Study FHL-910 August 3, 1999

Memorandum 99-48

Effect of Dissolution of Marriage on Nonprobate Transfers

The Commission has recommended legislation that would cause a revocable nonprobate transfer to a former spouse to fail after the dissolution or annulment of their marriage. This would implement the probable intent of a typical person whose marriage has been dissolved. This would parallel existing law providing that dissolution or annulment of marriage automatically revokes a will provision benefiting a former spouse.

Concerns about possible inequitable effects of the recommended law were raised by members and staff of the Assembly Judiciary Committee. At its June 24, 1999, meeting, the Commission considered whether these concerns could be addressed by expanding the exceptions to the proposed law to account for circumstances in which a person would be more likely to intend to preserve a nonprobate transfer to a former spouse. The Commission decided not to pursue that approach. Instead, the Commission instructed the staff to develop an alternative approach that would authorize the court to set aside a nonprobate transfer to a former spouse in appropriate circumstances. That approach is described below.

Another alternative that is explored in this memorandum is to allow the parties to revoke a nonprobate transfer to a spouse or to sever a spousal joint tenancy by signing a boilerplate provision on the dissolution judgment form .

Finally, the memorandum presents a draft tentative recommendation relating to the effect of an automatic temporary restraining order (ATRO) on a person's ability to change the beneficiary of a nonprobate transfer or sever a joint tenancy during the pendency of a dissolution proceeding. If the Commission approves the draft we will circulate it for public comment.

JUDICIAL AUTHORITY TO SET ASIDE TRANSFER

As an alternative to the automatic termination of a nonprobate transfer to a former spouse, a provision could be added that would allow a judge to set aside

such a transfer where it is proven that the transfer was unintended, and where setting aside the transfer would not be unfair to the former spouse:

> **Prob. Code § 5600. Setting aside unintended nonprobate transfer to former spouse**
>
> 5600. (a) A court may set aside a nonprobate transfer of property on death to a former spouse where all of the following conditions are met:
>
> (1) The instrument making the transfer was executed before or during the transferor's marriage to the former spouse.
>
> (2) The provision making the transfer was subject to modification by the transferor.
>
> (3) The former spouse is not the transferor's surviving spouse.
>
> (4) The transferor did not intend to preserve the provision making the transfer to the former spouse after the dissolution or annulment of their marriage.
>
> (b) Notwithstanding subdivision (a), a court may decline to set aside a transfer under this section if to do so would be inequitable under the circumstances, taking into account the rights of all interested persons.
>
> **Comment**. Section 5600 is added to allow a court to set aside a nonprobate transfer to a former spouse where the transferor did not intend to preserve the transfer after the dissolution or annulment of the transferor's marriage to the former spouse.
>
> Subdivision (b) provides that a court may decline to set aside a transfer where to do so would be inequitable. For example, where there is a significant arrearage in the transferor's court-ordered support payments to the former spouse, it may be inequitable to set aside a nonprobate transfer to the former spouse, regardless of the transferor's intent.

Extension to Wills

One disadvantage of this approach is that it perpetuates the inconsistency between the law of wills and the law of nonprobate transfers. In response to this concern, the Commission instructed the staff to consider repeal of existing provisions that automatically revoke a disposition in a will favoring a former spouse (Probate Code Sections 6122 and 6227) and expansion of the approach described above to encompass wills as well as nonprobate transfers. This could be done easily, by deleting the word "nonprobate" in subdivision (a) and revising the Comment.

The Uniform Probate Code and the statutes of at least 46 states provide that dissolution of marriage automatically revokes a provision in a will benefiting a

former spouse. See, e.g., Unif. Prob. Code § 2-804 (1993); N.Y. Est. Powers & Trusts Law § 5-1.4 (Westlaw 1999). That has been the rule in California since 1983, when Probate Code Section 6122 was enacted on the Commission's recommendation. See *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301, 2325 (1982). The staff is reluctant to significantly change the rule now, in the absence of any suggestion that it is creating problems. If the Commission decides to pursue the approach described above, **the staff recommends that it not be extended to wills**.

Increased Litigation

The described approach would invite litigation in any case where there is a nonprobate transfer to a former spouse. What's more, the litigation would involve a difficult question of fact — the court would need to consider all of the circumstances surrounding the relationship of the deceased transferor and the former spouse in order to determine the decedent's intent and the potential unfairness of setting aside the nonprobate transfer. The staff believes that the approach described above could significantly burden the courts. In addition, the cost of litigation may deter some heirs from vindicating their rights.

Burden of Proof

If the provision described above is silent as to the burden and standard of proof involved in determining the transferor's intent, the person seeking to have the transfer set aside will bear the burden of proving the transferor's intent by a preponderance of the evidence. See Evid. Code §§ 115 (preponderance of evidence is default standard of proof), 500 (burden of proof falls on party who must prove fact essential to asserted claim). This effectively reverses the burden of the Commission's recommendation, which would cause a nonprobate transfer to a former spouse to fail unless it could be proven by the former spouse that the transferor intended to preserve the nonprobate transfer. That burden was consistent with our assumption that a typical divorcing person would not preserve a nonprobate transfer to a former spouse.

Placing the burden on the transferor's estate to challenge a nonprobate transfer to a former spouse is not consistent with our assumption about the probable intent of a divorcing person. In light of the difficulties of proof that are involved, such a burden will undoubtedly result in some windfalls to former spouses — where the

transfer to the former spouse was actually unintended but cannot be proven to be unintended.

Shifting the burden to the former spouse is not a good alternative. If we believe that the default result should be to set the aside transfer then we should stick by our earlier recommendation, which does just that with less need for litigation.

Conclusion

The staff recommends against the described approach. It would invite litigation and would be less effective in achieving our overall goal (effectuating the transferor's probable intent) than an automatic revocation rule.

BOILERPLATE PROVISION ON JUDGMENT FORM

Another possible approach would be to provide some sort of boilerplate provision on the dissolution judgment form (Judicial Counsel Form 1287) allowing the parties to a dissolution or annulment to directly indicate whether the dissolution or annulment of marriage will revoke a nonprobate transfer to a spouse. Thus:

> **Fam. Code § 2557. Revocation of nonprobate transfers**
>
> 2557. A judgment for dissolution of marriage, nullity of marriage, or for legal separation of the parties shall contain the substance of the following text:
>
> Except as otherwise provided in this order or specified in an attachment to this order, I revoke the designation of my spouse as beneficiary of any instrument making a transfer of property on my death (e.g., a trust, life insurance policy, pay-on-death bank account, etc.) However, this does not affect an instrument that is not subject to modification by me. (Sign below to take this action.)
>
> Petitioner: _____
> Respondent: _____
>
> Except as otherwise provided in this order or specified in an attachment to this order, I terminate the right of survivorship in any property held by my spouse and myself as joint tenants. (Sign below to take this action.)
>
> Petitioner: _____
> Respondent: _____
>
> **Comment.** Section 2557 adds language to the form of judgment for dissolution of marriage, nullity of marriage, or legal separation of the parties. See Judicial Council Form 1287. The language may be used to revoke a nonprobate transfer to a spouse, or sever a joint

> tenancy between spouses. This will help prevent unintended transfers where a person inadvertently fails to make such changes as part of a marital property agreement.

This approach has promise. It would allow the parties to express their intentions directly, rather than requiring the Legislature to step in to protect a parties' unexpressed intentions. Also, by incorporating the parties' desires directly into the court's order, there would be a recordable document that would help clarify the title to affected property for interested third parties. Some technical issues relating to this approach are discussed below.

Relation to Other Elements of Order

In some circumstances, a court may order one party to maintain life insurance naming the other party as beneficiary. A general election to revoke all nonprobate transfers should not supersede such a specific requirement. Thus, the language set out above expressly subordinates the revocation provision to all other provisions of the order.

Furthermore, parties should be able to specify a nonprobate transfer or joint tenancy property that is not to be revoked or severed by the general provision. The introductory language permits a party to do this in an attachment to the order.

Access to the Form

In some cases a respondent will not have access to the judgment form before it is submitted to the court. See Practice Under the Family Code: Dissolution, Legal Separation, Nullity § 14.51 (Cal. Cont. Ed. Bar 1999) ("When the respondent's default has been entered and there is no agreement of the parties, the proposed judgment is usually prepared by the counsel for the petitioner without review or approval by the respondent.") In such a case, the form could be used by the petitioner to revoke beneficiary designations but could not be used for that purpose by the respondent. This is unfortunate, but not necessarily unfair. The form language simply facilitates what either party could do unilaterally outside of the court order.

A possible remedy to this problem would be to provide that where the petitioner uses the revocation provision and the respondent defaults (and therefore does not have access to the form) the language automatically operates on behalf of the respondent as well as the petitioner. In other words, where only the petitioner has access to the form, any revocation is reciprocal.

Implication of Silence

Adding the proposed language to the judgment form may create an implication that a person who prepared the judgment form and elects not to sign the revocation provision did so intentionally. This will make it harder for that person's estate to argue that the failure to revoke a nonprobate transfer to a former spouse was inadvertent, where that question is at issue. This seems appropriate in most cases. Of course, there may be unsophisticated pro per petitioners who simply don't understand the purpose of the revocation provision and don't use it despite an intent to make such changes. In that case an implication of intention to preserve based on the failure to elect revocation could be a problem.

Either-Or Alternative

The proposed language is structured to facilitate what is probably the most commonly desired outcome — revocation and severance. However, this "one-sided" approach could be perceived as improperly promoting revocation. An alternative would be to phrase the language in terms of alternatives: "I (❑ do / ❑ do not) revoke …." This does present both options, but is more complicated and raises some potential for confusion. For example, what would be the result where someone checks "don't revoke" on the form then lists specific exceptions to that instruction in an attachment. Would the listed items be revoked? On the other hand, providing both alternatives would lessen the implication that might be drawn from a party's failure to use the boilerplate provision to revoke. A failure to check one of the boxes would not necessarily imply that the party did or did not intend to preserve a nonprobate transfer to a former spouse.

Warning

As previously discussed in the context of this study, federal law probably preempts state law with respect to death benefits that are part of a federally-regulated employee benefit plan. In order to change beneficiaries of such plans, it is probably necessary to follow the procedures specified in the plan. In addition, even where the order is effective to revoke a beneficiary designation, the parties should inform the property holder of the change. The parties could be warned of these limitations of the revocation provision by amending Family Code Section 2024 as follows:

> 2024. …

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

"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 in view of the dissolution or annulment of your marriage, or your legal separation. Dissolution or annulment of your marriage may automatically change a disposition made by your will to your former spouse.

If this order revokes the designation of your spouse as the beneficiary of an instrument making a transfer of property on your death you should notify the person responsible for transferring the property (e.g., your insurance company). This is especially important for employer-provided benefit plans, which may not be affected by this order. In order to change the beneficiary of these plans you should follow whatever procedure the plan provides."

Conclusion

This is a relatively simple approach and is probably worth investigating further. The Commission should consider whether to develop a tentative recommendation. Such a recommendation would need to include provisions protecting third-party property holders, purchasers, and encumbrancers, along the lines of the protections in the original recommendation. **The staff believes that this approach is worth investigating.**

AUTOMATIC TEMPORARY RESTRAINING ORDER

The summons in a proceeding for dissolution or annulment of marriage contains an ATRO restraining certain actions with respect to the parties' property. The ATRO has been interpreted by some courts as restraining the parties from changing a beneficiary designation in an instrument making a nonprobate transfer or severing a spousal joint tenancy. This creates the risk that a party will die after the ATRO goes into effect but before judgment is reached, making it impossible for the person to ever make such changes. This is particularly unfair because the restraint is effectively unilateral — the person who files for dissolution or annulment is free to change any beneficiary designation or sever a joint tenancy *before* filing.

The Commission instructed the staff to develop language that would eliminate the automatic restraint on changes to a nonprobate transfer or joint tenancy, while still allowing the court to order such restraints where necessary. This is done in the

attached staff draft tentative recommendation by amending Family Code Section 2040 to provide that the ATRO does not restrain beneficiary changes or joint tenancy severance and by amending Section 2045 to authorize the court to issue an order restraining such changes on the motion of a party.

If the Commission approves the staff draft tentative recommendation, we will circulate it for public comment.

Respectfully submitted,

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SUMMARY OF STAFF DRAFT TENTATIVE RECOMMENDATION ON RESTRAINT ON ESTATE PLAN CHANGES DURING DISSOLUTION OF MARRIAGE

Existing law can be interpreted to automatically restrain a person from changing a beneficiary designation in an instrument making a nonprobate transfer on death (e.g., a trust, retirement death benefits, transfer on death bank account, etc.) or from severing a joint tenancy during the pendency of a proceeding for dissolution or annulment of marriage. If a person dies after a dissolution proceeding has begun, but before judgment has been reached, that person will never have an opportunity to make these types of estate planning changes.

The Law Revision Commission recommends that a party to a dissolution proceeding not be automatically restrained from revoking a nonprobate transfer of property on death or from terminating the survivorship right in joint tenancy property. However, a court may issue an order restraining such changes on the request of one of the parties.

This recommendation was prepared pursuant to Resolution Chapter 91 of the Statutes of 1998.

RESTRAINT ON ESTATE PLAN CHANGES DURING MARITAL DISSOLUTION

Existing Law

The summons in a proceeding for dissolution or annulment of marriage contains an automatic temporary restraining order (ATRO) restraining the parties from

> in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life…[1]

The Law Revision Commission is informed that some trial courts interpret this to restrain a change of beneficiary in an instrument making a nonprobate transfer or the severance of a joint tenancy.

In addition, the ATRO expressly restrains

> both parties from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability held for the benefit of the parties and their child or children for whom support may be ordered.[2]

This provision expressly restrains a change of beneficiary in a life insurance policy.

Problems with Existing Law

Estate plan changes precluded. In most cases, a party to a pending marital dissolution proceeding will want to make estate planning changes to reflect the upcoming change in the party's marital status. If a party dies after a marital dissolution summons has been served but before judgment is entered, that party would never have had an opportunity to change a beneficiary to a nonprobate transfer or sever a joint tenancy.[3] This is particularly troublesome where the property at issue is the party's separate property. There does not appear to be any reason to restrain estate planning changes that relate to separate property.

In addition, a party may wish to make changes to an estate plan for reasons unrelated to dissolution of marriage (e.g., a change in tax status, the marriage or

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1. Fam. Code § 2040(a)(2).

2. Fam. Code § 2040(a)(3).

3. Of course, a change to a beneficiary designation to most forms of nonprobate transfer can be made with the consent of a spouse or a court order authorizing the change. Fam. Code § 2040(a)(2). However, in some cases, spousal consent or a court order may be difficult or impossible to procure. Furthermore, the law does not authorize a change in beneficiary to a life insurance policy, even with spousal consent. Fam. Code § 2040(a)(3). In order to change a life insurance beneficiary, the court would need to modify the ATRO. See Fam. Code § 235 (modification or revocation of temporary restraining order).

birth of children, or a change in charitable desires). These changes would also be restrained.

Rule unclear. While the Commission has been informed that some courts interpret the ATRO to restrain nonprobate transfer beneficiary changes and severance of a joint tenancy, it isn't clear that this interpretation is correct. These changes do not affect vested property rights and thus may not fall within the letter or spirit of the ATRO's restriction on "disposing" of property. Also, there are two other facts that argue against construing the ATRO to restrain changes in the beneficiary of a nonprobate transfer or severance of a joint tenancy:

(1) The summons form contains a warning cautioning the parties that they may wish to change the form of title to jointly held property in order to preserve the community property presumption should one of them die before judgment.[4] This implies that the parties are free to make changes to their property that affect the disposition of the property on death.

(2) Family Code Section 2040 specifically restrains a change in beneficiary of a life insurance policy. It does not specifically restrain beneficiary changes with respect to any other types of nonprobate transfer. This implies that only changes to life insurance beneficiaries were intended to be restrained.

The effect of an ATRO should be clarified.

Potential unilateral effect. A significant problem with a restraint on estate plan changes is that it is potentially unilateral. A petitioner in a marital dissolution proceeding may act in anticipation of the ATRO and make desired estate planning changes before the ATRO goes into effect. In such a case only the respondent is meaningfully restrained.

Inconsistency with law of wills. Restraint of estate planning changes during a marital dissolution proceeding appears to be inconsistent with the law governing wills — a person is apparently not restrained from modifying a will simply because a dissolution proceeding is pending.[5] The rule should be the same for a nonprobate transfer. In each case, only a future donative transfer, in which the beneficiary has no vested interest, is at issue.

Proposed Law

The proposed law provides that a marital dissolution ATRO does not restrain a change to a beneficiary designation in an instrument making a nonprobate transfer[6]

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4. See Fam. Code § 2040(b).

5. The Commission has not heard of any cases where the restraining order was interpreted to restrain modification of a will. Such an interpretation is unlikely considering that dissolution of marriage automatically revokes a will provision benefiting a former spouse. See Prob. Code §§ 6122, 6227.

6. Other than a life insurance policy. See discussion below.

and does not restrain severance of joint tenancy title.[7] However, this does not preclude the court from ordering such a restraint on the motion of a party.[8]

Life Insurance

Life insurance presents a special case. A court may require a party to maintain life insurance naming a former spouse as beneficiary, as part of a spousal support order.[9] This option would be undermined if a party could dispose of a life insurance policy before the court could issue its support order. The ATRO expressly restrains changes to a life insurance policy. The tentative recommendation preserves this rule.

7. See proposed amendment to Fam. Code § 2040. Note that severance of a joint tenancy only affects the right of survivorship, converting the joint tenancy into a tenancy in common. See 4 B. Witkin, Summary of California Law *Real Property* §§ 257, 276-78, at 459-60, 475-77 (9th ed. 1987).

8. See proposed amendment to Fam. Code § 2045.

9. See Fam. Code § 4360 (court may order means of support after obligor's death); Practice Under the Family Code: Dissolution, Legal Separation, Nullity § 6.7, at 157 (Cal. Cont. Ed. Bar, 1999)

PROPOSED LEGISLATION

Fam. Code § 2040. Temporary restraining order

SECTION 1. Section 2040 of the Family Code is amended to read:

2040. (a) In addition to the contents required by Section 412.20 of the Code of Civil Procedure, the summons shall contain a temporary restraining order:

(1) Restraining both parties from removing the minor child or children of the parties, if any, from the state without the prior written consent of the other party or an order of the court.

(2) Restraining both parties from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life and requiring each party to notify the other party of any proposed extraordinary expenditures at least five business days before incurring those expenditures and to account to the court for all extraordinary expenditures made after service of the summons on that party. However, nothing in the restraining order shall preclude the parties from using community property to pay reasonable attorney's fees in order to retain legal counsel in the proceeding.

(3) Restraining both parties from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability, held for the benefit of the parties and their child or children for whom support may be ordered. Nothing in this section restrains either party from changing the beneficiary in any other instrument making a nonprobate transfer of property on death or terminating the right of survivorship in property held by the parties in joint tenancy.

(b) In all actions filed on and after January 1, 1995, the summons shall contain the following notice:

"WARNING: California law provides that, for purposes of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint form is presumed to be community property. If either party to this action should die before the jointly held community property is divided, the language of how title is held in the deed (i.e., joint tenancy, tenants in common, or community property) will be controlling and not the community property presumption. You should consult your attorney if you want the community property presumption to be written into the recorded title to the property."

Comment. Section 2040 is amended to make clear that there is no automatic restraint on severing a joint tenancy or changing a beneficiary designation in an instrument, other than a life insurance policy, making a nonprobate transfer on death. Such restraints may still be ordered by the court where appropriate. See Section 2045. Note that modification of a nonprobate transfer of

community property by one spouse, without the consent of the other spouse, may not affect the nonconsenting spouse's interest in the transferred property. See Prob. Code §§ 5010-5032.

Fam. Code § 2045 (amended). Ex parte protective orders

SEC. 2. Section 2045 of the Family Code is amended to read:

2045. During the pendency of the proceeding, on application of a party in the manner provided by Part 4 (commencing with Section 240) of Division 2, the court may issue ex parte any of the following orders:

(a) An order restraining any person from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life, and if the order is directed against a party, requiring that party to notify the other party of any proposed extraordinary expenditures and to account to the court for all extraordinary expenditures.

(b) A protective order, as defined in Section 6218, and any other order as provided in Article 1 (commencing with Section 6320) of Chapter 2 of Part 4 of Division 10.

(c) An order restraining a party from changing the beneficiary of a nonprobate transfer of property on death or terminating the right of survivorship in property held by the parties in joint tenancy.

Comment. Section 2045 is amended to authorize issuance of a court order restraining a party from changing the beneficiary of a nonprobate transfer or severing a joint tenancy. These changes are not automatically restrained by the order issued pursuant to Section 2040.