Prepared by: December 2008

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JOINT TENANCY AND TENANCY-IN-COMMON IN TEXAS

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Many people assume that if they own their home together with their spouse that the surviving spouse will inherit the home when the other one dies. This is not necessarily true. First, it is necessary to determine if the deceased died testate (with a will) or intestate (without a will). If a spouse dies intestate, property automatically vests 100% in the surviving spouse *only* if the property is community property *and* the deceased had no children or, if there are children, all of them are the result of the marriage between these two spouses (ie., there are no children from a prior marriage - see Texas Probate Code Sec. 45).

There are different ways to hold an interest in real property. Texas law presumes that if two people are named as co-owners (grantees) in a deed, and nothing more is said, then they are tenants-in-common. This means they each owns an undivided one-half interest in the property with no automatic right of survivorship - ie., only such rights or survivorship as may be conferred by the Probate Code. Depending on the circumstances, there may be no survivorship rights at all. Probate Code Sec. 46 states that "The joint owners may agree in writing, however, that the interest of any joint owner who dies shall survive to the surviving joint owner or owners, but no such agreement shall be inferred from the mere fact that the property is held in joint ownership." The simplest way to accomplish this agreement in writing is to recite special language in the deed.

Of course, even if a deed contains no survivorship language, each co-owner may make his or her wishes clear by executing a valid will that provides for inheritance of the deceased's interest in the property. The intestacy provisions of the Probate Code govern only in the absence of a will. Failing to make a will is equivalent to requesting that the State of Texas determine how your property will be disposed of (See Probate Code Sec. 38 *et seq*.). Note that if property is currently held by two persons as tenants-in-common, they can convert this to joint tenancy by means of a survivorship agreement as provided in Probate Code Sec. 46.

If special joint tenancy language is included in the deed, however, a joint tenancy may be created, which will result in result in the survivor inheriting the interest of deceased owner - even if they are not spouses. An example of a grantee clause that creates joint tenancy is "John and wife, Mary, as joint tenants with rights of survivorship and not as tenants in common, as agreed

by Grantees." The intent and agreement of the co-owners is stated plainly. This achieves a survivorship arrangement that some have dubbed the "poor man's will."

Sec. 47(d) imposes a caveat: in order for a joint tenant to inherit, the survivor must survive the deceased by at least 120 hours. If this does not occur, then "these assets shall be distributed one-half as if one joint owner had survived and the other one-half as if the other joint owner had survived."

Unfortunately, when buyers arrive at the title company to close, they are handed an "assembly line" deed prepared by an attorney they have never met that contains no extra clauses favorable to them (unless, of course, they have a real estate attorney that is assisting them with the purchase). If buyers want to hold title as joint tenants with rights of surviviorship, they must specifically ask in advance that appropriate wording be included in the deed.

If a person dies both without a will and without a joint tenancy clause in the deed, then issues arise as to which persons have title to the property and in what percentages. Such property is often referred to as "heirship property." It is essentially un-sellable, except perhaps privately by quitclaim deed. A title company will not issue title insurance until heirship issues are addressed and resolved. This must be done by either a probate proceeding in county court (resulting in appointment of a personal representative of the estate of the deceased), or by an affidavit of heirship followed by a curative deed signed by the heirs. The affidavit of heirship recites relevant facts concerning family history, identifies the heirs, and is usually signed by a family member with personal knowledge. The curative deed then generally consolidates title into a single heir who may then keep the property or sell it (this may be easy or difficult, depending on whether the various heirs are willing to sign). Both documents are filed in the real property records.

Occasionally, clients will ask that another person be "added" to their deed so that this other person can have co-ownership and inheritance rights. There is no simple or direct way to do this. Common law requires that joint tenancy with rights of survivorship must be created at the inception, ie., when the property is taken by both persons simultaneously. Therefore, to meet this client request, title must be conveyed out to a third party (often to the attorney in the capacity of trustee) and then conveyed *back* into the two persons as joint tenants with rights of survivorship. This requires two deeds which are filed back-to-back in the real property records. As an aside, it should be noted that the "added" person does not then become liable on the loan on the property. Liability on a loan occurs only when a person signs a note to the lender.

DISCLAIMER

needs and circumstances is advisable before taking any action that has legal consequences. Consult your tax advisor as well. This firm does not represent you unless and until it is expressly retained in writing to do so.