

First Supplement to Memorandum 99-84

Changes in Estate Plan During Marital Dissolution

In a recent appellate opinion, *Estate of Mitchell*, 91 Cal. Rptr. 2d 192 (1999), the court held that the Automatic Temporary Restraining Order (ATRO) that is in effect during a proceeding for dissolution of marriage does not restrain severance of a joint tenancy. This opinion is discussed below. In addition, we have received comments regarding the draft tentative recommendation that is attached to Memorandum 99-84. A letter from Don Travers, of the State Bar Estate Planning, Trust, and Probate Law Section is attached. Comments from Steven M. Pack, a private practitioner, were received by telephone. These comments are also discussed below.

ESTATE OF MITCHELL

Estate of Mitchell involves exactly the situation our tentative recommendation is intended to address. During their marriage, Robert and Shirley Mitchell acquired four parcels of real property in joint tenancy title. During the pendency of a proceeding for the dissolution of their marriage, Robert attempted to sever these joint tenancies. Pursuant to Civil Code Section 683.2(a)(2), he executed and recorded a declaration of severance. He then died, before the marriage had been dissolved. In the probate proceeding that followed, Shirley argued that the attempt to sever the joint tenancies was ineffective because it violated the ATRO's restraint on the transfer or disposition of property. The probate court agreed and held that Shirley was the sole owner of the properties, by right of survivorship.

The court of appeal reversed, concluding that "when one spouse severs a joint tenancy with the other spouse by executing and recording a declaration of severance, there is neither a 'transfer' nor a 'disposition' of any property." 91 Cal. Rptr. 2d. at 199. There was no transfer because "no right, title, or interest in the property moved from anyone to anyone else" as a consequence of severance. *Id.* at 200. There arguably was a disposition, because the severance "disposed of" the right of survivorship. However, the court concluded that there was no

disposition of *property* because the joint tenancy right of survivorship is a mere expectancy rather than a property interest. *Id.* at 201-02.

The holding in *Mitchell* is consistent with the Commission's decision that the ATRO should not restrain the creation, modification, or revocation of a will, or the revocation of a revocable nonprobate transfer. Like the severance of a joint tenancy, these types of estate planning changes only affect expectancy interests.

The staff does not believe that any change to the substance of the proposed law is required in response to the *Mitchell* decision. However, the preliminary part of the tentative recommendation, and Comments to the proposed legislation should be revised to refer to *Mitchell*. If the Commission approves the draft tentative recommendation, the staff will make these changes before circulating it for comment.

DEFINITION OF "NONPROBATE TRANSFER"

The proposed law lists the most common forms of nonprobate transfer (revocable trust, joint tenancy, Totten trust, and a pay-on-death account in a financial institution) rather than using the term "nonprobate transfer," which may be unfamiliar to some parties and is not defined in the Family Code.

In Memorandum 99-84, the staff asks whether the list of common nonprobate transfers should be expanded to include retirement death benefits, and transfer-on-death registration of securities, vehicles, and mobile homes. Mr. Travers comments that the list of nonprobate transfers should include transfer-on-death registration, but does not express an opinion on retirement death benefits. See Exhibit p. 1.

Mr. Pack believes that even an expanded list of common nonprobate transfers would be too restrictive. Probate Code Section 5000(a) recognizes the validity of a nonprobate transfer of property on death in any of the following instruments:

an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature....

In his practice, Mr. Pack relies on the catch-all language in Section 5000 ("or other written instrument of a similar nature") as authority to include a death beneficiary provision in family limited partnership agreements. Such a provision

would not be covered by the tentative recommendation's list of common nonprobate transfers. Mr. Pack sees no reason why a person who chooses a less common form of nonprobate transfer should be subject to a different rule during dissolution of marriage than a person who has chosen a common form. He suggests that the proposed law should apply to all instruments authorized under Probate Code Section 5000.

We could eliminate the need to decide which forms of nonprobate transfer are common enough to justify inclusion in the proposed law and the problem of excluding less common forms by using the term "nonprobate transfer" and defining it broadly. To make the meaning of the definition clearer, we could still include a list of the most common forms, supplemented by catch-all language similar to that in Probate Code Section 5000. This could be implemented by revising the proposed amendments to Sections 2040 and 2045 to read as follows, in relevant part:

§ 2040. Automatic temporary restraining order

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:

...

(4) Restraining both parties from creating or modifying a nonprobate transfer without the written consent of the other party or an order of the court. Nothing in the restraining order restrains revocation of a nonprobate transfer, severance of a joint tenancy, or the creation, modification, or revocation of a will.

...

(c) For the purposes of this section, "nonprobate transfer" means an instrument, other than a will, that makes a transfer of property on death, including a revocable trust, pay-on-death account in a financial institution, Totten trust, transfer-on-death registration of personal property, or other instrument of a type described in Section 5000 of the Probate Code. "Nonprobate transfer" does not include a provision for the transfer of property on death in an insurance policy or other coverage held for the benefit of the parties and their child or children for whom support may be ordered.

Comment. Paragraph (4) is added to Section 2040(a) to clarify the scope of the automatic temporary restraining order (ATRO) with respect to estate planning changes. The fact that the ATRO does not restrain revocation of a nonprobate transfer does not mean that a nonprobate transfer is necessarily subject to revocation by a party. The question of whether a nonprobate transfer is subject to

revocation is governed by the terms of the nonprobate transfer and applicable substantive law.

Subdivision (c) defines “nonprobate transfer” for the purposes of this section. The definition of “nonprobate transfer” does not include insurance held for the benefit of the parties and their child or children for whom support may be ordered. The effect of the restraining order on such insurance is governed by subdivision (a)(3).

Note that the court may issue an order restraining estate planning changes on the motion of a party. See Section 2045(c).

§ 2045. Ex parte protective and restraining orders

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:

...

(c) An order restraining a party from creating, modifying, or revoking a provision of a will or of a nonprobate transfer as defined in subdivision (c) of Section 2040.

Comment. Section 2045 is amended to authorize issuance of a court order restraining certain estate planning changes that may not be automatically restrained pursuant to Section 2040. See Section 2040(a)(4).

Note that the definition of “nonprobate transfer” excludes insurance. This is consistent with the decision not to disturb existing law respecting the restraint on changes to insurance. **The staff recommends the revisions set out above.** For convenience, all of the draft language set out in the remainder of this memorandum is drafted as if “nonprobate transfer” is a defined term as proposed above.

SEPARATE PROPERTY

An estate planning change that only affects the separate property of the person making the change would not affect the interests of the person’s spouse and arguably should not be restrained. However, it can sometimes be difficult to determine the extent to which an asset is separate or community in character. For this reason, the proposed law does not distinguish between separate and community property. This is consistent with existing law.

Mr. Pack comments that many of his clients choose to opt out of the community property system entirely, by premarital or marital agreement. For

people in this situation, there is no chance of improperly characterizing community property as separate property because there is no community property (assuming the enforceability of the parties' agreement). Mr. Pack suggests that the proposed law should not apply to separate property under such an agreement. This could be implemented by revising the proposed change to Family Code Section 2040 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:

...

(4) Restraining both parties from creating or modifying a nonprobate transfer without the written consent of the other party or an order of the court. Except as provided in subdivision (d), this paragraph applies to a nonprobate transfer of any property, whether community, quasi-community, or separate.

...

(d) Nothing in the restraining order restrains any of the following:

(1) Creation, modification, or revocation of a will.

(2) Revocation of a nonprobate transfer.

(3) Severance of a joint tenancy.

(4) Creation or modification of a nonprobate transfer of property that is, by express written agreement of the parties, the separate property of the spouse making the change.

The language in subdivision (d)(4) is broad enough that it would encompass a more conventional transmutation agreement as well as an agreement to “opt out” of the community property system. **The Commission should decide whether to make the proposed change.**

LIMITED RESTRAINT ON CREATION AND MODIFICATION

Under the proposed law, revocation of a nonprobate transfer is not restrained, but creation and modification of a nonprobate transfer are restrained. Mr. Pack is concerned that allowing revocation while restraining creation and modification could yield unintended results. If a person revokes a nonprobate transfer and then dies, the property will be subject to probate, contrary to the person's initial intention to avoid probate. If the person does not have a will, then the property will pass by intestacy, which may also be inconsistent with the person's intentions (e.g., a large part of the property would pass to the person's

surviving spouse). These problems could be avoided if a person were allowed to create or modify a nonprobate transfer during the dissolution proceeding, because the person could create whatever disposition is desired.

Mr. Pack suggests that creation or modification of a nonprobate transfer could be permitted during dissolution, without threatening the other spouse's community property interests, if two conditions were imposed:

(1) The court must be notified before a nonprobate transfer is created or modified.

(2) Any new or modified nonprobate transfer must include a provision requiring the property-holder to contact the court before transferring the property.

This would certainly simplify things for the person making the change, but would do so by imposing a burden on the property holder. The staff suspects that institutional property holders (such as banks) would be unhappy with this complication of what are currently straightforward transactions. This approach would also raise difficult technical issues. For example, it isn't clear that a court would have jurisdiction to consider the propriety of a transfer after the transferor's death. Ordinarily the death of a party abates a proceeding for dissolution of marriage. The technical problems could be solved with careful drafting, but the result might be fairly complex. **Because of the potential complexity and the imposition on institutional property-holders, the staff does not favor this approach.**

Another alternative would be to restrain creation or modification of a nonprobate transfer unless notice of the proposed change (including a description of the beneficiaries and assets to be affected) is served on the other spouse at least ten days before the proposed change is made. A spouse who objects to a proposed nonprobate transfer could then seek a court order restraining the change. This could be implemented by revising the proposed change to Family Code Section 2040 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:

...

(4) Restraining both parties from creating or modifying a nonprobate transfer unless written notice of the change, including a description of the assets and beneficiaries to be affected, is served

on the other party at least ten days before the proposed change is made. Nothing in the restraining order restrains revocation of a nonprobate transfer, severance of a joint tenancy, or the creation, modification, or revocation of a will.

Comment. ... Creation or modification of a nonprobate transfer is restrained unless the person proposing to make the change serves notice of the proposed change on the party's spouse at least ten days before making the change. If the proposed change is improper, the spouse may seek a court order restraining the change. See Section 2045(c) (court may issue order restraining party from creating or modifying nonprobate transfer).

The staff believes that this is the better alternative. It is fairly straightforward and places the burden of challenging a proposed change on the person whose interests are affected.

The Commission should consider whether to recommend either of the approaches discussed above as an alternative to restraint under the ATRO.

Respectfully submitted,

Brian Hebert
Staff Counsel



ESTATE PLANNING, TRUST
AND PROBATE LAW SECTION

THE STATE BAR OF CALIFORNIA

November 24, 1999

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Re: Memorandum 99-84
Estate Planning During Dissolution of Marriage

Dear Mr. Hebert:

At our meeting on November 13, 1999, the Committee discussed the proposed amendment of Family Code Sections 2040 and 2045. It is our feeling that the amendment should explicitly provide that revocation of a revocable trust is not restrained, and that revocation of a pay-on-death provision pertaining to a securities account and a vehicle (including a mobile home) is not enjoined. The difficulty with the present statute is the lack of certainty as to what is enjoined and what is not, and an explicit list of both prohibited and allowable acts seems to be the best way to eliminate the problem.

I will attend the CLRC meeting on November 30, 1999, and I can address our concerns more fully at that time.

Very truly yours,

A handwritten signature in cursive script that reads "Donald R. Travers".

Donald R. Travers

DRT:srm

cc: James B. Ellis

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