

## Long Division

By Mitchell A. Jacobs and Tam B. Nguyen

As divorce cases tend to get more complicated, obtaining a final judgment dissolving the marriage is prolonged. Family Code Section 2337 permits the parties to sever for early adjudication the issue of dissolution of marriage (commonly called bifurcation of marital status) and reserve the court's jurisdiction to later determine all other pending issues in the case, including spousal support, division of property and attorney fees.

Prior to allowing bifurcation of marital status, several conditions are imposed by the court. Until recently, these conditions were discretionary. Several significant amendments were made to Section 2337, which became effective Jan. 1, 2008. These amendments now set forth both discretionary and mandatory conditions imposed by the court on bifurcation of marital status. The amendments to Section 2337, which were influenced by two major changes in the law, were intended to afford both parties greater protection, as well as avoid serious and often unintended consequences to the preservation of the community wealth if one or both parties die before the division can be completed as a result of the termination of marital status in advance of the division of community property.

The first change that necessitated the amendment to Family Code Section 2337 occurred when the Legislature added Probate Code Section 5600 in 2002. This important statute established the rule that a nonprobate transfer, as defined in Probate Code Section 5000, from a transferor to a transferor's former spouse before or during marriage are automatically revoked at termination of marital status unless: the nonprobate transfer is not subject to revocation by the transferor at the time of the transferor's death; there is clear and convincing evidence that the transferor intended to preserve the nonprobate transfer to the former spouse; or there is an order from the court.

The addition of Probate Code Section 5600 required amendments to Family Code Section 2337 in order to prevent the inadvertent loss of property that might occur in the event that automatic revocation of a spousal beneficiary would be triggered if the marital status is terminated and one spouse dies before the asset has been divided.

The second change, which also occurred in 2002, happened when California adopted the philosophy that during the divorce action, no spouse should have to keep the other spouse as a designated survivor or beneficiary to 100 percent of every asset

within the community or separate estates of the parties. Family Code Section 2040 was amended to allow the removal of a spousal beneficiary designation after the filing of the petition of dissolution of marriage.

A change in Family Code Section 2337 was needed to ensure that the surviving spouse did not lose his or her one-half community property interest in an asset if the other party had changed the beneficiary designation of a nonprobate transfer or revoked or changed the beneficiary of a trust.

The first significant amendments to Family Code Section 2337 are where language was added to subsection(c)(2) to require the requesting party to demonstrate an ability to pay for the health insurance for the other party and any minor children if coverage is not available.

Although prior law required the party with health insurance to maintain it for the other party and any minor children so long as the party was eligible to do so, the revisions provide that if the health insurance cannot be continued, then the party must demonstrate an ability to pay health and medical costs for dependents to the extent these would have been covered under the existing insurance.

However, as phrased in the statute, this condition could have overreaching impact, such that if the party who had the health insurance cannot demonstrate the ability to pay it for the dependant party, due to, for example, a catastrophic illness or injury, the court's power to deny a bifurcation of marital status would be subject to scrutiny.

The new language added to Section 2337 also requires the requesting party to pay the medical care costs incurred by the other spouse that would have been paid by the existing medical coverage if comparable coverage is not available.

Second, language was added to subsection(c)(5) to require the requesting party to indemnify and hold the other party harmless from any adverse consequences to the other party if the bifurcation results in the loss of the other party's rights with respect to deferred compensation benefits under any plan, fund, or arrangement, or to any elections or options associated therewith until a judgment has been entered on all remaining issues and has become final. The amendments to subsection(c)(5) serve to broaden the coverage allowed for the other party from pensions to include deferred compensation.

Third, the entire discretionary language under subsection(c)(7)(A) was added to allow the court to order a party to maintain the other party as beneficiary of a nonprobate transfer, as described in Section 5000

of the Probate Code, for up to one-half of or, upon a showing of good cause, for all of a nonprobate transfer asset until judgment has been entered with respect to the community ownership of that asset, and until the other party's interest has been distributed to him or her.

The addition of subsection(c)(7)(A) preserves the former spouse's interest in all nonprobate transfer assets when the marital status is terminated early. Section(c)(7)(A) essentially requires a revoking spouse to maintain designation of the former spouse as beneficiary of nonprobate transfers, such as insurance policies, promissory notes, wills, pension plan, retirement plan, Individual Retirement Account, etc., for up to one-half of the asset (or all of the asset, if good cause shown) until judgment is entered with respect to the community ownership of that asset and the former spouse's assets distributed to him/her.

Subsection (c)(7)(B) lists exclusions for which the court may not order the beneficiary designation maintained, such as a nonprobate transfer as defined under Probate Code Section 5000 that was acquired by gift, descent, or devise, or an irrevocable trust.

Fourth, the entire subsection(c)(8) was added, which allows the court to order a transfer of one-half (or all upon good cause) of the community interest in an IRA or annuity to a separate IRA for the former spouse, such that if the revoking spouse were to pass away, the former spouse can still defer the IRA distribution.

Fifth, the entire discretionary language in subsection(c)(9) was added. This subsection allows the court to order the revoking spouse to provide a security interest to make sure that if the requesting party passes away, the surviving spouse's interest will be protected and reaching those interests will not be made unduly burdensome for the surviving spouse.

Under this new section, the court can order the requesting spouse to secure an interest in an asset by several methods: post a bond; have a Qualified Domestic Relations Order prepared; create a trust; make other arrangements for appropriate security; or if a retirement plan is not subject to payment of survivor benefits, then the requesting spouse could be required to pay and to post adequate security for the payment of any survivor benefits the surviving spouse would have been entitled to if the bifurcation had not occurred.

Finally, several mandatory conditions were added under subsection(d) regarding retirement. Prior to, or simultaneously with, entry of judgment granting dissolution of the status of the marriage, the court requires all the following conditions be met: The requesting party's retirement or pension plan shall be joined as a party to the proceeding for dissolution, unless



joinder is precluded or made unnecessary; to preserve the claims of each spouse in all retirement plan benefits upon entry of judgment granting a dissolution of the status of the marriage, the court shall enter one of the following in connection with the judgment for each retirement plan in which either party is a participant: an order pursuant to Family Code Section 2610 disposing of each party's interest in retirement plan benefits, or an interim order preserving the nonemployee party's right to retirement plan benefits.

The addition of subsection(d) requires the requesting party make the retirement plan a party to the case. It is necessary to alert the retirement plan to a claim of interest by the nonemployee spouse since that is the first essential step to preserving benefits. Language is also provided in the statute to instruct how to make claims. Subsection(d) also requires the requesting party to serve the order, interim order or attachment entered under subsection(d), along with a copy of the status only dissolution judgment on the retirement or pension plan administrator.

Although amendments to Section 2337 were intended to afford both parties greater protection, the burden put on the request-

ing party for a bifurcation of marital status is quite onerous and in some cases nearly impossible to meet when considering all of the conditions imposed by the court with which the requesting party is required to comply under Section 2337. Furthermore, because the status revisions are so new, it is not clear how the courts will interpret the conditions imposed on the requesting party.

An attorney representing a client who is seeking to have early marital status bifurcation must fully and competently disclose to their client all the conditions under Section 2337 and their ramifications before the client decides to proceed. Not doing so may subject the client to unwanted conditions, which may not be satisfied. In light of these conditions, it may be better to hold off on requesting a bifurcation of marital status, unless the requesting party is planning on remarrying right away.

**Mitchell A. Jacobs** of the Law Office of Mitchell A. Jacobs in Los Angeles is a certified family law specialist who limits his practice to marital dissolution and other family law matters. **Tam B. Nguyen** is an associate with the Law Office of Mitchell A. Jacobs in Los Angeles.



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