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Non-Probate Transfers of All Kinds

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Background and Practice

Mr. Baker has been a licensed CPA since 1994, has practiced law since 1999, is currently a member of the bars in Arizona and Texas, and is Board Certified in Estate Planning and Probate Law. Mr. Baker counsels individuals and fiduciaries in a wide variety of estate and business succession, charitable giving, and estate and trust administration matters. With an eye toward minimizing the burdens of taxation and uncertainty, Mr. Baker designs and implements the vehicles most appropriate for meeting each client's unique needs (including wills, revocable trusts, irrevocable trusts for children and other family members, charitable trusts and foundations, business and investment entities, durable powers of attorney, and health care directives) and then assists each client with maintaining those structures. Mr. Baker also advises personal representatives, trustees, settlors, and beneficiaries regarding the efficient and effective administration of estates and trusts, including compliance with the myriad of tax and non-tax obligations and implementation of judicial and non-judicial modifications and settlements.

Education

- University of Texas School of Law, J.D., 1997
- University of Texas at Austin, B.B.A.-Accounting (High Honors), M.P.A-Taxation, 1993

Professional Affiliations

- Board Certified, Estate Planning and Probate Law (Texas Board of Legal Specialization)
- Certified Public Accountant (Texas State Board of Public Accountancy)
- American Bar Association - Real Property, Trust and Estate Law Section
- College of the State Bar of Texas
- State Bar of Texas - Real Estate, Probate and Trust Law Section
- State Bar of Arizona - Estate and Trust Committee of the Board of Legal Specialization, Member (2006-2009)/Chairperson (2008-2009); Fee Arbitration Committee, Member Arbitrator (2007-2008)
- American Institute of Certified Public Accountants

Publications (Selected)

- *Rachal v. Reitz and the Efficacy and Implementation of Mandatory Arbitration Provisions in Trusts*, Estate Planning & Community Property Law Journal, Texas Tech University School of Law (Volume 9, Page 191; 2017)
- *The Texas Mess: Marital Property Characterization of Trust Income*, Estate Planning & Community Property Law Journal, Texas Tech University School of Law (Volume 5, Page 217; 2013)
- *What You Need to Know About the Arizona Trust Code*, AZ CPA Magazine (Oct. 2008)

1. CO-OWNERSHIP WITH RIGHTS OF SURVIVORSHIP

1.1. Joint Ownership with Rights of Survivorship

As a general rule, the interest of a deceased co-owner of property passes by will or intestacy.¹ This Part 1 discusses co-ownership that includes rights of survivorship that affect succession to title outside of testate or intestacy.

1.1.1. *General Rule*

Historically speaking, joint tenancies are not frequently encountered in Texas, where (unlike most other states) rights of survivorship could only be created by express agreement (i.e., not by operation of law by merely conveying to two or more grantees) and where it was impossible to create among spouses prior to 1987 changes to the Texas Constitution. That said, an appellate court in an early case, pre-dating the current statutory language, held that merely accepting a deed with the grantees title recited as “as joint tenants with right of survivorship” is sufficient to give rise to an agreement of survivorship;² however, subsequent decisions have been less than unequivocal in similar circumstances, referring to joint tenancy as having been “abolished.”³ In any event, in the absence of special statutory provisions to the contrary (as discussed below in Parts 1.1.2, 1.1.3, and 1.2), this general requirement, which is currently reflected in Texas Estates Code Section 111.001, is necessary to create rights of survivorship in any property owned by two or more parties.⁴

1.1.2. *Rights of Survivorship in Motor Vehicles*

The Texas Transportation Code provides for the inclusion, on each title certificate for a motor vehicle, of an agreement for rights of survivorship between two or more eligible persons⁵ - which may either be reflected: (a) during the lives of the joint owners, by the joint owners filing a joint application for new title (Form 130-U) with an agreement of survivorship (Form VTR-122), upon which the names of up to two joint owners (or “Multiple Survivors”) will be reflected on the title; or (b) upon the death of a joint owner by the surviving owners filing a joint application for new title, an agreement of survivorship executed by *all* of the joint owners (including the deceased joint owner), and a copy of the death certificate. If the agreement applies, ownership of the vehicle may only be transferred by all of the persons acting jointly, or if one co-owner dies, by the surviving person by providing a copy of the death certificate.⁶ Such an agreement may be revoked

¹ TEX. EST. CODE §101.002.

² Chandler v. Kountze, 130 S.W.2d 327, 331 (Tex. Civ. App.—Galveston 1939, *writ ref’d*).

³ See Spires v. Hoover, 466 S.W.2d 344, 346 (Tex. Civ. App.—El Paso 1971, *writ ref’d n.r.e.*).

⁴ Note that Chapter 112 of the Texas Estates Code, and not Section 111.001, applies to community property with right of survivorship, as discussed in Part 1.2. TEX. EST. CODE §111.002.

⁵ TEX. TRANSP. CODE §501.031(a). A married person is eligible to take title as such only if the spouse of the signing person is the only other party to the agreement *or* the spouse provides an affidavit that attests that the signing person’s interest is separate property; and an unmarried person must provide an affidavit attesting to his/her unmarried status. TEX. TRANSP. CODE §501.031(e). The provision requiring a familial relationship to sign a survivorship agreement in connection with a sale was eliminated effective January 1, 2012. TEX. TRANSP. CODE §501.031(f) (as amended by Acts 2011, 82nd Leg., ch. 1296 (H.B. 2357), §20, eff. Jan. 1, 2012).

⁶ The requirement of providing the original certificate was eliminated effective January 2, 2012. TEX. TRANSP. CODE §501.031(c) (as amended by Acts 2011, 82nd Leg., ch. 1296 (H.B. 2357), §20, eff. Jan. 1, 2012).

only if all persons named in the agreement file a joint application for a new title in the name(s) of the new owner(s).⁷

1.1.3. *Rights of Survivorship in Joint Accounts with Financial Institutions*

(See Parts 2.2.1 and 2.3.1 for the special statutory rules governing joint accounts with rights of survivorship.)

1.2. Community Property with Rights of Survivorship

The 1987 amendment to Article XVI, Section 15 of the Texas Constitution provides that “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” (referred to herein as “CPWROS”). Under the subsequent statutes enacted in 1989,⁸ spouses may agree among themselves that all or part of the community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of the spouse as a nontestamentary transfer.⁹ However, such an agreement does not alter its nature as community property during the marriage or the rights of management, control, or disposition of the property.¹⁰ (See discussion of marital property at Part 6.2.)

Prior to 1987, with respect to community property, spouses could only create rights of survivorship amongst themselves in two steps: (i) partitioning the community property by agreement or making a gift to each other, either of which would result in each spouse holding a separate property interest; and then (ii) executing a joint ownership with right of survivorship agreement under the general rule (Part 1.1.1). However, under this arrangement, when one spouse died, only the one-half interest of the decedent passing by right of survivorship would receive an adjustment in the federal income tax basis to fair market value.¹¹ The 1987 constitutional amendment and Chapter 113 of the Texas Estates Code grant spouses the right to create a right of survivorship while maintaining the community property character of the property, and as such, the entire property – not just the one-half interest of the decedent – is entitled to an adjusted income tax basis at death.¹²

1.2.1. *Agreement of Spouses*

The agreement creating CPWROS must be in writing and signed by both spouses,¹³ The statute also includes safe harbor language that should be included in the agreement, such

⁷ TEX. TRANSP. CODE §501.031(d). See also Part 4 regarding beneficiary designations for motor vehicles.

⁸ Prior to November 3, 1987, spouses were compelled to partition community property into separate property by written partition agreement and then create a joint tenancy by right of survivorship. *See Hilley v. Hilley*, 342 S.W.2d 565, 571 (Tex. 1961). The current statutory scheme, enacted in 1989, is now the *sole* method of creating rights of survivorship in community property between spouses. *See* TEX. EST. CODE §111.002. With respect to the extent to which Texas law applies to a community property with right of survivorship agreement governing personal property, see note 26.

⁹ TEX. EST. CODE §§112.051, 112.0152.

¹⁰ TEX. EST. CODE §112.151. *See also* Rev. Proc. 87-98, 1987-39 IRB 15.

¹¹ *See* I.R.C. §§1014(b)(9), 2040(b).

¹² *See* I.R.C. §§1014(b)(6), (b)(9).

¹³ Although the Texas Constitution does not require a signature, the Texas Supreme Court has held that former Texas Probate Code Sections 451 to 462 (now Chapter 112 of the Texas Estates Code) is the “exclusive means to establish rights of survivorship in community property.” *Holmes v. Beatty*, 290 S.W.3d 852, 861 (Tex. 2009).

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