

## First Supplement to Memorandum 97-43

### **Severance of Joint Tenancy by Dissolution of Marriage: Draft Recommendation**

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The Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section (Executive Committee) has written in response to Memorandum 97-18 and its First Supplement, which were considered at the May meeting. In its letter (attached) the Executive Committee strongly reiterates its views regarding the importance of consistency between the definition of “divorce or dissolution” in the proposed law and in the Probate Code. Specifically, the Executive Committee believes that divorce should be defined in the proposal by reference to Probate Code Section 78, and that a joint tenancy severed by divorce should be revived if the former joint tenants remarry each other.

#### **Definition by Reference to Probate Code Section 78**

The Executive Committee is correct that consistency between the proposed law and the Probate Code regarding the effectiveness of a divorce to revoke a disposition to a spouse is an important goal of this proposal. Memorandum 97-43 discusses the problems that arise if Section 78 is directly incorporated into the proposed law and offers alternative language to achieve as much substantive consistency as is possible.

#### **Revival on Remarriage**

The question of whether remarriage of former spouses to each other should revive a joint tenancy severed by their earlier divorce is a close one, on which opinion in the legal community is divided. Given the Executive Committee’s clear support for revival on remarriage, it is worth once again considering the merits of the question. The policy should be analyzed in terms of the likely intentions and expectations of typical parties, consistency with other law, and effect on third parties.

**Likely intentions.** In considering the likely intentions of typical parties, a concrete example is helpful:

H and W are married. They buy a home and take title in joint tenancy form, intending that the house pass by survivorship on one of their deaths. They then divorce, but never reach agreement on property matters, leaving their interests in the house undivided. Under the proposed law, the joint tenancy is severed by their divorce and each now holds an equal interest as tenants in common. A year later, they reconcile and remarry each other. H then dies, intestate. The alternative outcomes are as follows:

**1) No revival.** H's interest in the house is his separate property and will pass by intestate succession. If H is survived by children or parents, or the issue of either, then one half to two thirds of H's interest will be distributed to these relatives of H. The remaining one third to one half will pass to W as surviving spouse. One or more relatives of H would then be cotenants with W and could demand access to the property or bring an action for partition.

**2) Revival.** H's interest is a joint tenancy and passes by survivorship to W. W now owns the house in fee simple.

In the example, revival effectuates the intentions of the parties that the house pass entirely to the surviving spouse, without administration. Severance without revival would frustrate these intentions and could lead to the house being sold in a partition action brought by a child or parent of H. If the example represents a typical situation then the proposed law should include a revival on remarriage provision.

The alternative possibility is that something has happened in the period between divorce and remarriage that has changed H and W's intentions, such that they no longer intend the house to pass by survivorship. Perhaps, while divorced, H executed a will devising his interest in the house to a third person. This devise might be a clearer expression of H's intention than the implication drawn from H and W's remarriage — that H would once again intend W to receive the property.

**Likely expectations.** It may be that the former spouses have some understanding of marital property law and expect joint tenancy to be treated similarly to community property — divided on divorce and not revived on subsequent remarriage. This is the position of the Bar Association of San Francisco. See Memorandum 97-18, Exhibit pp. 11-12. On the other hand, as the Executive Committee points out, the former spouses may instead expect joint tenancy to be treated similarly to other spousal inheritance rights — revoked on divorce and revived on subsequent remarriage. A third possibility is that the former spouses have no expectation as to the effect of divorce and subsequent

remarriage on spousal dispositions established in the first marriage. This last possibility is consistent with the overall policy assumption of the proposed law, that a typical divorcing person does not consider the effect of divorce on joint tenancy and statutory intervention is therefore necessary to effectuate that person's likely intentions.

**Consistency.** As the Executive Committee points out, revival on remarriage is consistent with the treatment of dispositions to a spouse in a will, designation of a spouse as attorney-in-fact, and other rights that depend on one's status as a surviving spouse, such as intestate succession rights.

**Third party reliance.** As discussed in Memoranda 97-18 and 97-43, revival on remarriage can injure third parties who rely on an effective severance by divorce. As the Executive Committee points out, however, it is possible to qualify a revival on remarriage rule to protect third parties.

**Conclusion.** Keep in mind that the issue is a very narrow one, and the circumstances it addresses would be quite rare — a divorce, with undivided property held in joint tenancy title, where the community property presumption is rebutted or inapplicable, where the spouses subsequently remarry each other, and then one dies without title to the property ever having been altered. Given the closeness of the question as to likely intentions, and the relative rarity of the problem, it might make sense to adopt the rule that provides for the greatest consistency with existing probate law — revival on remarriage.

Respectfully submitted,

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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: Definition of "Dissolution" and Revival by Remarriage

**COMMENTS**

The Executive Committee, Estate Planning, Trust & Probate Section, State Bar of California, reiterates its position that the use of one definition of "surviving spouse" for purposes of intestate succession and bequests and the use of a different definition for joint tenancies would defeat the purpose of the proposed legislation to effect a severance of joint tenancy by dissolution of marriage. To use differing definitions, as suggested in the First Amendment to Memorandum 97-18, dated April 25, 1997, would perpetuate the existing discrepancies of the law concerning testamentary revocations, such discrepancies being the initial impetus for the proposed legislation.

A definitional reference to Probate Code Section 78 is necessary to eliminate these existing differences between the tests for revocation of similar, but not identical, testamentary dispositions of property to former spouses. Attention is directed to Sections 78, 6401 and 6122(d) of the Probate Code, the source of the definition of "surviving spouse" for purposes of intestate succession and the revocation of bequests to a former spouse under a Will.

The California Law Revision Commission ("CLRC") has long supported the idea that similar tests should be used. In the CLRC's tentative recommendation for this proposed legislation, pages 6-7, and noting Probate Code Sections 6122(b), 4154(b) and 4727, and the Uniform Probate Code Section 2-804(e), the Commission noted that

[i]f divorcing parties subsequently remarry there is no reason to think that the parties would not want and expect a spousal disposition from the former marriage to continue.

The Commission also mentioned that the proposed legislation would **not** revive the joint tenancy if a third party acquired an interest in the property or if another severing event occurred after the marriage dissolution.

The staff of the CLRC in its Memorandum 97-18, dated April 21, 1997, (page 9) suggested that the Commission reconsider its support of revival on remarriage. This suggestion was apparently based on comments of the Bar Association of San Francisco's Family Law Section that an "automatic switch back to community property [sic]...is not appropriate" apparently because of there only being "a slight burden" to re-transfer the property. *Bar Association of San Francisco, Family Law Section, Statement of Position on Proposed Legislation.*

As the staff correctly notes on page 8 of the Memorandum, the issue of revival should not be analyzed according to the ease or difficulty with which joint tenancy may be restored but should be analyzed as "how to effect the intentions" of the parties. The Executive Committee would also add that the issue should be analyzed as to what the parties believe the law to be and suggests that, because other testamentary dispositions are revived upon remarriage, the parties are likely to believe

that the testamentary aspects of joint tenancy are likewise revived.

While the Executive Committee supports the suggestions of the staff to add certain phrases and make certain changes to Proposed Section 2651(a) and (c), the Executive Committee does **not**, however, support the notion that the survivorship provisions should not be revived on remarriage.

The Executive Committee again respectfully suggests that an identical test as used with other testamentary dispositions be used to determine the revocation of the automatic survivorship provisions in joint tenancy property. The Executive Committee again suggests the following following language be added to proposed Family Law Code Section 2651:

(g) 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.

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cc: Mr. Don E. Green, Chair, Estate Planning, Trust and Probate Law Section  
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