

First Supplement to Memorandum 91-62

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

Attached to this supplementary memorandum is a letter from Carol Reichstetter of the Los Angeles County Bar Association, Probate and Trust Law Section Executive Committee, commenting on the tentative recommendation. The Committee agrees with the tentative recommendation, with a few exceptions. Their comments are analyzed below.

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

The Committee agrees with this section.

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

The Committee raises several issues in connection with this section:

Delayed Distribution

The Committee agrees with the protection given holders of property, but is concerned that a holder will have some incentive to make immediate distribution on notice of death in order not to lose the statutory protection on receipt of a notice of adverse claim. They suggest that the holder be barred from making distribution for some period after death, e.g. 60 days, in order to allow adverse claimants an opportunity to notify the property holder of their claims.

The staff has proposed such a moratorium on distribution in the past in connection with rights of creditors against nonprobate assets--40 days--but this proposal has always been strongly opposed by the practicing bar. Perhaps the Los Angeles group's letter signals a change in attitude.

Manner and Proof of Service

The Committee also suggests that the statute specify that service is effective if made personally or by mail with a return receipt signed by the holder of the property. The staff believes these details are not necessary; they are already covered by general provisions in the Probate Code. See Sections 1217 (manner of service), 1261 (proof of mailing), and 1264 (proof of personal delivery). Perhaps it would be helpful to add to the Comment the following sentence:

"For the manner and proof of service, see Part 2 (commencing with Section 1200) of Division 3."

§ 5020. Written consent required

The Committee agrees with this section.

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

The Committee agrees with the principle of subdivision (c) that a written expression of intent controls, but believes the provision is too narrowly drafted. "If, for instance, there is a subsequent property agreement between spouses which provides that a given community property asset be disposed of in a given manner, should that constitute a sufficient written expression of intent which governs over the preexisting provisions for transfer and consent?"

The Commission has before considered a suggestion that the statute catalog the various devices available to spouses to effect a disposition of their property, including waivers, disclaimers, property settlement agreements, will contracts, and the like. The Commission has declined to itemize these devices, but has retained Section 5013 (waiver of rights in community property). Perhaps it would be worthwhile expanding Section 5013 along the following lines:

5013. Nothing in this chapter limits the effect of a surviving spouse's waiver of rights in community property under Chapter 1 (commencing with Section 140) of Part 3 of Division 2 or other instrument or agreement that affects a married person's interest in community property .

Comment. Section 5013 recognizes ~~an alternate procedure~~ alternate procedures 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).

§ 5021. Transfer without written consent

The Committee agrees with this section, including the provision to allow the court discretion to devise an equitable remedy.

§ 5022. Written consent not a transmutation

The Committee agrees with this section.

§ 5023. Effect of modification

The Committee raises several issues in connection with this section:

Notification of Modification

The Committee agrees with the principle that a modification by a married person during the lifetimes of both spouses revokes the consent of the person's spouse, but believes the holder of the property should notify the spouse of a modification. "Our concern is that the married person/donor may by this section be able to independently cause revocation of a consent on which the spouse relies by merely electing a new payment option."

We have been assuming that the donor married person making a modification will have an incentive to notify the person's spouse and obtain a new consent--otherwise the modification will only enable the married person to pass one-half of the community property rather than both halves. We could go back to the concept we considered earlier of allowing the consenting spouse's share to pass in accordance with the disposition originally consented to--this is the result if a person makes a modification after the death of the person's spouse. In any case, the staff would not impose notification duties on the holder of the property, for practical as well as political reasons.

Change of Benefit or Payment Option

The Committee also questions the wisdom of applying the modification rules to changes of benefit or payment options. "As a practical matter, we are concerned that this will require on the death of the donor a distribution of a half interest to the spouse spouse's estate of one benefit or payment option and a distribution of the

remaining half to the donor's estate of a different benefit or payment option. This would seem to cause procedural and record keeping problems for the holding party."

The reason for inclusion of benefit and payment options in the statute is that the option selected can have a substantial impact on the rights of lifetime and remainder beneficiaries. A spouse who consents to distribution of the spouse's community property interest under a particular benefit or payment option might well not consent to a different arrangement. The staff agrees that this does not have as drastic an impact as revocation of the nonprobate transfer or change of a beneficiary. However, we have not heard from property holders that split payment options present a problem to them. Absent such information, the staff would keep the statute as drafted.

Authority for Surviving Spouse to Deal Fully with Community Property

Subdivision (b)(3) of Section 5030 authorizes the surviving spouse to deal fully with both halves of the community property after the death of the consenting spouse if the form of consent so specifies. The Committee would omit this subdivision since it is a specific instance of the general rule stated in Section 5011 (terms of consent govern), and inclusion of this particular instance could cast doubt on the effectiveness of other special provisions in the consent. They also see this as an invitation for a consenting spouse to execute such a provision routinely, "which might result in transmutation on death without the full knowledge of the consenting spouse".

The staff agrees that the section is an invitation to develop standard consent forms that include a release of all rights to the surviving spouse on death. Whether a spouse would select that option without reading or understanding it, we do not know. The Commission has discussed the possibility of drafting statutory form language that could be used and could make clear to the consenting spouse just what is being consented to. However, the Commission has rejected the concept of statutory form language in this area.

§ 5030. Revocability of written consent

The Committee agrees with this section.

§ 5031. Form and delivery of revocation

The Committee suggests that the manner of delivery of a revocation of consent be specified so as to preclude a situation where the consenting spouse hands a written revocation to the married person who later denies receipt. They suggest that a delivery by mail with return receipt executed by the married person be deemed sufficient.

The staff agrees that it is not clear whether "delivery" includes mail or requires personal delivery. The staff would conform this section to Section 5003, and require "service" of a notice of revocation. The Comment would state:

"For the manner and proof of service, see Part 2 (commencing with Section 1200) of Division 3."

§ 5032. Effect of revocation

The Committee agrees with this section.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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October 25, 1991

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via: Facsimile

RE: Study L-3050 (Nonprobate Transfers of Community Property Tentative Recommendation)

Dear Mr. Sterling:

The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association has reviewed the Tentative Recommendation relating to Nonprobate Transfers of Community Property and has requested that I convey their comments.

1. The Executive Committee agrees with the general principle that each spouse should have an equal right to control disposition of half the community property at death.

2. The Executive Committee agrees with the general principle that a written expression of intent should control over the proposed statutory default rules governing disposition of a spouse's interest in community property at death, as codified in proposed Probate Code Section 5011, with the following reservations. Section 5011(c) provides that "a written expression of intent of a party in the provision for transfer of the property or in a written consent to the provision" governs. This limits the written expression of intent which controls over the statutory provisions to the specific instrument itself, which appears unduly restrictive. If, for instance, there is a subsequent property agreement between spouse which provides that a given community property asset be disposed of in a given manner, should that constitute a sufficient written expression of intent which governs over the preexisting provisions for transfer and consent?

3. The Executive Committee generally agrees with the

Nathaniel Sterling
October 25, 1991
Page 2

transfer instrument should be protected in making the transfer notwithstanding the existence of contrary rights in the property, as codified in proposed Probate Code Sections 5002 and 5003. Section 5002 correctly specifies that limitations imposed by the instrument itself are binding on a holder of the property. Section 5003 adequately provides for the protection of a holder of the property without notice of an adverse claim or service of a contrary court order and requires that adverse rights of a spouse or beneficiaries be asserted against the estate of the person who executed the instrument or the beneficiary, rather than the holder of the property.

The only concern expressed in connection with Section 5003 is in regard to subdivision (b) which withdraws the protection of subdivision (a) once 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". This provision would as a practical matter encourage immediate distribution by a holder of property on notice of death. In addition, the nature and form of the "service" is unclear. We suggest that a period of time be specified, such as sixty (60) days following death, prior to which no transfer shall be made. We further suggest that Section 5003 specify that service be deemed effective if made personally or by mail with a return receipt signed by the holder of the property.

4. The Executive Committee agrees with the proposal that where there is no consent by the spouse of a donor, the transfer is voidable as to the donor's spouse's one-half interest and that the Court should have the discretion to return the value of the property, offset against other property or make such other disposition as appears equitable, as provided by proposed Probate Code Sections 5020 and 5021.

5. The Executive Committee agrees with the general principle (consistent with the result in Estate of MacDonald) that a written consent is not a transmutation of the consenting spouse's interest in the property, as set forth in proposed Probate Code Section 5022.

6. Proposed Probate Code Section 5023 addresses the effect of modification by revocation, designation of a different beneficiary, or election of a different benefit or payment option, where there has been prior written consent. The Executive Committee agrees that such modification should be effective as to the married person/donor's interest in the community property. The Executive

Nathaniel Sterling
October 25, 1991
Page 3

Committee further agrees that such modification should revoke the spouse's previous written consent if the modification is made during the spouse's lifetime. However, we suggest that notice to the consenting spouse of the modification, the resultant revocation of prior consent and the option to consent to the modification be given to the consenting spouse by the holding party. Our concern is that the married person/donor may by this section be able to independently cause revocation of a consent on which the spouse relies by merely electing a new payment option.

7. The Executive Committee agrees that if the modification is executed after the spouse's death, the modification should not affect the spouse's previous consent and the spouse's interest in the community property should be transferred on the death of the donor as provided in that prior consent. As a practical matter, we are concerned that this will require on the death of the donor a distribution of a half interest to the spouse's estate of one benefit or payment option and a distribution of the remaining half to the donor's estate of a different benefit or payment option. This would seem to cause procedural and record keeping problems for the holding party. The Executive Committee is uncertain why the focus on revocation and designation of a beneficiary has been expanded to include election of a different benefit or payment option. The problems raised herein might be addressed by removing the reference to an election of a different benefit or payment option.

8. Subdivision (3) of Section 5023 is intended to set forth a special instance of the general rule in Section 5011 that a written expression of intent controls over the statutory provisions, in that if the terms of the consent authorize the surviving spouse to make modifications in the transfer after the death of the consenting spouse, the modification will be effective as to both parties' interests in the community property. The Executive Committee would remove subdivision (3) for two reasons. First, it appears unnecessary in view of the general statement in Section 5011 and might suggest that where such special instances are not set forth, they are not available. Second, we see this as an invitation to routinely use language authorizing a modification after death, which might result in transmutation on death without the full knowledge of the consenting spouse.

9. The Executive Committee agrees that written consent should be revocable during the marriage, and should become irrevocable on

Nathaniel Sterling
October 25, 1991
Page 4

the death of either spouse, as provided by proposed Probate Code Section 5030.

10. The Executive Committee agrees that revocation of a consent may be made by a writing, including a will, that identifies the provision for transfer of the property being revoked and that is delivered to the married person/donor prior to the married person's death, as set forth in proposed Probate Code Section 5031. We suggest, however, that the manner of delivery be specified so as to preclude a situation where the consenting spouse hands a written revocation to the married person/donor who later denies receipt. We further suggest that a delivery by mail with return receipt executed by the married person/donor be deemed sufficient.

11. The Executive Committee agrees that upon revocation of written consent, the property should pass as if there had been no consent, as provided by proposed Probate Code Section 5032.

With the exceptions noted above, the Executive Committee approves the Tentative Recommendation.

Thank you for your consideration of these comments. I expect to attend the November 1 meeting and will be glad to answer any questions that may arise.

Very truly yours,



Carol A. Reichstetter

CAR/ps

cc: Executive Committee