Study FHL-910 January 12, 1998

Memorandum 98-5

Effect of Dissolution of Marriage on Nonprobate Transfers: Draft of Tentative Recommendation

At its October 1997 meeting, the Commission decided to consolidate the proposed laws governing the effect of dissolution of marriage on joint tenancy and nonprobate transfers into a single proposal. Under this consolidated proposal, a person's death will sever a joint tenancy between the decedent and the decedent's former spouse and will cause a nonprobate transfer to the former spouse to fail. This memorandum discusses specific issues that must be addressed before the consolidated proposal can be distributed as a tentative recommendation. A staff draft of a tentative recommendation is attached.

This memorandum supersedes both Memorandum 97-76 and Memorandum 97-86, which were not considered by the Commission. We have received two letters regarding these superseded memoranda. The first is from Jim Deeringer of the Estate Planning, Trust and Probate Law Section of the State Bar, conveying Diana Hastings Temple's comments on Memorandum 97-76. The second is from Diana Hastings Temple, discussing Memorandum 97-86. These letters are attached. Drafting suggestions made in the first letter have been incorporated in the attached draft. Ms. Hastings Temple's suggestions regarding the proposed law's transitional provision are discussed below.

Unless otherwise specified, statutory references in this memorandum are to the Probate Code.

APPLICATION OF THE PROPOSED LAW

Impairment of Contracts

As discussed in Memorandum 97-70, there is some authority suggesting that application of the proposed law to contracts in existence at the time of the law's enactment would unconstitutionally impair the obligations of those contracts. However, considering the uncertainty of this conclusion, the Commission decided not to preclude such retroactive application of the proposed law, relying on the

Probate Code's general severability provision to preserve application of the law where not unconstitutional.

The staff was instructed to study whether applicable statutory rules of construction might limit the scope of any possible Contracts Clause problem with the proposed law. For example, Code of Civil Procedure Section 703.060(b) provides:

> (b) All contracts shall be deemed to have been made and all liens on property shall be deemed to have been created in recognition of the power of the state to repeal, alter, and add to statutes providing for liens and exemptions from the enforcement of money judgments.

Such a provision puts the public on notice that any contracts executed after the enactment of the provision are subject to later legislative changes. Unfortunately, the staff could not find a statute of this kind that would apply to a contract making a nonprobate transfer or to changes in the Probate Code.

Transitional Provisions

A transitional provision has been added to the proposed law:

> 5502. (a) This part is operative January 1, 1999.
> (b) This part does not affect a nonprobate transfer or joint tenancy created before January 1, 1999, if the transferor or joint tenant dies before January 1, 2001.

Subdivision (a) establishes a general operative date. Nonprobate transfers created on or after that date will be subject to the proposed law. Subdivision (b) establishes a special rule for nonprobate transfers created before the operative date. This rule has two effects: (1) It implements the Commission's decision that the proposed law should not disturb a transfer that is completed (by the death of the transferor) prior to the operative date of the proposed law. (2) It creates a two-year grace period during which existing law applies to preexisting nonprobate transfers. This provides time for a person who wishes to preserve an existing nonprobate transfer to a former spouse to take the steps necessary to do so.

Ms. Hastings Temple is concerned about the fairness of creating a grace period without any special provision relating to a person who becomes incompetent prior to the end of the grace period and dies after the end of the grace period, without ever having regained competence. Such a person might wish to preserve an existing nonprobate transfer but lack the capacity to do so. On such a person's

death, the proposed law will operate and the nonprobate transfer to that person's former spouse will fail.

In Memorandum 97-86, the staff suggested that a conservator or other interested person could use the procedures for substituted judgment to implement an incompetent person's intentions in such a situation. See Prob. Code §§ 2580-2586 (substituted judgment). For example, if the court can be persuaded that the incompetent person would intend to preserve the designation of a former spouse as beneficiary to a life insurance policy, the court can order a conservator to redesignate the former spouse as beneficiary, preventing failure of the transfer under the proposed law.

In her letter of January 8, 1998, Ms. Hastings Temple questions whether substituted judgment is adequate to implement the intentions of an incompetent person in this context. She notes that the substituted judgment procedure is rather cumbersome — it requires the appointment of a conservator and judicial consideration of a broad range of facts surrounding the decedent's and the former spouse's relationship and circumstances. She also notes the difficulty a former spouse will face in trying to persuade a court that the "conservatee, as a reasonably prudent person" would intend to preserve a nonprobate transfer to a former spouse.

As an alternative, Ms. Hastings Temple suggests that the proposed law should simply not apply to a person who becomes incompetent before the end of the grace period and never regains competence. The staff has reservations about this approach. It would implement the intentions of those incompetent persons who wish to preserve a nonprobate transfer to a former spouse, but in doing so would defeat the intentions of the presumably larger group of incompetent persons who do not.

EXCEPTIONS TO OPERATION OF THE PROPOSED LAW

The Commission asked the staff to clarify the nature of a court order or agreement of the parties sufficient to preclude operation of the proposed law. The staff can only see two cases in which a court order or agreement should preclude operation of the proposed law:

> (1) Where the order or agreement renders the nonprobate transfer or joint tenancy irrevocable by the decedent — for example, where a court orders a spousal support obligor to maintain an existing life insurance policy for the benefit of a former spouse. In

such a case, the decedent lacks the power to revoke a spousal disposition, so the intent of the decedent is irrelevant.

(2) Where an agreement constitutes clear and convincing evidence that the decedent intended to preserve the nonprobate transfer or joint tenancy survivorship. For example, if prior to divorce, H and W sign an agreement providing that their divorce will not automatically sever their joint tenancy, this could be clear and convincing evidence that H intended to preserve joint tenancy survivorship. In such a case the proposed law's assumption as to the likely intentions of H is rebutted and the law should not sever the joint tenancy.

The attached staff draft addresses these two situations in more general terms. For example, proposed Section 5500(b) provides:

(b) Subdivision (a) does not cause a nonprobate transfer to fail in either of the following cases:

(1) The nonprobate transfer is not revocable by the transferor immediately prior to the transferor's death.

(2) There is clear and convincing evidence that the transferor intended to preserve the nonprobate transfer to the former spouse.

Comment. …

Paragraph (1) of subdivision (b) provides that a nonprobate transfer to a former spouse does not fail by operation of subdivision (a) if, at the time of the transferor's death, the nonprobate transfer is not revocable by the transferor. This precludes operation of subdivision (a) where a nonprobate transfer is irrevocable on execution, or later becomes irrevocable. For example, a court may order a spousal support obligor to maintain life insurance on behalf of a former spouse. See Family Code § 4360. If a person dies while subject to such an order, subdivision (a) would not affect the rights of the transferor's former spouse under the policy.

Paragraph (2) of subdivision (b) provides that a nonprobate transfer to a former spouse does not fail on the transferor's death if there is clear and convincing evidence that the transferor intended to preserve the nonprobate transfer. For example, if after divorcing, the transferor modified the beneficiary terms of a life insurance policy without changing the designation of the former spouse as primary beneficiary, this could be sufficiently clear and convincing evidence of the transferor's intent to preserve the nonprobate transfer to the former spouse so as to prevent the operation of subdivision (a).

This language gets to the essence of the exception while avoiding the intricacies of determining, for each conceivable type of nonprobate transfer, what form of court

order or agreement can permissibly be used to render that nonprobate transfer irrevocable. It also allows consideration of agreements for their probative value in determining whether a decedent intended to preserve the nonprobate transfer, without regard for whether the agreement is enforceable.

WARNING REGARDING EFFECT OF DISSOLUTION OF MARRIAGE

The Commission instructed the staff to revise the proposed amendments to Family Code Section 2024, which provides a warning to divorcing parties suggesting that they examine certain documents that they may wish to change in light of their divorce, or that may automatically be affected by divorce. Considering the likelihood that the proposed law will be preempted as applied to federally-regulated employer-provided benefits, the warning should be drafted to avoid giving the impression that divorce will always revoke a nonprobate transfer to a spouse. The staff proposes the following amendments to Family Code Section 2024:

> 2024. (a) A petition for dissolution of marriage, nullity of marriage, or legal separation of the parties, or a joint petition for summary dissolution of marriage, shall contain the following notice:
>
> "Dissolution or annulment of your marriage may or may not affect the rights of your former spouse regarding such things as your will, power of attorney designation, life insurance proceeds, inter-vivos trust benefits, pay on death bank accounts, transfer on death vehicle registration, joint tenancy survivorship, etc. Please review your will, insurance policies, retirement benefit plans, credit cards, other credit accounts and credit reports, and other matters that you may want to change or reaffirm in view of the dissolution or annulment of your marriage, or your legal separation. However, some changes may require the agreement of your spouse or a court order (see Part 3 (commencing with Section 231) of Division 2 of the Family Code). ~~Dissolution or annulment of your marriage may automatically change a disposition made by your will to your former spouse~~."
>
> (b) A judgment for dissolution of marriage, for nullity of marriage, or for legal separation of the parties shall contain the following notice:
>
> "Dissolution or annulment of your marriage may or may not affect the rights of your former spouse regarding such things as your will, power of attorney designation, life insurance proceeds, inter-vivos trust benefits, pay on death bank accounts, transfer on death vehicle registration, joint tenancy survivorship, etc. Please review your will, insurance policies, retirement benefit plans, credit

cards, other credit accounts and credit reports, and other matters that you may want to change or reaffirm in view of the dissolution or annulment of your marriage, or your legal separation. However, some changes may require the agreement of your spouse or a court order (see Part 3 (commencing with Section 231) of Division 2 of the Family Code). ~~Dissolution or annulment of your marriage may automatically change a disposition made by your will to your former spouse~~."

Comment. Section 2024 is amended to refer to the effect of dissolution or annulment of marriage on the designation of a former spouse as attorney-in-fact, nonprobate transfers to a former spouse, and joint tenancy survivorship as between former spouses. See Prob. Code §§ 3722, 4154, 4727(e) (power of attorney), 5502 (nonprobate transfer), 5503 (joint tenancy).

PROPERTY HOLDER PROTECTION

At the October 1997 meeting, the Commission approved the general idea that a property holder should not be held liable for transferring property according to the terms of an instrument making a nonprobate transfer if the property holder lacks adequate notice of a failure of the nonprobate transfer under the proposed law. The current staff draft implements this idea by amending existing Section 5003, which offers similar protection to property holders who lack notice of a failure of spousal consent to a nonprobate transfer of community property. Adapting an existing section to apply in both contexts avoids the potential for inconsistent and overlapping protections that could arise if a separate section were created, especially considering the already broad language of Section 5003.

It is worth noting how Subdivision (b) of Section 5003 will operate if the section is adapted to apply in the context of the proposed law. This subdivision provides that the property holder's protection from liability does not apply if the property holder is served with (1) a contrary court order or (2) written notice of a person claiming an adverse interest in the property. Exception (2) is further qualified — it does not apply where the property in question is a periodic payment pursuant to a pension plan. The exception in paragraph (b)(2) was apparently added in response to concerns raised by the State Teachers' Retirement System (STRS), who felt that the property holder's safe harbor should only be defeated by a contrary court order when dealing with periodic retirement payments. This makes some sense. Monthly retirement payments are sufficiently important to a person's livelihood that they should not be disrupted lightly.

Requiring a court order, rather than a mere adverse claim, before a property holder loses its safe harbor, provides a greater degree of security to such payments. Consequently, it may make sense to preserve this exception when adapting Section 5003 to apply in the context of the proposed law. What's more, as a practical matter, we may expect STRS to object if we try to draft a property holder protection provision that does not include similar language.

ALTERNATIVE DISTRIBUTION OF PROPERTY ON FAILED NONPROBATE TRANSFER

Memorandum 97-70 raised the question of the proper disposition of property that fails to transfer to a former spouse under the proposed law. Subdivision (c) of proposed Section 5500 is added to make clear that such property passes pursuant to Section 21111, which generally governs the disposition of failed probate and nonprobate transfers.

The proposal amends Section 21111 to clarify its operation. As presently written, Section 21111 provides that property which fails to transfer instead passes under the residue of the transferring instrument. This does not take into account transferring instruments that do not contain a residuary provision. The staff proposes the following amendments to Section 21111:

> 21111. Except as provided in Section 21110:
>
> (a) If a transfer, other than a residuary gift or a transfer of a future interest, fails for any reason, ~~the property transferred becomes a part of the residue transferred under the instrument.~~ the property is transferred as follows:
>
> (1) If the transferring instrument provides for an alternative disposition in the event the transfer fails, the property is transferred according to the terms of the instrument.
>
> (2) If the transferring instrument does not provide for an alternative disposition but does provide for the transfer of a residue, the property becomes a part of the residue transferred under the instrument.
>
> (3) If the transferring instrument does not provide for an alternative disposition and does not provide for the transfer of a residue, the property is transferred to the decedent's estate.
>
> (b) If a residuary gift or a future interest is transferred to two or more persons and the share of a transferee fails for any reason, the share passes to the other transferees in proportion to their other interest in the residuary gift or the future interest.

This amendment makes clear that relevant terms of the governing instrument control. If the governing instrument is silent, the property passes to the decedent's estate.

INCONSISTENCY BETWEEN EXISTING WILL REVOCATION SECTIONS

In Memorandum 97-70, the staff noted that the operation of Section 6122 (revocation by divorce of spousal disposition in will) appears to be inconsistent with the operation of Section 6227 (revocation by divorce of spousal disposition in California statutory will). This is because Section 6122 revokes a spousal disposition in a will executed before or during a testator's marriage to a former spouse. See Reeves v. Reeves, 233 Cal. App. 3d 651, 284 Cal. Rptr. 650 (1991). Section 6227, on the other hand, is subject to the limited definition of spouse provided in Section 6202: "'Spouse' means the testator's husband or wife at the time the testator signs a California statutory will." Thus, Section 6227 would only operate to revoke a spousal disposition in a statutory will if the will was executed while the testator and the former spouse were married. The Commission instructed the staff to draft language rectifying this inconsistency.

The staff recommends repealing Section 6202. This would remove the limitation on the operation of Section 6227, which would then operate to revoke a spousal disposition in a statutory will regardless of whether the will was executed before or during the testator's marriage to the former spouse.

Repeal of Section 6202 would also remedy another problem that results from the section's limited definition of "spouse." Because a person who is not yet married doesn't have a "spouse" under section 6202, it isn't clear what happens if a person executes a statutory will in anticipation of marriage. A property disposition to "my spouse" under such a will may well be ineffective despite the testator's intent to leave property to the testator's spouse-to-be.

APPLICATION OF PROPOSED LAW TO JOINT ACCOUNTS

Early drafts of the joint tenancy proposal recommended that survivorship in a joint account in a financial institution should not be subject to severance on dissolution of marriage. There were three reasons for this suggestion:

> (1) Multiple party accounts are governed by an integrated body of statutory law. The staff felt it was preferable not to invade this body of law, which specifies the means by which survivorship rights in a joint account can be changed.

(2) The Civil Code's definition of joint tenancy expressly excludes joint accounts. See Civ. Code § 683.

(3) Because funds in a joint account are fungible and can generally be withdrawn by either spouse, it is unlikely that these funds will remain in a joint account, undivided, after dissolution of marriage.

In preparing a consolidation of the joint tenancy and nonprobate transfer proposals the staff reconsidered these three points:

(1) The nonprobate transfer proposal affects trusts, which are governed by an integrated body of law that specifies the means by which they can be modified or revoked. If we are willing to disturb this integrated scheme, it is not clear why we should leave multiple party account law undisturbed.

(2) While a joint account does not fall within the Civil Code's definition of joint tenancy, and would therefore not be subject to severance under the joint tenancy provision of the proposed law, survivorship in a joint account does appear to fit the proposed law's definition of a nonprobate transfer. That definition incorporates the catalog of nonprobate transfers in Probate Code Section 5000, which includes "a provision for a nonprobate transfer on death in an … account agreement … [or a] deposit agreement…." Thus, survivorship in a joint account would be subject to the proposed law as a nonprobate transfer.

(3) While it is true that funds in a joint account are likely to be withdrawn by one spouse before dissolution of marriage, this will not always occur. In cases where it does not, operation of the proposed law would be beneficial.

In light of the foregoing, the staff recommends that survivorship in a joint account should be subject to the proposed law as a form of nonprobate transfer. This recommendation is implemented in the attached draft.

Respectfully submitted,

Brian Hebert
Staff Counsel

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November 17, 1997

VIA FACSIMILE [(650) 494-1827]

Brian Hebert
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Memo 97-76

Dear Brian:

As I mentioned at the November CLRC meeting, Diana Hastings Temple has reviewed Memorandum 97-76 on behalf of the Executive Committee of the State Bar Estate Planning, Trust and Probate section, and I would like to pass along her comments to you.

In general, Diana likes the proposed legislation. Her proposed revisions are for the most part semantical rather than substantive. Her specific thoughts are as follows:

1. Throughout section 5500, the reference should be to "transferor" rather than "decedent".

2. Section 5501(b)(1) should read "the joint tenancy is not severable by the decedent immediately prior to the decedent's death." (Emphasis added.)

3. In the first sentence of the second paragraph of the comment to section 5501, the words "presumptions as to" should be inserted before the words "community property".

4. The second to the last paragraph in that same comment should read as follows: "Paragraph (2) of subdivision (b) provides that a joint tenancy is not severed on the donor's death if there is clear and convincing evidence that the decedent intended to preserve the former

spouse's rights of survivorship.

Diana's only substantive suggestion pertains to the transitional rule of section 5502. She suggests that the section read as follows:

> "5502.(a) Except as provided in subdivision (b), this part applies to non-probate transfers and death of joint tenants occurring on or after January 1, 2001.
>
> (b) This part does not apply to a non-probate transfer or to death of a joint tenant where the transferor or deceased joint tenant becomes incompetent prior to January 1, 1999."

Diana's thought here is that we do not need to make any reference to the time when a joint tenancy interest was created but that we should allow for incompetence of the creator of the interest in question prior to expiration of the grace period.

Please feel free to contact either me or Diana Hastings Temple if you have any questions concerning Diana's suggestions.

Very truly yours,

James L. Deeringer

James L. Deeringer

JLD:crc

cc: Diana Hastings Temple (415-421-3600)

Jim Deeringer, 03:05 PM 1/8/98, Effect of dissolution on nonpr

To: Jim Deeringer
From: Diana Hastings Temple <dht.taxlaw@worldnet.att.net>
Subject: Effect of dissolution on nonprobate transfers
Cc:
Bcc:
X-Attachments:

Jim, below are my thoughts on the proposed law concerning the Effect of Dissolution of Marriage on Nonprobate Transfers. I will fax a copy of this email to Brian Hebert at the California Law Revision Commission. I do not have an email address for him.

To: Mr. Jim Deeringer, ExComm
Mr. Brian Hebert, CLRC
Date: January 8, 1998
Re: MEMORANDUM CONCERNING CLRC MEMO. 97-86, Effect of Dissolution of Marriage on Nonprobate Transfers: Draft of Tentative Recommendation

I have read the above-noted memorandum (the "latter memorandum"), which supersedes CLRC Memorandum 97-76. This memorandum contains a draft of the proposed law on the effect of the dissolution of marriage on nonprobate transfers that is superior to the previous drafts and contains intelligent drafting to some really "sticky" issues.

In my previous comments to the earlier memorandum, which were essentially memorialized in Mr. Deeringer's letter to Mr. Hebert of November 17, 1997, I mentioned a need to address the potential that some transferors or joint tenants may be incompetent at the time the legislative becomes effective.

I am still concerned about the "transitional rules" that would affect the situation of transferors who are either incompetent now or who become so during the transitional period. The latter memorandum says that the CLRC staff believes that

"the powers of a conservator are adequate to protect an incompetent person's interests under the proposed law. If the incompetent person would have acted to preserve a nonprobate transfer or joint tenancy in favor of a former spouse, the conservator can do so on the incapacitated person's behalf."

Under the legislation as proposed, if a person dies during the "grace period," the OLD rules apply and the transferor's surviving ex-spouse would inherit the subject nonprobate or joint tenancy property, unless the transferor provides otherwise during this period. If the transferor becomes incompetent (and does not die), however, the NEW rules would apply and the transferor's surviving ex-spouse would NOT inherit the subject property unless he or she obtained an order from the probate court that would permit the transfer to the ex-spouse.

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The procedure to obtain such a court order may be more cumbersome than the staff is aware. First, a conservator would need to be appointed. Because many people in california hold their property in revocable trusts in order to avoid the appointment of a conservator during their lives, such an appointment might not occur otherwise. A conservator appointed in California does not AUTOMATCIALLY have the power to convey or release the conservatee's contingent or expectant property rights, including joint tenancies. See Prob. Code Secs. 2591 (independent powers do not provide such a power), 2459(c) (court authorization needed to change life insurance, etc., beneficiary) and 2501(a) (court approval required for modification of title to real property).
Second, the conservator "or any interested person," e.g. the ex-spouse, would need to petition the court to authorize OR to require the "[c]onveying or releasing [of] the conservatee's contingent and expectant interests in property" by the conservator. Prob. Code Sec. 2580(b)(2). Obtaining the court's "substituted judgment" for the conservatee is no easy task. See the numerous facts that the court must find or consider and the standards that must be applied by the court under Prob. Code Secs. 2582, 2583.

We have already determined that the NEW rules would be what MOST people would want should they become divorced. Use of the "substituted judgment" powers of the court are generally used to insure that a PARTICULAR CONSERVATEE would have taken the proposed action. In other words, the court would need to consider, among numerous other facts, that "the conservatee as a reasonably prudent person would" have NOT revoked the ex-spouse's putative survivorship interests in the subject property, a standard that is diametrically opposed to the standard applied to people who die during the "grace period." The requirement that ex-spouses meet the numerous burdens applied to use of these powers by the court may be unfair discrimination against ex-spouses of incompetent people without an adequate reason to justify the more cumbersome procedure.

Also, the ex-spouse may not find out about the joint tenancy until after the incompetent's death after the grace period. In that case, the ex-spouse would be precluded from using the conservatorship procedure and would be forced to bring perhaps a petition to transfer property to the ex-spouse under Prob. Code Sec. 9860. If a "probate" proceeding is not otherwise pending, see above, the ex-spouse would then be required to initiate one. The incompetent's death may be years and years after the close of the "grace period," which may cause difficulty in presenting relevant evidence.

Many statutes use the condition of incompetency to effect the same result as death during a transitional period. The example that comes readily to my mind is, more or less, Treas. Reg. Sec. 26.2601-1(b)(3).

I suggest that Proposed Section 5502 read as follows:

> 5502.(a) This part is operative January 1, 1999.
> (b) This part does not affect a nonprobate transfer or joint

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tenancy created before January 1, 1999, if the transferor or joint tenant dies before January 1, 2001, or if the transferor or joint tenant becomes incompetent prior to January 1, 2001, and remains incompetent until the transferor's death either before or after January 1, 2001.

I would also suggest that the last sentence of the Comment be removed.

Very truly yours,

#FHL-910

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

TENTATIVE RECOMMENDATION

Effect of Dissolution of Marriage on Nonprobate Transfers

January 1998

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **March 28, 1998.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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Summary of Tentative Recommendation

A person who creates an instrument making a nonprobate transfer to a spouse probably does not intend that it continue to operate in favor of the spouse after dissolution of their marriage. In many cases the person inadvertently fails to revoke the nonprobate transfer, with the result that on the person's death, the property passes to the person's former spouse, rather than to the person's estate. This result is contrary to the likely intentions of most divorcing parties and is inconsistent with the law governing wills and other inheritance rights. The Commission therefore recommends that dissolution of marriage prevent the operation of a revocable provision for a nonprobate transfer at death to a former spouse, unless there is clear and convincing evidence that the transferor intends to preserve the nonprobate transfer in favor of the transferor's former spouse.

This recommendation was prepared pursuant to Resolution Chapter 102 of the Statutes of 1997.

Effect of Dissolution of Marriage on Nonprobate Transfers

In California, as in most states, the dissolution or annulment of a person's marriage automatically revokes a disposition to a former spouse in that person's will. This policy is based on the assumption that typical divorcing parties will not intend or expect a will provision benefiting a spouse to survive the dissolution of their marriage. Where a person fails to change a will after a divorce, that failure is probably inadvertent.[1]

California law does not extend similar protection to a divorcing person who has chosen to pass property on death by means of an instrument other than a will. For example, the designation of a spouse as beneficiary to a life insurance policy is unaffected by dissolution of marriage. Where a person fails to change such a beneficiary designation after divorce, the policy proceeds will go to that person's former spouse, and not to that person's current spouse or children.

The Law Revision Commission recommends that dissolution of marriage prevent the operation of a revocable nonprobate transfer on death to a former spouse unless there is clear and convincing evidence that the transferor intends to preserve the nonprobate transfer in favor of the transferor's former spouse. This would protect the likely intentions of most divorcing parties and would eliminate the inconsistency that currently exists in the treatment of probate and nonprobate transfers on death after a dissolution of marriage.

Existing Law

A broad range of instruments other than wills may be used to transfer property on death.[2] Such instruments include life insurance policies, trusts, retirement death benefits, transfer-on-death financial accounts, and transfer-on-death vehicle registration. Joint tenancy title provides another means of transferring property on death outside of a will.[3] These "nonprobate transfers" form an increasingly important component of many Californians' estate plans.[4]

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1. See *Tentative Recommendation Relating to Wills and Intestate Succession* 16 Cal. L. Revision Comm'n Reports 2301, 2325 (1982).

2. See Prob. Code § 5000.

3. The distinguishing incident of joint tenancy is its survivorship feature. On the death of one joint tenant, that person's interest in the joint tenancy is terminated. The property is then held in joint tenancy between any surviving joint tenants. If there is only one surviving joint tenant, that person holds an undivided interest in the property. See 4 B. Witkin, Summary of California Law *Real Property* §257, at 459-60 (9th ed. 1987).

4. As recognized in the Prefatory Note to Article II of the 1993 Uniform Probate Code, "will substitutes and other inter-vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission."

Dissolution of marriage does not automatically revoke a disposition to a former spouse in an instrument making a nonprobate transfer.[5] Where a person inadvertently fails to change a provision making a nonprobate transfer after divorce, the property will pass to the former spouse, rather than to the person's estate.[6] This result is contrary to the probable intentions and expectations of most divorcing parties.[7]

Bifurcated dissolution proceedings can exacerbate this problem. Where one spouse dies after a judgment dissolving marital status but before property division proceedings have begun, a nonprobate transfer may operate to the benefit of the decedent's former spouse before the decedent has had an opportunity to change the instrument making the transfer. A number of reported cases turn on such facts.[8]

The rule that dissolution of marriage does not affect a nonprobate transfer is inconsistent with other law governing the disposition of property on death. For example, dissolution of marriage automatically revokes a disposition to a spouse in a will,[9] the designation of a spouse as attorney-in-fact,[10] and a death benefit

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5. See, e.g., Life Insurance Company of North America v. Cassidy, 35 Cal. 3d 599, 606, 676 P.2d 1050, 200 Cal. Rptr. 28 (1984) (marital property agreement assigning ownership of life insurance policy to one spouse does not automatically revoke status of other spouse as beneficiary); Estate of Layton, 44 Cal. App. 4th 1337, 1343, 52 Cal. Rptr. 2d 251, 255 (1996) (status only dissolution of marriage did not sever marital joint tenancy).

6. Note that the question of the effect of dissolution of marriage on a nonprobate transfer will not often arise in the context of marital joint tenancy. This is because there is a presumption, on dissolution of marriage, that property acquired by spouses in joint form is community property. See Fam. Code § 2581. See also *In re* Hilke, 4 Cal. 4th 215, 841 P.2d 891, 14 Cal. Rptr. 2d 371 (1992) (community property presumption applies after death of former spouse if court has entered judgment dissolving marriage and reserved jurisdiction over property matters). However, there will undoubtedly be cases where the community property presumption is inapplicable or is rebutted and therefore property acquired by former spouses in joint tenancy form will be treated as a joint tenancy and not as community property. The proposed law applies to such cases.

7. In discussing the rule that divorce revokes a beneficiary designation under the Public Employees' Retirement System, one court observed:

> The statutes anticipate that, upon undergoing a fundamental change in family composition such as marriage, divorce or birth of a child, employees would most likely intend to provide for their new family members, and/or revoke prior provisions made for their ex-spouses. The statutes also anticipate that employees themselves will often fail to so provide and revoke, not out of conscious intent, but simply from a lack of attentiveness. By automatically revoking prior beneficiary-designations upon a change in family composition, and by substituting statutory beneficiaries in their place, [the law is] designed to protect employees from such inattentiveness.

Coughlin v. Board of Administration, 152 Cal. App. 3d 70, 73, 199 Cal. Rptr. 286, 287-88 (1984). See also Estate of Blair, 199 Cal. App. 3d 161, 169-70, 244 Cal. Rptr 627, 631-32 (1988) (unlikely that divorcing parties wish to preserve joint tenancy after divorce, where an "untimely death results in a windfall to the surviving spouse, a result neither party presumably intends or anticipates."); In re Allen, 8 Cal. App. 4th 1225, 1231, 10 Cal. Rptr 2d 916, 919 (1993) (operation of joint tenancy survivorship after divorce not "consistent with what the average decedent and former spouse would have wanted had death been anticipated").

8. See, e.g., *In re* Hilke, 4 Cal. 4th 215, 841 P.2d 891, 14 Cal. Rptr. 2d 371 (1992); Estate of Layton, 44 Cal. App. 4th 1337, 52 Cal. Rptr. 2d 251 (1996).

9. See Prob. Code §§ 6122, 6227.

10. See Prob. Code §§ 3722, 4154, 4727.

beneficiary designation under the Public Employees' Retirement System (PERS).[11] Dissolution of marriage also terminates a person's status as a surviving spouse, and all of the rights that follow from that status.[12]

The inconsistent treatment of probate and nonprobate transfers after dissolution of marriage does not make sense. If the typical divorcing person does not intend to maintain a disposition benefiting a spouse in a will, that person will likewise not wish to preserve a disposition to a spouse in some other instrument. Furthermore, a person who is aware of the laws revoking spousal inheritance rights on dissolution of marriage will probably assume that similar laws apply to nonprobate transfers and to joint tenancy. This increases the probability that a divorcing person will not revoke a nonprobate transfer or sever a joint tenancy after dissolution of marriage, despite an intent to terminate the disposition to the person's former spouse.

proposed law

General Rule

Subject to the exceptions discussed below, the proposed law would prevent the operation of a nonprobate transfer to a former spouse[13] and would sever a joint tenancy as between the decedent and the decedent's former spouse,[14] if dissolution of marriage has terminated the surviving beneficiary's or joint tenant's status as the decedent's "surviving spouse" under Probate Code Section 78.[15] This rule implements the intentions of the typical divorcing person and eliminates the existing inconsistency between the treatment of probate and nonprobate transfers after dissolution of marriage.[16]

Exceptions

Creation after dissolution of marriage. The proposed law would only affect a provision making a nonprobate transfer or a joint tenancy that was created before or during the former spouses' marriage to each other. This permits a person who

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11. See Gov't Code § 21492.

12. See Prob. Code § 78 ("surviving spouse" defined). The rights contingent on one's status as a decedent's surviving spouse are numerous. See, e.g. Prob. Code § 6401 (surviving spouse's share in intestate succession), 6540 (family allowance), 6560 (share of spouse omitted from will).

13. Under the proposed law, property that fails to transfer under a provision making a nonprobate transfer is instead transferred under Probate Code Section 21111 governing failed probate and nonprobate transfers.

14. Severance of a joint tenancy terminates the right of survivorship, converting the joint tenancy into a tenancy in common between the former joint tenants. See Witkin, *supra* note 3, §§ 276-78, at 475-77.

15. Dissolution of marriage terminates a person's status as a decedent's surviving spouse, unless that person and the decedent are married to each other at the time of the decedent's death. See Prob. Code § 78.

16. The proposed law is similar to Uniform Probate Code Section 2-804, which revokes a broad range of nonprobate transfers on dissolution of marriage. See Unif. Prob. Code § 2-804 (1993). Section 2-804 is based on the same policy assumption as the proposed law, that revocation of spousal dispositions on divorce gives "effect to the average owner's presumed intent…." McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 Brook. L. Rev. 1123, 1161-63 (1993).

wishes to preserve a nonprobate transfer to a former spouse, or a joint tenancy with a former spouse, to do so by recreating the provision or the joint tenancy after dissolution of marriage. For example, if a person adds a former spouse as a beneficiary to a life insurance policy, after the dissolution of the person's marriage to the former spouse, the designation of the former spouse as beneficiary to a nonprobate transfer is created after the dissolution of their marriage and is therefore not affected by the proposed law.

Irrevocability. The proposed law would only affect a nonprobate transfer or joint tenancy that is revocable or subject to severance by the decedent just prior to the decedent's death.[17] A person's intent to revoke a nonprobate transfer or sever a joint tenancy after dissolution of marriage is irrelevant if that person lacks authority to do so.

Evidence of contrary intent. The proposed law does not affect a nonprobate transfer or a joint tenancy if there is clear and convincing evidence that the decedent intended to preserve the nonprobate transfer or joint tenancy survivorship. In such a case the policy assumption underlying the general rule, that a typical person does not intend a spousal disposition to survive dissolution of marriage, is inapplicable.

Third Party Protections

The proposed law protects third parties in two contexts:

Property holders. Most forms of nonprobate transfer involve an intermediary who holds the property to be transferred and is responsible for its distribution according to the terms of the transferring instrument. The proposed law provides protection from liability for a property holder who transfers property according to the terms of the transferring instrument, unless the property holder has been served with a contrary court order or with notice from a person with an adverse claim to the property.[18]

Bona fide purchasers. The proposed law protects the rights of a good faith purchaser or encumbrancer who relies on the apparent failure of a nonprobate transfer or severance of a joint tenancy under the proposed law, or who lacks knowledge of the failure of a nonprobate transfer or the severance of a joint tenancy under the proposed law.[19] The remedy for a person who is injured by a transaction with a purchaser or encumbrancer is against the transacting former spouse and not against the purchaser or encumbrancer.

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17. For example, where a court orders a spousal support obligor to maintain a life insurance policy designating a former spouse as beneficiary, that provision is not revocable by the transferor and thus would not fail by operation of the proposed law.

18. This protection would be implemented by amending existing Probate Code Section 5003, which offers similar protection in the context of a failure of spousal consent to a nonprobate transfer of community property, to clarify its application in the context of the proposed law.

19. See proposed Prob. Code §§ 5500(d), 5501(c).

Scope of Proposed Law

Preemption

The Commission recommends that the proposed law apply to the broadest extent consistent with federal law. While the proposed law may be preempted by federal law as applied to many forms of employer-provided benefits,[20] the proposed law does not exempt such benefits from its scope of application.[21] To do so would codify the present extent of federal preemption, precluding broader application of the proposed law if the scope of preemption is later reduced by Congress or the courts. It is to be hoped that, as more states adopt provisions similar to the proposed law, Congress will adopt a similar provision or will clear a space for state law to operate in this area.

Contracts Clause

There is some authority suggesting that application of the proposed law to a contract in existence prior to enactment of the proposed law could unconstitutionally impair the obligations of that contract.[22] There are, however, good arguments against this proposition.[23] Considering the uncertainty on this point, and the Commission's recommendation that the law be applied broadly, application of the proposed law is not limited to contracts formed after the law's enactment.[24] However, the proposed law does include a two-year grace period

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20. See, e.g., Metropolitan Life Insurance Company v. Hanslip, 939 F.2d 904 (10th Cir. 1991) (ERISA preempts state law providing that dissolution of marriage revokes designation of former spouse as beneficiary to employer-provided life insurance).

21. The Probate Code's general severability section will preserve application of the proposed law where not preempted. See Prob. Code § 11.

22. See U.S. Const. art. I, § 10, cl. 1; Whirlpool Corporation v. Ritter, 929 F.2d 1318 (8th Cir. 1991) (Oklahoma statute providing that dissolution of marriage revokes the designation of a spouse as beneficiary to life insurance unconstitutionally impaired obligation of preexisting contract).

23. A cogent summary of this argument is provided by the Joint Editorial Board for the Uniform Probate Code (JEB) in its response to the decision in *Whirlpool Corporation v. Ritter*. The JEB's argument rests on the following points:

> (1) "A life insurance policy is a third-party beneficiary contract. As such it is a mixture of contract and donative transfer.... In *Ritter* and in comparable cases, there is never a suggestion that the insurance company can escape paying the policy proceeds that are due under the contract.... The divorce statute affects only the donative transfer, the component of the policy that raises no Contracts Clause issue. The precise question in these cases is which of the decedent's potential donee-transferees should receive the proceeds.... The JEB believes that there is no justification for extending Contracts Clause concerns to a statute that only affects the donative transfer component of a life insurance policy, since the statute works no interference with the contractual component of the policy, the company's obligation to pay." Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents, 17 ACTEC Notes 184 (1991).
>
> (2) "The Contracts Clause protects contractual reliance. Because statutes such as Uniform Probate Code § 2-804 serve to implement rather than to defeat the insured's expectation under the insurance contract, the premise for applying the Contracts Clause is wholly without foundation." *Id.*
>
> (3) Statutes such as Uniform Probate Code § 2-804 are mere constructional default rules. "The JEB is aware of no authority for the application of the Contracts Clause to state legislation applying

applicable to preexisting contracts.[25] This provides time for a person who wishes to preserve an existing nonprobate transfer or joint tenancy benefiting a former spouse to take the steps necessary to do so.[26]

conforming revisions

The proposed law includes the following minor revisions to existing law:

- Family Code Section 2024, which provides for a printed warning of the automatic revocation of a spousal disposition in a will, is amended to expand the scope of the warning to refer to the effects of the proposed law.
- Probate Code Section 5302, governing disposition of funds in a multiple party account in a financial institution, is amended to make survivorship rights in such accounts subject to the proposed law.
- Probate Code Section 6202, which defines "spouse" for the purposes of California statutory will law, is repealed to eliminate an inconsistency in the treatment of statutory wills, other wills, and nonprobate transfers.[27]
- Probate Code Section 21111, governing the effect of a failed transfer of property on death, is amended to clarify its application to instruments that do not provide for the transfer of a residue.

altered rules of construction or other default rules to pre-existing documents in any field of law[.]" *Id.*

24. The Probate Code's general severability section will preserve application of the proposed law where not unconstitutional. See Prob. Code § 11.

25. See proposed Prob. Code § 5502(b).

26. A conservator or other interested person may take these steps on behalf of a transferor or joint tenant who is incapacitated during the grace period. See Prob. Code §§ 2580-2586 (substituted judgment).

27. Under the applicable definition of "spouse," dissolution of marriage does not revoke a spousal disposition in a California statutory will that is executed before the testator's marriage to the former spouse. See Prob. Code §§ 6202, 6227. This is inconsistent with the general rule that a disposition to a spouse is revoked on dissolution of marriage, regardless of whether the will was executed before the testator's marriage to the former spouse. See Reeves v. Reeves, 233 Cal. App. 3d 651, 284 Cal. Rptr. 650 (1991); Prob. Code § 6227. This is also inconsistent with the proposed law. Repeal of Probate Code Section 6202 eliminates these inconsistencies.

Proposed Legislation

Prob. Code §§ 5500-5502 (added). Nonprobate transfer to a former spouse

SECTION 1. Part 3 (commencing with Section 5500) is added to Division 5 of the Probate Code, to read:

Part 3. Nonprobate Transfer to a Former Spouse

§ 5500 Failure of nonprobate transfer to former spouse

5500. (a) Except as provided in subdivision (b), a nonprobate transfer to the transferor's former spouse, in an instrument executed by the transferor before or during the marriage, fails if, at the time of the transferor's death, the former spouse is not the transferor's surviving spouse.

(b) Subdivision (a) does not cause a nonprobate transfer to fail in either of the following cases:

(1) The nonprobate transfer is not revocable by the transferor immediately prior to the transferor's death.

(2) There is clear and convincing evidence that the transferor intended to preserve the nonprobate transfer to the former spouse.

(c) Where a nonprobate transfer fails by operation of this section, the property is instead transferred pursuant to Section 21111.

(d) Nothing in this section affects the rights of a subsequent purchaser or encumbrancer for value in good faith who relies on the apparent failure of a nonprobate transfer under this section or who lacks knowledge of the failure of a nonprobate transfer under this section.

(e) As used in this section, "nonprobate transfer" means a provision of a type described in Section 5000 for a transfer of property on death.

Comment. Subdivision (a) of Section 5500 establishes the general rule that a nonprobate transfer to a former spouse fails if, at the time of the transferor's death, the former spouse is not the transferor's surviving spouse. "Surviving spouse" is defined in Section 78.

Paragraph (1) of subdivision (b) provides that a nonprobate transfer to a former spouse does not fail by operation of subdivision (a) if, at the time of the transferor's death, the nonprobate transfer is not revocable by the transferor. This precludes operation of subdivision (a) where a nonprobate transfer is irrevocable on execution, or later becomes irrevocable. For example, a court may order a spousal support obligor to maintain life insurance on behalf of a former spouse. See Fam. Code § 4360. If a person dies while subject to such an order, subdivision (a) would not affect the rights of the transferor's former spouse under the policy.

Paragraph (2) of subdivision (b) provides that a nonprobate transfer to a former spouse does not fail on the transferor's death if there is clear and convincing evidence that the transferor intended to preserve the nonprobate transfer. For example, if after divorcing, the transferor modified the beneficiary terms of a life insurance policy without changing the designation of the former spouse as primary beneficiary, this could be sufficiently clear and convincing evidence of the transferor's intent to preserve the nonprobate transfer to the former spouse so as to prevent the operation of subdivision (a).

Subdivision (c) governs the disposition of property that fails to transfer by operation of subdivision (a). See Section 21111 (failed probate and nonprobate transfers at death).

Subdivision (d) makes clear that nothing in this section affects the rights of a good faith purchaser or encumbrancer who relies on the apparent failure of a nonprobate transfer under this section or who lacks knowledge of the failure of a nonprobate transfer under this section. For the purpose of this subdivision, "knowledge" of the failure of a nonprobate transfer includes both actual knowledge and constructive knowledge through recordation of a judgment of dissolution or annulment or other relevant document. See Civ. Code § 1213 (recordation as constructive notice to subsequent purchasers and mortgagees). The remedy for a person injured by a transaction with an innocent purchaser or encumbrancer is against the transacting former spouse and not against the purchaser or encumbrancer.

Note that, in general, Section 5003 protects a property holder from liability for transferring the property according to the terms of the instrument making the nonprobate transfer, even if the nonprobate transfer has failed by operation of subdivision (a).

§ 5501. Severance of joint tenancy between decedent and former spouse

5501. (a) Except as provided in subdivision (b), a joint tenancy between the decedent and the decedent's former spouse, created before or during the marriage, is severed as to the decedent's interest if, at the time of the decedent's death, the former spouse is not the decedent's surviving spouse.

(b) Subdivision (a) does not sever a joint tenancy in either of the following cases:

(1) The joint tenancy is not severable by the decedent immediately prior to the decedent's death.

(2) There is clear and convincing evidence that the decedent intended to preserve the joint tenancy in favor of the former spouse.

(c) Nothing in this section affects the rights of a subsequent purchaser or encumbrancer for value in good faith who relies on an apparent severance under this section or who lacks knowledge of a severance under this section.

Comment. Subdivision (a) of Section 5501 establishes the general rule that a joint tenancy between a decedent and the decedent's former spouse is severed if, at the time of the decedent's death, the former spouse is not the decedent's surviving spouse. "Surviving spouse" is defined in Section 78. This effectively reverses the common law rule that dissolution or annulment of marriage does not sever a joint tenancy between spouses. See, e.g., Estate of Layton, 44 Cal. App. 4th 1337, 52 Cal. Rptr. 2d 251 (1996).

Note that property acquired during marriage in joint tenancy form is presumed to be community property on dissolution of marriage or legal separation. See Fam. Code § 2581. See also *In re* Hilke, 4 Cal. 4th 215, 841 P.2d 891, 14 Cal. Rptr. 2d 371 (1992) (community property presumption applies after death of former spouse if court has entered judgment dissolving marriage and reserved jurisdiction over property matters). This section does not affect the community property presumption and does not affect property characterized as community property under that presumption.

This section applies to both real and personal property joint tenancies, and affects property rights that depend on the law of joint tenancy. See, e.g., Veh. Code §§ 4150.5, 5600.5 (property passes as though in joint tenancy). This section does not affect United States Savings Bonds, which are subject to federal regulation. See Conrad v. Conrad, 66 Cal. App. 2d 280, 152 P.2d 221 (1944) (federal regulations controlling). Note that a joint account in a financial institution is not a joint tenancy and is therefore not subject to this section. See Civ. Code § 683 ("joint tenancy" defined).

The method provided in this section for severing a joint tenancy is not exclusive. See, e.g., Civ. Code § 683.2.

Where a joint tenancy involves three or more joint tenants, severance by operation of this section converts the decedent's interest into a tenancy in common, but does not sever the joint tenancy as between the other joint tenants. For example, husband, wife, and child create a joint tenancy during husband and wife's marriage to each other. On husband's death, wife is no longer husband's surviving spouse and the joint tenancy is severed by operation of this section. Husband's one third interest becomes a tenancy in common and does not pass by survivorship. The remaining two thirds remain in joint tenancy as between the child and the former wife.

Paragraph (1) of subdivision (b) provides that a joint tenancy is not severed by operation of subdivision (a) if the joint tenancy is not severable by the decedent. For example, if the decedent is subject to a court order or binding agreement prohibiting severance of the joint tenancy by the decedent, then the joint tenancy is not severed by operation of subdivision (a).

Paragraph (2) of subdivision (b) provides that a joint tenancy is not severed on the donor's death if there is clear and convincing evidence that the decedent intended to preserve the former spouse's rights of survivorship.

Subdivision (c) makes clear that nothing in this section affects the rights of a good faith purchaser or encumbrancer who relies on an apparent severance by operation of this section or who lacks knowledge of a severance by operation of this section. For the purpose of this subdivision, "knowledge" of a severance of joint tenancy includes both actual knowledge and constructive knowledge through recordation of a judgment of dissolution or annulment or other relevant document. See Civ. Code § 1213 (recordation as constructive notice to subsequent purchasers and mortgagees). The remedy for a person injured by a transaction with an innocent purchaser or encumbrancer is against the transacting joint tenant and not against the purchaser or encumbrancer.

§ 5502. Application of part

5502. (a) This part is operative January 1, 1999.

(b) This part does not affect a nonprobate transfer or joint tenancy created before January 1, 1999, if the transferor or joint tenant dies before January 1, 2001.

Comment. Section 5502 governs the application of this part. Under subdivision (b), this part does not apply where a transferor or joint tenant dies before the operative date of the part. Consequently, this part will not retroactively disturb a transfer of property on death that has been completed before the operative date of the part.

Subdivision (b) also provides a two year grace period during which a preexisting nonprobate transfer or joint tenancy can be reaffirmed, reexecuted, or recreated, so as to prevent its failure or severance under this part. If a transferor or joint tenant becomes incapacitated during this grace period, a conservator or other interested person may petition the court to order appropriate actions to implement the incapacitated person's intentions in relation to a nonprobate transfer to a former spouse.

Conforming Revisions

Fam. Code § 2024 (amended). Notice concerning effect of judgment on will, insurance, and other matters

SEC 2. Section 2024 of the Family Code is amended to read:

2024. (a) A petition for dissolution of marriage, nullity of marriage, or legal separation of the parties, or a joint petition for summary dissolution of marriage, shall contain the following notice:

"Dissolution or annulment of your marriage may or may not affect the rights of your former spouse regarding such things as your will, power of attorney designation, life insurance proceeds, inter-vivos trust benefits, pay on death bank accounts, transfer on death vehicle registration, joint tenancy survivorship, etc. Please review your will, insurance policies, retirement benefit plans, credit cards, other credit accounts and credit reports, and other matters that you may want to change or reaffirm in view of the dissolution or annulment of your marriage, or your legal separation. However, some changes may require the agreement of your spouse or a court order (see Part 3 (commencing with Section 231) of Division 2 of the Family Code). ~~Dissolution or annulment of your marriage may automatically change a disposition made by your will to your former spouse.~~"

(b) A judgment for dissolution of marriage, for nullity of marriage, or for legal separation of the parties shall contain the following notice:

"Dissolution or annulment of your marriage may or may not affect the rights of your former spouse regarding such things as your will, power of attorney designation, life insurance proceeds, inter-vivos trust benefits, pay on death bank accounts, transfer on death vehicle registration, joint tenancy survivorship, etc. Please review your will, insurance policies, retirement benefit plans, credit cards, other credit accounts and credit reports, and other matters that you may want to change or reaffirm in view of the dissolution or annulment of your marriage, or your legal separation. However, some changes may require the agreement of your spouse or a court order (see Part 3 (commencing with Section 231) of Division 2 of the Family Code). ~~Dissolution or annulment of your marriage may automatically change a disposition made by your will to your former spouse.~~"

Comment. Section 2024 is amended to refer to the effect of dissolution or annulment of marriage on the designation of a former spouse as attorney-in-fact, nonprobate transfers to a former spouse, and joint tenancy survivorship as between former spouses. See Prob. Code §§ 3722, 4154, 4727(e) (power of attorney), 5500 (nonprobate transfer), 5501 (joint tenancy).

Prob. Code § 5003 (amended). Protection of property holders

SEC 3. Section 5003 of the Probate Code is amended to read:

5003. (a) A holder of property under an instrument of a type 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 for transfer of the property and other persons having an interest in the property or their successors, and whether or not the transfer has failed by operation of section 5500.

(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 either of the following events:

(1) The holder of the property has been served with a contrary court order.

(2) The holder of the property has been served with a written notice of a person claiming an adverse interest in the property. However, this paragraph does not apply to a pension plan to the extent the transfer is a periodic payment pursuant to the plan.

(c) The protection provided by this section does not affect the rights of the person who executed the provision for transfer of the property 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 amended to make clear that the section applies where a nonprobate transfer has been caused to fail by operation of Section 5500.

Prob. Code § 5302. Sums remaining in account on death of party

SEC 4. Section 5302 of the Probate Code is amended to read:

5302. Subject to Section 5500:

(a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent. If there are two or more surviving parties, their respective ownerships during lifetime are in proportion to their previous ownership interests under Section 5301 augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before the decedent's death; and the right of survivorship continues between the surviving parties.

(b) If the account is a P.O.D. account:

(1) On death of one of two or more parties, the rights to any sums remaining on deposit are governed by subdivision (a).

(2) On death of the sole party or of the survivor of two or more parties, (A) any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more die before the party, (B) if two or more P.O.D.

payees survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit agreement expressly provide for different shares, and (C) if two or more P.O.D. payees survive, there is no right of survivorship in the event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(c) If the account is a Totten trust account:

(1) On death of one of two or more trustees, the rights to any sums remaining on deposit are governed by subdivision (a).

(2) On death of the sole trustee or the survivor of two or more trustees, (A) any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a different intent, (B) if two or more beneficiaries survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit agreement expressly provide for different shares, and (C) if two or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(d) In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of the decedent's estate.

(e) A right of survivorship arising from the express terms of the account or under this section, a beneficiary designation in a Totten trust account, or a P.O.D. payee designation, cannot be changed by will.

Comment. Section 5302 is amended to make clear that the transfer of property in a multiple party account on death is subject to Section 5500, which causes a nonprobate transfer to a former spouse to fail if the former spouse is not the transferor's surviving spouse. See Section 5500 (effect of dissolution of marriage on a nonprobate transfer).

Prob. Code § 6202 (repealed). Spouse defined

SEC 5. Section 6202 of the Probate Code is repealed.

~~6202. "Spouse" means the testator's husband or wife at the time the testator signs a California statutory will.~~

Comment. Section 6202 is repealed. Section 6202 excludes from the definition of "spouse" a person who marries the testator after the testator signs a California statutory will. This would defeat the likely intentions of a testator who signs a California statutory will in anticipation of marriage. This definition may also yield inconsistent results in the operation of Section 6122 (revocation by dissolution or annulment of marriage of spousal disposition in will) and Section 6227 (revocation by dissolution or annulment of marriage of spousal disposition in California statutory will). This is because Section 6122 revokes a spousal disposition in a will executed before or during a testator's marriage to a former spouse. See Reeves v. Reeves, 233 Cal. App. 3d 651, 284 Cal. Rptr. 650 (1991).

Prob. Code § 21111 (amended). Failed transfer

SEC. 6. Section 21111 of the Probate Code is amended to read:

21111. Except as provided in Section 21110:

(a) If a transfer, other than a residuary gift or a transfer of a future interest, fails for any reason, ~~the property transferred becomes a part of the residue transferred under the instrument.~~ the property is transferred as follows:

(1) If the transferring instrument provides for an alternative disposition in the event the transfer fails, the property is transferred according to the terms of the instrument.

(2) If the transferring instrument does not provide for an alternative disposition but does provide for the transfer of a residue, the property becomes a part of the residue transferred under the instrument.

(3) If the transferring instrument does not provide for an alternative disposition and does not provide for the transfer of a residue, the property is transferred to the decedent's estate.

(b) If a residuary gift or a future interest is transferred to two or more persons and the share of a transferee fails for any reason, the share passes to the other transferees in proportion to their other interest in the residuary gift or the future interest.

Comment. Section 21111 is amended to clarify the treatment of a failed transfer by will, trust, life insurance policy, or other instrument transferring property at death, where the transferring instrument does not provide for the transfer of a residue.