

First Supplement to Memorandum 91-44

Subject: Study F-3050/L-3050 - Donative Transfers of Community Property
(Comments of State Bar Probate Section)

Attached to this supplementary memorandum are comments of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section on policy issues concerning donative transfers, and of Team 2 on the staff draft attached to Memorandum 91-44. We will raise their comments orally at the meeting in connection with the specific points to which they relate.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

**ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**

**JUL 18 1991
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July 15, 1991

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Re: Memoranda 91-32 and 91-44
Donative Transfers of Community Property

Dear Nat:

At the Meeting of the Executive Committee of the Estate Planning, Trust and Probate Law Section on July 13, we continued the process of addressing the policy issues raised in California Law Revision Commission Memorandum 91-32 regarding Donative Transfers of Community Property. Time did not permit us to address all of the issues. In this letter I will follow the format of the letter that I wrote on June 5 to indicate those positions of Team 2 that were affirmed or modified when considered by the entire Executive Committee.

PRESENT GIFTS OF COMMUNITY PROPERTY

1. Is the gift irrevocable as to both spouses if both consent in writing?

The Executive Committee said "Yes."

2. Should the nonconsenting spouse be able to revoke the entire gift or only his or her half of the community property?

Existing law allows the entire gift to be revoked. The remedy of the nonconsenting spouse is either to set aside the gift and recover the property, or to seek reimbursement. The Executive Committee was in favor of retaining the current law as the alternatives appeared to introduce a great deal of undesirable complexity. Team 2 raised issues of the effect of an intervening bona fide purchaser (e.g., gift of one spouse to charity auction and purchase from the auction by bona fide purchaser), but believes these issues should be addressed later as the Commission drafts detailed provisions. As is discussed in more detail below, the Executive Committee believes that relief by revocation of the gift and requiring a return from third parties should be available for a shorter period of time than the right to reimbursement from the other spouse or his or her estate.

3. Should any gifts be exempted from the requirement of written consent?

The Executive Committee believes that there should be no exceptions to the requirement of written consent. The Executive Committee recognizes that the case law has allowed a de minimus exception, but believes that is poor policy. A disproportionate amount of litigation is generated by trying to determine if the unconsented-to gift falls within the standard for a de minimus gift. If the gift is small and not consented-to, then it should not be a tremendous burden to allow revocation or reimbursement.

4. Should there be a period of limitations for the nonconsenting spouse to exercise his or her right to void the gift?

If so, how long?

The Executive Committee believes that the following rules should apply with regard to the right of the nonconsenting spouse to set aside the gift and obtain relief from third parties (parties other than the other spouse).

The Executive Committee believes there should be a one-year period commencing with the date the nonconsenting spouse obtained actual knowledge of the gift of community property. The Executive Committee believes that a period of voidability for so long as the marriage lasted was too long if there was actual knowledge. If there was no actual knowledge, it was appropriate.

If the period lasts as long as the marriage because there was no actual knowledge, if the marriage ends by the death of the donor spouse, the limitations period should be the same one year currently found in C.C.P. §353. After death, the gift should be revocable as to only half,

assuming the subject of the gift is divisible. We did not decide what the rule should be if the subject property is not divisible.

If the marriage ends by the death of the nonconsenting nondonor spouse, the law set forth in C.C.P. §353(a) should apply if there was actual knowledge, and a one year period should apply if there was no knowledge. The personal representative or other fiduciary should be able to commence appropriate discovery to discover the unconsented-to gift within that period of time.

If the period lasts as long as the marriage, and the marriage ends as a result of a dissolution action, then the period of limitations should be the earlier of one year from the date of actual knowledge or from the date of the entry of the order finally determining the property rights of the spouses in the dissolution proceeding.

The Executive Committee believes that a longer statute of limitations should apply to actions between the spouses, as opposed to those against third parties. While this may not allow revocation of the gift, it would allow for the remedy of reimbursement. The Executive Committee believes the currently existing statutes of limitation for causes of action for fraud, constructive trust, or breaches of fiduciary duty should govern. As the Executive Committee has expressed opposition to S.B. 716, we do not want the use of the words "breaches of fiduciary duty" to imply any endorsement of efforts to expand the scope of fiduciary duties between spouses.

FUTURE GIFTS OF COMMUNITY PROPERTY

There is consensus that future gifts of community property by beneficiary designation raise the issue of consent, because a spouse can be deprived of his or her half of the community property if he or she is deprived of the ability to either receive the property or to designate who should receive it. Examples include life insurance, employee benefit plans which are not pre-empted by ERISA, I.R.A. accounts and P.O.D. accounts.

1. Should any gifts be exempted from the requirement of written consent?

The Executive Committee opposed a de minimus exception.

2. What should the lack of written consent do to the status of the beneficiary designation (gift)?

"Voidable but not void", but the case law only allows the nonconsenting spouse to void his or her half of the gift at this time. The Executive Committee concurs with the case law, recognizing that the issues differ from those of present gifts.

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3. Should there be a period of limitations for the nonconsenting spouse to exercise his or her right to void the gift?

If so, how long?

Since the possibility exists that the designation will be changed during the marriage or the fund will be exhausted (e.g., the spending down of an I.R.A. or pension plan), it makes more sense to extend the time for potential voidability in this case than in the case of the present gift.

The Executive Committee concluded the action to void one-half of the gift need not be commenced during the marriage, but that the time periods set forth for present gifts should generally apply at the termination of the marriage by dissolution or by death of either donor spouse.

4. At the time of the beneficiary designation, is it irrevocable by the participant-donor spouse as to his or her half of the community property regardless of whether the other spouse consents?

The Executive Committee says "No." If the beneficiary designation itself is made irrevocable by its express written terms, then the donor-participant's half is irrevocable, but the other half does not become irrevocable absent written consent.

MEMORANDUM 91-44 - NONPROBATE TRANSFERS OF PROPERTY

The following comments are those of Team 2 only, as the full Executive Committee did not have the time to consider this memorandum at its last meeting.

We recognize that we put some pressure on you to prepare a draft statute promptly by the scheduling of a meeting of Team 2 set for July 12. We also recognize the difficulty in drafting legislation on these difficult issues. We believe you produced an excellent first draft, and hope you will not take umbrage at the lengthy comments as we look toward producing a better second draft.

Our first concern was one of organization. We believed that all of the new definitions should be at the beginning of Part 1, rather than in Chapter 2. We believed that those provisions should then be followed by General Rules for Nonprobate Transfers, which would be followed by special rules for Nonprobate Transfers of Community Property.

Attached to this letter is a draft statute which reflects our suggestions for revised organization and wording. It should be regarded as only a suggested

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second working draft, as we recognize that there is still much more fine tuning to be done in drafting clear, workable language of broad application.

Team 2 thought it important that all of the definitions that affect this part be at the beginning. The draft had some of the definitions after the terms were used and this was distracting. Team 2 also thought it important that all of the relevant terms be defined. Thus, we have added a definition of "joinder" and considered the possibility that terms delineating the transferor or consenting spouse also be added.

Team 2 strongly criticized the use of the term "fiduciary" in a manner which conflicts with the definition of "fiduciary" in Probate Code §39. One problem is the implication that the insurance company or other person or entity subject to the nonprobate transfer is a fiduciary in the traditional sense. We believe many would object to that implication. Our draft uses the term "asset holder" as we found ourselves using this term in our discussions. We are very open to the possibility of other terms, such as "depository" or "holder." We rejected the term "third party holder" as it is possible the decedent or his or her spouse may be a holder.

The definition of "nonprobate transfer" in our Section 5003 is a combination of your sections 5016 and 5000. As our section previously commented before this provision was enacted, we believe the dramatic expansion of the scope of nonprobate transfers from former Probate §160 will make it more difficult and more expensive to adequately estate plan. We take minor comfort in the fact that the new provisions of this part may allow us to use "blockbuster wills" to accomplish the goals of the plan if they are delivered to all of the asset holders.

Section 5003(d) [was your §5000(c)] claims that there is no effect on the rights of creditors, but our Team believes the proliferation of this type of transfer will have a negative effect on creditors as it will make it more difficult for them to discover the assets of a decedent and levy against them in a timely manner. If the Commission is truly going to consider all creditors' claims against a decedent (as is implied in Memorandum 91-10), then this is an area that deserves more attention.

Our Section 5010 is your §5019. It is unchanged. We believe you should change the comment, however. The comment assumes the new legislation is a change to existing law, but most of the provisions are codifications of existing case law. We would change the comment so the second sentence would commence "To the extent this Part changes the law,...."

Our Section 5011 [your §5001] has been rewritten. The first two sections were acceptable, but we had serious concerns about (c). As drafted, (c) implies that the non-acquiring spouse may dispose of one-half of the quasi-community property, which is not current law. In fact, there are serious constitutional problems to that. We suggest a rewrite of (c) and the addition of a new Section 5050 to deal

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with quasi-community property issues. We have derived the new language from that of Professor Kasner in Memorandum 91-19, with a few minor alterations.

Team 2 also had problems with the wording of (d) of that section. As written, it was not very clear. We have a suggested revision, followed by an alternate which is your §5030, rewritten to reflect the suggestion at the end of the Staff Note at the top of page 8. The comment to your 5030 is a bit misleading as the case law allows such nonprobate transfers if the nonconsenting spouse does not act to void the gift. We believe the correct analysis is that in the first paragraph of the Staff Note. It would probably be better to revise the language of the statute still further. Team 2 believes there is no need to have the same thought in two places. We recognize that there are some differences in the two provisions as the Alternate allows a nonprobate transfer to the surviving spouse without consent and that is not in either version of (d).

Our §5012 is a restatement of your §5002. The Comment to your §5002 misunderstands who may have the right to designate the beneficiary of life insurance. While it may be the insured, most contracts other than group term insurance grant the right to name a beneficiary to the owner (who may not be the insured).

Our §5013 is a rewrite of your §5003 to remove the most offensive provisions of it. We could not understand why you would want to make the law of nonprobate transfers so difficult and expensive for surviving spouses by requiring court orders where they are not now required. Current post-MacDonald practice is for the I.R.A. account holder to require the surviving spouse to sign a simple sheet of paper either consenting to the beneficiary designation or claiming his or her half. It is simple and uncomplicated. We see no reason to make things more complicated. Having gutted the protective provisions, we then wondered if this section is necessary or desirable. The prior section is probably enough protection. Currently the system works precisely because the holder can be held potentially liable for wrongful payment. We like that result. It gives the holders an incentive to comply with the law. Most holders have their own lawyers. We do not believe they need additional protection at the expense of the general public.

We rewrote Section 5014 [your §5020] to try to phrase the rules more positively and to make it clear that the terms of the instrument cannot abrogate controlling law. I am not happy with this rewritten provision for two reasons: (1) Do we really need a statement that the law controls over an instrument? and (2) It is still not as clear as the comment to the section. In any future rewrites, we believe the word "contrary" should be avoided as the area of conflict may be ambiguous or impliedly inconsistent without being contrary.

Section 5016 is a restatement of your §5021, but there was strong sentiment on Team 2 for deleting this section entirely as it is redundant. Its essence is already in §5013 (your §5003).

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We tried to separate into the new Chapter 3 only those provisions that applied only to nonprobate transfers of community property. We then rearranged them because it seemed the provisions of our earlier sections are needed to fully understand the significance of some of the provisions of the later ones. We are merely suggesting this order and do not have a strong commitment to it.

Throughout this section we repeatedly encountered difficulty with the term "person" when "spouse" was meant and with differentiating which spouse was the subject of the provision. We have rewritten in the hopes of adding clarity, but recognize there is still much more that could be done.

Our §5020 is your §5150 with minor modifications. We suggest more major surgery be done to this section as we strongly dislike (b)'s implication that the nonconsenting spouse may only claim his or her community interest through a court order. We believe these sections should be self-executing, as we said earlier in the discussion of §5013. If a court order is going to be required, why not just use the probate or spousal property petition provisions?

Our §5021 is derived from your §5151. We think we understood what was intended and tried to redraft to clarify; however, there was sufficient ambiguity that we are not sure if our draft is what you intended.

Our §5030 is your §5022(a). We believe that your §5022(b) should be in the Civil Code where it will be readily seen by family law practitioners and have suggested that at the end of our draft. We believe the comments here and to our §5031 (your §5131) should cross-reference the Civil Code transmutation statutes and the comments to the Civil Code transmutation statutes should cross-reference to this Chapter.

Section 5031 (your §5131) is not substantially changed. While we believe it may be advisable to put this same language in the Civil Code, we also felt there was benefit to having it here.

Section 5032 (your §5132) has been extensively rewritten. While Team 2 could not reach a consensus on this issue at our meeting on May 31, 1991, we did reach a consensus at our most recent meeting. The Team believes the "Halbach approach" has some of the elements of a revival of the terminal interest rule, but is more akin to a forced heirship gift to the surviving spouse. While it has the virtue of simplicity, it also has elements of unfairness. Because of that latter issue, Team 2 mustered only a minority vote for the Halbach approach. Team 2 believes the "Kasner approach" is more consistent with the overall community property rights of spouses. Team 2 believes that the reasonable expectation of a spouse who grants a consent to a nonprobate transfer is that the property will pass in the manner consented to. Nevertheless, Team 2 recognizes that most spouses would leave their

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interest to the discretion of the surviving spouse if asked. Therefore, Team 2 added language (in new (c)) to the section to allow the original consent to authorize changes by the surviving spouse. If this provision were in the law, we would anticipate that most forms of consent would include this option as it makes things simpler for the asset holder in the long run.

Team 2 would like to point out that the second paragraph to the Comment to your § 5132 is incorrect as (b) is inconsistent with your § 5140.

Team 2 rewrote (c) of §5040 (your §5140) and added a new (d) because existing (c) was inconsistent with the decisions of the team on §5032.

Team 2 also extensively changed §5041 (your §5141). Team 2 was concerned that the requirement of delivery prior to death would effectively preclude deathbed transfers. Team 2 believed there was no detriment to delaying the required time to delivery to a date prior to payout or transfer. This was the position of the A.B.A. in its study of "blockbuster" wills, and a position we preferred.

Team 2 was also concerned that the requirement of delivery to both the spouse and the asset holder would provide problems of proof if one had received the notice of revocation and the other had not. We were particularly concerned with the incentive of the spouse to conceal the existence of notice in order to defeat the change. Thus, we added a presumption (which we assume to be rebuttable) that there was delivery to the spouse if there was delivery to the asset holder. We did not add the converse presumption, out of some concern that the asset holder needs to have actual notice of revocation in order to be affected.

Section 5042 (your §5142) was rewritten to provide that revocation of consent makes the nonprobate transfer revert to the same status as a transfer in which no consent was ever given. We thought this simpler and more internally consistent than the earlier draft.

Team 2 added new Section 5050 to deal with the issues of consent to nonprobate transfers of community property. Team 2 derived the language from the suggestions of Professor Kasner in Memorandum 91-19. We believe this is the simplest and fairest manner of dealing with quasi-community property nonprobate transfers.

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I am a member of Team 2 and will be at the next meeting of the Commission on Friday, July 26, 1991, if additional discussion or clarification of our views is desired.

Sincerely,

A handwritten signature in black ink, appearing to read "Valerie J. Merritt". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Valerie J. Merritt
Team Captain

VJM:gjm

cc: Members of Team 2
Members of Executive Committee

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CHAPTER 1. DEFINITIONS AND RULES OF CONSTRUCTION

§ 5000. Application of definitions and rules of construction

5000. Unless the provision or context otherwise requires, the definitions and rules of construction in this article govern the construction of this chapter.

§ 5001. Asset Holder

5001. "Asset holder" means a person or entity holding property under a written instrument described in Section 5003.

§ 5002. Joinder

5002. "Joinder" means joint action by both spouses or a signature of both spouses is found on the same written instrument described in Section 5003.

§ 5003. Nonprobate transfer

5003. (a) "Nonprobate transfer" means a provision for nonprobate transfer effective on death in a written instrument described in this Section 5003.

(b) A provision for a nonprobate transfer effective on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan,, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is not invalid because the instrument does not comply with the requirements for execution of a will, and this code does not invalidate the instrument.

(c) Included within subdivision (b) are the following:

(1) A written provision that money or other benefits due to, controlled by, or owned by a decedent before death shall be paid after the decedent's death to a person whom the defendant designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(2) A written provision that money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand.

(3) A written provision that any property controlled by or owned by the decedent before death that is the subject of the instrument shall pass to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(d) Nothing in this section limits the rights of creditors under any other law.

CHAPTER 2. GENERAL PROVISIONS FOR NONPROBATE TRANSFERS.

§ 5010. Transitional provision

5010. This part applies to a nonprobate transfer on the death of a person who dies on or after January 1, 1993.

§ 5011. Property subject to nonprobate transfer

5011. Except as otherwise provided by statute, a provision for a nonprobate transfer effective on death in a written instrument described in Section 5003 may dispose of the following property:

(a) The transferor's separate property.

(b) The one-half of the community property that belongs to the transferor under Section 100.

(c) The transferor's quasi-community property, subject however, to Section 5050 below.

(d) If the surviving spouse joins in, or gives written consent to, the provision, the one-half of the community property and of the transferor's quasi-community property that belongs to the transferor's surviving spouse under Sections 100 and 101.

[Alternate: A person may not make a nonprobate transfer of the other spouse's interest in community property other than to the surviving spouse without the joinder or written consent of the surviving spouse.]

§ 5012. Limitation on authority to make nonprobate transfer

5012. Nothing in this part requires an asset holder holding property under a written instrument described in Section 5003 to receive, or to transfer property in compliance with, a provision for a nonprobate transfer effective on death executed by a person who has an interest in the property if either (i) the person is not authorized by the terms of the written instrument

to make a transfer of the property, or (ii) the provision does not otherwise satisfy the terms of the written instrument.

§ 5013. Protection of asset holder

5013. (a) An asset holder holding property under a written instrument described in Section 5003 may transfer the property in compliance with a provision for a nonprobate transfer effective on death that satisfies the terms of the written instrument.

(b) The protection provided by this section has no bearing on the rights of the transferor and the surviving spouse of the transferor in disputes between themselves or their successors concerning the beneficial ownership of the property held by the asset holder.

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

§ 5014. Controlling provision of transfer, consent, instrument, or law

5014. A provision of this part, otherwise applicable to a nonprobate transfer of property, is subject to all of the following:

(a) An express expression of intent of the parties in the nonprobate transfer or in a written joinder or consent to the nonprobate transfer controls.

(b) The terms of the written instrument under which the nonprobate transfer is made control.

(c) State or federal law governs the written instrument under which the nonprobate transfer is made, and may not be abrogated by this part.

§ 5016. Governing provisions for married persons

5016. A provision of this part concerning rights between married persons is relevant only to controversies between the persons and their successors and has no bearing on the obligation of an asset holder to hold and transfer the property in the manner required by the terms of the written instrument under which nonprobate transfer of the property is made.

CHAPTER 3. NONPROBATE TRANSFERS OF COMMUNITY PROPERTY

Article 1. Nonprobate Transfer without Joinder or Consent

§ 5020. Effect of transfer

5020. (a) A nonprobate transfer of community property by a person without the joinder or written consent of the person's spouse is voidable as to the one-half interest of the person's spouse.

(b) A court order pursuant to subdivision (a) shall set aside the nonprobate transfer of community property as to the one-half interest of the person's spouse, subject to such terms and conditions or other remedy as appears equitable under the circumstances of the case, taking into account the rights of all the parties.

(c) Nothing in this section affects any remedy the person's spouse may have against the person's estate for a nonprobate transfer of community property made without the joinder or written consent of the person's spouse.

§ 5021. Right of nonconsenting spouse in community property

5021. A nonprobate transfer of community property made without the joinder or written consent of a spouse does not affect the right of the nonconsenting spouse to make a disposition at death of the nonconsenting spouse's one-half interest in the community property by testate or intestate succession or by nonprobate transfer.

Article 2. Joinder or Consent to Nonprobate Transfer

§ 5030. Waiver of rights in community property

5030. Nothing in this chapter limits the effect of a person's waiver of rights in community property under Chapter 1 (commencing with Section 140) of Part 3 of Division 2.

§ 5031. Effect of joinder or written consent

5031. (a) Joinder or written consent of a spouse to a provision for a nonprobate transfer of community property is a nonprobate transfer of the consenting spouse's one-half interest in the community property.

(b) Joinder or written consent of a spouse to a nonprobate transfer of community property is not a transmutation

of the consenting spouse's one-half interest in the community property into separate property of the other spouse. Nothing in this chapter affects a joinder or written consent that satisfies Section 5110.710 of the Civil Code; such a joinder or consent is a transmutation and is governed by the law applicable to transmutations and not by this chapter.

§ 5032. Effect of change in terms of nonprobate transfer

5032. If after a person has joined in or given written consent to a nonprobate transfer of community property, the consenting person's spouse, without the person's joinder or written consent, revokes the nonprobate transfer, names a different beneficiary, or elects a different benefit or payment option:

(a) If done during the lifetimes of the spouses, the change in terms revokes the person's joinder or consent to the nonprobate transfer and is effective only as to the one-half interest of the consenting person's spouse in the community property.

(b) If done after the consenting spouse's death, the change in terms is effective as to the interest of the surviving spouse, but the interest of the deceased spouse in the community property shall be transferred in accordance with the provisions of the nonprobate transfer to which the predeceased spouse consented.

(c) Notwithstanding subparagraph (b) of this Section, if the terms of the consent to the nonprobate transfer authorize the transferor to make changes after the death of the consenting spouse, then the interest of the deceased consenting spouse in the community property shall be deemed to be transferred to the surviving transferor spouse.

Article 3. Revocation of Joinder or Consent

§ 5040. Revocability of joinder or written consent

5040. (a) Joinder or written consent of a person to a nonprobate transfer of community property is revocable during the marriage.

(b) On termination of the marriage by dissolution, the joinder or written consent is revocable and the community property is subject to division under Section 4800 of the Civil Code or other order within the jurisdiction of the court.

(c) On death of the transferor spouse, the joinder or written consent is irrevocable.

(d) On death of the consenting spouse, the joinder or written consent is governed by Section 5123 above.

§ 5041. Form and delivery of revocation

5041. Revocation of joinder or written consent of a person to a nonprobate transfer of community property is not effective unless made in writing and delivered to both the person's spouse and any asset holder holding the property prior to the compliance by the asset holder with the terms of the nonprobate transfer. If delivery is made to the asset holder, it shall be presumed that it was also made to the other spouse.

§ 5042. Effect of revocation

5042. On revocation of joinder or written consent of a spouse to a nonprobate transfer of community property, the property will pass in the same manner as if the consent had never been given.

CHAPTER 4. NONPROBATE TRANSFERS OF QUASI-COMMUNITY PROPERTY

§5050. Nonprobate Transfers of Quasi-Community Property

5050. For the purposes of this part, quasi-community property as defined under Section 66 of this code shall be treated in the same manner as community property if the acquiring spouse is the first spouse to die.

CONFORMING CHANGES TO OTHER CODES

Civil Code § 5110.710 or nearby

(b) A waiver of a right to a joint and survivor annuity or survivor's benefits under the federal Retirement Equity Act of 1984 is not a transmutation of the community property rights of the person executing the waiver.

(b) Joinder or written consent of a spouse to a nonprobate transfer of community property is not a transmutation of the consenting spouse's one-half interest in the community property into separate property of the other spouse. Nothing in this chapter affects a joinder or written consent that satisfies Section 5110.710 of the Civil Code; such a joinder or consent is a transmutation and is governed by the law applicable to transmutations and not by this chapter.