

RESOLUTION 05-01-2007

DIGEST

Right of Survivorship: Severance of Joint Tenancy

Amends Family Code section 2040 and Probate Code section 5020 to prohibit a spouse who terminates a right of survivorship to joint property while a dissolution is pending from terminating the other spouse's community interest in the property.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Family Code section 2040 to require a spouse who terminates a right of survivorship to joint property while a dissolution is pending from terminating the other spouse's community interest in the property. This resolution should be approved in principle because a spouse should not be permitted to sever his or her interest in community property while impairing the other spouse's interest in the property.

After service of a family law petition on the spouses, Family Code section 2040 generally prohibits both spouses from taking actions that would harm the other spouse's interests in property. But Family Code section 2040, subdivision (a)(3) permits a spouse, with notice to the other spouse, to terminate a right of survivorship in property held with the other spouse. The intent of the section is to allow each spouse to sever only his or her community property interest in the property; however, the statute does not make that intent clear.

Spouses should not be able to impair the other spouse's interest in the property. This resolution would incorporate the protections of Civil Code section 683.2 and Probate Code section 5020 into section 2040, thus insuring that a spouse can only sever his or her own interest in the property and may not impair the other party's interest to the property.

SECTION/COMMITTEE REPORTS

FAMILY LAW SECTION

APPROVE IN PRINCIPLE

The Family Law Executive Committee approves this Resolution for the reasons given by the proponent.

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 Governors 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.

TRUST & ESTATES SECTION
APPROVE AS AMENDED

The Trust & Estates Section approves in principle the concept presently stated, but noted that the default result should be tenancy in common.

This position is only that of the TRUST & ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUST & ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Family Code section 2040 (a)(4)(b)(3) and Probate Code section 5020 to read as follows:

1 §2040

2 (a) In addition to the contents required by Section 412.20 of the Code of Civil
3 Procedure; the summons shall contain a temporary restraining order:

4 (1) Restraining both parties from removing the minor child or children of the
5 parties, if any, from the state without the prior written consent of the other party or an order
6 of the court.

7 (2) Restraining both parties from transferring, encumbering, hypothecating,
8 concealing, or in any way disposing of any property, real or personal, whether community,
9 quasi-community, or separate, without the written consent of the other party or any order of
10 the court, except in the usual course of business or the necessities of life, and requiring each
11 party to notify the other party of any proposed extraordinary expenditures at least five
12 business days before incurring those expenditures and to account to the court for all
13 extraordinary expenditures made after service of the summons on that party.

14 Notwithstanding the foregoing, nothing in the restraining order shall preclude a party
15 from using community property, quasi-community property, or the party's own separate
16 property to pay reasonable attorney's fees and costs in order to retain legal counsel in the
17 proceeding. A party who uses community property or quasi-community property to pay his
18 or her attorney's retainer for fees and costs under this provision shall account to the
19 community for the use of the property. A party who uses other property that is subsequently
20 determined to be the separate property of the other party to pay his or her attorney's retainer
21 for fees and costs under this provision shall account to the other party for the use of the
22 property.

23 (3) Restraining both parties from cashing, borrowing against, canceling,
24 transferring, disposing of, or changing the beneficiaries of any insurance or other coverage,
25 including life, health, automobile, and disability, held for the benefit of the parties and their
26 child or children for whom support may be ordered.

27 (4) Restraining both parties from creating a nonprobate transfer or modifying a
28 nonprobate transfer in a manner that affects the disposition of property subject to the
29 transfer, without the written consent of the other party or an order of the court.

30 (b) Nothing in this section restrains any of the following:

31 (1) Creation, modification, or revocation of a will.

32 (2) Revocation of a nonprobate transfer, including a revocable trust, pursuant to
33 the instrument, provided that notice of the change is filed and served on the other party
34 before the change takes effect.

35 (3) Elimination of a right of survivorship to property, in a manner consistent with
36 Civil Code section 683.2 and Probate Code section 5020, provided that notice of the change
37 is filed and served on the other party before the changes take effect.

38 (4) Creation of an unfunded revocable or irrevocable trust.

39 (5) Execution and filing of a disclaimer pursuant to Part 8 (commencing with
40 Section 260) of Division 2 of the Probate Code.

41 (c) In all actions filed on and after January 1, 1995, the summons shall contain
42 the following notice:

43 “WARNING: California law provides that, for purposes of division of property
44 upon dissolution of marriage or domestic partnership or legal separation, property acquired
45 by the parties during marriage in joint form is presumed to be community property. If either
46 party to this action should die before the jointly held community property is divided, the
47 language of how title is held in the deed (i.e., joint tenancy, tenants in common, or
48 community property) will be controlling and not the community property presumption. You
49 should consult your attorney if you want the community property presumption to be written
50 into the recorded title to the property.”

51 (d) For the purposes of this section:

52 (1) “Nonprobate transfer” means an instrument, other than a will, that makes a
53 transfer of property on death, including a revocable trust, pay on death account in a financial
54 institution, Totten trust, transfer on death registration of personal property, or other
55 instrument of a type described in Section 5000 of the Probate Code.

56 (2) “Nonprobate transfer” does not include a provision for the transfer of
57 property on death in an insurance policy or other coverage held for the benefit of the parties
58 and their child or children for whom support may be ordered, to the extent that the provision
59 is subject to paragraph (3) of subdivision (a).

60 (e) The restraining order included in the summons shall include descriptions of
61 the notices required by paragraphs (2) and (3) of subdivision (b).

62
63
64 §5020

65 A provision for a nonprobate transfer of community property on death executed by a
66 married person or domestic partner without the written consent of the person's spouse or
67 domestic partner (1) is not effective as to the nonconsenting spouse's or domestic partner's
68 interest in the property and (2) does not affect the nonconsenting spouse's or domestic

69 partner's disposition on death of the nonconsenting spouse's or domestic partner's interest in
70 the community property by will, intestate succession, or nonprobate transfer.

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

PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS

Existing Law: Provides that there is no prohibition under the Family Code to eliminate a right of survivorship to a spouse's one-half interest in community property, however, it does not address the prohibition against disposing of the other spouse's interest in said property as set forth in Family Code § 2040 (a)(2) and Probate Code § 5020. Clearly, the legislative intent of these statutes is to allow each spouse, in the event of a dissolution, to sever only his or her community property interest in real property – not to impair the other spouse's interest in the property.

This Resolution: Makes Family Code § 2040 (b)(3) consistent with Civil Code § 683.2 and Probate Code § 5020, thus clarifying the title issues as well as removing the potential harm to one spouse when the other spouse executes a deed naming the conveying spouse as the transferee but failing to specify that the transfer is from a joint tenancy to a tenancy in common.

The Problem: This resolution is designed to address a specific situation that arose in a dissolution matter. The husband gave appropriate notice that he would be eliminating the right of survivorship of his half-interest in the family residence. However, when the wife received a copy of the husband's filed and recorded deed, it was defective. According to the deed, the husband had transferred the residential property to himself, however, the deed did not refer to any title to the property that he held or transferred. Thus, the deed did not properly sever the joint tenancy property. If the husband had died before the Court disposed of the residence, the surviving wife would have had no recourse but to spend time and money challenging the severance, per Probate Code § 5020, in a probate action. This resolution is designed to provide the Family Court with jurisdiction to resolve this matter, and not require the spouse whose interest was injured to resolve the matter in Probate Court.

IMPACT STATEMENT

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

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