

Third Supplement to Memorandum 86-41

Subject: Study L-1030 - Estate and Trust Code (Distribution Without Administration)

In Memorandum 86-41, the staff proposes that two suggestions forwarded by Assembly Member Harris be given study by the staff in the future.

The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association has sent comments on these suggestions, expressing the view that the suggestions will require careful study to be sure that they do not have unanticipated effects and making a number of suggestions that should be considered in making a staff study of the suggestions. In addition, the Executive Committee indicates some reservations concerning whether the suggestions should be adopted. A copy of the letter from the Executive Committee is attached to this supplement.

The staff will take the suggestions into account when the staff studies of the suggestions are made.

Respectfully submitted,

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May 9, 1986

California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, California 94306

Re: Memorandum 86-41  
Study L-1030 Estate and Trust Code  
(Distribution without Administration -  
California Transfer-On-Death Form;  
Community Property Held in Joint Tenancy)

Dear Commissioners:

The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association submits the following comment on Memorandum 86-39 which is scheduled for discussion at your May 15-16 meeting.

A. California Statutory Transfer-On-Death (T.O.D.)  
Form.

At its meeting on May 6, 1986, the Executive Committee of the Probate and Trust Law Section reviewed the suggestion in Memorandum 86-41 for a proposed California statutory Transfer-On-Death Form.

The Executive Committee has major reservations regarding the advisability of creating a new Transfer-On-Death Form, which may be unwittingly used by members of the public without understanding the impact upon their estate plan, the dispositive provisions of a Will or trust, or the tax consequences of the document.

The Committee also questions whether the general availability of this form to members of the public might cause an increase in the number of fraudulent transfers. Persons attempting to unduly influence elderly or unsuspecting individuals would have ready access to forms which would allow the perpetrators to receive the property without

having to give notice to the beneficiaries of a Will or the heirs at law. In addition, there are major questions regarding the treatment of creditors if the real property does not pass thorough probate.

In California many individuals have estate plans with Wills or trusts which set forth the disposition of property upon the death of that person. The ready availability of forms which might frustrate that disposition gives rise to a concern that a carefully constructed estate plan might be frustrated by the use of a T.O.D. form.

It is also common for most estate plans to have specific directions regarding the payment of expenses and of any death taxes. Commonly the death taxes are charged against the residue of the estate. The use of a T.O.D. form might cause a major asset of the estate to pass tax free outside of the estate plan, reducing the amount received by the residuary beneficiaries who would have to pay the death taxes.

Existing use of joint tenancy deeds already poses questions regarding the payment of creditors after the death of a joint tenant. If the property passing to the designated beneficiary under a T.O.D. directive is not subject to the debts of the decedent, the remaining beneficiaries, who may not be the same as the individuals receiving the property, may be responsible for those debts, possibly without recourse against the beneficiary of the T.O.D. directive.

In considering any legislation to create a statutory Transfer-On-Death form, the Executive Committee of the Los Angeles County Bar Association suggests that strong consideration be given to the foregoing concerns. In particular, protection should be afforded to elderly and infirm individuals, the rights of creditors should be considered, the dispositive provisions of existing Wills or trusts should be taken into account, and the tax implications should also be discussed.

#### B. Community Property Held in Joint Tenancy.

The Executive Committee also considered the proposal to have a statutory presumption that deeds in the name of "husband and wife as community property held in joint tenancy" pass title to the survivor independent of the Will of the decedent, and require the property to be treated as community property for both California and federal taxes.

The Executive Committee has a number of concerns regarding this proposal, and hopes that any proposed legislation will take into account the potential tax implications and the possible effect upon the community property interest of the surviving spouse.

The proposed legislation would provide that the property be treated as community property for federal taxes. However, Internal Revenue Code §2040(b) provides that marital property held by a husband and wife as joint tenants is "qualified joint tenancy property." Only one-half of the qualified joint tenancy property is included in the estate of the deceased spouse. Presumably only one-half of the qualified joint tenancy property receives a step up in basis under IRC §1014(b)(9), as only one-half of the property is included in the estate of the decedent. The Internal Revenue Service might contend that the proposed statute would create property which is subject to treatment under IRC §1014(b)(9) rather than IRC §1014(b)(6). The latter section provides that only the surviving spouse's one-half of community property receives an increased cost basis. There is no similar provision which provides that the surviving spouse's share of qualified joint interest property also receives an increased basis.

Many estate plans in California are prepared under the assumption that the one-half interest of a deceased spouse will pass in accordance with the provisions set forth in a Will. The proposed legislation would vest the property in the surviving spouse, and may frustrate the estate planning goals of husbands and wives who relied on the existing law. With the increased number of second and third marriages in California, the deceased spouse may not always wish to have his or her interest in community property pass outright to the surviving spouse.

In reviewing any proposed legislation, careful consideration should be given to the potential adverse federal income tax consequences of such a proposal, and also to the potential frustration of estate planning goals set forth in present or future Wills.

We trust that these comments will be useful in your work. If you require clarification on any points, please contact Michael J. Harrington, Hahn & Hahn, 301 East Colorado Blvd., Suite 900, Pasadena, California 91101, Telephone 818-796-9123.

Sincerely,

Executive Committee  
Probate and Trust Law Section

By   
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