

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Estate Planning During Marital Dissolution

February 2000

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **May 30, 2000.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

Existing law imposes an automatic temporary restraining order on both parties in a proceeding for dissolution or annulment of marriage, or legal separation. Except as necessary to pay attorney's fees or ordinary expenses, the order restrains either party from transferring or in any way disposing of any property without the written consent of the other party or an order of the court. The extent to which the restraining order affects estate planning changes that only affect the disposition of property on death is not clear.

The Law Revision Commission recommends that Family Code Section 2040 be amended to clarify the scope of the restraining order, consistent with the following principles:

- (1) The restraining order should not restrain the creation, modification, or revocation of a will.
- (2) The restraining order should restrain the creation or modification of a nonprobate transfer.
- (3) The restraining order should not restrain the revocation of a nonprobate transfer (other than life insurance).

This recommendation was prepared pursuant to Resolution Chapter 81 of the Statutes of 1999.

ESTATE PLANNING DURING MARITAL DISSOLUTION

1 Existing law imposes an automatic temporary restraining order (ATRO) on both
2 parties in a proceeding for dissolution or annulment of marriage, or legal
3 separation (hereinafter “dissolution”). Except as necessary to pay attorney’s fees
4 or ordinary expenses, the ATRO restrains the parties from “transferring,
5 encumbering, hypothecating, concealing, or in any way disposing of any property,
6 real or personal, whether community, quasi-community, or separate, without the
7 written consent of the other party or an order of the court.”¹ The extent to which
8 the ATRO restrains estate planning changes during a dissolution proceeding is not
9 clear. The Commission has been informed that different trial courts interpret the
10 ATRO differently — some interpret the ATRO as restraining estate planning
11 changes while others do not.²

12 In a recent decision, *Estate of Mitchell*, the court held that revocation of a joint
13 tenancy is not restrained by the ATRO, because unilateral severance does not
14 involve a transfer and because severance only disposes of an expectancy, not
15 property.³ This is a reasonable interpretation of Family Code Section 2040.
16 However, the opinion does not consider other types of estate planning changes,
17 such as creation, modification, or revocation of a trust. The applicability of the
18 ATRO to these other types of changes should also be clarified.

PROBLEMS WITH EXISTING LAW

19 **Uncertainty**

20
21 Uncertainty as to whether the ATRO restrains estate planning changes can create
22 a trap for unwary parties and inexperienced practitioners. For example, if a party
23 makes an estate planning change during a dissolution proceeding without first

1. See Fam. Code § 2040(a)(2).

2. This uncertainty is reflected in a standard family practice treatise and in a recent publication of the California State Bar Family Law Section. See W. Hogoboom & D. King, *California Practice Guide: Family Law* ¶ 1:394.1 (1999) (cautioning that severance of a joint tenancy “may well” violate the ATRO); Moore, *Selected Estate Planning Issues for Family Lawyers*, Family Law News, California State Bar Family Law Section, Winter 1996, at 12-13 (discussing uncertainty as to whether ATRO applies to severance of joint tenancy and revocation of trust).

Courts in other states have interpreted similar provisions restraining the disposal of property during a marital dissolution proceeding, with varying results. See, e.g., *Lindsey v. Lindsey*, 492 A.2d 396 (Pa. Super. 1985) (change of beneficiary designation on life insurance policies not conveyance of asset because beneficiary designation vests nothing in beneficiary during lifetime of insured — beneficiary has mere expectancy); *Lonergan v. Strom*, 700 P.2d 893 (Ariz. 1985) (severance of joint tenancy by means of straw transfer violated ATRO, but did not violate purpose of ATRO — to protect marital estate from dissipation or removal beyond reach of divorce court); *Willoughby v. Willoughby* 758 F. Supp. 646 (DC Kan. 1990) (change of life insurance beneficiary was disposition of property in violation of restraining order). See generally Chapus, *Divorce and Separation: Effect of Court Order Prohibiting Sale or Transfer of Property on Party’s Right to Change Beneficiary of Insurance Policy*, 68 A.L.R.4th 929 (Westlaw 1999).

3. *Estate of Mitchell*, 76 Cal. App. 4th 1378, 91 Cal. Rptr. 2d 192 (1999).

1 obtaining spousal consent or the permission of the court, and the court interprets
2 the ATRO as restraining such a change, the change may be ineffective and the
3 party may be held in contempt.⁴

4 **Unintended Transfers**

5 A change in a person's life as significant as dissolution of marriage will often
6 lead to changes in that person's testamentary intentions. If the ATRO prevents a
7 person from making an intended estate planning change and the person dies during
8 the dissolution proceeding, the person's estate will pass in an unintended way. For
9 example, suppose a husband and wife convey their community property into a
10 trust that names the survivor of them as beneficiary and is unilaterally revocable
11 by either. The wife later files for dissolution of marriage and decides to revoke the
12 trust and execute a will devising her share of the community property to her
13 children. Before she can obtain a court order permitting the estate planning
14 changes, she dies, and contrary to her wishes, her husband receives the entire
15 property.

16 **Inefficiency**

17 It appears that a principal purpose of the ATRO provision is to conserve judicial
18 resources by making automatic those types of restraints that are commonly sought
19 and granted in dissolution proceedings.⁵ However, if parties to a dissolution
20 routinely wish to make estate planning changes during the proceeding, then
21 judicial efficiency is not served by an automatic restraint of such changes. In fact,
22 estate planning changes during dissolution of marriage appear to be commonplace.
23 In one appellate decision, the court suggests that family law attorneys risk
24 malpractice liability if they do not advise their clients of the need to make estate
25 planning changes during a dissolution proceeding in order to avoid an unintended
26 transfer if the client dies during the proceeding.⁶ Similar advice is provided in
27 standard family law practice treatises.⁷ Considering that careful attorneys will seek

4. See Civ. Code § 2224 (“One who gains a thing by ... wrongful act, is ... an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.”); Code Civ. Proc. § 1209(a)(5) (contempt includes disobedience of lawful court order).

5. See, e.g., Assembly Committee on Judiciary analysis of Assembly Bill 1905, May 4, 1989, at 6:

Proponents state that the restraining orders contained in this proposal are granted routinely by courts following the filing of an Order to Show Cause (OSC). One of the elements presently contributing to court congestion in family law courts is the routine filing of such OSC's simply to obtain these standard orders, with the attendant court time necessary for perfunctory hearings or, as is usual, signing in chambers. One or both parties usually seek at least one of these restraining orders soon after filing the family law action.

This proposal would save court time without diminishing the parties' right to a hearing. Either party always would have the option of filing a motion to request that the orders be dissolved.

6. See *Estate of Blair*, 199 Cal. App. 3d 161, 169, 244 Cal. Rptr. 627, 631 (1988).

7. See W. Hogoboom & D. King, *California Practice Guide: Family Law* ¶¶ 1:367-369, 390 (suggesting that it is the duty of family law attorneys to promptly inquire whether their clients wish to sever joint tenancy in order to avoid unintended transfer if client dies during proceeding); K. Kirkland et al.,

1 spousal consent or an order of the court before taking such actions, the court will
2 be required to hear numerous requests that would be granted in many cases — an
3 apparent waste of judicial resources.

4 **Disproportionate Effect on Respondent Spouse**

5 The ATRO takes effect on service of the summons in a proceeding for
6 dissolution of marriage.⁸ A petitioner can effectively avoid the ATRO by making
7 any desired estate planning changes before filing. A respondent who is unaware of
8 a pending summons cannot avoid the ATRO in this way. The problems associated
9 with the ATRO provision disproportionately affect respondents.

10 PROPER SCOPE OF RESTRAINING ORDER

11 As a general matter, it is inequitable and inefficient to require that a party to a
12 dissolution proceeding obtain spousal consent or an order of the court before
13 making estate planning changes that do not affect the rights of the other spouse.
14 Such a restraint also exceeds the proper purpose of the ATRO — protecting
15 marital assets from dissipation or concealment. As stated in an Arizona case
16 interpreting a similar ATRO provision:

17 In our opinion, it is not the purpose of [the ATRO] to freeze each party's estate
18 plan as of the date of the filing of the petition for dissolution and thus insure that it
19 will be effectuated without alteration in the event one of the parties dies before
20 entry of a final decree. The statutory intent is to forbid actions by either party that
21 would dissipate the property of the marital estate or place it beyond the court's
22 adjudicatory power in the dissolution proceeding.⁹

23 Whether different types of estate planning changes might adversely affect the
24 property interests of the other spouse is discussed below.

25 **Transaction Involving a Will**

26 The beneficiary of a will has no vested property interest in the will during the
27 testator's life. Thus, a decision by one spouse to create, modify, or revoke a will
28 during a dissolution proceeding does not affect the rights of the other spouse and
29 should not be automatically restrained. This is consistent with the holding in
30 *Estate of Mitchell*, that the ATRO does not restrain termination of an expectancy.¹⁰

31 Of course, spouses may agree by contract to make a particular testamentary
32 disposition by will. In such a case, the contract itself serves to restrain

California Family Law Practice and Procedure § 20.12[4][a][iv] (2d ed. 1999) (suggesting that clients should be advised to sever joint tenancy on commencing family law proceeding in order to avoid possible unintended transfer to other spouse). Although these examples focus on joint tenancy survivorship, the same concerns are raised by other instruments that transfer property on death.

8. See Fam. Code § 233(a).

9. *Lonergan v. Strom*, 700 P.2d 893, 898 (Ariz. 1985).

10. See *supra* note 3.

1 modification or revocation of the agreed-upon will provision.¹¹ It is not necessary
2 that all estate planning changes involving wills be automatically restrained during
3 dissolution proceedings in order to protect these contractual agreements.

4 **Revocation of Nonprobate Transfer**

5 Many people choose to use a “nonprobate transfer” (such as a revocable trust,
6 joint tenancy title, or a pay-on-death (P.O.D.) account in a financial institution), in
7 order to pass property on death outside of the probate process. Revocation of a
8 revocable nonprobate transfer is similar to revocation of a will in that it terminates
9 a mere expectancy.¹² There does not appear to be any reason to automatically
10 restrain the revocation of a nonprobate transfer during a dissolution proceeding.¹³
11 Again, this is consistent with the holding in *Estate of Mitchell*.¹⁴

12 **Modification of a Nonprobate Transfer**

13 Modification of a nonprobate transfer during a dissolution proceeding can result
14 in an unauthorized transfer of community property. This is because a nonprobate
15 transfer, unlike a will, can be used to dispose of both spouses’ shares of the
16 community property, so long as both spouses have consented to the transfer.¹⁵

17 If, during a dissolution proceeding, one party modifies an instrument making a
18 nonprobate transfer of community property without the consent of the party’s
19 spouse, the spouse’s share of the property may be transferred contrary to the
20 spouse’s wishes. For example, suppose that a husband, with his wife’s consent,
21 deposits community funds in a P.O.D. account, naming their children as
22 beneficiaries. Later, during a proceeding to dissolve their marriage, the husband
23 changes the account to name his brother as beneficiary, without his wife’s consent.
24 The husband then dies and his brother withdraws all of the funds, including the
25 wife’s share of the community property.¹⁶ This is exactly the sort of dissipation of
26 marital assets that the ATRO is intended to prevent. Thus, modification of a
27 nonprobate transfer of community property should be restrained by the ATRO.¹⁷

11. See, e.g., *Redke v. Silvertrust*, 6 Cal. 3d 94, 490 P.2d 805, 98 Cal. Rptr. 293 (1971) (enforcing oral agreement to maintain particular testamentary provision).

12. See, e.g., *In re Marriage of Hilke*, 4 Cal. 4th 215, 222, 841 P.2d 891, 895, 14 Cal. Rptr. 2d 371, 375 (1992) (“severance of a joint tenancy — by eliminating the survivorship characteristic of the joint tenancy form of ownership — theoretically affects the expectancy interest of the other joint tenant, but does not involve a diminution of his or her present vested interest”).

13. Life insurance presents a special case and is discussed separately. See *infra* text accompanying notes 19-20.

14. See *supra* note 3.

15. See Prob. Code §§ 5020 (spousal consent required for nonprobate transfer of community property), 6101 (will may only dispose of testator’s half of community property).

16. See Prob. Code §§ 5403 (P.O.D. account paid to P.O.D. payee on proof of death of original payee), 5405 (payment pursuant to Section 5403 discharges financial institution of all claims regardless of whether payment was consistent with beneficial ownership of account).

17. Note that a rule permitting revocation of a nonprobate transfer, but requiring spousal consent or a court order in order to modify a nonprobate transfer, is consistent with the rule governing a trust containing

1 Modification of a nonprobate transfer of separate property does not present the
2 same risk. However, characterization of property as community or separate often
3 involves a complex legal and factual determination that is probably best left to the
4 courts. For this reason, it is appropriate to automatically restrain modification of a
5 nonprobate transfer of separate property during a dissolution proceeding and
6 thereby avoid the possibility that a party will act on an incorrect characterization
7 of community property as separate. This is consistent with existing law, which
8 restrains transactions involving either separate or community property.¹⁸

9 **Creation of a Nonprobate Transfer**

10 Creation of a nonprobate transfer can also pose a risk of unauthorized transfer of
11 community property. For example, one spouse may use community funds to
12 establish a P.O.D. account, without the consent of the other spouse, naming a third
13 party as P.O.D. payee. On the account holder's death, the funds, including the
14 nonconsenting spouse's share, would be paid to the third party. Thus, for the same
15 reasons that modification of a nonprobate transfer should be restrained, creation of
16 a nonprobate transfer should also be restrained.

17 **Life Insurance**

18 Under existing law, the ATRO expressly restrains cancellation or modification
19 of any type of insurance during a dissolution proceeding.¹⁹ This preserves the
20 status quo in important ways, such as preventing the cancellation of health
21 insurance coverage of a spouse. It also helps avoid the problem of an unauthorized
22 transfer of community property to a third party. Finally, it preserves an asset that
23 the court can use in fashioning a support order — it is fairly common for the court
24 to order the obligor spouse to maintain life insurance for the benefit of the
25 supported spouse, to provide support in the event of the obligor's death.²⁰ The
26 court's ability to make such an order might be compromised if the policy were
27 canceled. For all of these reasons, the existing restraint on cancellation or
28 modification of insurance policies should be maintained.

29 **Special Circumstances**

30 The Commission would like to receive comment on whether there are any
31 circumstances in which the creation, modification, or revocation of a will, the
32 severance of a joint tenancy, or the revocation of a nonprobate transfer should be
33 restrained during a dissolution proceeding. If so, should the court be granted
34 authority to order such a restraint? This could perhaps be done by amending

community property — either spouse can unilaterally revoke such a trust, but the consent of both spouses is required in order to modify it. See Fam. Code § 761.

18. See Fam. Code § 2040(a)(2).

19. See Fam. Code § 2040(a)(3).

20. See Fam. Code § 4360 (support order may include amount sufficient to maintain insurance on life of support obligor, for benefit of supported spouse).

1 Family Code Section 2045, which authorizes the issuance of certain restraining
2 orders ex parte.²¹

3 RECOMMENDATION

4 The Commission recommends that Family Code Section 2040 be amended to
5 clarify the scope of the ATRO, consistent with the following principles:

- 6 (1) The ATRO should not restrain the creation, modification, or revocation
7 of a will.
- 8 (2) The ATRO should restrain the creation or modification of a nonprobate
9 transfer.
- 10 (3) The ATRO should not restrain the revocation of a nonprobate transfer
11 (other than life insurance).²²

21. Family Code Section 2045 provides:

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.

22. See proposed Fam. Code § 2040(c) (“nonprobate transfer” defined).

PROPOSED LEGISLATION

1 **Fam. Code § 2040 (amended). Automatic temporary restraining order**

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

3 2040. (a) In addition to the contents required by Section 412.20 of the Code of
4 Civil Procedure, the summons shall contain a temporary restraining order:

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

8 (2) Restraining both parties from transferring, encumbering, hypothecating,
9 concealing, or in any way disposing of any property, real or personal, whether
10 community, quasi-community, or separate, without the written consent of the other
11 party or an order of the court, except in the usual course of business or for the
12 necessities of life and requiring each party to notify the other party of any
13 proposed extraordinary expenditures at least five business days before incurring
14 those expenditures and to account to the court for all extraordinary expenditures
15 made after service of the summons on that party.

16 Notwithstanding the foregoing, nothing in the restraining order shall preclude a
17 party from using community property, quasi-community property, or the party's
18 own separate property to pay reasonable attorney's fees and costs in order to retain
19 legal counsel in the proceeding. A party who uses community property or quasi-
20 community property to pay his or her attorney's retainer for fees and costs under
21 this provision shall account to the community for the use of the property. A party
22 who uses other property that is subsequently determined to be the separate
23 property of the other party to pay his or her attorney's retainer for fees and costs
24 under this provision shall account to the other party for the use of the property.

25 (3) Restraining both parties from cashing, borrowing against, canceling,
26 transferring, disposing of, or changing the beneficiaries of any insurance or other
27 coverage, including life, health, automobile, and disability held for the benefit of
28 the parties and their child or children for whom support may be ordered.

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

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

35 "WARNING: California law provides that, for purposes of division of
36 property upon dissolution of marriage or legal separation, property acquired by
37 the parties during marriage in joint form is presumed to be community
38 property. If either party to this action should die before the jointly held
39 community property is divided, the language of how title is held in the deed

1 (i.e., joint tenancy, tenants in common, or community property) will be
2 controlling and not the community property presumption. You should consult
3 your attorney if you want the community property presumption to be written
4 into the recorded title to the property.”

5 (c) For the purposes of this section, “nonprobate transfer” means an instrument,
6 other than a will, that makes a transfer of property on death, including a revocable
7 trust, pay-on-death account in a financial institution, Totten trust, transfer-on-death
8 registration of personal property, or other instrument of a type described in Section
9 5000 of the Probate Code. “Nonprobate transfer” does not include a provision for
10 the transfer of property on death in an insurance policy or other coverage held for
11 the benefit of the parties and their child or children for whom support may be
12 ordered.

13 **Comment.** Section 2040 is amended to clarify the scope of the automatic temporary restraining
14 order with respect to estate planning changes. The fact that the restraining order does not restrain
15 revocation of a nonprobate transfer does not mean that such a provision is necessarily subject to
16 revocation by a party. The question of whether a nonprobate transfer is subject to revocation is
17 governed by the terms of the nonprobate transfer and applicable substantive law.

18  **Note.** The Commission would like to receive comments on whether there are circumstances in
19 which the creation, modification, or revocation of a will, severance of a joint tenancy, or
20 revocation of a nonprobate transfer should be restrained. If so, should Family Code Section 2045
21 be amended to authorize an order making such a restraint?