

## Memorandum 2000-41

### Effect of Dissolution of Marriage on Nonprobate Transfers

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In 1998, the Commission issued its recommendation on the *Effect of Dissolution of Marriage on Nonprobate Transfers*. In the course of seeking implementing legislation, it became apparent that there would be substantial political opposition. The decision was made to temporarily table the recommendation and reassess its political prospects at a later date. This memorandum provides background on the recommendation and an update on the political situation.

#### Existing Law

Under existing law, a provision in a will benefiting the testator's spouse is automatically revoked by dissolution. See Prob. Code §§ 6122, 6227. Dissolution also automatically revokes the designation of a spouse as attorney-in-fact, a spouse's death benefits under the Public Employees' Retirement System, and various inheritance rights that are based on one's status as a decedent's "surviving spouse" (such as inheritance by means of intestate succession). See Gov't Code § 21492; Prob. Code §§ 3722, 4154, 4697 (operative 7/1/2000), 6401. These provisions are intended to implement the typical intentions of a person following dissolution.

Dissolution does *not* automatically revoke a disposition to a spouse in an instrument other than a will that transfers property on death (i.e., a "nonprobate transfer" — such as life insurance, a pay-on-death bank account, joint tenancy title, or a revocable living trust). Where a person inadvertently fails to change the designation of a spouse as beneficiary in such an instrument after dissolution, the property will pass to the former spouse, rather than to the person's estate. This may be true even where a marital property agreement transfers ownership and control of the instrument to one spouse. For example, a provision in a marital property agreement awarding ownership of a life insurance policy to one spouse does *not* automatically revoke a designation of the other spouse as beneficiary. If the policy-owning spouse does not change the beneficiary designation before

dying, the policy will pay the decedent's former spouse. Such a result is contrary to a typical person's expectations and intentions.

The inconsistent treatment of probate and nonprobate transfers after dissolution does not make sense. If the typical person does not intend to transfer property to a former spouse on death, it shouldn't matter whether the transfer is made by a will or a nonprobate transfer. What's more, the inconsistency creates a potential trap for some. A person who knows that dissolution revokes a will provision benefiting a spouse may erroneously assume that the same rule applies to a nonprobate transfer. Such a person may fail to revoke a nonprobate transfer based on the mistaken assumption that it was revoked by operation of law on dissolution.

### **Commission Recommendation**

The 1998 Commission recommendation proposed that a nonprobate transfer to a spouse should fail if, at the time of the transferor's death, the beneficiary was not the transferor's "surviving spouse," i.e., they were no longer married. See Prob. Code § 78 ("surviving spouse" defined). This default rule would be subject to three exceptions:

- (1) It would not apply to irrevocable transfers.
- (2) It would not apply to transfers created after dissolution.
- (3) It would not apply if there is clear and convincing evidence that the decedent intended to preserve the nonprobate transfer after dissolution.

The recommendation also included provisions protecting third party purchasers and encumbrancers. The default rule would be generally consistent with the law governing the effect of dissolution on a will.

### **Political Difficulty**

In searching for an author for the recommendation in the 1999 session, the staff approached the Assembly Judiciary Committee. Initially, the committee staff was receptive to the proposed law and suggested the possibility of implementing it in a committee bill. However, we learned through the committee staff that the committee chair, Assembly Member Sheila Kuehl, did not agree with the proposal. This not only precluded introduction in a committee bill, but indicated the recommendation would have significant trouble in the Judiciary Committee.

Assembly Member Kuehl was concerned that existing marital property law often severely disadvantages one spouse, due to the substantial disparity in earning power that can arise between spouses, especially in marriages of long duration. Under existing law, an economically weaker spouse might receive property by operation of a nonprobate transfer that the stronger spouse forgot to revoke or did not understand the need to revoke, after dissolution of their marriage. The recommendation would prevent these fortuitous transfers.

### **Attempts at Compromise**

The Commission considered various modifications to address Assembly Member Kuehl's concerns about economically disadvantaged spouses. The alternatives considered included the following:

- (1) Adding an exception for marriages of "long duration."
- (2) Adding an exception where a minor child of the former spouses is still alive at the time of the transferor's death.
- (3) Adding an exception for the principal residence of the surviving former spouse.
- (4) Replacing the default rule with a judicial procedure by which the court could set aside a nonprobate transfer to a former spouse if it is shown that the transferor did not intend the transfer to survive dissolution.
- (5) Replacing the default rule with boilerplate language on a Judicial Council form that would allow parties to a dissolution to revoke a nonprobate transfer to a spouse in the course of the dissolution proceeding.

The Commission rejected these proposals as unduly complicated and in conflict with the goal of harmonizing the treatment of wills and nonprobate transfers.

The Commission then directed the staff to meet with Assembly Member Kuehl and her staff to discuss whether the proposed law might be acceptable if accompanied by an increase in the priority of unpaid spousal support under the statutory priority scheme governing payment of debts by a decedent's estate. This would provide some relief for former spouses who are owed support from a deceased obligor. In January of this year, the staff spoke with committee consultant Donna Hershkowitz, who stated that the change in payment priority for support arrearages would not adequately address the chair's concern.

### **Future Prospects**

The political prospects for the recommendation do not appear to have changed since it was last considered by the Commission. At this point, there seem to be two options for how we might proceed: pursue implementing legislation for next session, despite the potential political difficulties, or keep the recommendation on the back-burner until some change in circumstances suggests that the prospects for enactment have improved. **The staff recommends the latter.**

Respectfully submitted,

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