

## RESOLUTION 01-04-2014

### DIGEST

#### Family Law: Automatic Restraining Order on Assets Held by Employee Benefit Plan

Amends Family Code section 2060 to include in the Summons (Joinder) an automatic restraining order to protect community assets held by an employee benefit plan.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Family Code section 2060 to include in the Summons (Joinder) an automatic restraining order to protect community assets held by an employee benefit plan. This resolution should be approved in principle because it places an automatic restriction on a pension plan so that it cannot be “emptied out” by a spouse acting in bad faith.

Currently, both parties are enjoined from disposing of the community property assets, such as pension plan funds, but these restrictions apply only to the parties. A pension plan is not enjoined from, nor held accountable in any way for allowing one party to withdraw all funds on account with that pension plan since the restrictions on the parties does not extend to any other party or entity. This proposal would not only put the pension plan on notice that a dissolution has commenced, but also require that the pension plan not allow one party to withdraw all funds on account.

The proposed resolution also limits a plan from commencing and possibly continuing payments that have commenced, or are scheduled to commence. However, the proposed language also allows an exception for activities taken in “the usual course of business.” While the five (5) business day notice period may be short, the overall goal of the resolution is laudable, and the proposed language accomplishes the purpose of the resolution by effectively precluding the parties from taking action prior to the commencement of the distribution.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 2060 to read as follows:

#### § 2060

- 1 (a) Upon written application by a party, the clerk shall enter an order joining as a party to
- 2 the proceeding any employee benefit plan in which either party to the proceeding claims an
- 3 interest that is or may be subject to disposition by the court.
- 4 (b) An order or judgment in the proceeding is not enforceable against an employee
- 5 benefit plan unless the plan has been joined as a party to the proceeding.
- 6 (c) The summons (joinder) shall contain a temporary restraining order restraining the
- 7 employee benefit plan from transferring, encumbering, hypothecating, concealing, or in any way
- 8 disposing of any property held in the plan by either party to the action, except in the usual course
- 9 of business, and requiring the plan to notify the other party of any such distributions at least five
- 10 business days before making any such distributions.

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** Bar Association of San Francisco

### **STATEMENT OF REASONS**

The Problem: Section 2040 of the Family Code provides for automatic, temporary restraining orders (“ATROs”) to be issued with every summons, to restrain the parties to the action and protect community assets. Section 2060 et seq. provides for joinder of employee benefit plans to permit division of community property retirement assets. The summons that issues with joinder does not include any ATROs. Employee benefit plans may thus distribute funds out to a party, even when they have been joined, thus defeating the goal of marshalling and preserving community assets while a case is pending, to ensure an equal division of community property.

The Solution: This resolution seeks to close this loophole by adding ATROs to the summons issued on joinder of employee benefit plans. Routine plan payments that are in the ordinary course of business are permitted, with notice to the other party.

### **LEGISLATIVE HISTORY**

Not known.

### **IMPACT STATEMENT**

The proposed resolution does not affect any other law, statute or rule.

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## **SECTION COMMENTS TO RESOLUTION 01-04-2014**

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### **FAMILY LAW SECTION OF THE STATE BAR OF CALIFORNIA**

**APPROVE IN PRINCIPLE:** The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) agrees that marshaling and preserving the community estate pending final distribution may include limitations or restrictions on the distribution of employee benefit plans. However, FLEXCOM believes that the joinder of a plan to a marital dissolution action may not provide the Court the jurisdiction to “automatically” limit the Plan administrator’s obligations when the Plan is already in pay status when joined. FLEXCOM recognizes that the “the usual course of business”

exception may resolve the confusion, but recommends clarification of that issue going forward.

**Disclaimer:**

**This position is only that of the FAMILY LAW SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California. Membership in the FAMILY LAW SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.**

