

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Effect of Dissolution of Marriage on Nonprobate Transfers

September 1998

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

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

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STATE OF CALIFORNIA

PETE WILSON, Governor

CALIFORNIA LAW REVISION COMMISSION

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September 25, 1998

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

A person who creates an instrument making a nonprobate transfer to a spouse probably does not intend that it continue to operate in favor of the spouse after dissolution of their marriage. In many cases the person inadvertently fails to revoke the nonprobate transfer, with the result that on the person's death, the property passes to the person's former spouse, rather than to the person's estate. This result is contrary to the likely intentions of most divorcing parties and is inconsistent with the law governing wills and other inheritance rights. The Commission therefore recommends that dissolution of marriage prevent the operation of a revocable nonprobate transfer on death to a former spouse, unless there is clear and convincing evidence that the transferor intends to preserve the nonprobate transfer in favor of the transferor's former spouse.

This recommendation is submitted pursuant to Resolution Chapter 91 of the Statutes of 1998.

Respectfully submitted,

Arthur K. Marshall
Chairperson

EFFECT OF DISSOLUTION OF MARRIAGE ON NONPROBATE TRANSFERS

In California, as in most states, the dissolution or annulment of a person's marriage automatically revokes a disposition to a former spouse in that person's will. This policy is based on the assumption that typical divorcing parties will not intend or expect a will provision benefiting a spouse to survive the dissolution of their marriage. Where a person fails to change a will after a divorce, that failure is probably inadvertent.¹

California law does not extend similar protection to a divorcing person who has chosen to pass property on death by means of an instrument other than a will. For example, the designation of a spouse as beneficiary to a life insurance policy is unaffected by dissolution of marriage. Where a person fails to change such a beneficiary designation after divorce, the policy proceeds will go to that person's former spouse, and not to that person's current spouse or children.

The Law Revision Commission recommends that dissolution of marriage prevent the operation of a revocable nonprobate transfer on death to a former spouse unless there is clear and convincing evidence that the transferor intends to preserve the nonprobate transfer in favor of the transferor's former spouse. This would protect the likely intentions of most divorcing parties and would eliminate the inconsistency that currently exists in the treatment of probate and nonprobate transfers on death after dissolution of a marriage.

1. See *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301, 2325 (1982).

EXISTING LAW

A broad range of instruments other than wills may be used to transfer property on death.² Such instruments include life insurance policies, trusts, retirement death benefits, transfer-on-death financial accounts, and transfer-on-death vehicle registration. Joint tenancy title provides another means of transferring property on death outside of a will.³ These “nonprobate transfers” form an increasingly important component of many Californians’ estate plans.⁴

Dissolution of marriage does not automatically revoke a disposition to a former spouse in an instrument making a nonprobate transfer.⁵ Where a person inadvertently fails to change a provision making a nonprobate transfer after divorce, the property will pass to the former spouse, rather than to the person’s estate.⁶ This result is contrary to the

2. See Prob. Code § 5000.

3. The distinguishing incident of joint tenancy is its survivorship feature. On the death of one joint tenant, that person’s interest in the joint tenancy is terminated. The property is then held in joint tenancy between any surviving joint tenants. If there is only one surviving joint tenant, that person holds an undivided interest in the property. See 4 B. Witkin, *Summary of California Law Real Property* § 257, at 459-60 (9th ed. 1987).

4. As recognized in the Prefatory Note to Article II of the Uniform Probate Code (1993), “will substitutes and other inter-vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission”

5. See, e.g., *Life Ins. Co. of No. America v. Cassidy*, 35 Cal. 3d 599, 606, 676 P.2d 1050, 1053, 200 Cal. Rptr. 28, 31 (1984) (marital property agreement assigning ownership of life insurance policy to one spouse does not automatically revoke status of other spouse as beneficiary); *Estate of Layton*, 44 Cal. App. 4th 1337, 1344, 52 Cal. Rptr. 2d 251, 256 (1996) (status-only dissolution of marriage did not sever marital joint tenancy).

6. Note that the question of the effect of dissolution of marriage on a nonprobate transfer will not often arise in the context of marital joint tenancy. This is because there is a presumption, on dissolution of marriage, that property acquired by spouses in joint form is community property. See Fam. Code § 2581. See also *In re Marriage of Hilke*, 4 Cal. 4th 215, 222, 841 P.2d 891, 896,

probable intentions and expectations of most divorcing parties.⁷

Bifurcated dissolution proceedings can exacerbate this problem. Where one spouse dies after a judgment dissolving marital status but before property division proceedings have begun, a nonprobate transfer may operate to the benefit of the decedent's former spouse before the decedent has had an opportunity to change the instrument making the transfer.⁸

The rule that dissolution of marriage does not affect a nonprobate transfer is inconsistent with other law governing the disposition of property on death. For example, dissolution of marriage automatically revokes a disposition to a spouse in a will,⁹ the designation of a spouse as attorney-in-fact,¹⁰ and a

14 Cal. Rptr. 2d 371, 376 (1992) (community property presumption applies after death of former spouse if court has entered judgment dissolving marriage and reserved jurisdiction over property matters).

7. In discussing the rule that divorce revokes a beneficiary designation under the Public Employees' Retirement System, one court observed:

The statutes anticipate that, upon undergoing a fundamental change in family composition such as marriage, divorce or birth of a child, employees would most likely intend to provide for their new family members, and/or revoke prior provisions made for their ex-spouses. The statutes also anticipate that employees themselves will often fail to so provide and revoke, not out of conscious intent, but simply from a lack of attentiveness. By automatically revoking prior beneficiary-designations upon a change in family composition, and by substituting statutory beneficiaries in their place, [the law is] designed to protect employees from such inattentiveness.

Coughlin v. Board of Admin., 152 Cal. App. 3d 70, 73, 199 Cal. Rptr. 286, 287-88 (1984). See also *In re Marriage of Allen*, 8 Cal. App. 4th 1225, 1231, 10 Cal. Rptr. 2d 916, 919 (1992) (operation of joint tenancy survivorship after divorce not "consistent with what the average decedent and former spouse would have wanted had death been anticipated"); *Estate of Blair*, 199 Cal. App. 3d 161, 169, 244 Cal. Rptr. 627, 632 (1988) (unlikely that divorcing parties wish to preserve joint tenancy after divorce, where an "untimely death results in a windfall to the surviving spouse, a result neither party presumably intends or anticipates").

8. See, e.g., *Layton*, 44 Cal. App. 4th 1337, 52 Cal. Rptr. 2d 251 (1996).

9. See Prob. Code §§ 6122, 6227.

10. See *id.* §§ 3722, 4154, 4727.

death benefit beneficiary designation under the Public Employees' Retirement System.¹¹ Dissolution of marriage also terminates a person's status as a surviving spouse, and all of the rights that follow from that status.¹²

The inconsistent treatment of probate and nonprobate transfers after dissolution of marriage does not make sense. If the typical divorcing person does not intend to maintain a disposition benefiting a spouse in a will, that person will likewise not wish to preserve a disposition to a spouse in some other instrument. Furthermore, a person who is aware of the laws revoking spousal inheritance rights on dissolution of marriage will probably assume that similar laws apply to nonprobate transfers and to joint tenancy. This increases the probability that a divorcing person will not revoke a nonprobate transfer or sever a joint tenancy after dissolution of marriage, despite an intent to terminate the disposition to the person's former spouse.

PROPOSED LAW

General Rule

Subject to the exceptions discussed below, the proposed law would prevent the operation of a nonprobate transfer to a former spouse¹³ and would sever a joint tenancy as between

11. See Gov't Code § 21492.

12. See Prob. Code § 78 ("surviving spouse" defined). The rights contingent on one's status as a decedent's surviving spouse are numerous. See, e.g. Prob. Code §§ 6401 (surviving spouse's share in intestate succession), 6540 (family allowance), 21610 (share of spouse omitted from will).

13. Where a nonprobate transfer fails by operation of the proposed law, the instrument is given effect as if the former spouse had failed to survive the decedent. See proposed Prob. Code § 5600(c). Existing law governing the death of a beneficiary or trustee would then apply. See Prob. Code §§ 15660 (failure of trustee designation), 21111 (failed probate and nonprobate transfers).

the decedent and the decedent's former spouse,¹⁴ if dissolution of marriage has terminated the surviving beneficiary's or joint tenant's status as the decedent's "surviving spouse" under Probate Code Section 78.¹⁵ This rule implements the intentions of the typical divorcing person and eliminates the existing inconsistency between the treatment of probate and nonprobate transfers after dissolution of marriage.¹⁶

Exceptions

Creation after dissolution of marriage. The proposed law would only affect a provision making a nonprobate transfer or a joint tenancy that was created before or during the former spouses' marriage to each other. This permits a person who wishes to preserve a nonprobate transfer to a former spouse, or a joint tenancy with a former spouse, to do so by recreating the provision or the joint tenancy after dissolution of marriage. For example, if a person adds a former spouse as a beneficiary to a life insurance policy after the dissolution of the person's marriage to the former spouse, the designation of the former spouse as beneficiary of a nonprobate transfer is made after the dissolution of their marriage and is therefore not affected by the proposed law.

14. Severance of a joint tenancy terminates the right of survivorship, converting the joint tenancy into a tenancy in common between the former joint tenants. See Witkin, *supra* note 3, §§ 276-78, at 475-77.

15. Dissolution of marriage terminates a person's status as a decedent's surviving spouse, unless that person and the decedent are, by virtue of a subsequent marriage, married to each other at the time of the decedent's death. See Prob. Code § 78.

16. The proposed law is similar to Uniform Probate Code Section 2-804, which revokes a broad range of nonprobate transfers on dissolution of marriage. See Unif. Prob. Code § 2-804 (1993). Section 2-804 is based on the same policy assumption as the proposed law, that revocation of spousal dispositions on divorce gives "effect to the average owner's presumed intent" McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 Brook. L. Rev. 1123, 1161-63 (1993).

Irrevocability. The proposed law would only affect a non-probate transfer or joint tenancy that is subject to revocation or severance by the decedent at the time of the decedent's death.¹⁷ A person's intent to revoke a nonprobate transfer or sever a joint tenancy after dissolution of marriage is irrelevant if that person lacks authority to do so.

Evidence of contrary intent. The proposed law does not affect a nonprobate transfer or a joint tenancy if there is clear and convincing evidence that the decedent intended to preserve the nonprobate transfer or joint tenancy survivorship.¹⁸ In such a case the policy assumption underlying the general rule, that a typical person does not intend a spousal disposition to survive dissolution of marriage, is inapplicable.

Third Party Protections

The proposed law protects third parties in two contexts:

Property holders. Most forms of nonprobate transfer involve an intermediary who holds the property to be transferred and is responsible for its distribution according to the terms of the transferring instrument. The proposed law provides protection from liability for a property holder who transfers property according to the terms of the transferring instrument, unless the property holder has been served with a contrary court order or with notice from a person with an

17. For example, where a court orders a spousal support obligor to maintain a life insurance policy designating a former spouse as beneficiary, that provision is not subject to revocation by the transferor and thus would not fail by operation of the proposed law.

18. The clear and convincing evidence standard allows consideration of evidence of a contrary intent without opening the door to a flood of litigation. Other Probate Code provisions apply the same standard where considering evidence of an intent contrary to a statutory default rule. See, e.g., Prob. Code §§ 5301 (lifetime ownership of funds in joint account), 5302 (disposition of funds in joint account on death of one account holder).

adverse interest in the property.¹⁹ A person who files a bad faith notice of an adverse interest is liable for costs and damages that result.²⁰

Bona fide purchasers. The proposed law protects the rights of a good faith purchaser or encumbrancer for value who relies on the apparent failure of a nonprobate transfer or severance of a joint tenancy under the proposed law, or who lacks knowledge of the failure of a nonprobate transfer or the severance of a joint tenancy under the proposed law.²¹ The remedy for a person who is injured by a transaction with a purchaser or encumbrancer is against the transacting former spouse and not against the purchaser or encumbrancer.

The proposed law also provides an affidavit procedure that may be used to quickly and easily certify that a person's rights to real property transferred by an instrument making a nonprobate transfer or by operation of joint tenancy survivorship are not affected by the proposed law (either because the person is a surviving spouse or because the transfer falls within one of the proposed law's exceptions).²² The rights of a good faith purchaser or encumbrancer who relies on such an affidavit are protected.²³

SCOPE OF PROPOSED LAW

Preemption

The Commission recommends that the proposed law apply to the broadest extent consistent with federal law. While the

19. This protection would be implemented by broadening the application of existing Probate Code Section 5003, which offers similar protection in the context of a failure of spousal consent to a nonprobate transfer of community property.

20. *Id.*

21. See proposed Prob. Code §§ 5600(d), 5601(c).

22. See proposed Prob. Code § 5602.

23. *Id.*

proposed law may be preempted by federal law as applied to many forms of employer-provided benefits,²⁴ the proposed law does not exempt such benefits from its scope of application.²⁵ To do so would codify the present extent of federal preemption, precluding broader application of the proposed law if the scope of preemption is later reduced by Congress or construed more narrowly by the courts. It is to be hoped that, as more states adopt provisions similar to the proposed law, Congress will adopt a similar provision or will clear a space for state law to operate in this area.

Contracts Clause

There is some authority suggesting that application of the proposed law to a contract in existence prior to enactment of the proposed law could unconstitutionally impair the obligations of that contract.²⁶ There is, however, a good argument against this proposition.²⁷ Considering the uncertainty on this

24. See, e.g., *Metropolitan Life Ins. Co. v. Hanslip*, 939 F.2d 904 (10th Cir. 1991) (ERISA preempts state law providing that dissolution of marriage revokes designation of former spouse as beneficiary to employer-provided life insurance).

25. The Probate Code's general severability section will preserve application of the proposed law where not preempted. See Prob. Code § 11.

26. See U.S. Const. art. I, § 10, cl. 1; *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991) (Oklahoma statute providing that dissolution of marriage revokes the designation of a spouse as beneficiary to life insurance unconstitutionally impaired obligation of preexisting contract).

27. A cogent summary of the argument is provided by the Joint Editorial Board for the Uniform Probate Code (JEB) in its response to the decision in *Whirlpool Corp. v. Ritter*. See *Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents*, 17 Am. C. Tr. & Est. Couns. Notes 184, 185 (1991). The JEB's argument rests on the following points:

(1) "A life insurance policy is a third-party beneficiary contract. As such it is a mixture of contract and donative transfer.... In *Ritter* and in comparable cases, there is never a suggestion that the insurance company can escape paying the policy proceeds that are due under the contract.... The divorce statute affects only the donative transfer, the component of the

point, and the Commission's recommendation that the law be applied broadly, application of the proposed law is not limited to contracts formed after the law's enactment.²⁸

CONFORMING REVISIONS

The proposed law includes the following minor revisions to existing law:

- Family Code Section 2024, which provides for a printed warning of the automatic revocation of a spousal disposition in a will, is amended to expand the scope of the warning to refer to the effects of the proposed law.
- Probate Code Section 5003, protecting property holders from liability for transferring property according to the terms of an instrument making a nonprobate transfer, is amended to make it applicable to the proposed law.
- Probate Code Section 5302, governing disposition of funds in a multiple party account in a financial institu-

policy that raises no Contracts Clause issue. The precise question in these cases is which of the decedent's potential donee-transferees should receive the proceeds....

....

.... The JEB believes that there is no justification for extending Contracts Clause concerns to a statute that only [affects] the donative-transfer component of a life insurance policy, since the statute works no interference with the contractual component of the policy, the company's obligation to pay."

(2) "The Contracts Clause protects contractual reliance. Because statutes such as Uniform Probate Code § 2-804 serve to implement rather than to defeat the insured's expectation under the insurance contract, the premise for applying the Contracts Clause is wholly without foundation."

(3) Statutes such as Uniform Probate Code § 2-804 are mere constructional default rules. "The JEB is aware of no authority for the application of the Contracts Clause to state legislation applying altered rules of construction or other default rules to pre-existing documents in any field of law"

28. The Probate Code's general severability section will preserve application of the proposed law where not unconstitutional. See Prob. Code § 11.

tion, is amended to make survivorship rights in such accounts subject to the proposed law.

- Probate Code Section 6202, which defines “spouse” for the purposes of California statutory will law, is repealed to eliminate an inconsistency in the treatment of statutory wills, other wills, and nonprobate transfers.²⁹
- Probate Code Section 21111, governing the effect of a failed transfer of property on death, is amended to clarify its application to instruments that do not provide for the transfer of a residue.

29. Under the applicable definition of “spouse,” dissolution of marriage does not revoke a spousal disposition in a California statutory will that is executed before the testator’s marriage to the former spouse. See Prob. Code §§ 6202, 6227. This is inconsistent with the general rule that a disposition to a spouse is revoked on dissolution of marriage, regardless of whether the will was executed before the testator’s marriage to the former spouse. See *Estate of Reeves*, 233 Cal. App. 3d 651, 658, 284 Cal. Rptr. 650, 654 (1991). This is also inconsistent with the proposed law. Repeal of Probate Code Section 6202 eliminates these inconsistencies.

PROPOSED LEGISLATION

Prob. Code §§ 5600-5603 (added). Nonprobate transfer to former spouse

SEC. _____. Part 4 (commencing with Section 5600) is added to Division 5 of the Probate Code, to read:

PART 4 . NONPROBATE TRANSFER TO FORMER SPOUSE

§ 5600. Failure of nonprobate transfer to former spouse

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.

(b) Subdivision (a) does not cause a nonprobate transfer to fail in either of the following cases:

(1) The nonprobate transfer is not subject to revocation by the transferor at the time of the transferor's death.

(2) There is clear and convincing evidence that the transferor intended to preserve the nonprobate transfer to the former spouse.

(c) Where a nonprobate transfer fails by operation of this section, the instrument making the nonprobate transfer shall be treated as it would if the former spouse failed to survive the transferor.

(d) Nothing in this section affects the rights of a subsequent purchaser or encumbrancer for value in good faith who relies on the apparent failure of a nonprobate transfer under this section or who lacks knowledge of the failure of a nonprobate transfer under this section.

(e) As used in this section, "nonprobate transfer" means a provision of either of the following types:

(1) A provision of a type described in Section 5000.

(2) A provision in an instrument that operates on death, other than a will, conferring a power of appointment or naming a trustee.

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. "Surviving spouse" is defined in Section 78.

Paragraph (1) of subdivision (b) provides that a nonprobate transfer to a former spouse does not fail by operation of subdivision (a) if, at the time of the transferor's death, the nonprobate transfer is not subject to revocation by the transferor. This precludes operation of subdivision (a) where a nonprobate transfer is irrevocable on execution, or later becomes irrevocable by the transferor (for reasons other than the death or incapacity of the transferor). For example, a court may order a spousal support obligor to maintain life insurance on behalf of a former spouse. See Fam. Code § 4360. If a person dies while subject to such an order, subdivision (a) would not affect the rights of the transferor's former spouse under the policy. The irrevocability of a trust can be established by certification of the trust's contents. See Section 18100.5.

Paragraph (2) of subdivision (b) provides that a nonprobate transfer to a former spouse does not fail on the transferor's death if there is clear and convincing evidence that the transferor intended to preserve the nonprobate transfer. For example, if after divorcing, the transferor modified the beneficiary terms of a life insurance policy without changing the designation of the former spouse as primary beneficiary, this might be sufficiently clear and convincing evidence of the transferor's intent to preserve the nonprobate transfer to the former spouse so as to prevent the operation of subdivision (a).

Subdivision (c) governs the effect of failure of a nonprobate transfer under this section. For the effect of a failed nonprobate transfer of property, see Section 21111. For the effect of a failure of a trustee designation, see Section 15660.

Subdivision (d) makes clear that nothing in this section affects the rights of a good faith purchaser or encumbrancer for value who relies on the apparent failure of a nonprobate transfer under this section or who lacks knowledge of the failure of a nonprobate transfer under this section. For the purpose of this subdivision, "knowledge" of the failure of a nonprobate transfer includes both actual knowledge and constructive knowledge through recordation of a judgment of dissolution or annulment or other relevant document. See Civ. Code § 1213 (recordation as constructive notice to subsequent purchasers and

mortgagees). The rights of a subsequent purchaser or encumbrancer are also protected if the purchaser or encumbrancer relies on an affidavit or declaration executed under Section 5602. The remedy for a person injured by a transaction with a subsequent purchaser or encumbrancer for value is against the transacting former spouse and not against the purchaser or encumbrancer.

In general, Section 5003 protects a property holder from liability for transferring the property according to the terms of the instrument making the nonprobate transfer, even if the nonprobate transfer has failed by operation of subdivision (a).

This section may be preempted by federal laws regulating employer-provided benefits. See *Metropolitan Life Ins. Co. v. Hanslip*, 939 F.2d 904 (10th Cir. 1991) (ERISA preempts state law providing that dissolution of marriage revokes designation of former spouse as beneficiary to employer-provided life insurance). It is therefore especially important on dissolution or annulment of marriage to review beneficiary designations for employer-provided death benefits.

§ 5601. Severance of joint tenancy between decedent and former spouse

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.

(b) Subdivision (a) does not sever a joint tenancy in either of the following cases:

(1) The joint tenancy is not subject to severance by the decedent at the time of the decedent's death.

(2) There is clear and convincing evidence that the decedent intended to preserve the joint tenancy in favor of the former spouse.

(c) Nothing in this section affects the rights of a subsequent purchaser or encumbrancer for value in good faith who relies on an apparent severance under this section or who lacks knowledge of a severance under this section.

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. "Surviving spouse" is defined in Section 78. This effectively reverses the common law rule that dissolution or annulment of marriage does not sever a joint tenancy between spouses. See, e.g., *Estate of Layton*, 44 Cal. App. 4th 1337, 52 Cal. Rptr. 2d 251 (1996).

Property acquired during marriage in joint tenancy form is presumed to be community property on dissolution of marriage or legal separation. See Fam. Code § 2581. See also *In re Marriage of Hilke*, 4 Cal. 4th 215, 841 P.2d 891, 14 Cal. Rptr. 2d 371 (1992) (community property presumption applies after death of former spouse if court has entered judgment dissolving marriage and reserved jurisdiction over property matters). This section does not affect the community property presumption and does not affect property characterized as community property under that presumption.

This section applies to both real and personal property joint tenancies, and affects property rights that depend on the law of joint tenancy. See, e.g., Veh. Code §§ 4150.5, 5600.5 (property passes as though in joint tenancy). This section does not affect United States Savings Bonds, which are subject to federal regulation. See *Conrad v. Conrad*, 66 Cal. App. 2d 280, 284-85, 152 P.2d 221, 223 (1944) (federal law controls).

The method provided in this section for severing a joint tenancy is not exclusive. See, e.g., Civ. Code § 683.2.

Where a joint tenancy involves three or more joint tenants, severance by operation of this section converts the decedent's interest into a tenancy in common, but does not sever the joint tenancy as between the other joint tenants. For example, husband, wife, and a third person create a joint tenancy during husband and wife's marriage to each other. On husband's death, wife is not husband's surviving spouse and the joint tenancy is severed by operation of this section. Husband's one third interest becomes a tenancy in common and does not pass by survivorship. The remaining two thirds remain in joint tenancy as between the third person and the former wife.

Paragraph (1) of subdivision (b) provides that a joint tenancy is not severed by operation of subdivision (a) if the joint tenancy is not subject to severance by the decedent (for reasons other than the decedent's death). For example, if the decedent is subject to a court order or binding agreement prohibiting severance of the joint tenancy by the decedent, then the joint tenancy is not severed by operation of subdivision (a).

Subdivision (c) makes clear that nothing in this section affects the rights of a good faith purchaser or encumbrancer who relies on an apparent severance by operation of this section or who lacks knowledge of a severance by operation of this section. For the purpose of this subdivision, "knowledge" of a severance of joint tenancy includes both

actual knowledge and constructive knowledge through recordation of a judgment of dissolution or annulment or other relevant document. See Civ. Code § 1213 (recordation as constructive notice to subsequent purchasers and mortgagees). The rights of a subsequent purchaser or encumbrancer are also protected if the purchaser or encumbrancer relies on an affidavit or declaration executed under Section 5602. The remedy for a person injured by a transaction with a subsequent purchaser or encumbrancer is against the transacting joint tenant and not against the purchaser or encumbrancer.

§ 5602. Certification of rights under this part

5602. (a) Nothing in this part affects the rights of a purchaser or encumbrancer of real property for value who in good faith relies on an affidavit or a declaration under penalty of perjury under the laws of this state that states all of the following:

(1) The name of the decedent.

(2) The date and place of the decedent's death.

(3) A description of the real property transferred to the affiant or declarant by an instrument making a nonprobate transfer or by operation of joint tenancy survivorship.

(4) Either of the following, as appropriate:

(A) The affiant or declarant is the surviving spouse of the decedent.

(B) The affiant or declarant is not the surviving spouse of the decedent, but the rights of the affiant or declarant to the described property are not affected by Probate Code Section 5600 or 5601.

(b) A person relying on an affidavit or declaration made pursuant to subdivision (a) has no duty to inquire into the truth of the matters stated in the affidavit or declaration.

(c) An affidavit or declaration made pursuant to subdivision (a) may be recorded.

Comment. Section 5602 provides a procedure for certifying that a person's rights to real property transferred on the death of a spouse or former spouse, by an instrument making a nonprobate transfer or by operation of joint tenancy survivorship, are not affected by this part. See

also Code Civ. Proc. § 2015.5 (certification or declaration under penalty of perjury); Prob. Code §§ 210-212 (recording evidence of death affecting title to real property).

§ 5603. Application of part

5603. (a) This part is operative on January 1, 2000.

(b) Except as provided in subdivision (c), this part applies to an instrument making a nonprobate transfer or creating a joint tenancy, whether executed before, on, or after the operative date of this part.

(c) Sections 5600 and 5601 do not apply, and the applicable law in effect before the operative date of this part applies, to an instrument making a nonprobate transfer or creating a joint tenancy in either of the following circumstances:

(1) The person making the nonprobate transfer or creating the joint tenancy dies before the operative date of this part.

(2) The dissolution of marriage or other event that terminates the status of the nonprobate transfer beneficiary or joint tenant as a surviving spouse occurs before the operative date of this part.

Comment. Section 5603 governs the application of this part.

Under subdivision (c), where a dissolution of marriage, or other event terminating a person's status as a decedent's surviving spouse occurs before January 1, 2000, that person's rights as a nonprobate transfer beneficiary or joint tenant of the decedent are not affected by Section 5600 or 5601. See Section 78 ("surviving spouse" defined).

CONFORMING REVISIONS

Fam. Code § 2024 (amended). Notice concerning effect of judgment on will, insurance, and other matters

SEC. _____. Section 2024 of the Family Code is amended to read:

2024. (a) A petition for dissolution of marriage, nullity of marriage, or legal separation of the parties, or a joint petition for summary dissolution of marriage, shall contain the following notice:

~~“Please review your will, insurance policies, retirement benefit plans, credit cards, other credit accounts and credit reports, and other matters that you may want to change~~
“Dissolution or annulment of your marriage may automatically affect the rights of your former spouse regarding such things as your will, life insurance proceeds, trust benefits, retirement death benefits, power of attorney designation, pay on death bank accounts, transfer on death vehicle registration, and joint tenancy survivorship. You should review these matters, as well as any credit cards, other credit accounts, and credit reports to determine whether they should be changed or reaffirmed in view of the dissolution or annulment of your marriage, or your legal separation. However, some changes may require the agreement of your spouse or a court order (see Part 3 (commencing with Section 231) of Division 2 of the Family Code). ~~Dissolution or annulment of your marriage may automatically change a disposition made by your will to your former spouse.”~~

(b) A judgment for dissolution of marriage, for nullity of marriage, or for legal separation of the parties shall contain the following notice:

~~“Please review your will, insurance policies, retirement benefit plans, credit cards, other credit accounts and credit reports, and other matters that you may want to change “Dissolution or annulment of your marriage may automatically affect the rights of your former spouse regarding such things as your will, life insurance proceeds, trust benefits, retirement death benefits, power of attorney designation, pay on death bank accounts, transfer on death vehicle registration, and joint tenancy survivorship. You should review these matters, as well as any credit cards, other credit accounts, and credit reports to determine whether they should be changed or reaffirmed in view of the dissolution or annulment of your marriage, or your legal separation. However, some changes may require the agreement of your spouse or a court order (see Part 3 (commencing with Section 231) of Division 2 of the Family Code). Dissolution or annulment of your marriage may automatically change a disposition made by your will to your former spouse.”~~

Comment. Section 2024 is amended to refer to the effect of dissolution or annulment of marriage on the designation of a former spouse as attorney-in-fact, nonprobate transfers to a former spouse, and joint tenancy survivorship as between former spouses. See Prob. Code §§ 3722, 4154, 4727(e) (power of attorney), 5600 (nonprobate transfer), 5601 (joint tenancy).

Prob. Code § 5003 (amended). Protection of property holders

SEC. _____. Section 5003 of the Probate Code is amended to read:

5003. (a) A holder of property under an instrument of a type described in Section 5000 may transfer the property in compliance with a provision for a nonprobate transfer on death that satisfies the terms of the instrument, whether or not the transfer is consistent with the beneficial ownership of the property as between the person who executed the provision for transfer of the property and other persons having an

interest in the property or their successors, *and whether or not the transfer is consistent with the rights of the person named as beneficiary.*

(b) Except as provided in this subdivision, no notice or other information shown to have been available to the holder of the property affects the right of the holder to the protection provided by subdivision (a). The protection provided by subdivision (a) does not extend to a transfer made after either of the following events:

(1) The holder of the property has been served with a contrary court order.

(2) The holder of the property has been served with a written notice of a person claiming an adverse interest in the property. However, this paragraph does not apply to a pension plan to the extent the transfer is a periodic payment pursuant to the plan.

(c) The protection provided by this section does not affect the rights of the person who executed the provision for transfer of the property and other persons having an interest in the property or their successors in disputes among themselves concerning the beneficial ownership of the property.

(d) The protection provided by this section is not exclusive of any protection provided the holder of the property by any other provision of law.

(e) A person shall not serve notice under paragraph (2) of subdivision (b) in bad faith. If the court in an action or proceeding relating to the rights of the parties determines that a person has served notice under paragraph (2) of subdivision (b) in bad faith, the court shall award against the person the cost of the action or proceeding, including a reasonable attorney's fee, and the damages caused by the service.

Comment. Subdivision (a) of Section 5003 is amended to make clear that the section applies where a nonprobate transfer has been caused to fail by operation of Section 5600.

Subdivision (e) provides for compensation where a person serves a bad faith notice of a contrary claim to property held for the purpose of a nonprobate transfer. This provision is similar to Section 13541(d) (compensation where notice slanders title to community property after spouse's death).

Prob. Code § 5302. Sums remaining in account on death of party

SEC. _____. Section 5302 of the Probate Code is amended to read:

5302. Subject to Section 5600:

(a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent. If there are two or more surviving parties, their respective ownerships during lifetime are in proportion to their previous ownership interests under Section 5301 augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before the decedent's death; and the right of survivorship continues between the surviving parties.

(b) If the account is a P.O.D. account:

(1) On death of one of two or more parties, the rights to any sums remaining on deposit are governed by subdivision (a).

(2) On death of the sole party or of the survivor of two or more parties, (A) any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more die before the party, (B) if two or more P.O.D. payees survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit agreement expressly provide for different shares, and (C) if two or more P.O.D. payees survive, there is no right of survivorship in the event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(c) If the account is a Totten trust account:

(1) On death of one of two or more trustees, the rights to any sums remaining on deposit are governed by subdivision (a).

(2) On death of the sole trustee or the survivor of two or more trustees, (A) any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a different intent, (B) if two or more beneficiaries survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit agreement expressly provide for different shares, and (C) if two or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(d) In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of the decedent's estate.

(e) A right of survivorship arising from the express terms of the account or under this section, a beneficiary designation in a Totten trust account, or a P.O.D. payee designation, cannot be changed by will.

Comment. Section 5302 is amended to make clear that the transfer on death of funds in a multiple party account is subject to Section 5600, which causes a nonprobate transfer to a former spouse to fail if the former spouse is not the transferor's surviving spouse. See Section 5600 (effect of dissolution of marriage on nonprobate transfer).

Prob. Code § 6202 (repealed). Spouse defined

SEC. _____. Section 6202 of the Probate Code is repealed.

~~6202. "Spouse" means the testator's husband or wife at the time the testator signs a California statutory will.~~

Comment. Section 6202 is repealed to eliminate the inconsistency in the operation of Section 6122 and Section 6227. Section 6122 revokes a

disposition to a former spouse in a will executed before or during the testator's marriage to the former spouse. For the purposes of a statutory will, Section 6202 defines a "spouse" as a person who is married to the testator at the time the testator signs the statutory will. This means that Section 6227 only revokes a disposition to a former spouse in a statutory will that is executed after the testator's marriage to the former spouse. See Estate of Reeves, 233 Cal. App. 3d 651, 284 Cal. Rptr. 650 (1991).

Prob. Code § 21111 (amended). Failed transfer

SEC. _____. Section 21111 of the Probate Code is amended to read:

21111. Except as provided in Section 21110:

(a) If a transfer, other than a residuary gift or a transfer of a future interest, fails for any reason, ~~the property transferred becomes a part of the residue transferred under the instrument.~~ *the property is transferred as follows:*

(1) If the transferring instrument provides for an alternative disposition in the event the transfer fails, the property is transferred according to the terms of the instrument.

(2) If the transferring instrument does not provide for an alternative disposition but does provide for the transfer of a residue, the property becomes a part of the residue transferred under the instrument.

(3) If the transferring instrument does not provide for an alternative disposition and does not provide for the transfer of a residue, the property is transferred to the decedent's estate.

(b) If a residuary gift or a future interest is transferred to two or more persons and the share of a transferee fails for any reason, the share passes to the other transferees in proportion to their other interest in the residuary gift or the future interest.

Comment. Section 21111 is amended to clarify the treatment of a failed transfer by will, trust, life insurance policy, or other instrument transferring property at death, where the transferring instrument does not provide for the transfer of a residue.
