

## Memorandum 82-102

Subject: Study H-510 - Joint Tenancy (Staff Draft of Tentative Recommendation)

At the May 1982 meeting the Commission reviewed a staff study of joint tenancy and community property in California and directed the staff to prepare a comprehensive statute governing joint tenancy and the interrelation of joint tenancy and community property. The statute is to have the following general features:

(1) The rule applicable in some judicial districts that a joint tenancy may be severed by written declaration of a joint tenant should be codified.

(2) The rule that a surviving joint tenant takes property free of liens and encumbrances on the interest of the decedent should be reversed.

(3) Property acquired by spouses in joint tenancy form should be presumed to be community property subject to a right of survivorship and should not be presumed to be joint tenancy. This presumption should be rebuttable by tracing to a separate property source or by proof of an agreement between the spouses as to the character of the property.

(4) The changes in the law should be applied retroactively to the extent feasible (i.e., to property acquired in joint tenancy form before the operative date).

The attached staff draft of the tentative recommendation embodies these features. If the staff draft is acceptable, we will distribute the tentative recommendation for comment.

Respectfully submitted,

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STAFF DRAFT

## TENTATIVE RECOMMENDATION

relating to

## JOINT TENANCY AND COMMUNITY PROPERTY

Interrelation of Joint Tenancy and Community Property

A husband and wife in California may hold property in joint tenancy or as community property.<sup>1</sup> The two types of tenure, one common law and the other civil law, have different legal incidents--the spouses have different management and control rights and duties, creditors have different rights to reach the property, and the property is treated differently at dissolution of marriage and at death.<sup>2</sup>

In California it is common for husband and wife to take title to property in joint tenancy form even though the property is acquired with community funds. Frequently the joint tenancy title form is selected by the spouses upon the advice of lay persons who are ignorant of the differences in legal treatment between the two types of property tenure. The spouses themselves are ordinarily unaware of the differences between the two types of tenure, other than that joint tenancy involves a right of survivorship.<sup>3</sup>

As a consequence, a party who is adversely affected by the joint tenancy title form may litigate in an effort to prove that the parties did not intend to transmute the community property into joint tenancy. Because joint tenancy is often disadvantageous to the spouses, particularly the tax consequences of joint tenancy, the courts have been liberal in relaxing evidentiary rules to allow proof either that the

1. Civil Code § 5104.
2. See, e.g., discussion in Sterling, Joint Tenancy and Community Property in California (unpublished 1982).
3. See, e.g., discussion in Bruch, The Definition and Division of Marital Property in California: Towards Parity and Simplicity, 33 Hastings L.J. 769, 828-38 (1982).

parties did not intend to transmute community property to joint tenancy or, if they did, that they subsequently transmuted it back.<sup>4</sup>

The result has been general confusion and uncertainty in this area of the law, characterized by constant litigation<sup>5</sup> and negative critical comment.<sup>6</sup> It is apparent that the interrelation of joint tenancy and community property requires clarification.

4. See, e.g., discussion in Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 159-68 (1981).
5. See, e.g., Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003 (1932); Delanoy v. Delanoy, 216 Cal. 23, 13 P.2d 513 (1932); Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905 (1944). Cases struggling with the issue in the past two or three years include In re Marriage of Lucas, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980); In re Marriage of Camire, 105 Cal. App.3d 859, 164 Cal. Rptr. 667 (1980); In re Marriage of Gonzales, 116 Cal. App.3d 556, 172 Cal. Rptr. 179 (1981); In re Marriage of Cademartori, 119 Cal. App.3d 970, 174 Cal. Rptr. 292 (1981); In re Marriage of Mahone, 123 Cal. App.3d 17, 176 Cal. Rptr. 274 (1981); Badillo v. Badillo, 123 Cal. App.3d 1009, 177 Cal. Rptr. 56 (1981); In re Marriage of Hayden, 124 Cal. App.3d 72, 177 Cal. Rptr. 183 (1981); Estate of Levine, 125 Cal. App.3d 701, 178 Cal. Rptr. 275 (1981).
6. See, e.g., Comment, 5 S. Cal. L. Rev. 144 (1931); Miller, Joint Tenancy as Related to Community Property, 19 Cal. St. B.J. 61 (1944); Note, 32 Cal. L. Rev. 182 (1944); Lyman, Oral Conversion of Property by Husband and Wife from Joint Tenancy to Community Property, 23 Cal. St. B.J. 146 (1948); Marshall, Joint Tenancy, Tax-wise and Otherwise, 40 Cal. L. Rev. 501 (1952); Brown & Sherman, Joint Tenancy or Community Property: Evidence, 28 Cal. St. B.J. 163 (1953); Joint Tenancy v. Community Property in California: Possible Effect Upon Federal Income Tax Basis, 3 UCLA L. Rev. 636 (1956); Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87 (1961); Ferrari, Conversion of Community Property into Joint Tenancy Property in California: The Taxpayer's Position, 2 Santa Clara Lawyer 54 (1962); Griffith, Joint Tenancy and Community Property, 37 Wash. L. Rev. 30 (1962); Backus, Supplying or Prescribing Community Property Forms, 39 Cal. St. B.J. 381 (1964); Tax, Legal, and Practical Problems Arising from the Way in Which Title to Property Is Held by Husband and Wife, 1966 S. Calif. Tax. Inst. 35 (1966); Knutson, California Community Property Laws: A Plea for Legislative Study and Reform, 39 S. Cal. L. Rev. 240 (1966); Mills, Community Joint Tenancy--A Paradoxical Problem in Estate Administration, 49 Cal. St. B.J. 38 (1974); Property Owned with Spouse: Joint Tenancy, Tenancy by the Entireties and Community Property, 11 Real Property, Probate and Trust Journal 405 (1976); Sims, Consequences of Depositing Separate Property in Joint Bank Accounts, 54 Cal. St. B.J. 452 (1979); Mills, Community/Joint Tenancy--Avoid a Tax Doubleplay; Touch the Basis, 1979 S. Cal. Tax.

Legislation enacted in 1965 directly addressed the problem of married persons taking title to property in joint tenancy form without being aware of the consequences and in fact believing the property is actually community.<sup>7</sup> Civil Code Section 5110 provides that a single-family residence acquired during marriage in joint tenancy form is presumed community property for purposes of dissolution of marriage. This presumption has had a beneficial effect. However, it is limited to a single-family residence and is only applicable at dissolution of marriage. Moreover, it has been criticized because the presumption can be rebutted only by evidence of a contrary agreement or understanding; it cannot be rebutted by tracing the funds used to acquire the property to a separate property source.<sup>8</sup>

Section 5110 should be broadened so that it is not limited to marriage dissolution and so that it extends to all types of property acquired during marriage in joint tenancy form. The property should be presumed to be community property but the presumption should be rebuttable either by tracing the source of the funds for the acquisition to separate property or by showing a clear agreement of the spouses that the property is in fact intended to be separate and not community. This will make the law governing marital property held in joint tenancy form consistent with the law governing marital property generally.<sup>9</sup>

If the spouses intend anything when they take title to property in joint tenancy form, it is that the property be subject to a right of survivorship. Although the property should be presumed to retain its community character during the lifetime of the spouses, at death the

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Inst. 951 (1979); Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143 (1981); Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity (1981); Comment, 3 Whittier L. Rev. 617 (1981); Comment, 15 U.C.D. L. Rev. 95 (1981); Comment, 15 Loyola L. Rev. 157 (1981).

7. Cal. Assem. Int. Comm. on Judic., Final Report relating to Domestic Relations, reprinted in 2 App. J. Assem., Cal. Leg. Reg. Sess. 123-24 (1965).
8. In re Marriage of Lucas, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).
9. See, e.g., discussion in Lichtig, Characterization of Property, 1 California Marital Dissolution Practice 185 (1981).

intended survivorship right should be recognized. This is consistent with the recommendation of many commentators who have studied the matter<sup>10</sup> as well as with the law of other community property jurisdictions that permit the spouses to hold community property subject to a right of survivorship.<sup>11</sup> Recognition of "community property with right of survivorship" has not caused loss of favorable tax treatment accorded community property in other jurisdictions and ought not to do so in California.<sup>12</sup>

#### Severance of Joint Tenancy

If one joint tenant wishes to sever the joint tenancy (thereby destroying the right of survivorship), this can be done in two ways under existing California Law:

(1) If the property is located in most parts of California, the joint tenant must use the traditional technique of conveyance and reconveyance of his or her interest to and from a strawman.<sup>13</sup>

(2) If the property is located in the First Appellate District, the joint tenant may sever the joint tenancy by a unilateral conveyance to himself or herself as a tenant in common.<sup>14</sup>

The strawman conveyance is a legal fiction designed to satisfy feudal technicalities that have no contemporary application. The law should codify the rule allowing unilateral severance of joint tenancy.

10. See, e.g., Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87 (1961).
11. Idaho, New Mexico, and Washington recognize survivorship agreements between the spouses. Nevada provides for a community property with right of survivorship title form. Nev. R.S. 111.064(2). California should also provide for an express community property with right of survivorship title form.
12. See discussion in Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 238-40 (1981).
13. Clark v. Carter, 265 Cal. App.2d 291, 70 Cal. Rptr. 923 (1968); Estate of Dean, 109 Cal. App.3d 156, 167 Cal. Rptr. 138 (1980).
14. Riddle v. Harmon, 102 Cal. App.3d 524, 162 Cal. Rptr. 530 (1980).

### Effect of Survivorship on Secured Creditors

A creditor may obtain a security interest on the share of one joint tenant. This can occur voluntarily through a mortgage or other security agreement between the joint tenant and the creditor or involuntarily when the creditor records a judgment or other lien against the interest of the joint tenant. The imposition of the lien does not have the effect of severing the joint tenancy, and when one of the joint tenants dies the other takes the whole by right of survivorship.

Under classical joint tenancy theory, if the joint tenant whose share is encumbered dies, the survivor takes the property free of the encumbrance.<sup>15</sup> This counter-intuitive result is the consequence of the theory that each joint tenant is seised of the whole from the time of creation of the joint tenancy, subject only to defeasance by failing to survive.<sup>16</sup>

Despite the technical justifications for the rule, it has no real social policy justification. The practical effect is that an informed lender will not give credit to one joint tenant; the joint tenant must either obtain the joinder of the other tenant to get a loan or else sever the joint tenancy. An uninformed lender who is unaware of the potential loss may give credit on the security of one joint tenant only to lose the security on the death of the joint tenant, while the survivor gets a windfall. In the case of a creditor who has obtained a judgment or other involuntary lien on the interest of one joint tenant, the creditor is not inclined to wait until the property is sold in order to collect because of the risk that the joint tenant will die; the creditor is motivated to levy and sell immediately, to the detriment of the joint tenant.

To remedy these defects the law should be revised to provide that a security interest on the share of one joint tenant is not extinguished

15. See e.g., *People v. Nogarr*, 164 Cal App.2d 591, 330 P.2d 858 (1958); *Hamel v. Gootkin*, 202 Cal. App.2d 27, 20 Cal. Rptr. 372 (1962).
16. See discussion in *Zeigler v. Bonnell*, 52 Cal. App.2d 217, 126 P.2d 118 (1942); *Hammond v. McArthur*, 30 Cal.2d 512, 183 P.2d 1 (1947).

by the death of the joint tenant. This is consistent with the recommendations of commentators and will create a more equitable result.<sup>17</sup>

#### Effect of Survivorship on Lessees

A long-term lease given by one joint tenant does not sever the joint tenancy; if the joint tenant dies during the period of the lease, the property passes to the surviving joint tenant and the lease is terminated by operation of law.<sup>18</sup>

The existing California rule is plainly intended to favor the surviving joint tenant at the expense of the third party to whom the lease is made. The argument is that the third party is in a position to protect himself or herself by inspection of the property records; presumably the third party, upon discovery that the property to be leased is held in joint tenancy, could require either a joinder of both owners or a prior severance of the tenure. A more likely result is development of a standard practice, at least in long-term commercial leases, that a lessee requires as one of the lease clauses that the lessor specifically severs or intends to sever any joint tenancy in the property. Then the only lessees trapped by the peculiar law of joint tenancy will be uninformed persons who innocently and in good faith enter into what appears to be a binding lease.

If the lease were a long-term lease at below market rates, it could substantially impair the interest of the survivor. This was the main concern of the court in Tenhet v. Boswell,<sup>19</sup> which stated the rule that the lease terminates with the death of the lessor. But it should be noted that an impairment can occur during the life of the lessor. In such a case the tenant out of possession is either entitled to a share of the rents or to joint possession; otherwise, partition is the remedy.

17. See, e.g., Hines, Personal Property Joint Tenancies: More Law, Fact and Fancy, 54 Minn. L. Rev. 509 (1970); Swenson & Degnan, Severance of Joint Tenancies, 38 Minn. L. Rev. 466 (1954); Mattis, Severance of Joint Tenancies by Mortgage: A Contextual Approach, 1977 S. Ill. U. L.J. 27 (1977); Comment, 11 Stan. L. Rev. 574 (1959).

18. Tenhet v. Boswell, 18 Cal.3d 150, 554 P.2d 330, 133 Cal. Rptr. 10 (1976).

19. Id.

The rule that death of the joint tenant lessor terminates the lease has been criticized as a corruption of traditional joint tenancy theory and substitution of a rule of partial severance has been advocated.<sup>20</sup> The lease should not cause a severance, but upon the death of the lessor the survivor should take the joint tenancy property subject to the lease on the decedent's share. If the survivor and the lessee are unable to work out their possessory rights, they can partition. This solution will more equitably accommodate the interests of both lessor and lessee than existing law.

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The Commission's recommendations would be effectuated by enactment of the following measure:

An act to add Chapter 5 (commencing with Section 745.110) to Title 2 of Part 1 of Division 2 of, to add Article 4 (commencing with Section 5110.410) to Title 8 of Part 5 of Division 4 of, to amend Sections 686 and 5110 of, and to repeal Sections 683, 683.1, 684, 687, and 704 of, the Civil Code, and to amend Section 8627 of the Health and Safety Code, relating to property tenure.

The people of the State of California do enact as follows:

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20. Comment, Consequences of a Lease to a Third Party Made by One Joint Tenant, 66 Cal. L. Rev. 69 (1978); Comment, Joint Tenancy in California Revisited: A Doctrine of Partial Severance, 61 Cal. L. Rev. 231 (1973).



SECTION 1. Section 683 of the Civil Code is repealed.

~~683. A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or by transfer from a sole owner to himself and others, or from tenants in common or joint tenants to themselves or some of them, or to themselves or any of them and others, or from a husband and wife, when holding title as community property or otherwise to themselves or to themselves and others or to one of them and to another or others, when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. A joint tenancy in personal property may be created by a written transfer, instrument or agreement. Provisions of this section shall not restrict the creation of a joint tenancy in a bank deposit as provided for in the Bank Act.~~

Comment. The substance of former Section 683 is continued in Sections 745.110 ("joint tenancy" and "property" defined), 745.130 (joint tenancy between spouses), 745.210 (manner of creation of joint tenancy), and 745.230 (joint bank accounts).

08373

SEC. 2. Section 683.1 of the Civil Code is repealed.

~~683.1. No contract or other arrangement made after the effective date of this section between any person, firm, or corporation engaged in the business of renting safe/deposit boxes, and the renter or renters of a safe/deposit box, shall create a joint tenancy in or otherwise establish ownership in any of the contents of such safe/deposit box. Any such contract or other arrangement purporting so to do shall be to such extent void and of no effect.~~

Comment. The substance of former Section 683.1 is continued in Section 745.220 (safe deposit rental).

32687

SEC. 3. Section 684 of the Civil Code is repealed.

~~684. A partnership interest is one owned by several persons, in partnership, for partnership purposes.~~

Comment. The substance of former Section 684 is continued in Corporations Code Section 15025 (Uniform Partnership Act).

SEC. 4. Section 686 of the Civil Code is amended to read:

686. Every interest created in favor of several persons in their own right is an interest in common, unless except in one of the following situations:

(a) The interest is acquired by them in partnership, for partnership purposes ~~;~~ or unless .

(b) The interest is declared in its creation to be a joint interest, as provided in ~~section six hundred and eighty three,~~ or unless Section 745.210 (manner of creation).

(c) The interest is acquired as community property.

Comment. Section 686 is amended to reflect the repeal of Section 683. See Section 745.210 (manner of creation of joint tenancy).

31486

SEC. 5. Section 687 of the Civil Code is repealed.

~~687. Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either.~~

Comment. The substance of former Section 687 is continued in Civil Code Sections 5107-5110 (The Family Law Act).

32699

SEC. 6. Section 704 of the Civil Code is repealed.

~~704. All United States savings bonds or other bonds or obligations of the United States, however designated, now or hereafter issued, which are registered in the names of two persons as co/owners in the alternative, shall, upon the death of either of the registered co/owners, become the sole and absolute property of the surviving co/owner, unless the Federal laws under which such bonds or other obligations were issued or the regulations governing the issuance thereof, made pursuant to such laws, provide otherwise.~~

All United States savings bonds or other bonds or obligations of the United States, however designated, now or hereafter issued, which are registered in the name of one person payable on death to a named survivor, shall, upon the death of the registered owner, become the sole and absolute property of the surviving beneficiary named therein, unless the Federal laws under which such bonds or other obligations were issued or the regulations

governing the issuance thereof, made pursuant to such laws, provide otherwise.

This section shall not be construed to mean that prior to the enactment hereof the law of this State was otherwise than as herein provided.

Comment. The substance of former Section 704 is continued in Article 4 (commencing with Section 745.410) (bonds or obligations of the United States) of Chapter 5.

09030

SEC. 7. Chapter 5 (commencing with Section 745.110) is added to Title 2 of Part 1 of Division 2 of the Civil Code to read:

CHAPTER 5. JOINT TENANCY

Article 1. General Provisions

§ 745.110. Definitions

745.110. Unless the provision or context requires otherwise, the following definitions govern the construction of this chapter:

(a) "Joint tenancy" is the ownership of a joint interest in property by several persons.

(b) "Property" includes real and personal property and any interest therein.

Comment. Subdivision (a) of Section 745.110 is intended for drafting convenience. It is keyed to the terminology of Section 682 (ownership of several persons).

Subdivision (b) makes clear that a less than fee interest may be held in joint tenancy and that personal as well as real property may be held in joint tenancy. This continues existing law. See former Section 683.

08944

§ 745.120. Scope of chapter

745.120. This chapter is not intended as a comprehensive statement of the law of joint tenancy. This chapter provides specific rules that govern joint tenancy and does not supersede the common law of joint tenancy of this state except to the extent provided by the specific rules. The specific rules provided in this chapter are subject to statutory provisions otherwise.

Comment. Section 745.120 makes clear the limited scope of this chapter. For other statutes governing joint tenancy, see, e.g., Sections 5110.410-5110.440 (community property with right of survivorship) [and Probate Code Section 5100 (multiple party accounts)].

045/221

§ 745.130. Joint tenancy between spouses

745.130. Subject to Article 4 (commencing with Section 5110.410) [of Chapter 2] of Title 8 of Part 5 of Division 4 (community property with right of survivorship), a husband and wife may hold property as joint tenants.

Comment. Section 745.130 continues a portion of former Section 683 to the effect that a joint tenancy may be created by transfer from husband and wife, when holding title as community property or otherwise, to themselves or to themselves and others or to one of them and to another or others, when expressly declared to be a joint tenancy. See Section 745.210 (manner of creation of joint tenancy). For special rules that govern community property in joint tenancy form, see Section 5110.420 (community property in joint tenancy form).

31191

§ 745.190. Transitional provisions

745.190. (a) Subject to subdivision (b), this chapter applies to all property held in joint tenancy, whether the joint tenancy was created before, on, or after the operative date of this act.

(b) This chapter does not affect any of the following:

(1) The validity of a joint tenancy validly created under the law in effect at the time of creation.

(2) The validity of a severance validly made under the law in effect at the time of severance.

(3) The rights of a surviving joint tenant of a decedent under the law in effect at the time of the decedent's death.

Comment. Section 745.190 makes clear the legislative intent to make this chapter fully retroactive to the extent practical, consistent with the reasonable expectations of persons who may have relied upon the creation or termination of a joint tenancy under prior law. Retroactive application is supported by the importance of the state interest served by clarification and modernization of the law of joint tenancy, the generally procedural character of the changes in the law, and the lack of any vested right in a joint tenancy due to the severability of the tenure.

Article 2. Creation of Joint Tenancy

§ 745.210. Manner of creation

745.210. A joint tenancy in property may be created only by an express declaration in a written instrument, including but not limited to any of the following:

- (a) A will or transfer of the property to two or more persons as joint tenants. A transfer may include the transferor as a joint tenant.
- (b) An agreement among the owners of the property.

Comment. Section 745.210 continues the substance of a portion of former Section 683. It preserves the long-established California rule that joint tenancy is not a preferred form of property tenure and may only be created by express written declaration. See, e.g., *Dewey v. Lambier*, 7 Cal. 347 (1857). Absent an express declaration, ownership by several persons as tenants in common is presumed or, in the case of married persons, ownership as community property. See Sections 686 (tenancy in common) and 5110 (community property).

Section 745.210 also preserves the California rule that a "strawman" conveyance is not necessary for creation of a joint tenancy. See, e.g., *Blevins v. Palmer*, 172 Cal. App.2d 324, 342 P.2d 356 (1959). Thus a joint tenancy may be created by a direct transfer from a sole owner to himself or herself and others, or by a direct transfer from tenants in common or joint tenants to themselves (or some of them), or to themselves (or any of them) and others.

For special rules governing creation of joint tenancies between husband and wife, see Section 5110.420 (community property in joint tenancy form). For special rules governing creation of joint tenancies in safe deposit boxes, see Section 745.220. [For special rules governing creation of joint tenancies in bank accounts, see Probate Code Section 5100 (multiple party accounts).] For special rules governing creation of joint tenancies in automobiles, see Vehicle Code Sections 4150.5 and 5600.5.

31177

§ 745.220. Safe deposit rental

745.220. (a) A contract or other arrangement made between a person engaged in the business of renting safe-deposit boxes and the renter of a safe-deposit box does not create a joint tenancy in, or otherwise establish ownership of, any of the contents of the safe deposit box. Such a contract or other arrangement purporting to do so is to that extent void and of no effect.

(b) Nothing in this section is intended to limit creation of a joint tenancy in any of the contents of a safe deposit box by an instrument other than a contract or other arrangement described in this sec-

tion, or to affect the obligation of the depository to deliver a deposit upon the death of the depositor in the manner prescribed in the contract or other arrangement.

(c) This section applies to a contract or other arrangement made after October 1, 1949.

Comment. Subdivisions (a) and (c) of Section 745.220 continue the substance of former Section 683.1. Subdivision (b) clarifies the scope of the section. See Section 1828 (delivery of joint deposit to survivor).

32695

§ 745.230. Joint bank accounts

745.230. This article does not apply to a joint account in a financial institution if Part 1 (commencing with Section 5100) of Division 5 of the Probate Code applies to the account.

Comment. Section 745.230 continues the substance of the last sentence of former Section 683. The former reference to a joint tenancy in a bank deposit under the Bank Act is changed to a reference to a joint account in a financial institution under newly-enacted provisions of the Probate Code (Sections 5100-5407). Such accounts are governed by the new Probate Code sections and various provisions of the Financial Code.

Note. The provisions referred to in this section and Comment are contained in Recommendation Relating to Nonprobate Transfers, 16 Cal. L. Revision Comm'n Reports \_\_\_\_ (1982).

67712

Article 3. Termination of Joint Tenancy

§ 745.310. Severance of joint tenancy

745.310. In addition to any act that terminates ownership of a joint interest in property, joint tenancy may be severed by a written declaration of severance. In the case of real property, the written declaration shall be in recordable form, but need not be recorded to be effective.

Comment. Section 745.310 codifies the recent case law holding that a "strawman" conveyance is not necessary to sever a joint tenancy by unilateral act of a joint tenant. See *Riddle v. Harmon*, 102 Cal. App.3d 524, 162 Cal. Rptr. 530 (1980). For other means of severance of joint tenancy, see, e.g., [Section 4800.1 (division of joint tenancy at dissolution of marriage) and] Code Civ. Proc. § 872.210 (partition of property owned by several persons concurrently).

§ 745.320. Effect of survivorship

745.320. A surviving joint tenant takes property held in joint tenancy by right of survivorship subject to all encumbrances on the interest of the decedent, including but not limited to the following:

(a) A lien or other security interest, whether voluntary or involuntary. The lien or other security interest burdens the property to an extent not exceeding the proportionate value of the interest of the decedent.

(b) A life estate, leasehold, or other estate or interest. The rights of the parties during the period of the estate or interest are governed, to the extent applicable, by the Legal Estates Principal and Income Law, Chapter 2.6 (commencing with Section 731).

Comment. Subdivision (a) of Section 745.320 overrules the case law principle that an interest in joint tenancy property passes by survivorship free of liens and other security interests. See, e.g., *Hamel v. Gootkin*, 202 Cal. App.2d 27, 20 Cal. Rptr. 372 (1962) (deed of trust); *People v. Nogarr*, 164 Cal. App.2d 591, 330 P.2d 858 (1958) (mortgage); *Ziegler v. Bonnell*, 52 Cal. App.2d 217, 126 P.2d 118 (1942) (judgment lien). The surviving joint tenant is not entitled to exoneration of the lien or other security interest out of estate assets. *Estate of Dolley*, 265 Cal. App.2d 63, 71 Cal. Rptr. 56 (1968).

Subdivision (b) overrules the case law principle that the reversionary interest or remainder following a life estate or leasehold executed by the decedent passes by survivorship free of the life estate or leasehold. *Hammond v. McArthur*, 30 Cal.2d 512, 183 P.2d 1 (1947) (life estate); *Tenhet v. Boswell*, 18 Cal.3d 150, 554 P.2d 330, 133 Cal. Rptr. 10 (1976) (leasehold).

32696

Article 4. Bonds and Obligations of the United States

§ 745.410. Application of article

745.410. (a) This article applies to all United States savings bonds and other bonds or obligations of the United States, however designated, now or hereafter issued.

(b) This article does not apply to the extent the Federal laws under which the bonds or obligations were issued, or the regulations made pursuant to such laws governing the issuance of the bonds or obligations, provide otherwise.

Comment. Article 4 (commencing with Section 745.410) continues the substance of former Section 704.

§ 745.420. Co-ownership registration

745.420. A bond or obligation of the United States that is registered in the names of two persons as co-owners in the alternative becomes, upon the death of either of the registered co-owners, the sole and absolute property of the surviving co-owner.

Comment. See Comment to Section 745.410.

31496

§ 745.430. Payable on death registration

745.430. A bond or obligation of the United States that is registered in the name of one person payable on death to a named survivor becomes, upon the death of the registered owner, the sole and absolute property of the surviving beneficiary named in the registration.

Comment. See Comment to Section 745.410.

15787

§ 745.440. Construction of article

745.440. The enactment of this article, and of former Section 704 (the substance of which this article continues), does not constitute a change in, but is declaratory of, the existing law.

Comment. See Comment to Section 745.410.

31491

SEC. 8. Section 5110 of the Civil Code is amended to read:

5110. Except as provided in Sections 5107, 5108, and 5109, all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state, and property held in trust pursuant to Section 5113.5, is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired prior to January 1, 1975, by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if so acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different



intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of the husband and wife. ~~When a single family residence of a husband and wife is acquired by them during marriage as joint tenants; for the purpose of the division of such property upon dissolution of marriage or legal separation only; the presumption is that such single/family residence is the community property of the husband and wife.~~ The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of the property.

In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that the real property was community property, or to recover the real property from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

As used in this section, personal property does not include and real property does include leasehold interests in real property.

Comment. Section 5110 is amended to delete a provision superseded by Section 5110.420 (community property in joint tenancy form).

31492

SEC. 9. Article 4 (commencing with Section 5110.410) is added to Title 8 of Part 5 of Division 4 of the Civil Code, to read:

Article 4. Community Property With Right of Survivorship

§ 5110.410. "Community property with right of survivorship" defined

5110.410. Notwithstanding any other statute, community property may be held by the spouses subject to a right of survivorship between the spouses. Such property shall be known as "community property with right of survivorship" and is created in the manner and has the legal incidents prescribed in this article.

Comment. Section 5110.410 is new. It authorizes a variant form of community property tenure to accommodate the common situation of joint tenancy title taken by the spouses in property acquired with community assets. Community property with right of survivorship retains all the characteristics of community property except that a right of survivorship is superimposed. See Section 5110.440 (legal incidents of community property with right of survivorship). This overrules the case law that community property in joint tenancy form must be either community property or joint tenancy and cannot have the attributes of both. See, e.g., *Siberell v. Siberell*, 214 Cal. 767, 7 P.2d 1003 (1932).

15342

§ 5110.420. Community property in joint tenancy form

5110.420. (a) Property acquired by the spouses during marriage in joint tenancy form is presumed to be community property with right of survivorship.

(b) The presumption established by this section is a presumption affecting the burden of proof and may be rebutted by proof of either of the following:

(1) The extent to which the proportionate contributions of the spouses to the acquisition of the property are traced to a separate property source.

(2) The spouses have made a written agreement or a clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.

Comment. Section 5110.420 overrules the presumption of former Section 683 that community property held in joint tenancy form is joint tenancy. Instead, property taken in joint tenancy form during marriage is presumed to be community property with right of survivorship. Section 5110.420 is consistent with the provision formerly found in Section 5110 that for purposes of division of the property a single-family residence acquired in joint tenancy form during marriage was presumed to be community property.

Unlike the provision formerly found in Section 5110, the presumption of Section 5110.420 may be rebutted by tracing the source of funds used for the acquisition of the property to a separate property source. Contrast In re Marriage of Lucas, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980) (no tracing). Section 5110.420 is consistent with the general rule that the community property presumption may be overcome by tracing. See [Section 5110.510 (presumptions)]. The presumption may also be overcome by contrary evidence of the express intention of the parties in the form of a written transmutation or transfer of ownership, in the deed or otherwise, negating the community character and affirming the separate character of the property. This will help ensure that any transmutation of community property to separate property by the spouses is in fact intentional.

§ 5110.430. Community property subject to declaration of survivorship

5110.430. Community property held by the spouses other than in joint tenancy form but subject to an express declaration in a written instrument of a right of survivorship between the spouses is community property with right of survivorship.

Comment. Section 5110.430 is new. It is consistent with the law of other community property jurisdictions that permit tenure of community property with right of survivorship by agreement or by conveyance. See, e.g., Nev. R.S. 111.064(2) (Nevada conveyance of community property with right of survivorship).

31493

§ 5110.440. Legal incidents of community property with right of survivorship

5110.440. Community property with right of survivorship has the following legal incidents:

(a) Except as otherwise provided in this section, the property is community property for all purposes including but not limited to management and control, liability for debts, and division.

(b) The property is not subject to testamentary disposition but passes to the surviving spouse by right of survivorship in the same manner and with the same effect as property held in joint tenancy that passes by right of survivorship. Severance of the joint tenancy or other termination of the right of survivorship terminates the right of survivorship but does not otherwise affect the community character of the property or the interests of the spouses in the property.

Comment. Section 5110.440 makes clear that community property with right of survivorship has the attributes its title implies--it is community property that passes by survivorship and not by will. This reverses case law that treated community property in joint tenancy form as either community property or joint tenancy, depending upon the intent of the parties. See, e.g., discussion in Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87 (1961).

24840

§ 5110.490. Transitional provisions

5110.490. (a) Subject to subdivision (b), this article applies to all property acquired by the spouses before, on, or after the operative date of this act.

(b) This article does not apply to any transaction involving the property that occurred before the operative date of this act including, but not limited to, inter vivos or testamentary disposition of the property by a spouse and division of the property at dissolution of marriage. Such a transaction is governed by the applicable law in effect at the time of the transaction.

Comment. Section 5110.490 makes clear the legislative intent to make this article fully retroactive to the extent practical, consistent with protection of the security of transactions involving the spouses or third persons that occurred before the operative date. Retroactive application is supported by the importance of the state interest served by clarification and modernization of the law of joint tenancy and community property, the generally procedural character of the changes in the law, and the lack of a vested right in a joint tenancy due to the severability of the tenure.

30693

SEC. 10. Section 8627 of the Health and Safety Code is amended to read:

8627. Cemetery property held in joint tenancy is exempt from the provisions of the Probate Code ~~of Civil Procedure~~ relating to proceedings for establishing the fact of death of a person whose death affects title to ~~real~~ or an interest in property.

Comment. Section 8627 is amended to correct an obsolete reference. See Probate Code §§ 1170-1175 (establishment of fact of death).