rptr. 31 (1985) and *In re Marriage of Fabian*, 41 Cal. 3d 440, 715 P. 2d 253, 224 Cal. Rptr. 333 (1986) (constitutional limitation on retroactive operation of Civil Code §§ 4800.1 and 4800.2).

OUTLINE

PROBATE CODE

DIVISION 5. NONPROBATE TRANSFERS

PART 1. PROVISIONS RELATING TO EFFECT OF DEATH

CHAPTER 1. GENERAL PROVISIONS

- § 5000. Nonprobate transfer at death
- § 5001. [Reserved for future use]
- § 5002. Limitations imposed by instrument
- § 5003. Protection of holder of property

CHAPTER 2. NONPROBATE TRANSFERS OF COMMUNITY PROPERTY

Article 1. General Provisions

- § 5010. "Written consent" defined
- § 5011. Governing provision of instrument, law, or consent
- § 5012. Community property rights independent of transfer obligation
- § 5013. Waiver of rights in community property
- § 5014. Transitional provision

Article 2. Consent to Nonprobate Transfer

- § 5020. Written consent required
- § 5021. Transfer without written consent
- § 5122. Written consent not a transmutation
- § 5123. Effect of modification

Article 3. Revocation of Consent

- § 5130. Revocability of written consent
- § 5131. Form and delivery of revocation
- § 5132. Effect of revocation

CONFORMING CHANGES

- Civ. Code § 5110.740 (amended). Estate planning documents
- Prob. Code § 141 (amended). Rights that may be waived

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PART 1. PROVISIONS RELATING TO EFFECT OF DEATH

SEC. . A chapter heading is added to Part 1 (immediately preceding Section 5000) of Division 5 of the Probate Code, to read:

CHAPTER 1. GENERAL PROVISIONS

Prob. Code § 5000 (unchanged). 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 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 also would validate, for example, a nonprobate transfer provision in a partnership agreement, stock redemption plan, buy-sell agreement, power of appointment, and the like.

Staff Note. Section 5000 is unchanged. It is set out here for convenience of reference, together with a supplementary comment.

Prob. Code § 5001 (Reserved for future use).

Prob. Code § 5002 (added). Limitations imposed by instrument

SEC. . Section 5002 is added to the Probate Code, to read:

5002. Notwithstanding any other provision of this part, a holder of property under an instrument described in Section 5000 is not required to receive, hold, or transfer the 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 (1) the person is not authorized by the terms of the instrument to execute a provision for a transfer of the property, or (2) the provision does not otherwise satisfy the terms of the instrument.

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

Prob. Code § 5003 (added). Protection of holder of property

SEC. . Section 5003 is added to the Probate Code, to read:

5003. (a) A holder of property under an 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 instrument, whether or not the transfer is consistent with the beneficial ownership of the property as between the person who executed the provision and other persons having an interest in the property or their successors.

(b) Except as provided in this subdivision, no notice or other information shown to have been available to the holder of the property affects the right of the holder to the protection provided by subdivision (a). The protection provided by subdivision (a) does not extend to a transfer made after the holder of the property has been served with a contrary court order or with a written notice of a person claiming an adverse interest in the property.

(c) The protection provided by this section does not affect the rights of the person who executed the provision and other persons having an interest in the property or their successors in disputes among themselves concerning the beneficial ownership of the property.

(d) The protection provided by this section is not exclusive of any protection provided the holder of the property 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 & Safety Code § 18102.3; Veh. Code §§ 5910.7, 9916.7 [SB 271]. A holder of 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. Unless the holder of property has been served with a contrary court order or notice of an adverse claim, the holder may transfer the property in accordance with the terms of the instrument, and any adverse rights of a spouse or beneficiaries must be asserted against the estate of the person who executed the instrument or against the beneficiary, not against the holder of the property. See Sections 5012 (community property rights independent of transfer obligation), 5021 (transfer without consent).

Staff Note. The Commission requested research concerning the rule in other situations where a holder of property may make payments subject to contrary claims or court orders. The Multiple Party Accounts Law (Probate Code § 5405) and the TOD vehicle registration bill (Health and Safety Code Section 18102.3 and Vehicle Code Sections 5910.7 and 9916.7), are cited in the Comment. They all require a court restraining order before the property holder is obligated to do anything other than comply with the terms of the nonprobate transfer.

The general rule applicable to banks is that the bank may make payment in accordance with the terms of the account unless (1) served with a court order restraining payment or (2) served with an affidavit of an adverse claimant stating that the person holding the account is a fiduciary and is about to misappropriate the funds, in which case the bank must hold the funds for three days before making payment. Fin. Code § 952.

An insurance company may make payments in accordance with the terms of the policy unless, before payment is made, "the insurer has received, at its home office, written notice by or on behalf of some other person that such other person claims to be entitled to such payment or some interest in the policy." Ins. Code § 10172. This provision applies notwithstanding Civil Code Sections 5105 and 5125, relating to the present interests and control rights of both spouses in community property.

Thus there is authority in existing law either to require a court order, or to allow a contrary claim or affidavit, to halt payment. The Commission could go either way on this. Because there seemed to be sentiment at the last meeting to not require a court order but to make it easier for a claimant to tie up payment, we have provided for a claim to stop payment as well as a court order in the present draft.

Prob. Code §§ 5011-5032 (added). Nonprobate transfers of community property

SEC. . Chapter 2 (commencing with Section 5011) is added to Part 1 of Division 5 of the Probate Code, to read:

CHAPTER 2. NONPROBATE TRANSFERS OF COMMUNITY PROPERTY

Article 1. General Provisions

§ 5010. "Written consent" defined

5010. As used in this chapter, "written consent" to a provision for a nonprobate transfer of community property on death includes a written joinder in such a provision.

Comment. Section 5010 is intended for drafting convenience.

§ 5011. Governing provision of instrument, law, or consent

5011. Notwithstanding any other provision of this chapter, a nonprobate transfer of community property on death is governed by all of the following:

(a) The terms of the instrument under which the nonprobate transfer is made.

(b) Preempting federal law and contrary state law applicable to the instrument under which the nonprobate transfer is made.

(c) A written expression of intent of a party in the provision for the nonprobate transfer or in a written consent to the provision.

Comment. Section 5011 establishes the principle that the rules in this chapter only apply in the absence of other governing provisions.

Subdivision (a) recognizes that the terms of the instrument may define the rights of the parties. See also Section 5012 (community property rights independent of transfer obligation).

Subdivision (b) recognizes that this chapter cannot override preempting federal law. See, e.g., *Ablamis v. Roper*, \_\_\_ F.2d \_\_\_ (9th Cir. 1991) (No. 89-15352) (ERISA precludes testamentary disposition of community property interest of nonparticipant spouse).

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

Staff Note. The Commission requested staff research whether there is contrary state law that should override this statute. We did not have to look very far to find contrary state law. The public employment retirement fund statutes limit the rights of the nonemployee spouse in the retirement fund, in the same way that the federal ERISA

statute overrides state community property laws. State law now requires the nonemployee spouse to be notified of applications for refund of contributions, beneficiary changes, and optional settlement elections. Gov't Code §§ 21209, 31760.3. The statutes indicate that they are not "intended to conflict with community property law", without specifying what that means. It is an open and hotly-debated question whether the terminable interest rule has been revoked or not with respect to community property rights of spouses at death.

The staff is reluctant to blunder into this, and possibly other areas, without really knowing what we are doing. The terminable interest problem alone involves extraordinarily complex issues that require extensive policy analysis. In the interest of limiting the scope of this project and addressing the MacDonald issue expeditiously, the staff recommends that the possibility of overriding special state laws be put on the back burner. We have retained in the current draft a simple recognition of the existence of contrary state law.

§ 5012. Community property rights independent of transfer obligation

5012. A provision of this chapter concerning rights between married persons in community property is relevant only to controversies between the persons and their successors and does not affect the obligation of a holder of community property under an instrument described in Section 5000 to hold, receive, or transfer the property in compliance with a provision for a nonprobate transfer on death, or the protection provided the holder by Section 5003.

Comment. Section 5012 is drawn from Section 5201 (multiple-party accounts).

§ 5013. Waiver of rights in community property

5013. Nothing in this chapter limits the effect of a spouse's waiver of rights in community property under Chapter 1 (commencing with Section 140) of Part 3 of Division 2.

Comment. Section 5013 recognizes an alternate procedure for releasing rights of a surviving spouse in community property.

Waiver of a joint and survivor annuity or survivor's benefits under the federal Retirement Equity Act of 1984 is not a transmutation. Civil Code § 5110.740 (estate planning instruments).

Staff Note. Melvin H. Wilson, Vice President and Associate Trust Counsel for Security Pacific National Bank, suggests an expansion of the waiver concept to cure MacDonald problems. He notes that the existing waiver statute is addressed to waiver by the surviving spouse, and he would expand the law to validate a prospective waiver of community property rights by the first spouse to die along the following lines:

(a) Property that is the subject of a nonprobate transfer described in Section 5000 may be distributed to a person other than the spouse of the decedent if the spouse has signed a written waiver of the right to claim the spouse's community or quasi-community property interest in the property.

(b) The waiver may be either in the instrument providing for the transfer or in a separate writing, including a will, and shall be signed by the spouse before the death of the decedent.

(c) The waiver may be in the form of the consent of the spouse to the transfer and is not invalid even though not in the form of an express declaration of an intent by the spouse to effect a transmutation of the spouse's community or quasi-community property interest.

(d) The waiver is not a transmutation of any community property interest of the spouse in the property before the first to occur of either the death of the decedent or of the spouse.

This is essentially the scheme we've been working on in this statute, except we call it a "consent" rather than a waiver. Mr. Wilson's draft is fairly simple in concept and consistent with ours, although it sticks to general principles while ours spells out details. Mr. Wilson's draft is phrased in an affirmative way, whereas the staff draft is phrased in a negative way. We have not picked up Mr. Wilson's specifics in the current draft because they are implicit in, or not inconsistent with, our draft. Nonetheless, the Commission may find some of these concepts worth stating expressly--Mr. Wilson felt they would be useful.

#### § 5014. Transitional provision

5014. (a) Except as provided in subdivision (b), this chapter applies to a provision for a nonprobate transfer of community property on the death of a married person, regardless of whether the provision was executed by the person, or written consent to the provision was given by the person's spouse, before, on, or after January 1, 1993.

(b) Subdivision (c) of Section 5030 does not apply, and the applicable law in effect on the date of death does apply, to revocation of a written consent given by a spouse who died before January 1, 1993.

Comment. Section 5014 is an exception to the rule stated in Section 3 (general transitional provision). To the extent this chapter changes the law governing the rights of successors of a person who 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.

Staff Note. Melvin H. Wilson, Vice President and Associate Trust Counsel for Security Pacific National Bank, writes to us that:

Nearly every financial institution in California uses a form of beneficiary designation and consent substantially similar to that involved in MacDonald. The form had its genesis in late 1974 when California banks first began to market IRAs. The form was constructed with the common law concept of prospective spousal waiver in mind. As more than 1 million Californians now have over \$13 billion invested in bank IRAs alone, the need for contractual stability is evident.

The corrective amendment must be retroactive so as to validate any conforming instruments on the operative date of Civil Code Section 5110.730 as well as any executed since. Otherwise, this exercise will have been totally in vain.

The staff has made this draft retroactive to the extent we believe constitutionally it can be done. However, there are limits where a person has already died and rights have already vested under MacDonald. We could try to apply it to cases where the consenting spouse died before the operative date of the new law, but our record is not a good one trying to prove to the Supreme Court that one of its decisions has perpetrated a "rank injustice" causing a major crisis in state law and necessitates retroactive legislation to overturn it.

#### Article 2. Consent to Nonprobate Transfer

##### § 5020. Written consent required

5020. A provision for a nonprobate transfer of community property on death executed by a married person without the written consent of the person's spouse (1) is not effective as to the spouse's interest in the property and (2) does not affect the spouse's disposition on death of the spouse's interest in the community property by will, intestate succession, or nonprobate transfer.

Comment. Section 5020 is comparable to 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 for United States Savings Bonds).

It should be noted that while Section 5020 makes clear that a nonconsenting spouse retains full dispositional rights over the spouse's community property interest (subject to governing provisions of the instrument and applicable preempting federal law as provided in Section 5011), this does not imply that a consenting spouse loses these rights. A written consent is revocable during the spouse's lifetime, and a revocation and contrary disposition may be made by will. See Section 5031 (form and delivery of revocation).

Section 5020 does not affect the principle that a holder of property may transfer the property as specified in the instrument. Section 5003 (protection of holder of property). But the actions of the holder do not affect rights between the spouses and their successors. See Section 5012 (community property rights independent of transfer obligation).

§ 5021. Transfer without written consent

5021. (a) In a proceeding to set aside a nonprobate transfer of community property on death made pursuant to a provision executed by a married person without the written consent of the person's spouse, the court shall set aside the transfer as to the spouse's interest in the property, subject to the terms and conditions or other remedy that appears equitable under the circumstances of the case, taking into account the rights of all interested persons.

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

Comment. Subdivision (a) of Section 5021 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 direct 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).

Under subdivision (a) the court has discretion to fashion an appropriate order, depending on the circumstances of the case. The order may, for example, provide for recovery of the value of the property rather than the particular item, or aggregate property received by a beneficiary instead of imposing a division by item.

Subdivision (b) makes clear that this section does not provide the exclusive remedy where a person has directed a nonprobate transfer of community property without the 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 requested research on the question of whether the general statutes of limitation would apply to protect a bona fide purchaser of property taken through a nonprobate transfer made without spousal consent, in light of the general rule that there is no statute of limitations on opening a probate or for the personal representative to recover the decedent's property for the estate. There exists case law confronting this issue and attempting to harmonize the divergent statutes by holding that the statutes of*

limitation on recovery of property begin to run against the decedent's estate only after a person other than a beneficiary takes possession of the property. See, e.g., *Graham v. Bank of California*, 197 Cal. App. 2d 438, 17 Cal. Rptr. 279 (1961); *Graybiel v. Burke*, 124 Cal. App. 2d 255, 268 P. 2d 551 (1954); cited in *B. Ross & H. Moore, California Practice Guide: Probate 3-29* (1990). In light of the case law, the staff does not believe special statutes of limitation are needed here.

§ 5022. Written consent not a transmutation

5022. (a) Except as provided in subdivision (b), a spouse's written consent to a provision for a nonprobate transfer of community property on death is not a transmutation of the spouse's interest in the property.

(b) This chapter does not apply to a spouse's written consent to a provision for a nonprobate transfer of community property on death that satisfies Section 5110.730 of the Civil Code. Such a consent is a transmutation and is governed by the law applicable to transmutations.

Comment. Section 5022 is consistent with the result in *Estate of MacDonald*, 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990). A 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 5030 (revocability of written consent). However, if the consent specifies a clear intent to transmute the property, the expression of intent controls over this section. See Section 5011(c) (governing provision of consent).

§ 5023. Effect of modification

5023. (a) As used in this section "modification" means revocation of a provision for a nonprobate transfer on death in whole or part, designation of a different beneficiary, or election of a different benefit or payment option.

(b) If a married person has executed a provision for a nonprobate transfer of community property on death with the written consent of the person's spouse and thereafter executes a modification of the provision without the spouse's written consent:

(1) If the person executes the modification during the spouse's lifetime, the modification revokes the spouse's previous written consent to the provision and is effective only as to the person's interest in the community property.

(2) If the person executes the modification after the spouse's death, the modification is effective as to both the person's and the spouse's interests in the community property.

Comment. Section 5023 treats a modification of a nonprobate transfer during the lifetimes of the spouses as a new nonprobate transfer, as to which the living spouse may consent if so desired. If the spouse does not have legal capacity to consent at the time, consent may be obtained through substituted judgment procedures. See Section 2580 (substituted judgment). Failure of consent to the changed terms revokes the original consent to the nonprobate transfer, and the spouse's interest passes with the spouse's estate or as otherwise disposed of by the spouse. See Section 5032 (effect of revocation). It should be noted that a modification is subject to the right of the decedent to make a contrary disposition by will. Section 5031 (form and delivery of revocation).

### Article 3. Revocation of Consent

#### § 5030. Revocability of written consent

5030. (a) A spouse's written consent to a provision for a nonprobate transfer of community property on death is revocable during the marriage.

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

(c) On either spouse's death, the written consent is irrevocable, subject to Section 5023.

Comment. Section 5030 is subject to express terms to the contrary. See Section 5011 (governing provision of instrument, law, or consent). If the consent 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 consenting spouse, overrules the effect of Estate of MacDonald, 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990). The consent of a spouse to disposition of the spouse's one-half interest in the community property is subject to a contrary disposition in the spouse's will. Section 5031. The spouse's personal representative may not revoke the consent to a nonprobate transfer and impose a different estate plan on the spouse's property. However, the surviving spouse may make modifications that affect the tenor of the nonprobate transfer consented to. Section 5123 (effect of modification).

§ 5031. Form and delivery of revocation

5031. (a) If a married person executes a provision for a nonprobate transfer of community property on death with the written consent of the person's spouse, the spouse may revoke the consent by either of the following means:

(1) A writing delivered to the married person before the person's death.

(2) A will admitted to probate before the married person's death, if the revocation includes an express identification of the provision being revoked.

(b) Revocation of a spouse's written consent to a provision for a nonprobate transfer of community property on death does not affect the authority of the holder of the property to transfer the property in compliance with the provision to the extent provided in Section 5003.

Comment. Section 5031 is consistent with subdivision (c) of Section 5030 (written consent irrevocable on death). The will provision would change existing law as to life insurance by allowing the beneficiary designation to be overridden by an express provision in a will.

This section is subject to a contrary provision in the instrument. Section 5011 (governing provision of instrument, law, or consent).

§ 5032. Effect of revocation

5032. On revocation of a spouse's written consent to a nonprobate transfer of community property on death, the property passes in the same manner as if the consent had not been given.

Comment. Section 5032 governs the substantive rights of the spouses in the community property notwithstanding overriding contractual and legal requirements that bind a holder of the community property. See Sections 5003 (protection of holder of property), 5012 (community property rights independent of transfer obligation). However, this section is subject to contrary terms of the instrument and to overriding federal law governing the obligation of a holder of community property to deal with the property under the particular type of instrument. See Section 5011 (governing provision of instrument, law, or consent).

For rights of a spouse who has not given written consent, see Section 5020 (written consent required).

CONFORMING CHANGES

Civ. Code § 5110.740 (amended). Estate planning documents

SEC. . Section 5110.740 of the Civil Code is amended to read:

5110.740. (a) A statement in a will of the character of property is not admissible as evidence of a transmutation of the property in any proceeding commenced before the death of the person who made the will.

(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.

(c) A written joinder or written consent to a nonprobate transfer of community property on death is a transmutation and is governed by the law applicable to transmutations and not by Chapter 2 (commencing with Section 5011) of Part 1 of Division 5 of the Probate Code) if the written joinder or written consent satisfies Section 5110.730.

Comment. Under subdivision (b) of Section 5110.740, a waiver for federal tax purposes is not a transmutation within the meaning of Section 5110.710.

Subdivision (c) is consistent with Probate Code Section 5122 (written consent not a transmutation).

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

SEC. . 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 on death under Part 1 (commencing with Section 5000) of Division 5.

(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 5013 (waiver of rights in community property). Paragraph (10) is a specific instance of the general rule stated in subdivision (b).