Study H-603 April 25, 1997

First Supplement to Memorandum 97-18

Severance of Joint Tenancy by Dissolution of Marriage: Comments on Tentative Recommendation

We have received two additional letters regarding the Tentative Recommendation on *Severance of Joint Tenancy by Dissolution of Marriage* (February 1997).

Professor Carol Bruch, UC Davis Law School, writes in opposition to the proposal. See Exhibit pp. 1-2. She disagrees with the central assumption that an average divorcing party would intend to revoke a revocable disposition to a spouse.

The Executive Committee of the Estate Planning, Trust, and Probate Law Section, State Bar of California (hereinafter Executive Committee) writes in support of the proposal but suggests that it be expanded to affect other revocable spousal dispositions. See Exhibit pp. 3-6.

GENERAL POLICY ASSUMPTION

Intention of Average Divorcing Party

The proposed severance of a marital joint tenancy on dissolution or annulment of marriage (divorce) is based on the assumption that an average divorcing party would not intend a revocable disposition to a spouse to continue after divorce. This is the assumption underlying the rule that a disposition to a spouse in a will is revoked by divorce. This is also the implicit assumption underlying provisions revoking a revocable disposition to a spouse on divorce in other California law, statutes of other states, and the Uniform Probate Code.

The Executive Committee agrees with this policy assumption, believing that revocation of a revocable spousal disposition on divorce "reflects the likely intent — and perhaps belief — of the parties to the dissolution or annulment." See Exhibit p. 3.

Professor Bruch, however, contends that the assumption is incorrect. Based on her informal survey of friends, colleagues, and students, she believes that many divorcing parties, particularly where there are minor children or where the

marriage was a long one, intend to retain a former spouse as beneficiary or joint tenant because either "(1) this was the person who would end up raising the couple's children … and would need access to the money for that purpose, or (2) was someone for whom the divorced spouse still felt responsible." See Exhibit p. 1.

Discussion

Professor Bruch proposes that a joint tenancy not be severed on divorce unless other circumstances establish an intent to sever. Under this approach joint tenancy would be severed only if a decedent's estate introduces evidence that the decedent intended to alter the joint tenancy survivorship feature (such as including the asset in question in a larger estate plan.)

The staff opposes this suggestion. Such a rule would permit secret unilateral severance (by disposing of a joint tenancy asset in an unrecorded estate plan) and would invite litigation over the decedent's intentions. Furthermore, despite Professor Bruch's anecdotal evidence to the contrary, the staff believes that the average divorcing party intends the party's property to pass to the party's heirs or devisees on the party's death, not to a former spouse. This is the view of the other commentators and is consistent with the prevailing treatment of revocable spousal dispositions on divorce.

The staff recommends no change in the proposal. Those few parties who intend to pass their estate to a former spouse will be alerted by the warning printed on the petition and judgment forms and can easily act to reestablish a joint tenancy or disposition in a will.

Effect of Property Restraints

Professor Bruch also questions whether the automatic restraining orders that go into effect on commencement of an action for divorce are relevant to the proposal. These orders automatically restrain both parties from "transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life" during the pendency of an action for dissolution, annulment, or legal separation. See Fam. Code § 2040(b).

It isn't clear that such an order would restrain severance of a marital joint tenancy. Like a disposition in a will, survivorship is an expectancy rather than a vested property interest. Not only is survivorship contingent on survival, but it is also subject to unilateral destruction by a cotenant at any time. See In re Marriage of Hilke, 4 Cal. 4th 215, 841 P.2d 891, 14 Cal. Rptr. 2d 371 (1992) (Severance "theoretically affects the expectancy interest of the other joint tenant, but does not involve a diminution of his or her present vested interest.").

Even if severance of a marital joint tenancy is automatically restrained, this argues in favor of the proposed reform. Otherwise, a party who intended to sever a joint tenancy would be prevented from doing so, with adverse consequences if the party dies before the property is divided.

REVOKE OTHER SPOUSAL DISPOSITIONS

The Executive Committee recommends that the proposal be expanded to include other revocable spousal dispositions (see Exhibit p. 4):

> Life insurance, revocable *inter vivos* trusts and retirement benefits are customary components of the financial lives of most married Californians, whether or not they have, or believe they have, 'formal' estate plans. The exclusion of … these types of assets and contracts … from the proposed legislation would be a disservice to these Californians.
>
> Expansion of the law governing the severance or other revocation of spousal testamentary dispositions is an important step forward: therefore, the Executive Committee believes that the inclusion of other spousal testamentary dispositions, in addition to joint tenancies, to the proposed legislation or, at the very least, an expansive explanation of why they are excluded, is warranted.

See discussion, Memorandum 97-18, pp. 2-3.

LEGAL SEPARATION

The comments received also reflect on whether legal separation should revoke a marital joint tenancy. As discussed in Memorandum 97-18, legal separation does not terminate marital status, leaving intact certain incidents of marriage. This suggests that legally separating parties may not intend to revoke revocable spousal dispositions.

Professor Bruch doubts that the average party intends to revoke a revocable spousal disposition on divorce. To the extent that she is correct, it is even more

likely that a legally separating party would not intend to revoke a revocable spousal disposition.

The Executive Committee expressly agrees with the Commission that legal separation should not sever a marital joint tenancy. See Exhibit pp. 5-6.

EFFECT OF INVALID DIVORCE

The Executive Committee recommends that the proposal include a definition of divorce in order to clarify the effect of an invalid divorce under the proposal (see Exhibit p. 5):

> For purposes of this section, dissolution or annulment means any dissolution or annulment which would exclude the spouse as a surviving spouse within the meaning of Probate Code Section 78.

Probate Code Section 78 defines the effect of a valid or invalid divorce on a party's status as a surviving spouse. It includes language conditioning the effect of a divorce on whether the parties subsequently remarry each other. See Prob. Code § 78(a)-(b). Incorporation of this language into the definition of divorce in the proposal would have much the effect of a revival on remarriage provision — if the former spouses remarry each other, their earlier divorce would not be a "divorce" within the meaning of the statute and their joint tenancy would never have been severed.

The staff believes that the following changes capture most of the substance of Probate Code Section 78 regarding the effect of an invalid divorce, without creating an implied revival on remarriage provision:

> (a) Subject to the limitations of this section, a valid final judgment of dissolution or annulment of marriage severs a joint tenancy as between the parties to the dissolution or annulment. Legal separation is not dissolution for the purpose of this section.
>
> …
>
> **Comment**. An invalid judgment of dissolution or annulment of marriage does not sever a joint tenancy as between the parties to the dissolution or annulment. However, under the doctrine of equitable estoppel, a party who obtains, consents to, or acquiesces in an invalid judgment of dissolution or annulment of marriage may be barred from disputing the validity of that judgment in applying this section.

Because an apparently effective severance could later be invalidated as based on an invalid divorce, it is necessary to broaden the protections of third parties, by amending proposed subdivision (c):

> (c) ~~Severance by operation of this section does not affect~~ Nothing in this section affects the rights of a subsequent purchaser or encumbrancer for value in good faith who relies ~~and without~~ on an apparently effective severance by operation of this section or who lacks knowledge of ~~the~~ a severance by operation of this section.

Respectfully submitted,

Brian Hebert
Staff Counsel

Carol Bruch,4/9/97 11:58 AM,Jt ten severance 1

Date: Wed, 9 Apr 1997 14:58:46 +0300 (WET)
From: Carol Bruch <mscbruch@pluto.mscc.huji.ac.il>
To: addressee@clrc.ca.gov
Subject: Jt ten severance

Dear Nat,

Just looked at some materials my secretary forwarded to me here in Jerusalem, where I am on a Fulbright until late summer.

I have not seen the full proposal, and really don't have time for any detailed response, but I do want to say loud and clear that MANY DIVORCING PEOPLE FULLY INTEND TO KEEP THEIR SOON-TO-BE-FORMER SPOUSE AS A JOINT TENANT. At the time of the (unfortunately) successful proposal to strike spousal beneficiary designations as a matter of law upon divorce (but place a notice on the divorce judgments to alert people), I made an informal survey of divorced students, colleagues, friends and learned that a very large number of them (particularly where there were minor children or, alternatively, where the marriage had been a lengthy one) had kept their spouses on as beneficiaries or joint tenants ON PURPOSE.

Many attorneys ASSUMED that people just forgot to come back and change their wills, after they had told them they should do it after divorce. The divorced people to whom I spoke had forgotten nothing; they simply intended to retain the former spouse as a beneficiary or joint tenant because either (1) this was the person who would end up raising the couple's children if the person I spoke to died and would need access to the money for that purpose, or (2) was someone for whom the divorced spouse still felt responsible.

Not every divorcing person hates the other spouse. Many continue to care a great deal about that person's fortunes. I suppose I was alerted to this issue because I kept my joint tenancies and will unchanged when I divorced just after law school and it was precisely because my ex-husband would have been the person I wanted to have my property if I died. I didn't want him constrained by trusts, for example, because I trusted that he would use the money wisely, probably for the care of our minor children, and he was the adult to whom I was closest, even though we had divorced at my instigation. In my marital property class, when I canvassed the issue, those who had never been divorced voted overwhelmingly that a divorced person would WANT to cut the former spouse out of a will, while those who HAD been divorced voted overwhelmingly that an unchanged will meant the person wanted the surviving former spouse to TAKE.

Please be very careful about this. It can really catch people unaware and mess things up royally. Perhaps the most sensible is to assume that the joint tenancy controls unless other circumstances establish that this is not the disposition the decedent would have chosen. That would permit evidence to rebut the title transfer in cases like some of those in the reports, where the asset was part of a requested property division or part of a larger estate plan that made the decedent's intentions to alter the joint tenancy survivorship feature clear. I've not reviewed the automatic restraining orders that are put into effect by the filing and serving of a divorce action, but my memory is that they preclude any kind of transfer of title that I think may preclude someone during divorce litigation from severing a joint tenancy.

If that is so, perhaps the most appropriate relief would not be the proposal you all are considering, but rather one that permits a spouse during litigation to signal a desire to terminate the survivorship feature (although NOT thereby converting the property immediately into a tenancy in common succeptible to immediate severance of the ownership interests -- perhaps those interests could be held until the property division, which might transfer the entire asset to

one spouse or spouse's estate, is resolved).

That would do away with freezing people into a survivorship feature they do not want without either (1) permitting unilateral alientation of 1/2 of the asset pending the court's property division, or (2) forcing a disinheritance of an about-to-become former spouse if the decedent had no desire to terminate the surviviorship feature.

Please be so kind as to print this out and circulate it to the person staffing this recommendation and to the Commissioners.

Best personal regards. Hope all is well.

Carol

Carol S. Bruch
Professor of Law
University of California, Davis

Visiting Fulbright Professor
The Hebrew University of Jerusalem

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION
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April 23, 1997

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MEMORANDUM

TO: California Law Revision Commission

FROM: Executive Committee, Estate Planning, Trust & Probate Section, State Bar of California

RE: Severance of Joint Tenancy by Dissolution of Marriage

SUMMARY OF COMMENTS

The Executive Committee, Estate Planning, Trust & Probate Section, State Bar of California (the "Executive Committee") supports the recommendation of the California Law Revision Commission ("CLRC") that a judgment of dissolution or annulment of marriage should sever a joint tenancy between the spouses. The Executive Committee believes that said recommendation reflects the likely intent -- and perhaps belief -- of the parties to the dissolution or annulment. The Executive Committee's comments on the proposed statute primarily concern an expansion of the recommendation to include other Will substitutes within its scope. The Executive Committee also believes that the severance should not occur before the judgment of dissolution or annulment.

I. Comments on Proposed Family Code §§2024, 2651

A. Inclusion of Other Revocable Dispositions

Given the overriding policy consideration recognized by the CLRC -- that a divorcing party would not intentionally maintain a testamentary disposition to the party's former spouse -- the Executive Committee recommends that proposed Section 2651 be expanded to include other revocable "non-Will" dispositions, such as those made under revocable *inter vivos* trusts, life insurance, nonqualified deferred compensation plans and, to the extent allowable under federal law, qualified retirement plans and other pension benefits (including individual retirement accounts, 403(b) plans and SIMPLE plans). Proposed Section 2024 should also be amended correspondingly.

Life insurance, revocable *inter vivos* trusts and retirement benefits are customary components of the financial lives of most married Californians, whether or not they have, or believe they have, "formal" estate plans. The exclusion of the dispositive documentation for these types of assets and contracts, while including joint tenancy ownership, from the proposed legislation would be a disservice to these Californians.

Expansion of the law governing the severance or other revocation of spousal testamentary dispositions is an important step forward: therefore, the Executive Committee believes that the inclusion of other spousal testamentary dispositions, in addition to joint tenancies, to the proposed legislation or, at the very least, an expansive explanation of why they are excluded, is warranted. The minutes of the January 24, 1997, meeting of the CLRC indicate that the CLRC "decided against expanding the study to consider the effect of dissolution of marriage on other revocable spousal dispositions" without further explanation.

Attention is directed to proposed Resolution 3-14-97 introduced to the Conference of Delegates of the State Bar of California. This proposed resolution seeks to revoke automatically gratuitous transfers or powers given to a former souse under a declaration of trust and to treat thereby such transfers or powers under trusts the same as such transfers under Wills upon the dissolution of the trustor's marriage.

B. **Use of Statutory Definition of "Dissolution"**

Proposed Section 2651 does not provide a statutory definition of "dissolution" of marriage. Attention is directed to Section 6122(d) of the Probate Code, the source of a similar revocation of bequests to a former spouse under a Will. The Executive Committee suggests that virtually identical language as that in the Probate Code Section be used to define a "dissolution or annulment" for purposes of revoking the survivorship attributes of a joint tenancy and suggests the following:

> For purposes of this section, dissolution or annulment means any dissolution or annulment which would exclude the spouse as a surviving spouse within the meaning of Probate Code Section 78. A decree of legal separation which does not terminate the status of husband and wife is not a dissolution for purposes of this section.

The reference to Probate Code Section 78 should clear up an ambiguity related to a dissolution or annulment obtained in a State other than California

C. **Use of "Joint Tenancy" in Warnings**

Proposed Section 2024 provides the language to be used for the notices to be contained in a petition for dissolution, annulment or legal separation and on the judgment for the same. This language refers to "your right of survivorship in marital property held *jointly*." (Emphasis added.) Lines 14-15, 26 of proposed legislation. Because of the problems that are associated with differing definitions of any item, the Executive Committee believes that the italicized language may be made more clear if it is changed to read "in joint tenancy."

II. <u>Comments on Date of Effectiveness of Severance</u>

The Executive Committee supports the CLRC's recommendation that the severance of a joint tenancy be effective only upon the dissolution or annulment of the marital status. Effectiveness of the termination on an earlier date (such as upon the date of legal separation or date of filing of a petition for dissolution) would be against the public policy of encouraging the reconciliation of the separated parties. While the Executive Committee has no empirical data on the subject, members of said Committee believe that reconciliation often occurs after an initial

separation of the parties and that many laypersons believe that reconciliation nullifies all effects of the previous separation.

An effectiveness date on the date of legal separation would invite more disputes as to when a legal separation has actually occurred. An effectiveness date prior to the actual dissolution could also wreak havoc with existing estate plans.

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cc: Mr. Don E. Green, Chair, Estate Planning, Trust and Probate Law Section
Mrs. Diana Hastings Temple, Chair, Ad Hoc Subcommittee
Mr. Richard A. Gorini
Mr. Lynard C. Hinojosa
Ms. Sandra Price
Ms. Susan Orloff