

Going a step further, the Commission could identify the constitutional doctrines and express an intent that the sex equality provision apply to the maximal extent consistent with constitutional limitations.

An earlier Commission study provides an example of this approach. In the Commission’s work on nonprobate transfers to former spouses, the Commission crafted a rule (subject to specified exceptions) that dissolution of marriage would revoke a nonprobate transfer to a former spouse.⁸⁸ In that work, the Commission recognized that a federal statute, the federal Employee Retirement Income Security Act of 1974 (“ERISA”), could preempt the application of the Commission’s proposed rule in some cases. Although this issue was not addressed in the proposed statutory language (and the Commission recognized potential risk in doing so),⁸⁹ the Commission decided to acknowledge ERISA in its narrative report and in a Commission Comment.⁹⁰ In the report, the Commission recommended that “the proposed law apply to the broadest extent consistent with federal law.”⁹¹

In this study, the Commission could take a similar approach, expressing an intent for maximal application of the sex equality principle.

Approach 4 — Identify Affirmative Constitutional Support for Broad Application of the Sex Equality Provision

The Commission could also consider including language about the state’s interest in broad application of the sex equality principle. This language could also cite constitutional protections that could support and further sex equality (e.g., equal protection, liberty, and privacy). While this type of language would not typically be included in Commission Comments, such language could be drafted as proposed statutory language (likely as findings and declarations⁹²) or could be included in the Commission’s narrative report.

⁸⁸ *Effect of Dissolution of Marriage on Nonprobate Transfers*, 28 Cal. L. Revision Comm’n Reports 599 (1998).

⁸⁹ See *id.* at 610 (“[T]he proposed law does not exempt [ERISA-regulated] benefits from its scope of application. 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.” (footnote omitted)).

⁹⁰ *Id.* at 609-10, 615 (Comment to proposed Probate Code Section 5600).

⁹¹ *Id.* at 609. The Commission also recognized that an existing severability clause in the Probate Code would preserve the application of the proposed law where it was not preempted. *Id.* at 610, n. 25.

⁹² See generally, e.g., Fam. Code § 20000 (identifying compelling state interests relating to child and spousal support and resolution of custody and visitation disputes); Gov’t Code § 7461(c) (identifying the purpose of the law on governmental access to financial records as “balanc[ing] a citizen’s right of privacy with the governmental interest in obtaining information for specific purposes and by specified procedures”); Health and Safety Code § 123462 (describing the public policy of California and identifying protected fundamental rights of individuals related to reproductive privacy and decisionmaking); Pen. Code § 30505 (discussing legislative intent with respect to assault weapons and, in subdivision (b), the need for regulation to address the “unacceptable risk to the death and serious

