

A man and a woman owned property as joint tenants with the right of survivorship. Without the woman's knowledge or consent, the man signed a 10-year promissory note to a bank and secured the note with a mortgage on the property. The mortgage was promptly recorded.

Two years later, the man died intestate, leaving his son as his sole heir. The woman first learned of the mortgage after the man died. The woman and the son did not make any payments on the mortgage. As a result, the bank initiated judicial foreclosure proceedings, naming both the son and the woman as parties to the action. The woman and the son have consulted an attorney about the enforceability of the mortgage.

The jurisdiction follows the lien theory of mortgages.

What is the attorney likely to say regarding the mortgage?

- A. The mortgage is enforceable against the son and the woman, because the mortgage encumbered the entire property.
- B. The mortgage is enforceable against the son only, because he is the man's sole heir.
- C. The mortgage is enforceable against the woman only, because she is the surviving joint tenant.
- D. The mortgage is not enforceable against the son or the woman, because the mortgage expired upon the man's death.

Explanation:

The man and the woman owned the property as **joint tenants with the right of survivorship**. A joint tenant may only grant a mortgage on his/her *own* joint-tenancy interest without the other joint tenant's consent. Therefore, a **mortgage** executed by one joint tenant will only attach to that tenant's property interest. But **whether the joint tenancy remains intact** depends on the jurisdiction:

Lien theory (majority rule) – a mortgage is merely a **lien on the property**, which means that granting a mortgage **does not sever** the joint tenancy, but a severance will occur upon a foreclosure sale following a default

Title theory (minority rule) – a mortgage constitutes a **transfer of title**, which means that granting a mortgage **does sever** the joint tenancy and the mortgagor-tenant becomes **tenants in common** with the other joint tenants

Here, the man mortgaged the property without the woman's consent, so the mortgage only encumbered the man's joint-tenancy interest—not the entire property (**Choice A**). And since this jurisdiction follows the *lien* theory of mortgages, the joint tenancy between the man and the woman was not severed when the man mortgaged his joint-tenancy interest. Instead, the joint tenancy remained intact until the man's death.

When a joint tenant dies, that tenant's interest disappears and the remaining joint tenant's interest automatically expands to absorb it due to the [right of survivorship](#). This means that any mortgage attached to a joint tenant's interest also disappears when that tenant dies and cannot be enforced against the deceased tenant's heirs or the surviving tenant (the son and the woman, respectively) (**Choices B & C**). Therefore, the mortgage on the man's tenancy expired upon his death, leaving the bank with no interest in the property on which to foreclose.

Educational objective:

A joint tenant may only grant a mortgage on his/her joint-tenancy interest without the other joint tenant's consent. In a lien-theory jurisdiction (majority rule), granting a mortgage does *not* sever the joint tenancy. But in a title-theory jurisdiction (minority rule), granting a mortgage *does* sever the joint tenancy.

References

Restatement (Third) of Property: Mortgages § 4.1 (Am. Law Inst. 1997) (explaining the lien theory of mortgages).

20 Am. Jur. 2d Cotenancy and Joint Ownership § 93 (2018) (discussing a joint tenant's ability to bind other tenants).

Lien theory v. Title theory

	Joint tenancy created	Man executes mortgage	Man dies
Lien theory	Man & Woman (joint tenants)		Woman (fee simple)
		Man liable for mortgage	Mortgage disappears
Title theory	Man & Woman (joint tenants)	Man & Woman (tenants in common)	Son & Woman (tenants in common)
		Man liable for mortgage	Son liable for mortgage