Study H-603 January 9, 1997

First Supplement to Memorandum 96-87

Severance of Joint Tenancy by Dissolution of Marriage

INTRODUCTION

Additional research reveals that at least thirteen states already have statutes converting a marital joint tenancy into a tenancy in common by operation of law on dissolution or annulment of marriage (hereinafter divorce). There is, in fact, a marked trend in this direction, with eight of these statutes having been enacted since 1993. See *infra*.

These eight recently enacted statutes are modeled after Uniform Probate Code Section 2-804. Uniform Probate Code Section 2-804 provides for revocation, on divorce, of a disposition to a spouse in a will or will substitute, such as a revocable trust, an insurance or annuity policy, a pension or retirement benefit, an instrument creating a power of attorney, or a marital joint tenancy. See U.P.C. §§ 1-201, 2-804 (1993).

This supplement discusses statutes of California and other states that revoke a revocable disposition to a spouse on divorce. Such statutes include or are analogous to the severance of a marital joint tenancy on divorce, and provide additional support for the general policy justifying the reform proposed in Memorandum 96-87. Examination of these statutes also raises new questions related to subsidiary issues of implementation.

SUPPORT FOR GENERAL POLICY

General Policy Underlying Reform

Severance of a marital joint tenancy on divorce is justified by the common-sense assumption that a party will not wish a marital arrangement benefiting a spouse to survive divorce and will not understand the need to affirmatively revoke that arrangement. See discussion in Memorandum 96-87. This assumption expressly underlies Probate Code Section 6122's revocation on divorce of a

disposition to a spouse in a will. See *Tentative Recommendation Relating to Wills and Intestate Succession* 16 Cal. L. Revision Comm'n Reports 2301, 2325 (1982).

There is no logical reason why the policy assumption that underlies revocation on divorce of a disposition to a spouse in a will should not also apply to a disposition in a will substitute such as a revocable inter-vivos trust or a marital joint tenancy. This is the conclusion underlying Uniform Probate Code Section 2-804, which revokes a broad range of revocable dispositions to a spouse on divorce. See Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code,* 26 Real Prop. Prob. & Tr. J. 683, 689-701 (1992) ("The severance of spousal joint tenancies upon divorce merely applies the general principle […] that all revocable dispositions are presumptively revoked upon divorce.") These statutes "give effect to the average owner's presumed intent[.]" See McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 Brook. L. Rev. 1123, 1161-64 (Winter, 1993).

Specific Examples of Statutes Relying on General Policy

Uniform Probate Code Section 2-804 has been adopted by eight states in the last three years: Alaska, Arizona, Colorado, Hawaii, Montana, New Mexico, North Dakota, and South Dakota. See Alaska Stat. § 13.12.804; Ariz. Rev. Stat. Ann. § 14-2804 (1995); Colo. Rev. Stat. § 15-11-804 (1996); Haw. Rev. Stat. § 560:2-804 (1996); Mont. Code. Ann. § 72-2-814 (1993); N.M. Stat. Ann. § 45-2-804 (1995); N.D. Cent. Code § 30.1-10-04 (2-804) (1995); S.D. Codified Laws Ann. § 29A-2-804 (1996).

Five states have statutes that sever a marital joint tenancy on divorce, without affecting other interests: Connecticut, Michigan, Minnesota, Ohio, and Virginia. See Conn. Gen. Stat. § 47-14g (1995); Mich. Comp. Laws § 552.102 (1988); Minn. Stat. § 500.19 (1990); Ohio Rev. Code Ann. § 5302.20(c)(5) (1996); Va. Code Ann. §§ 6.1-125.4, 20-111 (Michie 1996).

Many states have statutes revoking other specific revocable dispositions to a spouse on divorce. For example, in California divorce revokes the designation of a spouse as attorney in fact (see Cal. Prob. Code §§ 3722, 4154, and 4727(e)) and revokes a revocable beneficiary designation for public employee retirement death benefits (see Cal. Govt. Code § 21492). In Ohio divorce revokes an inter-vivos trust benefiting a spouse (see Ohio Rev. Code Ann. § 1339.62 (1996)), and the designation of a spouse as an insurance policy beneficiary (see Ohio Rev. Code Ann. § 1339.63 (1996)).

All of these provisions share an implicit rationale, that a marital arrangement that depends on the character of the marital relationship is presumptively not intended to survive divorce. The broad acceptance of this general policy supports its application to marital joint tenancy.

Analogy to Tenancy by the Entirety

In addition to the statutes discussed *supra*, tenancy by the entirety law also provides support by analogy for severance of a marital joint tenancy on divorce.

Many states recognize tenancy by the entirety, a form of joint ownership with a right of survivorship. See Null, *Tenancy By The Entirety As An Asset Shield: An Unjustified Safe Haven For Delinquent Child Support Obligors*, 29 Val. U. L. Rev. 1057, 1081-1091 (1995) [hereinafter Null]. Tenancy by the entirety is similar to joint tenancy with two important differences – it is limited to co-ownership of real property between spouses, and a co-tenant by the entirety cannot unilaterally convey, partition, sever or, in many jurisdictions, encumber the co-tenant's interest in the property. *Id.*

Because tenancy by the entirety is limited to spouses, divorce typically severs survivorship, resulting in a tenancy in common. See, e.g., Mich. Comp. Laws § 552.102 (1996) (tenancy by entirety becomes tenancy in common on divorce, except as otherwise provided by divorce decree); but see Shepherd v. Shepherd, 336 So. 2d 497 (1976) (tenancy by entirety becomes joint tenancy on divorce). This is analogous to severance of a marital joint tenancy on divorce, because in both cases it can be assumed that a party would not want survivorship to continue beyond divorce. The analogy is not perfect however, as there are two additional policy grounds for severance on divorce of a tenancy by the entirety.

First, tenancy by the entirety is more fundamentally dependent on marital status than is marital joint tenancy. Having developed under English common law, at a time when married women had no separate legal identity, tenancy by the entirety provided a form of marital co-ownership consistent with the notion that husband and wife were a single legal person. See Null. Divorce severed survivorship because divorce sundered this unity of person. Severance of a tenancy by the entirety on divorce therefore depends, at least in part, on historical conceptions of the nature of gender and marital property.

Second, because in most jurisdictions neither co-tenant can unilaterally encumber or alienate the property, tenancy by the entirety offers much more complete protection against creditors than marital joint tenancy. Severance of a

tenancy by the entirety on divorce in part reflects a policy judgment that such strong protection is not appropriate outside of marriage. *Id.* at 1083 ("Society affords this benefit to the marital unit because of its high regard for family life and the public values derived from the institution of marriage.")

Despite these additional policy grounds for severance of a tenancy by the entirety on divorce, the analogy between severance of a tenancy by the entirety and severance of a marital joint tenancy on divorce is sufficient to lend support to the reform proposed in Memorandum 96-87.

REVIVAL ON REMARRIAGE TO A FORMER SPOUSE

In General

A will provision severed solely by operation of Probate Code Section 6122 is revived if the testator remarries the former spouse. See discussion in Memorandum 96-87. There is a similar revival rule in Uniform Probate Code Section 2-804 (see U.P.C. 2-804(f) ("[p]rovisions revoked solely by this section are revived by the divorced individual's remarriage to the former spouse or by a nullification of the divorce or annulment")), and in Probate Code Sections 4154 and 4727 (reviving a designation of a spousal attorney in fact designation).

In Memorandum 96-87 the staff recommended against a revival rule for severance of a marital joint tenancy. However, the use of a revival rule in so many analogous statutes justifies reconsidering that recommendation.

Rationale for Revival

Extrapolation of the general assumption underlying revocation of a disposition to a spouse on divorce clarifies the basis of the revival policy.

A party intending that a disposition to a spouse only exist during marriage would revoke the disposition on divorce if the party understood that it survives divorce. The party does not understand the effect of divorce on the disposition, therefore a statute revoking the disposition as a matter of law is required to protect the party's intention.

Remarriage to the former spouse restores the relationship that led to the creation of the disposition. The party should now have no objection to the disposition. In fact, because the party does not understand the effect of divorce on such a disposition, the party presumably believes the disposition still exists. Therefore revival of the disposition is required to protect the party's intention.

Just as the basic policy assumption underlying revocation of a will provision on divorce supports severance of a marital joint tenancy on divorce, so the rationale for revival on remarriage of a revoked will provision supports revival of a severed marital joint tenancy.

Remarriage Should not Revive a Disposition Revoked by Other Means

An important qualification of the revival rule is that it must not revive a disposition revoked by other means. If, for example, a party affirmatively revokes a will after divorce, remarriage to the party's former spouse should not revive that will. A party who affirmatively revokes a disposition clearly intends that it be revoked, and would not expect it to be revived on remarriage to a former spouse.

All of the statutes providing for revival on remarriage cited in this supplement are qualified in this way. See, e.g., Prob. Code § 6122(b) ("If any disposition or other provision of a will is revoked *solely* by this section, it is revived by the testator's remarriage to the former spouse.") (emphasis added).

Effect of Revival on Third Party

The principal concern underlying Memorandum 96-87's recommendation against revival of a joint tenancy severed by divorce is the potential injury to a third party who relies on the severance of a marital joint tenancy that is later revived by remarriage.

The potential for such injury is minimized by exempting a joint tenancy revoked by other means from revival on remarriage (as discussed *supra*). For example, the recorded transfer of a party's joint tenancy interest in real property is a separate basis for severance. See Civ. Code § 683.2(c). Therefore, remarriage would not revive a joint tenancy where one party has recorded a transfer of that party's interest in the real property.

However, even with this exemption there are instances where a third party could be injured by revival. For example, a transfer of a joint tenancy interest in real property that is not recorded pursuant to Civil Code Section § 683.2(c) does not sever a joint tenancy. Therefore remarriage of the former spouses after an unrecorded transfer would revive the joint tenancy. The transferee would then hold a tenancy in common interest subject to a right of survivorship in the nonsevering joint tenant. See Civ. Code § 683.2, Comment.

Also, the encumbrance of a joint tenancy interest does not sever a joint tenancy. Therefore, a creditor to a party who remarries a former spouse could find an encumbered tenancy in common interest transformed into an encumbered joint tenancy interest, subject to defeasance through operation of survivorship.

A straightforward approach to protecting a third party from the effects of revival on remarriage is to disallow revival where an interest in the severed property has been transferred or encumbered in the period between divorce and remarriage. This would entirely avoid third party reliance problems by exempting from revival any joint tenancy in which a third party has acquired an interest in the period between divorce and remarriage.

Conclusion

The policy rationale for revival on remarriage of a will provision revoked by divorce logically applies to a marital joint tenancy severed by divorce as well. Although revival has the potential to injure a third party who relies on a severance by divorce, this can be avoided by denying revival where an interest in the property has been transferred or encumbered.

Staff recommends that, subject to the qualifications discussed *supra*, remarriage to a former spouse should revive a joint tenancy severed by divorce. This could be accomplished by the following language:

> Except as otherwise provided in this subdivision, a joint tenancy severed by operation of this section is revived by the joint tenants' remarriage to each other. A joint tenancy is not revived if after dissolution or annulment of marriage but before remarriage either of the following occurs:
>
> (1) The property or an interest in the property is transferred or encumbered.
>
> (2) An event occurs sufficient to sever the joint tenancy had the joint tenancy not been severed by this section.
>
> **Comment.** With two exceptions, this subdivision revives a joint tenancy severed by this section on remarriage of the former joint tenants. A joint tenancy is not revived if, after dissolution or annulment of marriage but before remarriage, the property or an interest in the property is transferred or encumbered. Also, a joint tenancy is not revived if, after dissolution or annulment of marriage but before remarriage, an event occurs that would have severed the joint tenancy if the joint tenancy had not already been severed by this section. See, e.g., Civ. Code § 683.2.

Should Warning of Consequences of Divorce Include Other Spousal Dispositions Affected by Divorce?

Divorce revokes the designation of a spouse as attorney in fact (see Prob. Code §§ 3722, 4154, and 4727(e)), and as beneficiary to public employee retirement death benefits (see Govt. Code § 21492). There is no reason why Family Code Section 2024, which warns of the effect of divorce on a will, should not also warn of the effect of divorce on these spousal dispositions. Although it is outside the scope of this study, it makes sense to add such a warning to Section 2024, given that we are already proposing to amend it in order to warn of the effect of divorce on a marital joint tenancy. The relevant warning language would read:

> Dissolution or annulment of your marriage may automatically change a disposition made by your will to your former spouse, may automatically terminate your right of survivorship in marital property held jointly with your former spouse, may automatically revoke a power of attorney designating your spouse as your attorney in fact, and may automatically revoke your designation of a death benefit beneficiary under the Public Employee Retirement System.

Should Study be Broadened to Consider Other Will Substitutes?

The arguments that support revocation of a will provision, attorney in fact designation, or a marital joint tenancy on divorce also support revocation of other will substitutes not revoked by current California law, such as a revocable inter vivos trust or an insurance or annuity beneficiary designation.

Rather than protect a divorcing party's intention as to a revocable spousal disposition through piecemeal legislation, it may make sense to study the question more broadly. This is the approach taken in Uniform Probate Code Section 2-804, which attempts to apply the revocation on divorce policy to all will substitutes.

A broader study might also improve existing protections found in Probate Code Sections 3722, 4154, 4727(e), and 6122.

For example, in addition to revoking a disposition to a spouse on divorce, Uniform Probate Code Section 2-804 also revokes a disposition to a relative of a spouse. This avoids the situation where revoking a disposition to a spouse results instead in a disposition to the spouse's relative as an alternate beneficiary. See,

Uniform Probate Code § 2-804, Comment. If a party does not intend a disposition to a spouse to survive divorce, the party may not intend a disposition to a relative of a spouse to survive divorce.

Uniform Probate Code Section 2-804 also provides a comprehensive system of payor, creditor and innocent purchaser protection that might be preferable to a piecemeal approach to third party protection.

On the other hand, the goal of this study is to find a simple and quick solution to the problem posed by *Estate of Layton*. A broad study of the revocation of all revocable spousal dispositions on divorce would be neither simple nor quick.

Respectfully submitted,

Brian Hebert
Staff Counsel