

Third Supplement to Memorandum 2000-60

Estate Planning During Marital Dissolution (Comment of Christopher Moore)

We have received a letter from Christopher Moore of the Estate Planning, Trust, and Probate Section Executive Committee, writing on his own behalf (attached). He shares Flexcom's opposition to the proposed alternative approach. See the first supplement to Memorandum 2000-60 for a discussion of Flexcom's position. He also agrees that creation of an unfunded living trust should not be restrained by the ATRO.

In an email received October 4, 2000, Kenneth G. Petrulis of the Beverly Hills Bar Association (BHBA) addresses two of the staff's concerns regarding the BHBA proposal that creation and modification of a nonprobate transfer not be restrained during dissolution of marriage, so long as the nonprobate transfer includes a provision requiring the property holder to obtain court approval before transferring the property. See the second supplement to Memorandum 2000-60 for a discussion of the BHBA proposal. Mr. Petrulis' comments are set out below:

(1) In response to a concern that it might be difficult for a property holder to know whether a transferor died during a dissolution proceeding, Mr. Petrulis states:

Any transfer could refer to the specific ATRO and provide that the need for court approval terminates upon the expiration of the ATRO. This is much preferable to not being able to plan a transfer or to seeking court approval. It would be easy comparatively to provide proof that the ATRO had expired. E.g.:

"An ATRO has been served upon the trustor of this trust. During the period the ATRO is in effect, any distributions shall be subject to the jurisdiction and approval of the Superior Court issuing the ATRO. This provision shall be void and of no force or effect upon the expiration of the ATRO, a copy of which is attached."

This appears to be workable. However, the need to maintain separate limiting instructions of this kind could add to the procedural burden on institutional

property holders who currently employ standardized forms to administer nonprobate transfers (such as a pay on death account in a bank).

(2) In response to an inquiry as to who would be responsible for bringing a court action to obtain court approval of a transfer, Mr. Petrulis states:

No new action is required since the restriction would expire with the ATRO. Providing proof of expiration is far superior to being stuck with the old beneficiary designation.

This would work in cases where the ATRO expires before the transferor's death, but does not address the case where the transferor dies during the effective period of the ATRO. It is still unclear who would bear the burden and cost of bringing an action in the latter case.

Respectfully submitted,

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Staff Counsel

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October 3, 2000

OUR FILE:

BY FAX (916) 739-7382Brian Hebert, Staff Counsel
California Law Revision Commission
3200 Fifth Avenue
Sacramento, CA 95817**Re: Estate Planning During Marital Dissolution**

Dear Brian:

I am a member of the Estate Planning, Trust and Probate Section Executive Committee, speaking on my own behalf. Regarding your draft proposal, I am in full agreement with the communication that Suzanne Harris, the chair of Flexcom, sent to you.

I am not in favor of the alternative approach proposed at pages 8 to 13 of your Memo 2000-60 that would permit the creation or modification of a non-probate transfer. Suzanne Harris's letter cites the example of a large IRA which might represent more than half of the value of community property with the wife as beneficiary. Although the account is community property, and the wife has a present interest as to half that account, the husband could revoke the beneficiary designation and substitute a child by a prior marriage. On the death of the participant spouse, the IRA proceeds might be paid to the child and it would place a tremendous burden on the surviving spouse to file a civil action to impose a constructive trust to recover the funds. If the child receiving the funds resided in another state or overseas, the jurisdictional and practical difficulties could be enormous.