

## Memorandum 85-6

Subject: Study H-601 - Recording Severance of Joint Tenancy

The Commission considered at the November meeting whether to submit again its recommendation that severance of a joint tenancy interest in real property must be recorded during the lifetime of the severing joint tenant in order to be effective. The Commission added the additional requirement that an affidavit stating that written notice of the severance has been given to each of the other joint tenants also must be recorded before the death of the severing joint tenant in order for the severance to be effective. The legislation so revised was approved for submission to the 1985 legislative session.

Since the proposed legislation is not the same as the legislation submitted in 1984 (the proposed legislation includes the additional requirement for an affidavit that notice has been given), the staff prepared the attached Recommendation which was distributed to interested persons and organizations for review and comment. Assembly Member McAlister has introduced the recommended legislation as Assembly Bill 96.

More comments were received on this recommendation than any other recommendation or tentative recommendation distributed for comment. Only one comment disapproved of the recommendation entirely. That was the comment from the Estate Planning, Trust and Probate Law Section of the State Bar. All of the other comments approved the recording requirement. Most of the other comments approved the affidavit of giving notice requirement as well. But a few comments took strong objection to the affidavit of giving notice requirement. A few writers suggested technical revisions and some writers suggested strengthening the protection given the nonsevering joint tenant.

The basic issue appears to be whether the recording requirement alone is sufficient or whether there also should be a requirement of recording the affidavit of giving notice. On this issue, you should read all of the attached letters. The following is an analysis of the attached letters.

Exhibit 1 is an extract from the latest issue of the California Continuing Education of the Bar Estate Planning & California Probate

Reporter (December 1984). The extract is an analysis of the 1984 statute relating to severance of a joint tenancy. This statute was enacted upon Commission recommendation. Attached as a part of Exhibit 1 is a letter from Jeffrey Dennis-Strathmeyer. You should read the article and the letter. The article concludes that the deletion of the recording requirement from the new statute creates problems and that as enacted "the new statute appears to raise many more questions than it answers." In his letter, Mr. Dennis-Strathmeyer outlines a case he litigated to illustrate the need for the recording requirement.

Exhibit 2 (Professor Herbert Lazerow, UC San Diego Law School) "approves entirely" of the recommendation and he has no suggestions for its improvement. Exhibit 8 (Henry Angerbaur, Concord CPA) also supports the recommendation without change.

Exhibit 3 (Elliot D. Pearl, Sacramento) and Exhibit 7 (Herbert P. Moore, Jr., Orinda) also approve of the recommendation, but they suggest that the Commission consider legislation to permit severance of joint tenancies in personal property (such as securities). That suggestion may have merit but the Commission is in no position now to give it serious consideration. We need to devote all our efforts to the drafting of the new Probate Code. Exhibit 5 (Scott C. Verges, San Francisco) approves of the recommendation, but suggests a technical revision to make clear that it applies to a joint tenancy in real property. This is a needed technical, nonsubstantive revision, and the staff will make the revision by an amendment of the proposed legislation.

Exhibit 4 (Jerome Sapiro) believes that the proposed legislation does not provide adequate protection to the nonsevering joint tenant. He suggests that the recording requirement for the severing instrument and affidavit be revised to read:

. . . are recorded in the county where the real property is located within 15 days of the date of the deed, written declaration, or other written instrument effecting severance and at least 30 days before the death of any joint tenant whose interest may be affected thereby.

He makes a good case for this suggested change in his letter. The change would preclude a death-bed severance just before the severing tenant dies. You should read Exhibit 4 for the reasons for his suggestion. Exhibit 9 (Richard A. Gorini, San Jose) objects to the affidavit requirement (his letter makes a good argument for eliminating this requirement)

but suggests that the severing instrument should be required to be recorded within a short period after execution. Exhibit 11 (Grace K. Bannoff, La Jolla) would require personal service by a third person on the nonsevering joint tenants of the instrument and a notice of stating its effect and would require the recording of an affidavit of personal service. Exhibit 14 (Kenneth D. Robin) does not recommend specific language, but would require actual notice to nonsevering joint tenants.

The California Land Title Association (Exhibit 6) supports the recommendation. By way of a technical amendment, the Association suggests that the statute should be revised to require that the instrument making the severance be recorded, together with the affidavit, so that both will be recorded at the same time. This will require a filing at the same time. The association also would provide that the affidavit should be executed by the same person or person who executed the severing document.

Other writers support the recording of the instrument requirement but object to the requirement that notice be given to nonsevering joint tenants. The objection is based on a fear that giving notice will result in violence on the part of the nonsevering joint tenant who loses his or her right of survivorship and that the notice will cause litigation and uncertainty. See Exhibits 12 (Probate and Estate Planning Section of Kern County Bar Association), Exhibit 13 (Norma J. Wollesen). The State Bar Section also objects to the affidavit of notice requirement. See Exhibit 10.

Only one letter was received that objected to making any change in existing law. That was the letter from the Estate Planning, Trust and Probate Law Section. The letter is somewhat surprising in view that all the other comments, mostly from practicing lawyers, supported at a minimum the recording requirement and almost all of whom supported an affidavit requirement as well. You should read the letter from the State Bar Section.

Assembly Member McAlister likes this bill. I think he would be willing to delete the requirement that an affidavit be recorded that notice has been given if the Commission so determines. That is the real policy question for Commission decision. It is obvious from the comments received that the writers have given careful consideration to this issue

and take differing views on it. You should read all of the attached letters before you make a decision on what changes, if any, should be made in the Recommendation.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

## EXHIBIT 1

Extract from 6 CEB Est Plan R 53-54 (1984)

## Severance of Joint Tenancies in Real Property

Chapter 519 (AB 2276) enacts CC §683.2, providing that a joint tenancy in real property may be severed by a joint tenant without consent of other joint tenants by (1) execution and delivery of a deed to a third person (whether or not a strawman conveyance with obligation to reconvey), or (2) execution of a written instrument that evidences the intent to sever the joint tenancy, including a deed that names the transferor as transferee or a written declaration that the tenancy is severed.

As a result of the legislative process, the new law may create problems the legislature did not intend, and the Reporter has been advised that the California Law Revision Commission may give the statute further study. The original bill had two objectives. First, it was intended to resolve conflicting courts of appeal decisions on the issue of whether a joint tenant can sever the tenancy by conveying to himself without the use of a strawman. See the discussion of *Estate of Carpenter* (1983) 140 CA3d 709, 189 CR 651, at 4 CEB Est Plan R 136 (1983). The new law confirms that this procedure is effective.

Second, the original bill attempted to reduce the potential for fraud in severance transactions. A joint tenant may attempt to "have his cake and eat it too" by delivering a secret deed to a third party who will destroy the document in the event the grantor becomes the surviving joint tenant. In order to deter this conduct, AB 2276 originally provided that a severance was not effective unless the instrument was recorded before death.

The recording requirement was deleted by the Senate, apparently without recognizing the important evidentiary function of the recording requirement. (The deed in *Carpenter* was recorded and the court alluded to this; thus the statute goes beyond the facts of that case.) Apparently because of a belief that recording would provide the necessary evidence, the statute provides only minimal requirements for the contents of the severing document (which need only evidence an intent to sever) and does not require delivery of instruments that convey no interest to a third person. As the statute was enacted, however, such documents as informal letters may now provide the basis for litigation to determine whether a severance occurred. Furthermore, it may be argued that a will provision devising joint tenancy property severs the joint tenancy (and what if the will is later revoked?) On balance, the new statute appears to raise many more questions than it answers.



## CALIFORNIA CONTINUING EDUCATION OF THE BAR

2300 Shattuck Avenue, Berkeley, CA 94704  
(415) 642-3973; Direct Phone: (415) 642-8317

November 8, 1984

John H. DeMouilly, Esq.  
California Law Revision Comm.  
4000 Middlefield Road, D-2  
Palo Alto, California 94306

Re: Joint Tenancy Statute

Dear John:

Enclosed is my first rough draft for our coverage of the Joint Tenancy Statute, which does not necessarily bear much resemblance to what we will end up with. However, I think the point made is valid in any event. We might have been better off with no statute after the recording requirement was dropped. If there is no strawman, you need some substitute for delivery. Mere execution should never be enough for anything.

Someday I will tell you about the case I was called in to litigate: The decedent first executed and recorded a deed from herself to herself and my client (one of her three sons) as joint tenants. Later she considered severing the tenancy and giving something to another son. She executed another joint tenancy deed to herself and the second son as joint tenants (her lawyer advised this would leave the first son with 1/2 interest as a tenant in common, and cause the other half to pass to her second son on her death). However, she wasn't sure what she wanted to do, so she instructed her lawyer to not record the deed while she thought things over (according to his deposition testimony). Later, she executed a deed from herself to herself and the third son as joint tenants, which was left in the attorney's file with the second deed. The attorney cannot remember his instructions regarding the third deed, but knows he was never told to record the second deed. Who owns Blackacre? Also, what does this say about human expectations? Mere execution should not be enough because people believe they haven't done something until they can no longer just tear up the document.

Hope you can do something about this. I may have been the source of the "evidencing intent" language which aggravates the situation.

Regards,

Jeffrey Dennis-Strathmeyer

JD-S:dp  
Encl.

cc: E. Halbach



SCHOOL OF LAW

December 5, 1984

California Law Revision Commission  
4000 Middlefield Rd. #D-2  
Palo Alto, CA 94303

Dear Sir or Madam:

This letter relates to your projects on severance of joint tenancy number H-601 and abandoned easements number H-406.

I approve entirely of the project on joint tenancy, and have no suggestions for its improvement.

Thank you for the opportunity to present comments on the draft.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Herbert Lazerow'.

Herbert Lazerow  
Professor of Law

HIL:gsc

LAW OFFICES OF  
**ELLIOT D. PEARL**  
A PROFESSIONAL CORPORATION  
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SACRAMENTO, CALIFORNIA 95825  
(916) 927-7728

December 6, 1984

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303

Attn: John H. DeMouilly

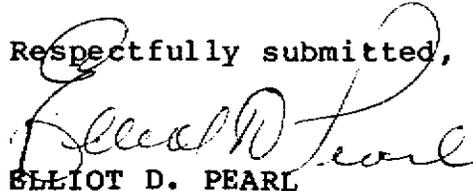
Dear Mr. DeMouilly:

I am pleased to have been nominated by Mr. Frantz to serve on the committee and to review the tentative proposals of the Law Revision Commission relating to probate law. I have reviewed the same and have the following general comments which perhaps will be of some assistance. Should specific recommendations be desired, I will be happy to meet with other committee members or with the Commission itself to discuss these.

2. I approve whole heartedly of the provisions regarding the recording of the severance of joint tenancies. I suggest, however, that this also be extended to severance of joint tenancy in personal property, including stocks, bonds or other holdings and that an appropriate procedure of notification be provided for such severances. This would include notification to the other joint tenant or tenants, as well as to the transfer agents or obligors under the bonds, notes, etc.

Thank you for having allowed us to review these very important proposals; if further review is desirable or if the commission would like me to appear or consult directly with it, I would be happy to do so.

Respectfully submitted,



ELLIOT D. PEARL

EDP:ap

cc: Benjamin Frantz

LAW OFFICES  
**JEROME SAPIRO**  
 100 BUSH STREET  
 SAN FRANCISCO 94104  
 (415) 362-7807

November 26, 1984

California Law Revision Commission  
 4000 Middlefield Road, Room D-2  
 Palo Alto, CA, 94306  
 Thru: John DeMouly, Executive Secretary

Re: Comments on Proposed Recommendation  
 #H-601, Proposed Tentative Recommendations  
 #L-605 and #L-500, and  
Discussion Draft #1-659

Dear Mr. DeMouly:

Herewith for the California Law Revision Commission are my comments and recommendations concerning the above mentioned proposals, recently received from your office.

RECOMMENDATION RE RECORDING SEVERANCE OF JOINT TENANCY (11/8/84 -#H-601)

The proposed amendments to Civil Code §683.2 do not adequately carry out the intention to prevent fraud by recordation of joint tenancy severance documents and proof of mailing of notice, because of the proposed provision as to time of recordation contained in subdivision (c) of that amendment.

It is recommended that same be amended to read: "...are recorded in the county where the real property is located within 15 days of the date of the deed, written declaration, or other written instrument effecting severance and at least 30 days before the death of any joint tenant whose interest may be affected thereby:"

This would prevent the concealment of severance documents by the requirement for prompt recordation and notice, not allowing one to wait until the other joint tenant was on his death bed. It may tend to prevent spite severances when a joint tenant is terminally ill and attempts to sever.

Recordation and notice merely before death is not adequate protection. A secret or hidden severance, where recordation is delayed, cannot in some cases be met because of loss of evidence, failure of memory, death of witnesses, senility and the like. An undue delay between date of execution of the severance documents and recordation thereof can have this adverse effect. Prompt recordation and notice should be provided so that appropriate action may be taken with likelihood of success.

Imagine the potential of wrong-doing where a joint tenant has been put on a deed without consideration and merely for survivorship by parent, other relation, or even a friend, and said joint tenant executes the severance documents, but does not timely record them. If the other joint tenant wants reconveyance, to sell, or to make loan on the property, this may be blocked or substantially delayed by the situation, and a belated or delayed action may be required to clear up the matter, which could frustrate the meeting of then present needs. Had recordation

been earlier and more timely, such action could have been more timely instituted so as to allow meeting such needs when they arose. The opportunity created to allow shake-down by the severing joint tenant should be obvious.

A 15 day requirement for recordation of the severance documents and notice will provide more timeliness of notice to the other joint tenants and allow appropriate recourse to meet the same.

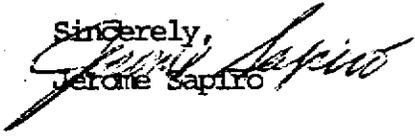
An at least 30 day notice and recordation before death of any joint tenant may allow appropriate action in those cases where a terminally ill joint tenant can provide evidence and authorize commencement of the action.

These time requirements will tend to deter some unscrupulous severance attempts and be more apt to give the protection that is intended.

Thank you for this opportunity to participate.

I hope that my suggestions will help to make better law for our people and State.

Sincerely,

  
Jerome Sapiro

JS:mes

cc to Kenneth M. Klug, Chair

Estate Planning, Trust & Probate Law Section

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JON L. MANGUS  
SCOTT C. VERGES  
CAROLE M. VICKERS

November 30, 1984

California Law Revision Commission  
4000 Middlefield Road  
Suite D-2  
Palo Alto, California 94303

Re: Recommendation Relating to Recording  
Severance of Joint Tenancy.

Gentlemen:

The proposed amendment of Section 683.2 of the Civil Code, dated November 8, 1984, is meritorious and would effect a positive change in the statutory framework concerning joint tenancy interests.

In order to make Section 683.2(a) consistent with subdivision (c), and in order to avoid any ambiguities of the scope of subdivision (c), I propose that Section 683.2(c) be modified to read in full as follows:

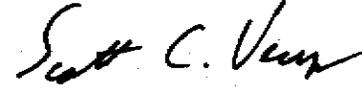
"Severance of a joint tenancy of record by deed, written declaration, or other written instrument pursuant to subdivision (a) is not effective to sever a joint tenancy in real property as to the joint tenant's interest unless both of the following are recorded in the

November 30, 1984

2.

county where the real property is located  
before the death of the joint tenant."

Very truly yours,



Scott C. Verges

SCV:rr

# CALIFORNIA LAND TITLE ASSOCIATION

P.O. BOX 13968 • SACRAMENTO, CALIFORNIA 95853 • (916) 444-2647

December 7, 1984

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road  
Palo Alto, California 94306

Re: Severance of Joint Tenancies

Dear John:

The CLTA believes that the recommendation of the CLRC on severance of joint tenancies should be introduced in the Legislature. Chapter 519 of the Statutes of 1984 is causing a great deal of concern in the title industry over the insurability of title based on an affidavit of death of a joint tenant. The concern arises because of the possibility of an unrecorded deed, written declaration or other written instrument which severed the joint tenancy. The title industry is also concerned as to what written declaration or instrument could sever a joint tenancy. For example, does a will bequeathing joint tenancy property sever the joint tenancy? Is a written declaration in correspondence to a third party sufficient to sever a joint tenancy?

However, some members of the CLTA have expressed the concern that under the proposed amendment to Section 683.2 title companies will have to search for two separately recorded instruments which may have been recorded at different times and presumably can be executed by different persons.

Title company practices prior to the enactment of Chapter 519 were to rely on a termination of a joint tenancy occasioned by the death of a joint tenant (apart from tax consequences) when a certified copy of death certificate was recorded to which was attached an affidavit of identity--one recorded document.

Thus, the CLTA believes that Section 683.2 should be revised to provide that the documentation effecting the severance be accompanied by the required affidavit which should be executed by the same person or persons who executed the severing document.

Sincerely,

*Larry* - *vd* -  
Lawrence E. Green  
Vice President -  
Legislative Counsel

LEG:vo

LAW OFFICES OF  
**HERBERT P. MOORE, JR.**  
23 ORINDA WAY, SUITE 312  
ORINDA, CALIFORNIA 94563

TELEPHONE  
(415) 254-2850

November 27, 1984

California Law Revision Commission  
4000 Middlefield Road, Suite D2  
Palo Alto, CA 94303

Re: No. H-601

Gentlemen:

I approve of the proposed amendments to Section 683.2 of the Civil Code with respect to eliminating secret severances of joint tenancies.

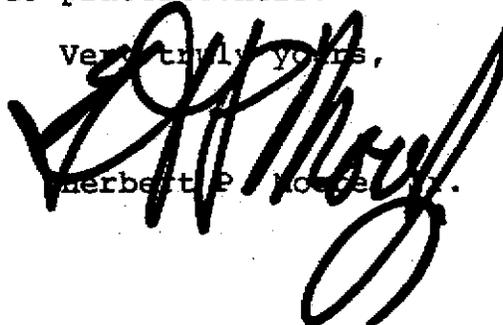
The proposed legislation does take some of the fun and gamesmanship away, especially in a divorce situation, but the proposal nonetheless appears fair.

I would appreciate it if the Law Revision Commission could propose legislation that would allow a joint tenant on securities (perhaps other than government securities) to terminate the survivorship aspect without consent of the other joint tenant.

In divorce situations we can terminate the real estate joint tenancy but the last time I tried I was unable to terminate any joint tenancies in securities.

I am sure the transfer agents would object and lobby against such legislation, but it would be nice to have this option available to practitioners.

Very truly yours,



Herbert P. Moore, Jr.

HPM:msr

HENRY ANGERBAUER, CPA  
2401 WILLOW GLEN CT.  
CONCORD, CA 94021

11/24/84

Law Person Commission

I agree with your recommendation relating  
to recording severance of Jt Terany and  
that you proceed to implement your  
recommendations to the legislature.

Sincerely  
H

**BOSKOVICH, GORINI & VANASSE**

ATTORNEYS AT LAW

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Charles F. Vanasse  
Associate Counsel

December 12, 1984

Mr. John DeMouilly  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, California 94306

Dear Mr. DeMouilly:

The following are comments on Tentative Recommendations L-500 and H-601. These are solely my opinions since I have just been appointed to replace Carla Holt as head of the legislative subcommittee for the Santa Clara County Bar Estate Planning Sections and have not yet been able to schedule a meeting of the new members.

**H-601 RECORDING SEVERANCE OF JOINT TENANCY:** I strongly disagree with your recommendation for the following reasons:

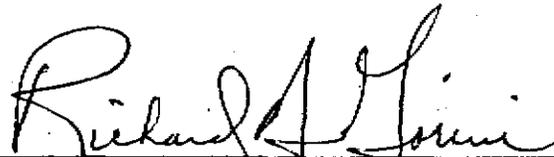
1. The creation of a joint tenancy is often substituted for a will. However, one need not disclose the fact that one is changing his or her will (unless there exists reciprocal wills bound by contract) to the former beneficiaries. Why create that requirement with joint tenancy? If there exists an opportunity for fraud under current law, it certainly is no worse than that which exists when wills are executed.

2. This revision could spark domestic violence among unmarried joint tenants. I currently have a woman client who, against my counsel, took title to property in joint tenancy with a friend. The relationship has recently soured, but neither she nor her friend can afford to sell the residence and move elsewhere. She wishes to leave her half of the residence to her children, but if she had to disclose this to her friend, he might be incited towards violence. Your recommendation would probably inhibit her from severing the joint tenancy out of fear of bodily harm.

3. If your purpose is preventing fraud, that could be accomplished by requiring the severing deed to be recorded within a certain period after execution (i.e., 3 days) in order to be valid. In so doing, the severing party has experienced an economic detriment and could not

suppress the severing deed. The notice of severance adds nothing but the required disclosure of an individual's wishes for testamentary disposition which have heretofore been private and confidential.

Sincerely,

A handwritten signature in cursive script, appearing to read "Richard A. Gorini". The signature is written in dark ink and is positioned above a horizontal line.

Richard A. Gorini, Esq.

RAG/dc

**ESTATE PLANNING, TRUST AND  
PROBATE LAW SECTION  
THE STATE BAR OF CALIFORNIA**

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H. NEAL WELLS, III, Costa Mesa  
JAMES A. WILLETT, Sacramento

December 13, 1984

John DeMouilly  
Executive Secretary  
California Law Revision  
Commission  
4000 Middlefield Road  
Suite D-2  
Palo Alto, Calif. 94303

Re: Recommendation Relating To Recording  
Severance of Joint Tenancy

Dear John:

The Executive Committee of the Estate Planning, Trust and Probate Law Section, State Bar of California has considered the recommendation relating to recording severance of joint tenancy. The Executive Committee, for the reasons set forth hereinafter disapproves the recommendation.

The reasons for disapproval are as follows:

1. The Conference of Delegates, State Bar, supported legislation to allow unilateral severance of joint tenancy but strongly opposed any notice requirement to the other joint tenant or tenants on severance. We understand that the lobbyists for the State Bar, based upon the action of the Conference of Delegates, opposed the notice aspects of last year's bill for unilateral severance of joint Tenancy.
2. A joint tenancy often may be created by a deed from one person to himself and another as joint tenants. Except for any constructive notice that may result from recording that deed the person whose name is added as a joint tenant may have no knowledge of the joint tenancy. To require recording of a deed severing the joint tenancy and also requiring formal notice to the other joint tenant of the severance as conditions of severance may cause numerous problems as to why it was created, why it was severed etc. as between the parties.

3. If a joint tenancy has been created between a husband and wife and they are later estranged, one or the other contemplates commencing an action for dissolution or a dissolution proceeding is pending, the requirement of formal notice of severance may cause undue antagonism between the parties.

4. As proposed, the severance would be effective only if the deed severing the joint tenancy and the formal notice of severance were both recorded before death of a severing joint tenant. This in itself might create various problems if, for example, the severing joint tenant was unaware of the notice statute but had recorded the deed, or if the severing documents were prepared as a matter of last-minute estate planning before the party's anticipated death and the documents were not recorded in a timely manner, etc.

5. The proposed additions to Section 683.2 of the Civil Code do not specify the form of the affidavit of written notice. If the affidavit, for example, was not acknowledged as a deed presumably it would not be recordable and hence there would be a technical defect.

6. If an affidavit were effective it would presumably have to list the details of the deed, the name of the grantor, the grantee, recording data, etc. in order to be properly indexed. The proposed statute contains no such detailing as to the nature of the affidavit and its form is likely to be defective in many instances.

7. Proposed sub-paragraph (c) refers to the documents to "terminate the right of survivorship". Query whether this would be intended to terminate all aspects of joint tenancy or only the survivorship aspect. There are, we believe, four unities necessary to create joint tenancy, survivorship being only one of them. There may be some ambiguity in this area.

8. Section 5127 of the Civil Code dealing with community property provides that if community property is held in the name of one spouse alone when that spouse conveys it to a third

John DeMouilly  
December 13, 1984  
Page 3

party, the other spouse has a one-year period from recordation to seek to avoid the transaction. There is no notice requirement in that instance. For consistency no notice should be required for joint tenancy severance.

9. If property held in joint tenancy is partitioned we believe it normally would become interest held as tenants in common. However, if the property was originally community property whether held in one name or both names, would the property on unilateral severance revert to community property or tenancy in common. Presumably the severance should not change the nature of the property which went into the transaction. The recommendation does not really deal with this issue.

10. The Commission's concern about a joint tenant preserving his or her options by executing a unilateral severance of the joint tenancy but not recording the deed, in the event that person is a surviving joint tenant, is believed to be a very unusual and remote possibility that does not justify the imposition of a requirement on all joint tenants who wish to sever the joint tenancy to not only record the deed severing but also serve formal notice on all other joint tenants as to the severance.

11. For the reasons set forth above the Executive Committee believes that the recommendation should be disapproved. We believe the change in the law which now allows unilateral severance of a joint tenancy is appropriate without any further requirements of notice.

Sincerely,



Charles A. Collier, Jr.

cc: Ken Klug  
Ted Cranston  
Jim Quillinan  
Bob Schlesinger

CAC:rp

GRACE K. BANOFF  
Attorney at Law  
733 Kline Street #304  
La Jolla, CA 92037  
(619) 459-9563

December 12, 1984

CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303

Gentlemen:

The enclosed memoranda comment on discussion drafts H601, L500, and L659.

I omit comment on L605, DISTRIBUTION UNDER A WILL OR TRUST, as I am neutral on its recommendation.

Very truly yours,

*Grace K. Banoff*

TO: LAW REVISION COMMISSION  
FROM: GRACE K. BANOFF  
RE: #H601  
Discussion draft dated 11/8/84  
RECORDING SEVERANCE OF JOINT TENANCY  
DATE: DECEMBER 10, 1984

This recommendation addresses a long-standing need, but I think stronger provisions regarding the content and the manner of notice would be more effective in eliminating the opportunities for fraud.

As proposed §683.2 is written, the sanctions of perjury may be meaningless because the perjurer may be dead before severance of the joint tenancy and the perjury become known to the unsuspecting joint tenant.

Also, in the case of joint tenants who are spouses, the severing joint tenant may easily intercept a mailed notice.

To eliminate these opportunities for fraud, I suggest that the statute require:

1-Notice consisting of a copy of the instrument effecting the severance and a notice stating its effect;

2-Personal delivery to the affected joint tenant(s);

3-Delivery by a third person who has no interest in the subject matter;

4-An affidavit of personal service reciting the address of the affiant as well as the time, place and facts of delivery.

Respectfully submitted,

*Grace K. Banoff*

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December 17, 1984

FILE NO.

Mr. John H. DeMouly, Executive Secretary  
CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303

Dear Mr. DeMouly:

This letter contains the comments of the Probate and Estate Planning Section of the Kern County Bar Association on the five specific recommendations you sent to me. Please add the following persons to your mailing list who would like to review and comment on future recommendations:

Thomas A. Tutton, Esq.  
DEADRICH, BATES & TUTTON  
1122 Truxtun Avenue  
Bakersfield, CA 93301

James Hulsy, Esq.  
HULSY & HULSY LAW OFFICES  
412 Truxtun Avenue  
Bakersfield, CA 93301

Vernon Kalshan, Esq.  
651 "H" Street  
Bakersfield, CA 93301

Barry L. McCown, Esq.  
5100 California Avenue  
Bakersfield, CA 93309

The Probate and Estate Planning Section of the Kern County Bar Association is willing to review and comment on preliminary drafts of the new Probate Code and would like to receive copies of the materials the Commission distributes. We request that the materials be sent out more than one month before the comment period ends, if possible, to give us more time to study the recommendations.

Our committee which reviewed the five recommendations had no objection to the recommendations on transfer without probate of title to certain property registered by the state and effect of adoption or out of wedlock birth on rights at death. We have specific comments on the other three recommendations.

Mr. John H. DeMouilly, Executive Secretary  
CALIFORNIA LAW REVISION COMMISSION  
December 17, 1984  
Page 2

### Recording Severance of Joint Tenancy

Our committee is of the view that the actual recording of the deed or other instrument severing the joint tenancy should be required for an effective severance. The committee believes that a document recorded after a joint tenant's death should be wholly ineffective to terminate the joint tenancy (or transfer title for that matter). The committee strongly objected to the Commission's requirement that written notice of the severance be given to the other joint tenants and that an affidavit stating that this has been done be recorded. The committee objected on the following grounds:

1. No such notice is now required. The committee does not see the evil the notice is designed to cure. The requirement that the document be recorded before the death of a joint tenant cures the fraud evil outlined in the recommendation. We do not see any need for the notice.
2. Determining a joint tenant's whereabouts may be difficult in some cases. The Commission's statute does not state what "by mail" means. Often, there may be some urgency in severing a joint tenancy. If a joint tenant's address cannot be obtained, it can defeat the person's intent to sever.
3. No other property right requires the giving of notice before being able to transfer it.
4. The requirement of a notice will lead to increased litigation over the sufficiency of the notice, whether the correct or current address was used and what duty a joint tenant has to advise the other joint tenants of a change in address.

For these reasons, the committee believes there should be no notice requirement. We do, however, support the Commission's proposal that the severance only be effective if the document is recorded before the joint tenant dies.

## GRIFFIN, CONWAY &amp; JONES

JOHN E. GRIFFIN  
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December 15, 1984

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303

Attention: Mr. John H. DeMouilly  
Executive Secretary

Gentlemen:

I am writing in response to the materials forwarded to me for review with your letter of November 14, 1984. Since no formal committee within our Stanislaus County Bar Association was formed to review the materials as a group and to comment as a committee, I am making my comments as an interested individual practicing in the probate and estate planning area of law. The following are my comments:

1. Recommendation to amend Section 683.2 of the Civil Code relating to joint tenancies

The principal motivation behind the recommendation is stated to be to prevent the surviving joint tenant from doing a unilateral act prior to the death of the other joint tenant to sever the joint tenancy and then destroying the severing instrument upon the death of the other joint tenant in order to take the other half of the property by survivorship. To prevent the destruction of the severing instrument, it is recommended that the severing instrument together with an affidavit that written notice of the severance has been given to each of the other joint tenants by mail or personal delivery be recorded. Since the stated concern is with destruction of the severing document, requiring that the severing document only be recorded would appear to be sufficient without having to give the other joint tenant or tenants notice of the action.

Often people who have placed title to property in joint tenancy are not aware that title to it passes to the surviving joint tenant and that the property is not subject to testamentary disposition until informed of the characteristics of joint tenancy ownership by legal counsel. At that time, one of the joint tenants may wish to leave his or her interest in the joint tenancy property to someone other than the other joint tenant

or joint tenants. This situation arises particularly in a second marriage where there are children of a prior marriage of either or both of the spouses who hold title to property in joint tenancy.

Since a person can make whatever testamentary disposition he or she wishes of his or her undivided interest in property held as community property or a tenant in common with another person without notifying the holder or holders of the other undivided interests, should a person not also be able to sever a joint tenancy in real property to create an undivided interest in the property as a tenant in common to be able to make a testamentary disposition of his or her interest in the property without having to give notice to the other joint tenant or joint tenants as long as the severance of the joint tenancy is irrevocable which recording of the severing document would accomplish. As stated in the recommendation, the joint tenancy has been called the "poor man's will," and the severance of the joint tenancy without notice to the other joint tenant would simply be making a change in the will.

I would suggest that subsection (c) of Section 683.2 of the Civil Code be amended to read as follows:

(c) Severance of a joint tenancy of record by deed, written declaration, or other written instrument pursuant to subdivision (a) is not effective to terminate the right of survivorship as to the joint tenant's interest unless the deed, written declaration, or other written instrument effecting the severance is recorded before the death of the joint tenant in the county where the real property is located.

and that subsection (d) of that section be amended to read as follows:

(d) A deed, written declaration, or other written instrument made and recorded pursuant to subdivision (c) is conclusive for the purpose of severing the joint tenancy.

Very truly yours,



Norma J. Wollesen

njw

**KENNETH D. ROBIN**

ATTORNEY AT LAW

2204 UNION STREET

SAN FRANCISCO, CALIFORNIA 94123

(415) 563-2400

November 29, 1984

California Law Revision Commission  
4000 Middlefield Road  
Suite D-2  
Palo Alto, CA 94303

Re: Recommendation Relating to Recording  
Severance of Joint Tenancy (November 1984)

Dear Sir:

I believe that the Recommendation goes overboard in its attempt not to "place an undue burden on the severing joint tenant or create title or proof problem" at the expense of ignoring the obvious need for protection to the other joint tenant where the severance is made secretly.

The Recommendation recites a classic case of fraud in these situations; joint tenant A has a reasonable expectation of ownership of the property through right of survivorship should B die first and A is willing to give B a similar interest should A die first. But unbeknownst to A, B has already deeded a one-half interest to a third person. This scenario practically concedes that if A knew what B had done, A would have taken different action and that A has detrimentally relied on the secrecy of B's action.

It seems to me that the Recommendation does absolutely nothing to protect A in this scenario. Proposed section 683.2 (c)(1) does not protect A unless one can presume that A will constantly, through the lifespan of B, check with the County Recorder's office to see if a "deed, written declaration, or other written instrument effecting the severance" has been recorded. Even if A was suspicious of B, it would be impractical to expect A to do this. And at the heart of this scenario is the trust A reposes in B so that A would never "check up" on B anyway. And, of course, there is absolutely no protection for A provided by the "affidavit" scheme of proposed section 683.2 (c)(2), particularly given the "conclusive" presumption set forth in section 683.2 (d).

California Law Revision Commission

Page Two

November 29, 1984

I for one think that the interest of A in this scenario far outweighs the recorded competing "undue burden" on B or the purported "title or proof problems". If the Commission disagrees, it should at least do so in a forthright manner. It should not pay lip service to the rights of A, purport to provide some protection for that interest of A, and then leave A completely in the cold and as unprotected as he or she was under prior law.

Sincerely,

A handwritten signature in black ink, appearing to read "Kenneth D. Robin", written in a cursive style.

Kenneth D. Robin

KDR/pb

STATE OF CALIFORNIA  
CALIFORNIA LAW  
REVISION COMMISSION

RECOMMENDATION

relating to

RECORDING SEVERANCE OF JOINT TENANCY

November 1984

Important Note: This recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the recommendation as it is to advise the Commission that you object to the recommendation or that you believe that it needs to be revised. COMMENTS ON THIS RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN DECEMBER 15, 1984.

The Commission often substantially revises recommendations as a result of the comments it receives. Hence, this recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303

## RECOMMENDATION

relating to

## RECORDING SEVERANCE OF JOINT TENANCY

A joint tenant may unilaterally sever the joint tenancy,<sup>1</sup> thereby converting it to a tenancy in common<sup>2</sup> and destroying the automatic right of survivorship which is the principal feature of a joint tenancy.<sup>3</sup> No notice need be given to the other joint tenant.<sup>4</sup> Since a severance may be made secretly,<sup>5</sup> there is an opportunity for fraud: A joint tenant

1. Civil Code § 683.2, enacted by 1984 Cal. Stats. ch. 519.
2. Estate of Dean, 109 Cal. App.3d 156, 160, 167 Cal. Rptr. 138 (1980); Riddle v. Harmon, 102 Cal. App.3d 524, 527, 162 Cal. Rptr. 530 (1980); 3 B. Witkin, Summary of California Law Real Property § 222, at 1952 (8th ed. 1973).
3. Riddle v. Harmon, 102 Cal. App.3d 524, 526, 162 Cal. Rptr. 530 (1980). Joint tenancy is a popular form of title because people want the automatic survivorship feature. Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87, 88, 90, 108 (1961); Sterling, Joint Tenancy and Community Property in California, 14 Pac. L.J. 927, 952 (1983); Hines, Personal Property Joint Tenancies: More Law, Fact and Fancy, 54 Minn. L. Rev. 509, 550 (1970); see also Basye, Joint Tenancy: A Reappraisal, 30 Cal. St. B.J. 504, 506 (1955). People who use joint tenancy want the survivor to get all the property in the event of death. Griffith, supra, at 108. They want the survivor to take the property automatically without the delay and expense of probate. Id. at 90. The joint tenancy has been called the "poor man's will," and it works well in practice for people of modest means. Id. at 108.
4. Estate of Dean, 109 Cal. App.3d 156, 159, 167 Cal. Rptr. 138 (1980); Burke v. Stevens, 264 Cal. App.2d 30, 35, 70 Cal. Rptr. 87 (1968); see Estate of Carpenter, 140 Cal. App.3d 709, 712, 189 Cal. Rptr. 651 (1983).
5. See Burke v. Stevens, 264 Cal. App.2d 30, 70 Cal. Rptr. 87 (1968). In the Burke case, the joint tenants were husband and wife. The husband had originally purchased a 60-acre orange grove, taking title with his wife as joint tenants. Some 19 years later, the wife discussed with her attorney the possibility of severing the joint tenancy and converting it to a tenancy in common so she could leave her half by will to her children of a former marriage. The severance was accomplished in secret and the instruments were kept in the office of the wife's attorney. The court noted that the actions of the wife were "subject to ethical criticism" and her "stealthy approach" was "not to be acclaimed." Nonetheless, the

may execute an undisclosed severance, deposit the severing instrument with a third person, and instruct the third person to produce the instrument if the severing joint tenant dies first so the severed half may pass to his or her heirs or devisees. However, if the other joint tenant dies first, the secret severing instrument may be destroyed so that the surviving joint tenant will take the other half of the property by survivorship, thereby becoming owner of the entire property.

To preclude this situation, the Law Revision Commission recommends that the instrument severing a real property joint tenancy of record by one joint tenant acting alone, together with an affidavit that written notice of the severance has been given to each of the other joint tenants, must be recorded before the death of the severing joint tenant in order for the severance to be effective.<sup>6</sup> This new requirement will prevent the severing joint tenant from suppressing the severing instrument if the other joint tenant dies first, yet will not place an undue burden on the severing joint tenant or create title or proof problems.

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court found that, since there was no legal requirement of notice to the other joint tenant or that the severing instruments be recorded, the joint tenancy had been properly severed and the wife's half passed under her will to the children of her former marriage. The husband argued that the court should not permit the severance on the grounds that, if the husband had died first, the wife could have suppressed the severing instruments and taken title to the whole property by survivorship. The court found no evidence to support this claim, saying that "it is pure guess and contrary to the presumption of fair dealing." At least one commentator has found the result in the Burke case to be troubling. See Crawford, Destructibility of Joint Tenancies in Real Property, 45 Cal. St. B.J. 222 (1970).

For other cases in which a joint tenant made a secret severance of the joint tenancy, see Estate of Carpenter, 140 Cal. App.3d 709, 189 Cal. Rptr. 651 (1983); Estate of Dean, 109 Cal. App.3d 156, 167 Cal. Rptr. 138 (1980); Clark v. Carter, 265 Cal. App.2d 291, 70 Cal. Rptr. 923 (1968) (severing joint tenant intended that the instrument be recorded, but recording not accomplished until after her death). See also Riddle v. Harmon, 102 Cal. App.3d 524, 162 Cal. Rptr. 530 (1980) (not clear whether severance was secret).

6. This renews a portion of an earlier Commission recommendation. See Recommendation Relating to Severance of Joint Tenancy, 17 Cal. L. Revision Comm'n Reports 941 (1984). The requirement that an affidavit that notice has been given to other joint tenants also be recorded is new.

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

An act to amend Section 683.2 of the Civil Code, relating to joint tenancies.

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

7917

SECTION 1. Section 683.2 of the Civil Code is amended to read:

683.2. (a) ~~In~~ Subject to the limitations and requirements of this section, in addition to any other means by which a joint tenancy may be severed, a joint tenant may sever a joint tenancy in real property as to the joint tenant's interest without the joinder or consent of the other joint tenants by any of the following means:

(1) Execution and delivery of a deed that conveys legal title to the joint tenant's interest to a third person, whether or not pursuant to an agreement that requires the third person to reconvey legal title to the joint tenant.

(2) Execution of a written instrument that evidences the intent to sever the joint tenancy, including a deed that names the joint tenant as transferee, or of a written declaration that, as to the interest of the joint tenant, the joint tenancy is severed.

(b) Nothing in this section authorizes severance of a joint tenancy contrary to a written agreement of the joint tenants.

(c) Severance of a joint tenancy of record by deed, written declaration, or other written instrument pursuant to subdivision (a) is not effective to terminate the right of survivorship as to the joint tenant's interest unless both of the following are recorded in the county where the real property is located before the death of the joint tenant:

(1) The deed, written declaration, or other written instrument effecting the severance.

(2) An affidavit that written notice of the severance has been given to each of the other joint tenants by mail or personal delivery.

(d) An affidavit made and recorded pursuant to subdivision (c) is conclusive for the purpose of severing the joint tenancy.

(e) Nothing in subdivision (c) limits the manner or effect of:

(1) A written instrument executed by all the joint tenants that severs the joint tenancy.

(2) A severance made by or pursuant to a written agreement of all the joint tenants.

(3) A deed from a joint tenant to another joint tenant.

~~(e) This section applies~~

(f) Subdivisions (a) and (b) apply to all joint tenancies in real property, whether the joint tenancy was created before, on, or after January 1, 1985, except that in the case of death of a joint tenant before January 1, 1985 the validity of a severance under subdivisions (a) and (b) is determined by the law in effect at the time of death. Subdivisions (c), (d), and (e) do not apply to or affect a severance made before January 1, 1986, of a joint tenancy.

Comment. Subdivisions (c) and (d) are added to Section 683.2 to require that in the case of a recorded real property joint tenancy, severance by written declaration or by other instrument, together with an affidavit that written notice has been given to the other joint tenants, must be recorded during the lifetime of the severing joint tenant to be effective, unless all joint tenants have joined. Subdivision (e) permits joint tenants to agree among themselves concerning the manner or effect of a severance, to join in the severance, or to make a deed from one to another, without being subject to the requirements of subdivision (c). Subdivision (f) is amended so that the new recording requirement will not make ineffective a nonrecorded severance where the severance was made before January 1, 1986.

Although an affidavit that notice has been given is conclusive for purpose of the severance, one making a false affidavit may be prosecuted for perjury. See Penal Code § 118.

If the joint tenancy is held by husband and wife, the property may actually be community property notwithstanding the joint tenancy form of title. See 7 B. Witkin, Summary of California Law Community Property §§ 49-50, at 5140-42 (8th ed. 1974). If it is established that the apparent joint tenancy is actually community property, each spouse may dispose of his or her interest in the property by will, whether or not a severance of the apparent joint tenancy has been recorded pursuant to subdivision (c). See Estate of Wilson, 64 Cal. App.3d 786, 134 Cal. Rptr. 749 (1976); Sandrini v. Ambrosetti, 111 Cal. App.2d 439, 244 P.2d 742 (1952); Chase v. Leiter, 96 Cal. App.2d 439, 215 P.2d 756 (1950); Estate of Jameson, 93 Cal. App.2d 35, 208 P.2d 54 (1949).