THE RUBIC'S CUBE OF MARITAL PROPERTY RIGHTS IN AN IRA

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The four fact patterns discussed below apply to an Intact Marriage including if death occurs after filing a Petition for Dissolution of Marriage but before Judgment Terminating Status of Marriage has been entered.

The general rule is that upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent. (Probate Code *§100, subd. (a)*.) Each spouse has the right of testamentary disposition over his or her half of the community property. *Tyre v. Aetna Life Ins. Co.* (1960) 54 Cal.2d 399, 404-405, 6 Cal. Rptr. 13, 353 P.2d 725.

1. Husband has an IRA with $1 million, all community property. Wife's community interest is 50% of that amount. Assume, without Wife's consent, Husband designates as his beneficiary his daughter from a prior marriage and fails to list Wife as a beneficiary of the IRA.

If Husband dies first, the IRA is a non-probate asset that passes by way of his beneficiary designation to his daughter.

However, at his death, Wife has the right to a proceeding to set aside wife's community property share of Husband's nonprobate transfer to his daughter, based on his giving away Wife's share without her consent. Probate Code §5021.

The Law Revision comment to this statute clarifies that the order may provide for recovery of the value of the property rather than the particular item, or aggregate property received by a beneficiary instead of imposing a division by item. It may be proper, for example, and without limitation, simply to allow the surviving spouse, instead of or in addition to proceeding against the beneficiary of the nonprobate asset, to proceed against the decedent's estate for an offset for the value of the property transferred out of the share of the decedent, or to give the surviving spouse a right of reimbursement.

2. Same facts as in #1 but Wife predeceases Husband.

If Wife dies first, her 1/2 of Husband's IRA becomes a probate asset in her estate. Probate Code§ 5020 provides: *A provision for a nonprobate transfer of community property on death executed by a married person without the written consent of the person's spouse (1) is not effective as to the nonconsenting spouse's interest in the property and (2) does not affect the nonconsenting spouse's disposition on death of the nonconsenting spouse's interest in the community property by will, intestate succession, or nonprobate transfer.*

The Law Revision Commission comment notes that "Section 5020 does not affect the principle that a holder of property may transfer the property as specified in the instrument. Probate Code Section 5003 (protection of holder of property). But the actions of the holder do not affect rights between the spouses and their successors. See Probate Section 5012 (community property rights independent of transfer obligation)."

See Miramontes v. Lizarraga Preciado (2004) 118 Cal. App. 4th 750; 13 Cal. Rptr. 3d 240; *Estate of Wilson* (1986) 183 Cal. App. 3d 67, 68-69, 227 Cal. Rptr. 794.

3. Wife predeceases Husband but his $1 million is in his 401(k) Plan, a community property asset. Is Wife's estate entitled to a portion of Husband's ERISA qualified 401(k) Plan?

The answer is no. In *Ablamis v. Roper* (1991) 937 F.2d 1450, the 9th Circuit held that a wife who dies while her husband is still living may not leave half of current or future pension benefits to a third party in her will if the employee's pension interests are covered by ERISA. This holding was approved by the USCT in *Boggs v. Boggs* (1997) 520 U.S. 833, which held that ERISA's pre-emption over Louisiana state probate laws not only defeated the sons entitlement to Dad's undistributed ERISA retirement based on their Mom's will, but also precluded the sons from pursuing a claim of constructive trust against Dad's new wife who received the retirement assets at Dad's later death.

Thus federal law appears to require that state Probate law treat an undistributed ERISA retirement asset as if it were in "joint tenancy." Does a community property estate then require equal assets in the aggregate? It appears the recent case *Miramontes v. Lizarraga Preciado* (2004) 118 Cal. App. 4th 750 which upheld the old rule that a surviving Wife was entitled to her one-half of the community property funds in each of the pay-on-death accounts the deceased Husband had established for his relatives, notwithstanding Wife's previous receipt of more than one-half of the community estate by virtue of joint tenancy assets.

4. If the $1 million from the 401(k) Plan has been rolled into an IRA before the Wife died, can Wife's estate claim interest in the rollover IRA?

The answer here is probably. The debate over this question was not decided in the *Boggs* decision. In holding that the sons could not have a testamentary interest in benefits that were undistributed at the time of their mother's death, the USCT specifically clarified that the case did not present the question of whether ERISA would permit a nonparticipant spouse to obtain a devisable community property interest in benefits paid out (i.e., rolled into an IRA) during the existence of the community between the participant and that spouse.

Following *Boggs*, the 9th Circuit joined with 5 of the 6 federal appeals courts which decided that issue to hold that ERISA does **not** prohibit assignment of benefits once those benefits are distributed from the Plan. *Wright v. Riveland* (9th Cir. 2000) 219 F.3d 9095. See also *Hoult v. Hoult* (1st Cir. 2004) 373 F.3d 47; *Robbins v. DeBuono* (2nd Cir. 2000) 218 F.3d 197; *Guidry v. Sheet Metal Workers* (10th Cir. 1994) 39 F.3d 1078; *Trucking Employees v. Colville* (3rd Cir. 1994) 16 F.3d 52l. Under this holding, the funds in a rollover IRA (an instrument under IRC §408) are no longer subject to the pre-emption of ERISA's nonassignability clause and therefore should be subject to community property rules.

See *In re Marriage of Powers* (1990) 218 Cal.App.3d 626 for an example of testamentary rights of a nonparticipant spouse in California under a benefit plan not subject to ERISA.

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