Study FHL-910 September 18, 1998

First Supplement to Memorandum 98-65

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

We have received two letters regarding Memorandum 98-65. These letters are attached.

The California Land Title Association (CLTA) writes to inform the Commission that it has no objections to the draft recommendation attached to Memorandum 98-65. CLTA also expresses its appreciation for the "receptiveness and responsiveness shown by the Staff and Commission to its concerns and suggestions." See Exhibit p. 1.

The Executive Committee of the Estate Planning, Trust, and Probate Law Section of the State Bar ("Executive Committee") writes to express its continuing support for the proposed law. See Exhibit p. 2. However, the Executive Committee is still concerned about the effect of the proposed transitional provision on a person who is or becomes incompetent before the new law becomes operative and never regains capacity before death. Such a person would not have an opportunity to take the new law into account (e.g., by expressing a clear intention to preserve a nonprobate transfer in favor of a former spouse). See Exhibit pp. 3-4.

However, the proposed law would only apply if the incompetent person's marriage is dissolved or annulled *after* the operative date of the proposed law. See proposed Section 5603. In the dissolution or annulment proceeding, the incompetent person would be represented by a guardian, conservator, or guardian ad litem. See Code Civ. Proc. § 372 (incompetent person as party to civil action). The spouse of the incompetent person could then negotiate with the incompetent person's representative regarding the disposition of nonprobate transfers and property held in joint tenancy. This would provide a significant opportunity for reappraisal of the incompetent person's intentions in light of the proposed law.

After discussing this matter with the representative of the Executive Committee, the staff believes that the substance of the transitional provision is

appropriate and should not be changed. However, it does appear that the clarity of the transitional provision could be improved by redrafting it to read as follows:

> 5603. (a) This part is operative on January 1, 2000.
>
> (b) Except as provided in subdivision (c), this part applies to an instrument making a nonprobate transfer or creating a joint tenancy, whether executed before, on, or after the operative date of this part.
>
> (c) Sections 5600 and 5601 do not apply, and the applicable law in effect before the operative date of this part applies, to an instrument making a nonprobate transfer or creating a joint tenancy in either of the following circumstances:
>
> (1) The person making the nonprobate transfer or creating the joint tenancy dies before the operative date of this part.
>
> (2) The dissolution of marriage or other event that terminates the status of the nonprobate transfer beneficiary or joint tenant as a surviving spouse occurs before the operative date of this part.
>
> **Comment.** Section 5603 governs the application of this part.
>
> Under subdivision (c), where a dissolution of marriage, or other event terminating a person's status as a decedent's surviving spouse occurs before January 1, 2000, that person's rights as a nonprobate transfer beneficiary or joint tenant of the decedent are not affected by Section 5600 or 5601. See Section 78 ("surviving spouse" defined).

Respectfully submitted,

Brian Hebert
Staff Counsel

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September 17, 1998

Anne Nelson Lanphar
Vice President
Associate Senior Underwriter

VIA TELECOPIER & FEDERAL EXPRESS

Brian Hebert, Esq.
CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road
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Palo Alto, CA 94303-4739

Re: Effect of Dissolution of Marriage on Nonprobate Transfers – September 1998 Draft

Dear Brian:

Please be advised that I have been authorized by the California Land Title Association ("CLTA") to advise you that the CLTA has no objections to the September 1998 Draft of the California Law Revisions Commission's proposed recommendation entitled "Effect of Dissolution of Marriage on Nonprobate Transfers."

The CLTA appreciates the receptiveness and responsiveness shown by the Staff and Commission to its concerns and suggestions.

If I can be of assistance to you in any way, please do not hesitate to contact me.

Very truly yours,

Anne Nelson Lanphar
Vice President
Associate Senior Underwriter

AL:la
cc: Cliff Morgan
Tim Reardon

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION
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September 9, 1998

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MEMORANDUM

TO: California Law Revision Commission
[via facsimile (650) 494 1827]

FROM: Executive Committee, Estate Planning, Trust & Probate Section, State Bar of California

RE: Effect of Dissolution of Marriage on Nonprobate Transfers: Memorandum 98-65

The Executive Committee, Estate Planning, Trust & Probate Section, State Bar of California (the "Executive Committee") supports the draft recommendation of the California Law Revision Commission ("CLRC") contained in Memorandum 98-65 that a judgment of dissolution or annulment of marriage should prevent the operation of a revocable nonprobate transfer on death to a former spouse. The Executive Committee believes that said recommendation reflects the likely intent of the parties to a dissolution or annulment.

Nevertheless, the Executive Committee believes that proposed Probate Code §5603, which provides that the draft

legislation applies to "all instruments making a nonprobate transfer or creating a joint tenancy, whenever executed," be modified so that nonprobate transfers made or joint tenancies created prior to the operative date of the statute by those persons who become incompetent prior to the operative date be excluded from operation of the statute.

* * * *

Under the legislation as proposed, if a person dies prior to the operative date of the statute, the former law would apply to the transfer of property to a former spouse and the former spouse ***would*** inherit the property. This application of the statute is fair because all parties (*i.e.*, the decedent, the former spouse, current potential beneficiaries) would be operating under the former law. Because we have no way of knowing the intent of a ***particular*** decedent, we can only assume that a particular decedent's wishes were reflected in the former law.

Those persons who will become incompetent prior to the operative date of the new statute, or who are already incompetent, stand in the same position as those persons who will die prior to the operative date: none will have the opportunity to change their estate plans to reflect the new law. The proposed statute, however, would assume that such people are able to change their minds.

The issue boils down to ***who*** would be required to seek a court order for "substituted judgment" under the conservatorship proceedings: the former spouse or the potential heirs. Under the law as proposed by the CLRC, the ***former spouse*** would be required to do so even though it is much more likely that the potential heirs would have knowledge of the potential conservatee's incapacity than would a former spouse. Likewise, it is much more likely that the potential heirs would have, during the life of the incapacitated potential transferor, knowledge of the assets that would comprise the nonprobate transfers: the former spouse is likely to receive such knowledge ***after*** the death of the transferor which is after the time allowed to obtain the court order! Moreover, even if the statutes governing the establishment of a conservatorship proceeding were also amended to provide that the former spouses be given notice of a conservatorship proceeding, modern estate planning techniques, indeed ***nonprobate transfers themselves***, are designed just to avoid conservatorship proceedings!

Therefore, we suggest that proposed Probate Code Section 5603 read as follows:

> §5602.(a) This part is operative January 1, 1999. (b) Sections 5600 and 5601 do not apply where the event terminating a person's status as a surviving spouse occurs, or where the transferor or joint tenant, as the case may be, becomes or is incompetent, before the operative date of this part, and remains incompetent until such transferor's or joint tenant's death.

This issue was briefly discussed by the CLRC staff in Memorandum 98-35 (May 15, 1998). In that Memorandum, the CLRC staff recommended that, if the issue of unfairness of retroactive application is significant enough to outweigh the benefit of retroactive application, the proposed law should be made prospective only. This issue was also briefly discussed in the minutes of the CLRC dated June 4, 1998.

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cc: Mr. Robert E. Temmerman, Chair, Estate Planning, Trust and Probate Law Section
Mr. Don Green, Immediate Past Chair, Estate Planning, Trust and Probate Law Section
Mrs. Diana Hastings Temple, Chair, Ad Hoc Subcommittee
Mr. Richard A. Gorini
Mr. Lynard C. Hinojosa
Ms. Sandra Price
Ms. Susan Orloff

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