

Memorandum 98-65**Effect of Dissolution of Marriage on Nonprobate Transfers:
Draft Recommendation**

In January 1998, the Commission circulated a tentative recommendation proposing that dissolution or annulment of marriage (hereinafter “divorce”) should cause a nonprobate transfer to a former spouse to fail. The proposed law is intended to implement the likely intentions of divorcing parties, and is consistent with other provisions of California law that automatically terminate spousal inheritance rights after a divorce. At its June 4 meeting, the Commission considered public comments regarding the tentative recommendation and instructed the staff to prepare a draft recommendation incorporating certain decisions it made in response to those comments. The draft recommendation is attached.

The Commission instructed the staff to work with the California Land Title Association (CLTA) in implementing one of its decisions — the addition of an affidavit procedure that could be used to quickly and easily certify a person’s rights under the proposed law. The staff has done so and the results are discussed below. In the course of discussions with the staff, the CLTA representative raised a new point, suggesting that a person who interferes in bad faith with another person’s right to receive property transferred by means of a nonprobate transfer should be liable for resulting costs and damages. This suggestion is also discussed below.

AFFIDAVIT PROCEDURE

In its response to the tentative recommendation, CLTA pointed out that the proposed law would complicate the process of insuring title to real property transferred by nonprobate transfer or by operation of joint tenancy survivorship. Because an apparent surviving spouse might not actually be a surviving spouse (due to an undisclosed divorce), an apparent surviving spouse may claim title to real property to which that person is not entitled under the proposed law. Before insuring title to such property, a title insurer would need to research whether the

transferee was actually the decedent's surviving spouse. This would require proof of a negative — that the transferee and decedent had not divorced.

The Commission agreed that this was a problem and agreed in principle with CLTA's proposed solution — the addition of an affidavit procedure that a person could use to certify their rights under the proposed law. The details of such a procedure were to be developed by the staff, in consultation with CLTA.

The staff has consulted with Anne Nelson Lanphar, the CLTA representative, and has developed a draft affidavit provision to be added to the Probate Code:

§ 5602. Certification of rights under this part

5602. (a) Nothing in this part affects the rights of a purchaser or encumbrancer of real property for value who in good faith relies on an affidavit or a declaration under penalty of perjury under the laws of this state that states all of the following:

- (1) The name of the decedent.
- (2) The date and place of the decedent's death.
- (3) A description of the real property transferred to the affiant or declarant by an instrument making a nonprobate transfer or by operation of joint tenancy survivorship.
- (4) Either of the following, as appropriate:
 - (A) The affiant or declarant is the surviving spouse of the decedent.
 - (B) The affiant or declarant is not the surviving spouse of the decedent, but the rights of the affiant or declarant to the described property are not affected by Probate Code Section 5600 or 5601.
- (b) A person relying on an affidavit or declaration made pursuant to subdivision (a) has no duty to inquire into the truth of the matters stated in the affidavit or declaration.
- (c) An affidavit or declaration made pursuant to subdivision (a) may be recorded.

Comment. Section 5602 provides a procedure for certifying that a person's rights to property transferred on the death of a spouse or former spouse, by an instrument making a nonprobate transfer or by operation of joint tenancy survivorship, are not affected by this part. See also Civ. Code Proc. § 2015.5 (certification or declaration under penalty of perjury); Prob. Code §§ 210-212 (recording evidence of death affecting title to real property).

Ms. Nelson Lanphar expects that the addition of this provision will satisfy CLTA's objections to the proposed law.

BAD FAITH NOTICE OF CONFLICTING CLAIM

Under the proposed amendment to Probate Code Section 5003 a property holder (such as an insurance company) who transfers property according to the terms of an instrument making a nonprobate transfer would be protected, even if the named beneficiary is not entitled to the property under the proposed law. However, this protection does not apply if the property holder is served with a contrary court order or with written notice of a person claiming an adverse interest in the property. Ms. Nelson Lanphar is concerned that an unscrupulous person could serve such notice in bad faith, either to gain some advantage in negotiations or out of malice. This could significantly delay a transferee's access to property to which the transferee is entitled. She suggests that a person who serves a bad faith notice of an adverse interest under Section 5003 should be liable for resulting damages.

There is precedent for such a provision. Probate Code Section 13540 governs the right of a surviving spouse to convey community real property after the death of a spouse. The rights and title of grantees, purchasers, and encumbrancers of property conveyed by a surviving spouse under Section 13540 are protected. However, Section 13541 establishes an exception to that protection where a person records a notice claiming an interest in the property under the will of the deceased spouse. Subdivision (d) was added to Section 13541, on the Commission's recommendation, to provide a remedy where a notice is recorded for the purpose of slandering title to the property:

(d) A person shall not record a notice under this section for the purpose of slandering title to the property. If the court in an action or proceeding relating to the rights of the parties determines that a person recorded a notice under this section for the purpose of slandering title, the court shall award against the person the cost of the action or proceeding, including a reasonable attorney's fee, and the damages caused by the recording.

The staff recommends that a similar provision be added to Section 5003, as follows:

5003....

...

(e) A person shall not serve notice under paragraph (2) of subdivision (b) in bad faith. If the court in an action or proceeding relating to the rights of the parties determines that a person has served notice under paragraph (2) of subdivision (b) in bad faith, the

court shall award against the person the cost of the action or proceeding, including a reasonable attorney's fee, and the damages caused by the service.

Comment. ...

Subdivision (e) provides for liability where a person serves a bad faith notice of a contrary claim to property held for the purpose of a nonprobate transfer. This provision is similar to Section 13541(d) (compensation where notice slanders title to community property after spouse's death).

EVIDENTIARY STANDARD FOR PROOF OF CONTRARY INTENT

The proposed law contains an exception where there is "clear and convincing evidence" that a transfer to a former spouse was intended to survive divorce. This standard was intended to allow some consideration of evidence of intent, without encouraging a flood of litigation. Even with the relatively strict clear and convincing evidence standard, the proposed law would be more liberal than similar provisions of the Probate Code which do not allow any extraneous evidence of an intent contrary to the default rule. See, e.g., Prob. Code § 6122 (will provision benefiting spouse terminated unless will expressly provides otherwise). Use of a clear and convincing evidence standard would also be consistent with other provisions of the Probate Code that consider evidence of an intent contrary to a statutory default rule. See, e.g., Prob. Code §§ 5302 (disposition of funds in joint account on death of one account-holder).

The Commission should perhaps reconsider use of the clear and convincing standard. It may be that the standard is too strict and will result in a failure of a nonprobate transfer to a former spouse even where the transferor intended it to survive divorce. What's more, it isn't clear that a stricter evidentiary standard will reduce litigation. If a significant amount of property is at stake, a former spouse who believes that a nonprobate transfer was intended to survive divorce will probably litigate with whatever evidence is available.

Respectfully submitted,

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#FHL-910

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT
RECOMMENDATION

Effect of Dissolution of Marriage on Nonprobate Transfers

September 1998

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

1 EFFECT OF DISSOLUTION OF MARRIAGE
2 ON NONPROBATE TRANSFERS

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

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

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

22 EXISTING LAW

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

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 Uniform Probate Code (1993), "will substitutes and other inter-vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission"

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

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

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

5. See, e.g., *Life Ins. Co. of No. America v. Cassidy*, 35 Cal. 3d 599, 606, 676 P.2d 1050, 1053-53, 200 Cal. Rptr. 28, 31-32 (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 Marriage of Hilke*, 4 Cal. 4th 215, 221, 841 P.2d 891, 895, 14 Cal. Rptr. 2d 371, 375 (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.

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 Admin., 152 Cal. App. 3d 70, 73, 199 Cal. Rptr. 286, 287-88 (1984). See also *In re Marriage of Allen*, 8 Cal. App. 4th 1225, 1231, 10 Cal. Rptr. 2d 916, 919 (1992) (operation of joint tenancy survivorship after divorce not "consistent with what the average decedent and former spouse would have wanted had death been anticipated"); *Estate of Blair*, 199 Cal. App. 3d 161, 169, 244 Cal. Rptr. 627, 632 (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.").

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

9. See Prob. Code §§ 6122, 6227.

10. See *id.* §§ 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 spouse¹³ 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

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), 21610 (share of spouse omitted from will).

13. Where a nonprobate transfer fails by operation of the proposed law, the instrument is given effect as if the former spouse had failed to survive the decedent. See proposed Prob. Code § 5600(c). Existing law governing the death of a beneficiary or trustee would then apply. See Prob. Code §§ 21111 (failed probate and nonprobate transfers), 15660 (failure of trustee designation).

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, by virtue of a subsequent marriage, 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).

1 or during the former spouses' marriage to each other. This permits a person who
2 wishes to preserve a nonprobate transfer to a former spouse, or a joint tenancy
3 with a former spouse, to do so by recreating the provision or the joint tenancy after
4 dissolution of marriage. For example, if a person adds a former spouse as a
5 beneficiary to a life insurance policy after the dissolution of the person's marriage
6 to the former spouse, the designation of the former spouse as beneficiary of a
7 nonprobate transfer is created after the dissolution of their marriage and is
8 therefore not affected by the proposed law.

9 *Irrevocability.* The proposed law would only affect a nonprobate transfer or joint
10 tenancy that is revocable or subject to severance by the decedent at the time of the
11 decedent's death.¹⁷ A person's intent to revoke a nonprobate transfer or sever a
12 joint tenancy after dissolution of marriage is irrelevant if that person lacks
13 authority to do so.

14 *Evidence of contrary intent.* The proposed law does not affect a nonprobate
15 transfer or a joint tenancy if there is clear and convincing evidence that the
16 decedent intended to preserve the nonprobate transfer or joint tenancy
17 survivorship.¹⁸ In such a case the policy assumption underlying the general rule,
18 that a typical person does not intend a spousal disposition to survive dissolution of
19 marriage, is inapplicable.

20 **Third Party Protections**

21 The proposed law protects third parties in two contexts:

22 *Property holders.* Most forms of nonprobate transfer involve an intermediary
23 who holds the property to be transferred and is responsible for its distribution
24 according to the terms of the transferring instrument. The proposed law provides
25 protection from liability for a property holder who transfers property according to
26 the terms of the transferring instrument, unless the property holder has been served
27 with a contrary court order or with notice from a person with an adverse interest in
28 the property.¹⁹ A person who files a bad faith notice of an adverse interest is liable
29 for any damages that result.²⁰

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. The clear and convincing evidence standard allows consideration of evidence of a contrary intent without opening the door to a flood of litigation. Other Probate Code provisions apply the same standard where considering evidence of an intent contrary to a statutory default rule. See, e.g., Prob. Code §§ 5301 (lifetime ownership of funds in joint account), 5302 (disposition of funds in joint account on death of one account-holder).

19. This protection would be implemented by broadening the application of 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.

20. *Id.*

Bona fide purchasers. The proposed law protects the rights of a good faith purchaser or encumbrancer for value 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.²¹ 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.

8 The proposed law also provides an affidavit procedure that may be used to
9 quickly and easily certify that a person's rights to real property transferred by an
10 instrument making a nonprobate transfer or by operation of joint tenancy
11 survivorship are not affected by the proposed law (either because the person is a
12 surviving spouse or because the transfer falls within one of the proposed law's
13 exceptions).²² The rights of a good faith purchaser or encumbrancer who relies on
14 such an affidavit are protected.²³

15 SCOPE OF PROPOSED LAW

16 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,²⁴ the proposed law does not exempt such benefits from its scope of application.²⁵ 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 construed more narrowly by 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.

26 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.²⁶ There are, however,

21. See proposed Prob. Code §§ 5600(d), 5601(c).

22. See proposed Prob. Code § 5602.

23. *Id.*

24. See, e.g., *Metropolitan Life Ins. Co. 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).

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

26. See U.S. Const. art. I, § 10, cl. 1; *Whirlpool Corp. 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).

1 good arguments against this proposition.²⁷ Considering the uncertainty on this
2 point, and the Commission's recommendation that the law be applied broadly,
3 application of the proposed law is not limited to contracts formed after the law's
4 enactment.²⁸

5 CONFORMING REVISIONS

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

- 7 • Family Code Section 2024, which provides for a printed warning
8 of the automatic revocation of a spousal disposition in a will, is
9 amended to expand the scope of the warning to refer to the
10 effects of the proposed law.
- 11 • Probate Code Section 5003, protecting property holders from
12 liability for transferring property according to the terms of an
13 instrument making a nonprobate transfer, is amended to make it
14 applicable to the proposed law.
- 15 • Probate Code Section 5302, governing disposition of funds in a
16 multiple party account in a financial institution, is amended to
17 make survivorship rights in such accounts subject to the proposed
18 law.
- 19 • Probate Code Section 6202, which defines "spouse" for the
20 purposes of California statutory will law, is repealed to eliminate

27. 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 Corp. v. Ritter*, printed in the quarterly publication of the American College of Trust and Estate Counsel. See *Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents*, 17 ACTEC Notes 184 (1991). 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." *Id.* at 184-85.

(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.* at 184.

(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 altered rules of construction or other default rules to pre-existing documents in any field of law" *Id.* at 185.

- 1 an inconsistency in the treatment of statutory wills, other wills,
2 and nonprobate transfers.²⁹
- 3 • Probate Code Section 21111, governing the effect of a failed
4 transfer of property on death, is amended to clarify its application
5 to instruments that do not provide for the transfer of a residue.

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

29. 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 *Estate of Reeves*, 233 Cal. App. 3d 651, 658, 284 Cal. Rptr. 650, 654 (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 §§ 5600-5603 (added). Nonprobate transfer to a former spouse

SEC. _____. Part 4 (commencing with Section 5600) is added to Division 5 of the Probate Code, to read:

PART 4. NONPROBATE TRANSFER TO A FORMER SPOUSE

§ 5600. Failure of nonprobate transfer to former spouse

5600. (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 subject to revocation by the transferor at the time of 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 instrument making the nonprobate transfer shall be treated as it would if the former spouse failed to survive the transferor.

(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 either of the following types:

(1) A provision of a type described in Section 5000.

(2) A provision in an instrument that operates on death, other than a will, conferring a power of appointment or naming a trustee.

Comment. Subdivision (a) of Section 5600 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 subject to revocation by the transferor. This precludes operation of subdivision (a) where a nonprobate transfer is irrevocable on execution, or later becomes irrevocable (for reasons other than the death of the transferor). 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

1 former spouse under the policy. The irrevocability of a trust can be established by certification of
2 the trust's contents. See Section 18100.5.

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

10 Subdivision (c) governs the effect of failure of a nonprobate transfer under this section. For the
11 effect of a failed nonprobate transfer of property, see Section 21111. For the effect of a failure of
12 a trustee designation, see Section 15660.

13 Subdivision (d) makes clear that nothing in this section affects the rights of a good faith
14 purchaser or encumbrancer for value who relies on the apparent failure of a nonprobate transfer
15 under this section or who lacks knowledge of the failure of a nonprobate transfer under this
16 section. For the purpose of this subdivision, "knowledge" of the failure of a nonprobate transfer
17 includes both actual knowledge and constructive knowledge through recordation of a judgment of
18 dissolution or annulment or other relevant document. See Civ. Code § 1213 (recordation as
19 constructive notice to subsequent purchasers and mortgagees). The rights of a subsequent
20 purchaser or encumbrancer are also protected if the purchaser or encumbrancer relies on an
21 affidavit or declaration executed under Section 5602. The remedy for a person injured by a
22 transaction with a subsequent purchaser or encumbrancer for value is against the transacting
23 former spouse and not against the purchaser or encumbrancer.

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

27 This section may be preempted by federal laws regulating employer-provided benefits. See
28 Metropolitan Life Ins. Co. v. Hanslip, 939 F.2d 904 (10th Cir. 1991) (ERISA preempts state law
29 providing that dissolution of marriage revokes designation of former spouse as beneficiary to
30 employer-provided life insurance). It is therefore especially important to review beneficiary
31 designations for employer-provided nonprobate transfers.

32 **§ 5601. Severance of joint tenancy between decedent and former spouse**

33 5601. (a) Except as provided in subdivision (b), a joint tenancy between the
34 decedent and the decedent's former spouse, created before or during the marriage,
35 is severed as to the decedent's interest if, at the time of the decedent's death, the
36 former spouse is not the decedent's surviving spouse.

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

39 (1) The joint tenancy is not subject to severance by the decedent at the time of
40 the decedent's death.

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

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

46 **Comment.** Subdivision (a) of Section 5601 establishes the general rule that a joint tenancy
47 between a decedent and the decedent's former spouse is severed if, at the time of the decedent's
48 death, the former spouse is not the decedent's surviving spouse. "Surviving spouse" is defined in
49 Section 78. This effectively reverses the common law rule that dissolution or annulment of

1 marriage does not sever a joint tenancy between spouses. See, e.g., *Estate of Layton*, 44 Cal. App.
2 4th 1337, 52 Cal. Rptr. 2d 251 (1996).

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

10 This section applies to both real and personal property joint tenancies, and affects property
11 rights that depend on the law of joint tenancy. See, e.g., Veh. Code §§ 4150.5, 5600.5 (property
12 passes as though in joint tenancy). This section does not affect United States Savings Bonds,
13 which are subject to federal regulation. See *Conrad v. Conrad*, 66 Cal. App. 2d 280, 284-85, 152
14 P.2d 221, 223 (1944) (federal law controls).

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

17 Where a joint tenancy involves three or more joint tenants, severance by operation of this
18 section converts the decedent's interest into a tenancy in common, but does not sever the joint
19 tenancy as between the other joint tenants. For example, husband, wife, and child create a joint
20 tenancy during husband and wife's marriage to each other. If on husband's death wife is not
21 husband's surviving spouse, the joint tenancy is severed by operation of this section. Husband's
22 one third interest becomes a tenancy in common and does not pass by survivorship. The
23 remaining two thirds remain in joint tenancy as between the child and the former wife.

24 Paragraph (1) of subdivision (b) provides that a joint tenancy is not severed by operation of
25 subdivision (a) if the joint tenancy is not subject to severance by the decedent (for reasons other
26 than the decedent's death). For example, if the decedent is subject to a court order or binding
27 agreement prohibiting severance of the joint tenancy by the decedent, then the joint tenancy is not
28 severed by operation of subdivision (a).

29 Subdivision (c) makes clear that nothing in this section affects the rights of a good faith
30 purchaser or encumbrancer who relies on an apparent severance by operation of this section or
31 who lacks knowledge of a severance by operation of this section. For the purpose of this
32 subdivision, "knowledge" of a severance of joint tenancy includes both actual knowledge and
33 constructive knowledge through recordation of a judgment of dissolution or annulment or other
34 relevant document. See Civ. Code § 1213 (recordation as constructive notice to subsequent
35 purchasers and mortgagees). The rights of a subsequent purchaser or encumbrancer are also
36 protected if the purchaser or encumbrancer relies on an affidavit or declaration executed under
37 Section 5602. The remedy for a person injured by a transaction with a subsequent purchaser or
38 encumbrancer is against the transacting joint tenant and not against the purchaser or
39 encumbrancer.

40 **§ 5602. Certification of rights under this part**

41 5602. (a) Nothing in this part affects the rights of a purchaser or encumbrancer
42 of real property for value who in good faith relies on an affidavit or a declaration
43 under penalty of perjury under the laws of this state that states all of the following:

44 (1) The name of the decedent.

45 (2) The date and place of the decedent's death.

46 (3) A description of the real property transferred to the affiant or declarant by an
47 instrument making a nonprobate transfer or by operation of joint tenancy
48 survivorship.

49 (4) Either of the following, as appropriate:

50 (A) The affiant or declarant is the surviving spouse of the decedent.

1 (B) The affiant or declarant is not the surviving spouse of the decedent, but the
2 rights of the affiant or declarant to the described property are not affected by
3 Probate Code Section 5600 or 5601.

4 (b) A person relying on an affidavit or declaration made pursuant to subdivision
5 (a) has no duty to inquire into the truth of the matters stated in the affidavit or
6 declaration.

7 (c) An affidavit or declaration made pursuant to subdivision (a) may be
8 recorded.

9 **Comment.** Section 5602 provides a procedure for certifying that a person's rights to real
10 property transferred on the death of a spouse or former spouse, by an instrument making a
11 nonprobate transfer or by operation of joint tenancy survivorship, are not affected by this part.
12 See also Civ. Code Proc. § 2015.5 (certification or declaration under penalty of perjury); Prob.
13 Code §§ 210-212 (recording evidence of death affecting title to real property).

14 **§ 5603. Application of part**

15 5603. (a) This part applies to all instruments making a nonprobate transfer or
16 creating a joint tenancy, whenever executed.

17 (b) Sections 5600 and 5601 do not apply where the event terminating a person's
18 status as a surviving spouse occurs before the operative date of this part.

19 **Comment.** Section 5603 governs the application of this part. Under subdivision (b), Sections
20 5600 and 5601 do not apply where a divorce or other event terminating a person's status as
21 surviving spouse under Probate Code Section 78 occurs before the operative date of the part.

CONFORMING REVISIONS

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

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

4 2024. (a) A petition for dissolution of marriage, nullity of marriage, or legal
5 separation of the parties, or a joint petition for summary dissolution of marriage,
6 shall contain the following notice:

7 “Dissolution or annulment of your marriage may automatically affect the rights
8 of your former spouse regarding such things as your will, life insurance proceeds,
9 trust benefits, retirement death benefits, power of attorney designation, pay on
10 death bank accounts, transfer on death vehicle registration, and joint tenancy
11 survivorship. You should review these matters, as well as any credit cards, other
12 credit accounts, and credit reports to determine whether they should be changed or
13 reaffirmed ~~Please review your will, insurance policies, retirement benefit plans,~~
14 ~~credit cards, other credit accounts and credit reports, and other matters that you~~
15 ~~may want to change~~ in view of the dissolution or annulment of your marriage, or
16 your legal separation. However, some changes may require the agreement of your
17 spouse or a court order (see Part 3 (commencing with Section 231) of Division 2
18 of the Family Code). ~~Dissolution or annulment of your marriage may~~
19 ~~automatically change a disposition made by your will to your former spouse.”~~

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

22 “Dissolution or annulment of your marriage may automatically affect the rights
23 of your former spouse regarding such things as your will, life insurance proceeds,
24 trust benefits, retirement death benefits, power of attorney designation, pay on
25 death bank accounts, transfer on death vehicle registration, and joint tenancy
26 survivorship. You should review these matters, as well as any credit cards, other
27 credit accounts, and credit reports to determine whether they should be changed or
28 reaffirmed ~~Please review your will, insurance policies, retirement benefit plans,~~
29 ~~credit cards, other credit accounts and credit reports, and other matters that you~~
30 ~~may want to change~~ in view of the dissolution or annulment of your marriage, or
31 your legal separation. However, some changes may require the agreement of your
32 spouse or a court order (see Part 3 (commencing with Section 231) of Division 2
33 of the Family Code). ~~Dissolution or annulment of your marriage may~~
34 ~~automatically change a disposition made by your will to your former spouse.”~~

35 **Comment.** Section 2024 is amended to refer to the effect of dissolution or annulment of
36 marriage on the designation of a former spouse as attorney-in-fact, nonprobate transfers to a
37 former spouse, and joint tenancy survivorship as between former spouses. See Prob. Code §§
38 3722, 4154, 4727(e) (power of attorney), 5600 (nonprobate transfer), 5601 (joint tenancy).

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

SEC. _____. 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 is consistent with the rights of the person named as beneficiary.

(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.

(e) A person shall not serve notice under paragraph (2) of subdivision (b) in bad faith. If the court in an action or proceeding relating to the rights of the parties determines that a person has served notice under paragraph (2) of subdivision (b) in bad faith, the court shall award against the person the cost of the action or proceeding, including a reasonable attorney's fee, and the damages caused by the service.

Comment. Section 5003(a) is amended to make clear that the section applies where a nonprobate transfer has been caused to fail by operation of Section 5600.

Subdivision (e) provides for compensation where a person serves a bad faith notice of a contrary claim to property held for the purpose of a nonprobate transfer. This provision is similar to Section 13541(d) (compensation where notice slanders title to community property after spouse's death).

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

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

5302. Subject to Section 5600:

(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

1 surviving parties, their respective ownerships during lifetime are in proportion to
2 their previous ownership interests under Section 5301 augmented by an equal
3 share for each survivor of any interest the decedent may have owned in the
4 account immediately before the decedent's death; and the right of survivorship
5 continues between the surviving parties.

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

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

9 (2) On death of the sole party or of the survivor of two or more parties, (A) any
10 sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to
11 the survivor of them if one or more die before the party, (B) if two or more P.O.D.
12 payees survive, any sums remaining on deposit belong to them in equal and
13 undivided shares unless the terms of the account or deposit agreement expressly
14 provide for different shares, and (C) if two or more P.O.D. payees survive, there is
15 no right of survivorship in the event of death of a P.O.D. payee thereafter unless
16 the terms of the account or deposit agreement expressly provide for survivorship
17 between them.

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

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

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

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

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

37 **Comment.** Section 5302 is amended to make clear that the transfer on death of funds in a
38 multiple party account is subject to Section 5600, which causes a nonprobate transfer to a former
39 spouse to fail if the former spouse is not the transferor's surviving spouse. See Section 5600
40 (effect of dissolution of marriage on a nonprobate transfer).

41 **Prob. Code § 6202 (repealed). Spouse defined**

42 SEC. _____. Section 6202 of the Probate Code is repealed.

1 6202. “Spouse” means the testator’s husband or wife at the time the testator
2 signs a California statutory will.

3 **Comment.** Section 6202 is repealed to eliminate the inconsistency in the operation of Section
4 6122 and Section 6227. Section 6122 revokes a disposition to a former spouse in a will executed
5 before or during the testator’s marriage to the former spouse. For the purposes of a statutory will,
6 Section 6202 defines a “spouse” as a person who is married to the testator at the time the testator
7 signs the statutory will. This means that Section 6227 only revokes a disposition to a former
8 spouse in a statutory will that is executed after the testator’s marriage to the former spouse. See
9 Estate of Reeves, 233 Cal. App. 3d 651, 284 Cal. Rptr. 650 (1991).

10 **Prob. Code § 21111 (amended). Failed transfer**

11 SEC. _____. Section 21111 of the Probate Code is amended to read:
12 21111. Except as provided in Section 21110:

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

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

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

22 (3) If the transferring instrument does not provide for an alternative disposition
23 and does not provide for the transfer of a residue, the property is transferred to the
24 decendent’s estate.

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

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