

## First Supplement to Memorandum 2001-50

### **AB 873 (Harman): Estate Planning and Dissolution of Marriage**

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AB 873 (Harman) implements two Commission recommendations regarding estate planning in the context of dissolution of marriage. The bill is scheduled to be heard in the Senate Judiciary Committee on July 3, 2001. Two issues have arisen regarding the bill. The staff has worked with the State Bar (the bill's sponsor), the committee consultant, and the author's office to resolve them. The issues and proposed solutions are described below.

#### **Community Property with Right of Survivorship**

Last year, Civil Code Section 682.1 was added, creating a new form of title — community property with right of survivorship. It combines community property with a right of survivorship similar to that of joint tenancy. Proposed Probate Code Section 5601 would sever a joint tenancy between former spouses if the survivor is not the decedent's "surviving spouse." The California Land Title Association wrote Assembly Member Harman suggesting that Section 5601 be amended to make clear that it applies to community property with right of survivorship (see attached letter). The committee consultant also urges that a clarifying change be made. In the course of discussions, the following language was developed as a possible solution and the staff expects that it will be offered as an author's amendment.

5601. ...

(d) For the purposes of this part, "joint tenancy" includes community property with right of survivorship as defined in Section 682.1 of the Civil Code.

#### **Legal Separation**

Proposed Sections 5600 and 5601 provide for the automatic failure of a nonprobate transfer, or severance of a joint tenancy, benefiting a former spouse who is not the decedent's "surviving spouse." Section 78(d) provides that "surviving spouse" does not include:

A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

Thus, a legal separation that results in property division can remove one's status as a surviving spouse. In such a case, our law would operate. The committee consultant objects that this is inconsistent with the sections governing wills, which provide that legal separation will not cause the revocation of a will provision benefiting a former spouse. See Prob. Code §§ 6122, 6227. She strongly urges that our provisions be amended to conform to the will provisions.

The staff agrees that consistency is desirable. The State Bar and the author's office have agreed to make a change to implement the committee consultant's suggestion. The staff has proposed the following amendments, but has not yet heard whether the language is acceptable:

5600. (a) Except as provided in subdivision (b), a nonprobate transfer to the transferor's former spouse, in an instrument executed by the transferor before or during the marriage, fails if, at the time of the transferor's death, the former spouse is not the transferor's surviving spouse as defined in Section 78 as a result of the dissolution or annulment of their marriage. A judgment of legal separation that does not terminate the status of husband and wife is not a dissolution for purposes of this section.

...

5601. (a) Except as provided in subdivision (b), a joint tenancy between the decedent and the decedent's former spouse, created before or during the marriage, is severed as to the decedent's interest if, at the time of the decedent's death, the former spouse is not the decedent's surviving spouse as defined in Section 78 as a result of the dissolution or annulment of their marriage. A judgment of legal separation that does not terminate the status of husband and wife is not a dissolution for purposes of this section.

...

This closely parallels the language in the will provisions. See Prob. Code §§ 6122(d), 6227(c).

If the bill is amended in this way, the staff recommends that the Commission study the question of whether the automatic revocation statutes (including those applicable to wills) should exclude legal separation.

If the Commission approves of these changes, the Comments to Sections 5600 and 5601 could be revised as follows:

**Comment.** Subdivision (a) of Section 5600 establishes the general rule that a nonprobate transfer to a former spouse fails if, at the time of the transferor's death, the former spouse is not the transferor's surviving spouse, due to the dissolution or annulment

of their marriage. “Dissolution or annulment” does not include legal separation. This is consistent with the law governing wills. See Prob. Code §§ 6122(d), 6227(c). “Surviving spouse” is defined in Section 78. “Nonprobate transfer” does not include life insurance. See subdivision (e).

**Comment.** Subdivision (a) of Section 5601 establishes the general rule that a joint tenancy between a decedent and the decedent’s former spouse is severed if, at the time of the decedent’s death, the former spouse is not the decedent’s surviving spouse, due to the dissolution or annulment of their marriage. “Dissolution or annulment” does not include legal separation. This is consistent with the law governing wills. See Prob. Code §§ 6122(d), 6227(c). “Surviving spouse” is defined in Section 78. ...

Respectfully submitted,

Brian Hebert  
Staff Counsel



**California Land  
Title Association**

June 18, 2001

The Honorable Tom Harman  
California State Assembly  
State Capitol, Room 5158  
Sacramento, CA 95814

**RE: AB 873 (HARMAN) – REQUEST FOR AMENDMENT**

Dear Assemblyman Harman:

On behalf of the California Land Title Association (CLTA), which represents California's title insurance industry, I am writing to inform you that CLTA members have raised some questions about your AB 873. Specifically the bill would invalidate the right of survivorship as it relates to a non-probate transfer upon death of a surviving joint tenant where there had been an intervening dissolution. Title companies, as a matter of practice, rely on affidavits of death of joint tenants to ensure a sale or financing of property after the death of one joint tenant. This essentially allows the title industry and others to rely on the status of record title to property without going behind recorded public information to determine if there has been a dissolution proceeding. Although it is likely that there was some disposition of property in the dissolution proceeding which required a quitclaim deed or the revesting of title, it is not uncommon for there to be the retention of title in joint tenancy form after the dissolution. Since bona fide purchasers are protected the CLTA is not opposed to the bill, but it will make reliance on the affidavit of death somewhat less certain.

In addition, last year the Legislature enacted a new form of community property – Community Property with the Right of Survivorship. Again, as part of a dissolution, it would be common for title to property to be revested. However, this might not always be the case. In order to be consistent, Section 5601 of the Probate Code as proposed to be added by your bill should not only reference joint tenancy, it should also reference community property with the right of survivorship.

Sincerely,

Lawrence E. Green  
Executive Vice President  
and Counsel

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cc: Gloria Megino Ochoa, Consultant, Senate Judiciary Committee