

## Second Supplement to Memorandum 2000-60

### **Estate Planning During Marital Dissolution (Comments of Beverly Hills Bar Association)**

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We received a letter from the Beverly Hills Bar Association Probate, Trust, and Estate Planning Legislative Committee (BHBA) (attached). The BHBA proposes another alternative approach to estate planning during marital dissolution: do not restrain creation or modification of a nonprobate transfer, so long as the transfer includes a provision requiring that the property holder receive court approval before distributing the property. This restriction would only apply if the transferor dies during the dissolution proceeding. This approach would protect the marital estate from unauthorized transfers and would leave the parties free to make whatever estate planning changes they wish.

The proposal is interesting, but raises some serious issues:

- (1) A property holder faced with a request for distribution of property (on proof of the transferor's death) would need to determine whether the transferor died during a dissolution proceeding. This might prove difficult, as proceedings might be pending in any jurisdiction. If the property holder is unaware of a pending dissolution proceeding and transfers the property, is the property holder liable?
- (2) Assuming that the transferor has died during a dissolution proceeding, it isn't clear how the property holder would obtain court approval for distribution of the property. If there is no pending dissolution proceeding (death of a party abates a dissolution proceeding if it precedes termination of marital status) and no pending probate proceeding (which may be the case if the decedent's estate plan relies on nonprobate transfers), then someone would need to initiate court action in order to distribute the property. If the property holder were to initiate the proceeding, then the cost of the proceeding could perhaps be paid from the property being held. However, who would pay if the property held is inadequate to cover the legal costs? The question of who initiates a proceeding and who pays could be particularly thorny if property is divided between multiple property holders (e.g.,

securities registered for transfer on death are held by multiple brokers and pay-on-death accounts exist in different banks).

- (3) While it would be a simple matter to insert a provision limiting distribution of property into a living trust, it might be more difficult to add such a provision to a nonprobate transfer involving an institutional property holder such as a bank or brokerage. Institutional property holders probably rely on standardized forms to govern the terms of pay-on-death accounts, transfer on death registration of securities, etc. These forms would need to be modified to account for the type of limiting provision discussed above.

**The staff is skeptical about whether these problems can be worked out.** In particular, it seems likely that institutional property holders will object to any change that increases their costs or scope of liability. However, if the Commission is interested in this approach, the staff will develop it further and present a draft the next time this study is considered.

Respectfully submitted,

Brian Hebert  
Staff Counsel

Exhibit

**Estate Planning During Marital Dissolution  
(Comments of Beverly Hills Bar Association)**

September 26, 2000

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

**Re: Estate Planning During Marital Dissolution  
Memorandum 2000-60**

Commissioners:

Underlying recent comments by practitioners to the above Memorandum are the desire to allow estate planning changes to the extent that they do not interfere with the jurisdiction of the Family Law Court. Maintaining the jurisdiction of the Family Law Court over property protects the rights of both spouses. However, present law, in an attempt to preserve that jurisdiction, bans a number of estate planning acts that present no threat to the jurisdiction of the Family Law Court and the property rights of the other spouse.

One way to accomplish maximum flexibility while protecting parties' rights would be to:

1. Allow only estate planning in which the transfers take place at death, and
2. Require that the transfer be subject to the jurisdiction of the Superior Court in the county where the Family Law proceeding is pending. This would include jurisdiction of the Probate Court in a probate proceeding or a trust proceeding subject to the approval of the Superior Court.

By way of example, the preparation of a will, as allowed by present statute, is acceptable because the transfers under the will do not take place until the death of the testator and the transfers would be subject to probate "supervision".

Suggested language for the automatic temporary restraining order is as follows:

2040(b). Nothing in this Section restrains revocation of a non-probate transfer, severance of a joint tenancy, or the creation, modification, or revocation of a will or living trust so long as any distributions pursuant to the will or living trust must be approved by the Superior Court of the county in which this proceeding is pending.

Respectfully submitted,

BEVERLY HILLS BAR ASSOCIATION  
Probate, Trust and Estate  
Planning Legislative Committee

By:  
Kenneth G. Petrulis, Chair

KGP/ct

cc: Marc Sallas  
Gary Edelstone

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