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LAW LETTER

Community Property

Right of Survivorship

On November 3, 1987, Texas voters approved an amendment to Article 16, Section 15, of the Texas Constitution. It states, ". . . and spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse. This amendment now allows spouses to create a right of survivorship in community property.

Prior to the amendment, a right of survivorship could be created only indirectly. First, the community property had to be partitioned into each spouse's separate property and then reunited by the couple as joint tenants with the right of survivorship. Failure to implement the steps in the prescribed order or to use the correct language nullified the right of survivorship. Prior cases focused primarily on joint bank accounts. The new amendment, however, encompasses all community property, both personal and real.

The creation of joint tenancy with the right of survivorship is important because it eliminates the need for probate. Ownership in this form dictates that all interest in the property goes automatically to the surviving co-tenant (spouse).

The statutory implementation of the constitutional amendment appears in Sections 451 through 462 of the Texas Probate Code. The following is a summary of the relevant sections of the statute.

Section 451 provides, "At any time, spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of a spouse."

Section 452 sets forth the formalities of the agreement. The agreement must (1) be in writing, (2) be signed by both spouses, (3) describe the community property subject to the agreement and (4) include any of the following phrases:

- "with right of survivorship,"
- "will become the property of the survivor,"
- "will vest in and belong to the surviving spouse" or
- "shall pass to the surviving spouse."

Section 453 describes the impact of the agreement on the subsequent ownership and management of the community property. Basically, the agreement has no effect on the rights of the spouses concerning the management, control and disposition of the property unless the agreement provides otherwise. The property remains community property, just as it was before the agreement.

Section 454 provides that the transfer of ownership upon the death of the first spouse is not testamentary. In other words, it is not viewed as a transfer at death and not subject to the terms of the deceased spouse's will.

Section 455 deals with the revocation of the agreement. First, the revocation will be governed by the terms specified in the agreement. If none, then a revocation is put into effect (1) by a written agreement signed by both spouses or (2) by a written agreement signed by one spouse and delivered to the other. A revocation may occur by a transfer (sale or disposition) of the property by one or both spouses as long as the transfer does not violate specific terms of the agreement or applicable law.

Sections 456, 457 and 458 describe the proof and adjudication of the agreement after the first spouse dies.

Section 456 begins by stating, "An agreement . . . that satisfies the requirements of this part is effective without adjudication." The section then provides that after the death of a spouse, either the surviving spouse or the personal representative of the surviving spouse may apply for a court order stating that the agreement is effective. The rest of the sections describe, among other things, the method of proof, the proof required, venue, the order of the court, the recording of the court order and the effect of the court order.

What appears to be missing is authority for the representative of the deceased spouse to adjudicate the effectiveness of the agreement. A puzzling question is why any adjudication is needed if the agreement meets the statute requirements.

Another question is why the adjudication must wait until a spouse dies. Section 454, referenced earlier, stated that the agreement is not testamentary. Thus, the death of a spouse should not be a requirement for adjudication.

Sections 460 and 461 protect persons dealing with the deceased's estate when they have no actual knowledge or notice of the agreement or its revocation. Basically, the

people protected include the personal representative of the deceased's estate, purchasers of property from the personal representative of the deceased's estate, debtors, transfer agents and other persons.

Section 461 addresses creditors' rights in the deceased's estate. The section states that "the community property subject to the sole or joint management, control and disposition of a spouse during marriage continues to be subject to the liabilities of that spouse upon death without regard to a right of survivorship in the decedent's surviving spouse. . . ." Consequently, the rights of creditors are not affected by the agreement. The creditors' rights continue in the property.

Conspicuously absent from the legislation is the required recording of the agreement even though the agreement creates a different type of ownership in property. If recording were required, Sections 456, 457 and 458 that deal with adjudicating the effectiveness of the agreement possibly could be eliminated.

The execution of the agreement poses another problem. Only a written agreement signed by both spouses is required. Neither spouse must sign before witnesses or a notary making the recording of the instrument impossible. Likewise, there is no requirement that both parties be aware of the extent of their community property holdings at the time of execution.

Prenuptial and postnuptial agreements require much more. For example, the laws governing prenuptial and postnuptial arrangements require the agreements to be entered knowingly. This means that the extent of each spouse's property must be disclosed before the instrument is signed. Similarly, the nuptial agreements *"may be recorded* in the deed records of the county in which the parties, or one of them, reside . . .", according to the Texas Family Code, Section 4.106(b). Although recording is not required, at least it is permitted. To be eligible for recording, a document must be signed before a notary.

Another confusing issue is that unilateral revocations are allowed. If both spouses must consent to the original agreement, why can one spouse unilaterally revoke it? Can the other spouse reject the delivery of the revocation and continue the agreement? Because neither the agreement nor its revocation is recorded, would it not be tempting for the surviving spouse to lose the deceased spouse's revocation after his or her death?

A similar issue resolved since the statute passed concerns disclaimers. Clearly, one spouse could unilaterally revoke the agreement as long as both were alive. However, could the surviving spouse disclaim the property after the first spouse dies? Effective September 1, 1993, Section 37A of the Texas Probate Code appears to answer the question affirmatively as long as the proper disclaimer form is timely filed.

Another question is how the agreement interacts with title to community personal property in the sole name of the first to die? Assume the deceased spouse owned a car, a bank account, a savings account, a certificate of deposit, stocks or bonds, in his or her sole name, yet the property was community property. Would the state, the bank, the corporation or other entity reissue title to the property in the surviving spouse's name based on a mere memorandum signed by both spouses without being witnessed or notarized?

How is notice imparted to land titles if the agreement is never recorded? Does the survivor place an affidavit of record or must every agreement be adjudicated to pass title?

And finally, how does the agreement operate when a simultaneous death occurs? Litigation could erupt over which spouse died first. The entire estate would pass according to the will of the last to die. Effective September 1, 1993, the Texas Probate Code, Section 47(d), requires a spouse to survive the deceased at least 120 hours as a condition to receive the property.

To settle the issue, Section 47A now provides that where real or personal property is jointly owned so that the survivor owns the whole on the death of the other, including community property with the right of survivorship, the 120-hour rule still applies. Unless one spouse survives the other by 120 hours, one-half of the property shall be distributed as if the husband survived the wife, and the other half shall be distributed as if the wife survived the husband.

The ability to create the right of survivorship in Texas community property is a milestone. Spouses may now leave their half of the community property to the survivor without the need to probate. If the transfer is accomplished by will, probate is necessary. Probate may prove both expensive and time consuming.

However, the survivorship agreement is not for every Texas couple. The agreement should be avoided when, by combining the two estates (or by stacking the two together), it causes the property to be subject to federal gift and estate taxes. In such instances, alternatives such as trusts or limited family partnerships should be examined.

Certainly these issues and others will be resolved by subsequent legislation and court decisions. In the meantime, the problems should not overshadow the benefits of the new law.

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