#H-510 5/24/83

Memorandum 83-36

Subject: Study H-510 - Joint Tenancy and Community Property

Introduction

Earlier this year the Commission distributed for comment its tentative recommendation relating to joint tenancy and community property. The major change proposed by the tentative recommendation is that property held by the spouses in joint tenancy form is presumed to be community property but the community property is subject to a right of survivorship on the death of a spouse. The community property presumption would be rebuttable by a written agreement between the spouses. Ownership rights in the property would be determined by tracing community and separate contributions to its acquisition. In addition, the tentative recommendation revises a number of general rules governing joint tenancy, including that a security interest or lease on the share of one joint tenant is not terminated by the death of that joint tenant.

A copy of the tentative recommendation is attached to this memorandum; also attached is a copy of the background study prepared by the staff, which is now published as Sterling, Joint Tenancy and Community Property in California, 14 Pac. L.J. 927 (1983).

This tentative recommendation excited as much interest as we have seen in any Commission proposal in recent years. We received the 14 letters attached to this memorandum as exhibits, as well as a few telephone calls, commenting on the tentative recommendation. The comments generally approve the tentative recommendation (with the exception of the Executive Committee of the Family Law Section of the Los Angeles County Bar Association which was unanimously opposed), although most also suggest improvements in the proposal. The particular problems raised or improvements suggested are discussed below.

General Comments

A number of the comments received were of a general approving nature and did not raise any problems or suggest any changes. These were the letters of Henry Angerbauer, CPA (Exhibit 3--"I approve of the Commission's recommendations and conclusions and agree that the laws should be amended to conform to the Commission's recommendation."),

Stephen R. Farrand and Nancy J. Jarvis (Exhibit 6--"The changes recommended by the Commission are a much-needed step toward rationalizing the ownership of property by married couples."), and Paul J. Goda, S.J. (Exhibit 10--the recommendation "effectively solves the problems that exist and eliminates the complexities of Lucas.").

§§ 745.110-745.440. Joint tenancy

Stephanie Nordlinger (Exhibit 14) dislikes six and seven digit numbers, and sees no reason to relocate the joint tenancy provisions from Civil Code Sections 683, 683.1, and following, where they now reside.

The reason we use decimal numbers is that it permits us to fit more sections in where only a couple of whole number spaces are available and that it provides a format for future expansion and insertion of new provisions. We have relocated the provisions from Section 683 to Section 745 in order to set up a chapter and article structure for the statute, which is difficult to achieve under existing Section 683.

§ 745.310. Severance of joint tenancy

Subdivision (a). A number of letters commented that the statute does not make clear whether a declaration of severance must be by all joint tenants or whether it may be executed by one alone. See Exhibits 7 (Richard J. Sensenbrenner), 11 (Charles A. Dunkel), and 13 (Roger Bernhardt). The letter writers assume we mean to permit severance by one joint tenant acting alone, and this is in fact the case. Professor Bernhardt argues for a requirement that in the case of a joint tenancy between spouses, both should be required to sign. This suggestion is discussed below. The staff would amend Section 745.310(a) to provide that "joint tenancy may be severed by a written declaration of severance executed by one or more of the joint tenants."

Subdivision (b). Subdivision (b) of Section 745.310 requires that a severance of a real property joint tenancy by written declaration be recorded to be effective. Professor Bernhardt suggests that a severance by deed be recorded to be effective, as well. We believe this to be the rule under existing law, but see no harm in codifying the rule. We would revise Section 745.310(b) to provide that "a severance by written declaration or otherwise is not effective until it is recorded."

§ 745.320. Effect of survivorship

Section 745.320 provides that a surviving joint tenant takes the property subject to liens and leasehold interests on the share of the decedent. Stephanie Nordlinger (Exhibit 14) strongly agrees with this position. "This is the only fair thing to do. Could it be done this year?" Kenneth D. Robin (Exhibit 5) raises a number of questions about the operation of this provision:

(1) Does this put the creditor or lessee of a joint tenant in a better position than the creditor or lessee of a community property tenant, and if so, should it? The answer to this question is not simple, since a creditor or lessee may not be able to obtain a valid interest in the share of a community property owner without the joinder of both spouses, although the law on this point is complex. But by providing that community property in joint tenancy form has the attributes of community property, the joinder requirements for liens and leases of spousal joint tenancy would be the same as for community property. The whole matter of dispositions of community property and joinder requirements is complex and is currently the subject of a separate Commission recommendation. Suffice it to say that the joint tenancy proposals bring joint tenancy law closer to community property law than it is at present. As Mr. Robin rightly points out this should be stated as one of the arguments in favor of the joint tenancy proposals.

(2) Mr. Robin also notes that the manner of taking by survivorship subject to the interests of creditors and lessees needs to be explained more adequately in the recommendation. He is particularly concerned to know how it will work if the survivor's right to the whole property is subject to a lease of the decedent's share of the property, which is also a right to concurrent possession of the whole property. The answer is that the survivor and lessee must work out a sharing arrangement, just as joint tenants must. The staff will elaborate this in the recommendation.

§ 5110.420. Community property in joint tenancy form

Section 5110.420 provides that property held by the spouses in joint tenancy form is presumed to be community property with right of survivorship. The presumption is rebuttable by proof of a written agreement between the spouses that the property is separate and not community. This provision received a number of comments:

(1) The community property presumption should also be rebuttable by tracing contributions to a separate property source. As many of the commentators recognize, the proposals do contain a tracing provision, only it appears in Section 5110.440(c) rather than in Section 5110.420; several commentators suggest the tracing provision be relocated to Section 5110.420 for clarity. See Exhibits 9 (Sandra Blair), 11 (Charles A. Dunkel), and 14 (Stephanie Nordlinger). One commentator approves the tracing provision but suggests that its operation be elaborated. Exhibit 8 (Dennis A. Cornell). And one commentator approves Lucas and does not believe in tracing to rebut the community property presumption. Exhibit 2 (Executive Committee of Family Law Section of Los Angeles County Bar Association).

The Commission has already substantially addressed these comments in its recommendation relating to division of joint tenancy property at dissolution of marriage, currently embodied in Assembly Bill No. 26. The bill is now a combined Law Revision Commission/State Bar bill that takes a limited approach to tracing--a community asset, including a community asset in joint tenancy form, is treated as community for purposes of dissolution, and to the extent a party can trace separate property contributions to the acquisition of the asset, the party is entitled only to reimbursement at dissolution. Because the Commission has adopted the reimbursement policy, the staff believes that the tracing provision of the present tentative recommendation should be replaced either by a reimbursement provision or by a reference to the reimbursement provision (assuming its enactment). The staff will check both provisions for consistency and make any necessary conforming changes.

There is a broader point the Commission must still consider, however. The reimbursement provision of AB 26 is limited to dissolution of marriage. Should tracing be allowed to establish for other purposes a different proportionate ownership of a community asset, whether held in joint tenancy form or otherwise? This would have an effect on rights of creditors and on disposition at death. The staff's feeling is that rights at dissolution are the most sensitive and emotional, and reimbursement is properly permitted there. But as for other incidents of marital property, recognition of separate contributions is not critical. The property should be community for all other purposes. This will also enormously simplify legal relations both between the spouses and as to third persons.

(2) The presumption of community property with right of survivorship should be rebuttable by an agreement between the spouses that the property is ordinary community property, and tracing to a separate property source should likewise be rebuttable by a community property agreement between the spouses. See Exhibits 1 (Alvin G. Buchignani) and 11 (Charles A. Dunkel). These are good points; the only question is how to implement them. Assembly Bill 26 makes clear that the reimbursement right is subject to agreement of the parties. The Commission has another tentative recommendation on presumptions and transmutations generally, that states the general rule that all marital property presumptions may be overcome by an agreement between the parties. The staff believes we should restate the general rule specifically here. This illustrates a major problem with our current approach of dealing with individual issues in this area rather than developing a comprehensive recommendation.

Incidentally, the tentative recommendation already provides a means by which the spouses can overcome the survivorship effect of the joint tenancy form and have the property treated as community at death--they may simply sever the joint tenancy under Section 5110.440(b). The staff will point out the interrelation of these provisions in the Comment.

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

Subdivision (a). Subdivision (a) makes clear that community property with right of survivorship is treated as community property for all purposes other than disposition at death and tracing. A major concern commentators have is the effect of this treatment for taxation purposes--we must be careful not to lose the favorable tax treatment currently afforded community property and would be doing an enormous service if such tax treatment could be extended to property held in joint tenancy form. See Exhibits 4 (John M. Minnott) and 11 (Charles A. Dunkel).

If we take the position that community property in joint tenancy form is community property for all purposes other than disposition at death and limit tracing to reimbursement at dissolution, this will help somewhat to assure community property treatment for taxation purposes. This could be aided by specifying community property treatment for tax purposes also, although this would not bind federal taxing authorities.

A significant problem that remains is the right of survivorship, which seems to demand joint tenancy tax treatment. This could be mitigated somewhat by a change in terminology. Instead of community property

"with right of survivorship," the property would simply be treated as any other community property (which passes to the surviving spouse absent a will), but the right of testamentary disposition would be precluded. This would have the effect of the right of survivorship without the technical terms that seem to trigger a tax liability, and would help ensure favorable tax treatment for community property in joint tenancy form. It would also assure consistent treatment of community property after death with respect to rights of creditors, thus solving the concern expressed by Alvin G. Buchignani (Exhibit 1).

One other possibility is to provide optional probate of community property in joint tenancy form. This would enable survivors to obtain favorable tax treatment under California law, which seems at present to hinge tax treatment on whether an asset was probated or not. If we avoid survivorship terminology and simply provide that the property is treated as community for purposes of passage at death (with testamentary disposition prohibited) as suggested above, this result would be assured, since the surviving spouse has the option to take community property directly or through probate. Probate Code § 202.

Subdivision (b). Subdivision (b) precludes testamentary disposition of community property in joint tenancy form but permits severance of the survivorship right in the same manner as severance of any other joint tenancy. This would permit testamentary disposition of the property but would not otherwise affect its community character.

The Executive Committee of the Family Law Section of the Los Angeles County Bar Association (Exhibit 2) takes the position that the spouses should be permitted to dispose of community property in joint tenancy form by will if they can show no intent to create joint tenancy. The staff agrees, but would require evidence of intent to be demonstrated by a written agreement; otherwise, there will be continuing litigation over the subjective intent of the parties and the law will be no better than it is now. We noted above that we should add to the statute a specific provision that allows the spouses by written agreement to vary their statutory rights in property.

Charles A. Dunkel (Exhibit 11) points out that the provision permitting either spouse to sever the survivorship right is superfluous, since the general rule is that any joint tenant may sever a joint tenancy. The staff believes the provision is useful, since we are creating a new

form of property tenure and the question probably will arise whether joint tenancy or community property principles control.

Roger Bernhardt (Exhibit 13) takes a different position. He believes the right of survivorship should only be terminated by an instrument executed by both spouses. He states that when spouses take property in joint tenancy form, the one thing they expect to get is a right of survivorship and they expect the right to be indestructible, i.e., neither should be entitled, unilaterally, to deprive the other of the intended inheritance. "Our reported appellate decisions on this matter reveal a distressing pattern of secret, death bed conveyances by a spouse intended to deny the widowed survivor full ownership of the jointly held property. I think it is unfair to permit this to happen, and doubly unfair to permit it to happen without even the knowledge of the other--who generally first learns of it after the funeral." Professor Bernhardt points out that requiring joinder to sever the joint tenancy would be consistent with general treatment of community property conveyances. It would also provide the spouses with a useful option--if they take community property in joint tenancy form they are assured of an indestructible right of survivorship, and if they wish to have a standard destructible joint tenancy, they make a separate property designation in the title or a separate property agreement. "As matters stand now, only a lawyer can draft a document guaranteeing either spouse a protected right of survivorship (by way, e.g., of joint life estates with a contingent remainder in the survivor). I find no public policy ordaining that the spouses should be unable to accomplish this purpose when they so desire or being forced to retain counsel in order to effectuate that purpose." Although the staff has resisted Professor Bernhardt's suggestion in the past, we find his present argument compelling and recommend that the rule be that both spouses must join in a termination of the survivorship right. This would be consistent with the treatment of community property generally.

Subdivision (c). The provision for proportionate ownership of community property in joint tenancy form would be eliminated under the revisions suggested above, and the property would be community for all purposes except testamentary disposition. This would resolve the concern of Stephanie Nordlinger (Exhibit 14)--"As to title companies and bona fide purchasers for value, all joint tenants should be required to sign

any deed, etc., regardless of the relative interests of each joint tenant."

§ 5110. 490. Transitional provision

Section 5110.490 makes the provisions on joint tenancy with right of survivorship prospective only--they do not apply to property acquired before the operative date. Stephanie Nordlinger (Exhibit 14) believes the provisions should be retroactive as well as prospective:

> The new law should be retroactive to all family law cases pending in the courts as of the date of its enactment. While it can be prospective as to third parties dealing with a married couple, it should not be prospective as to the couple. If it is prospective as to them, the family law courts are going to be applying the old, unfair rules for at least another generation. As there will be two sets of rules operating simultaneously, there will be confusion.

The staff agrees with this position completely. We would substitute the following provision for Section 5110.490:

> 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.

Other Matters

In addition to these comments, there were also suggestions that the Commission deal with related areas not dealt with in the tentative recommendation. The County Recorders' Association of the State of California (Exhibit 12) believes statutory authority would be useful to record affidavits of death of joint tenants, life estate, homestead interest and community property interest. The staff will work with the Association to see what can be done, either by inclusion in the current recommendation or by development of a separate recommendation.

Stephanie Nordlinger (Exhibit 14) sees the need for a statute of fraud for transactions involving $500 or more, applicable in family law situations. The staff is not certain about the precise character of this suggestion, and will write to Ms. Nordlinger for further information.

Conclusion

The staff recommends that, after making any changes in the recommendation that appear appropriate in light of the comments received, the Commission prepare the recommendation for introduction in the 1984 legislative session.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

ALVIN G. BUCHIGNANI
ATTORNEY AT LAW

ASSOCIATED WITH
KNIGHT, BOLAND & RIORDAN

100 PINE STREET, SUITE 3300
SAN FRANCISCO, CA 94111
(415) 362-0684

February 17, 1983

California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, CA 94036

Re: Tentative Recommendation Relating to Joint Tenancy and Community Property

I have the following comments regarding the above tentative recommendation.

Present law, imperfect as it is, makes it possible, in many cases, to have the benefits of both community property and joint tenancy, by the simple expedient of holding title in joint tenancy, and at the same time having a written agreement to the effect that the property is community. Under this arrangement, in the typical case, upon the death of one spouse, the survivor may expeditiously clear title by terminating the joint tenancy. This is consistent with the intention of the parties, since the will of the deceased spouse presumably leaves the property to the surviving spouse in any event. However, in the event the deceased spouse, for whatever reason, leaves his or her community interest in trust, or possibly leaves it to children in the event the survivor does not live for a certain period, it is then possible to probate the interest of the deceased spouse, on the basis of the written agreement, again accomplishing the objective of the parties.

It appears to me that, under the tentative recommendation, confusion may occur in the event property is held in joint tenancy, subject to an agreement that it is in fact community. By having "community property with right of survivorship," the question arises whether it is even possible to probate property held in joint tenancy,regardless of an agreement that it is in fact community property. Such an

agreement might be construed as only confirming that the property is community property with right of survivorship. Therefore, some means should be assured that spouses should be able, as now, to have the convenience of joint tenancy, when needed, subject to the ability of the parties to have the benefits of community property whenever necessary to effectuate the intention.

Accordingly, it is my belief that property held in joint tenancy should continue to be presumed "true" joint tenancy property, subject to evidence which may rebut the presumption, other than the mere tracing of the property. What is more important, however, is a provision that confirms the right of the parties to agree that property held in joint tenancy may be subject to probate, whenever such a probate is consistent with the parties' intention.

Another reason for the retention of the presumption presently applicable to joint tenancy property is to protect one spouse from the misdeeds of the other. It is not uncommon for one spouse to incur debts without the approval of the other. Under present law, at least, the spouse incurring the debt is not likely to be able to encumber the family home, if held in joint tenancy, since the lender knows the risks involved. Under the proposed legislation, either spouse, without the other's knowledge or consent, could encumber a one-half interest, and the other may not even know of the transaction. When the borrowing spouse dies, the shock to the survivor is not hard to imagine. The present system provides greater protection to the preservation of the family home, and I believe it should be retained.

Very sincerely

Alvin G. Buchignani

AGB/dg
D45-6

Family Law Section of the Los Angeles County Bar Association
617 SOUTH OLIVE STREET
LOS ANGELES, CALIFORNIA 90014
(213) 627-2727

February 18, 1983

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, California 94306

Re: Recommendation Relating To Division of Joint Tenancy And Tenancy In Common Property At Dissolution Of Marriage; Tentative Recommendations Relating To (1) Joint Tenancy And Community Property, (2) Continuation Of Support Obligation After Death of Support Obligor, and (3) Awarding Family Home To Spouse Having Custody Of Children

Dear Members:

The Executive Committee of the Family Law Section of the Los Angeles County Bar Association, which represents approximately 1,300 family law lawyers, has considered the above-referenced Recommendations promulgated by the Law Revision Commission. At a meeting held on February 15, 1983, the committee unanimously voted to voice its opposition to each of the recommendations.

1. Recommendation Relating To Division Of Joint Tenancy And Tenancy In Common Property At Dissolution Of Marriage.

The Recommendation, we believe, is unnecessary and inappropriate.

As the law now stands, such property may be divided as community property, if acquired with community funds by the unilateral act of one spouse or without the understanding or mutual consent of both spouses (Shindler vs. Shindler (1954) 126 Cal. App. 2d 597, 604, 272 P. 2d 566, 570; Thomasett vs. Thomasett (1953) 122 Cal. App. 2d 116, 133, 264 P. 2d 626, 637; Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 373-4, 125 Cal. Rptr. 804, 809). If the court concludes that the parties did not intend nor agree to alter the character of the property from community to a true joint holding, it may properly determine that the character

of the property remained community (Blankenship vs. Blankenship (1963) 212 Cal. App. 2d 736, 742, 28 Cal. Rptr. 176, 180; Martinelli v. California Pac. Title Ins. Co. (1961) 193 Cal. App. 2d 604, 14 Cal. Rptr. 542).

If the parties actually intended to create a joint tenancy or tenancy in common, thus altering the character of their property (either from community or the separate property of one of them) to separately owned joint interests, the court in the dissolution proceeding should not be given jurisdiction over separate property.

Contrary to the assertions set forth in the Recommendation, enactment of the proposed legislation would neither "eliminate litigation" over the community or separate character of the property nor "add flexibility" to a just division of marital property.

More litigation would be created by admitting evidence "of different proportionate contributions by the parties to the acquisition of the property", as proposed in Section 4800.1(b). Not only is such a provision contrary to the law expressed by the Supreme Court in Marriage of Lucas (1980) 27 Cal (3) 808, 166 Cal Rptr. 853, it is contrary to numerous cases decided before enactment of the Family Law Act, (e.g., Machado vs. Machado (1962) 58 Cal. App. 2d, 501, 25 Cal. Rptr. 87).

By permitting rebuttal of the presumption of equal ownership by evidence of the source of funds alone, the cost of litigation of the character of property would be increased as a result of the need for additional discovery, greater use of expert witnesses and additional court time.

As the court recently said in Marriage of Miller (1982) 133 Cal. App. 3d 988, 184 Cal. Rptr. 408, the party who wishes to preserve a separate property interest may do so by taking title in his or her name alone, or by securing his or her spouse's agreement that the separate interest will remain, commensurate with the contribution. The source of funds used should not be permitted, by itself, to rebut the presumption of equal ownership.

Flexibility would not be added; if the property is community or if the parties agreed to a different division than reflected in the title, the court already has jurisdiction to award the property accordingly (Marriage of Lucas, supra). If the property is truly separate property, the court should not have jurisdiction to divide it.

2. Tentative Recommendation Relating To Joint Tenancy And Community Property.

Much of what has been said heretofore relating to the Recommendation Relating to Division of Joint Tenancy and Tenancy in Common

Property applies equally to the Tentative Recommendation as well.

The Family Law Section is not concerned predominantly with those provisions of the Recommendation which do not relate to the Family Law Act. However, with respect to proposed Sections 5110.420 and 5110.440, it would appear that the two sections are inconsistent.

On the one hand, the former section permits rebuttal of the presumption only by proof of "a written agreement or a clear statement in the deed or other documentary evidence of title". On the other hand, the latter section permits the presumption to be rebutted by tracing the acquisition of the property to "a separate property source". It would appear to be the intention of the Commission that the presumption should be rebuttable either by tracing the source of the funds or by agreement. (Tent. Rec., p. 3) The Commission cited the author of this letter as authority for the proposition that permitting such rebuttal "will make the law governing marital property held in joint tenancy form consistent with the law governing marital property generally." (Tent. Rec., p.3, footnote 9)

Not only is that not the opinion of the author of this letter, it is not the law. Both as to marital property and marital property held in joint tenancy form, the presumption created by the form of title cannot be rebutted by evidence of the source of funds alone. (Marriage of Cademartori (1981) 119 Cal. App. 3d 970, 174 Cal. Rptr. 292 [Community Property]; Marriage of Lucas, supra, [Joint Tenancy Marital Property])

If the parties are truly unaware of the consequences of taking title to property in joint tenancy (Tent. Rec., p.3, footnote 7), it seems erroneous to afford such property the incident of survivorship. (Civ. Code §5110.440) If both of the parties truly had no idea that the right of survivorship was being created by using community property in joint tenancy form, evidence thereof should be permitted so as to allow a testamentary disposition of the property by one of the spouses, just as attends all other community property.

3. Tentative Recommendation Relating To Continuation Of Support Obligation After Death Of Support Obligor.

An order for spousal support is predicated predominantly upon the ability of the support obligor to make payments (Civ. Code §4801(a)(1)), if the support obligee is in need thereof. Such ability to pay is materially lessened, if not destroyed, by the death of the support obligor. The automatic continuation of support obligations upon the death of the support obligor appears, therefore, to be erroneous.

After the death of the support obligor, the income previously used to pay spousal support, in most instances, ends. Except in unusual circumstances, where the support obligor has amassed a substantial estate, or has left his heirs with extensive life insurance proceeds, continuation of the support obligation seems unjustifiable.

The Recommendation prohibiting modification after the death of the support obligor is unjust. Not only is the support obligor's income stream ended upon death, but other factors may subsequently arise which might justify modification or termination. For example, the supported spouse might become employed, inherit a substantial estate, or commence living with a person of the opposite sex so as to come within the provisions of Civil Code §4801.5.

Perhaps an alternative would be to permit the trial court to continue the support obligation after the death of the support obligor, in its discretion, but only if such support obligation were modifiable or terminable after the death of the support obligor.

4. Awarding Family Home To Spouse Having Custody of Children.

Awarding the family dwelling or its use to the party to whom custody of minor children is awarded will create additional litigation with regard to custody. By providing a presumption favoring the award of the use of the dwelling during the minority of the children will create economic imbalance in many instances. The non-custodial parent in "single-asset" cases will be deprived of the economic benefit of one-half of the community property for extended periods of time in many instances. That result is often unfair, and should not be mandated. Rather than providing the court with additional discretion to make innovative distributions of property, these recommendations will lead to additional problems, rather than solving them.

Our committee stands ready to provide any additional input which you may desire concerning these or other proposals affecting the practice of family law.

Very truly yours,

Gerald E. Lichtig

GERALD E. LICHTIG

GEL:dsd
cc: Sybil Anne Davis, Chair
Martin E. Shucart, Legislative Committee Chair

HENRY ANGERBAUER, CPA
4401 WILLOW GLEN CT.
CONCORD, CA 94521

2/19/83

Law Revision Commission:

Regarding the Tentative Recommendation relating to Joint Tenancy and Community dated 1/22/83

I approve of the Commission's recommendations and conclusions and agree that the Code should be amended to conform to the Commission's recommendations.

Sincerely

H

MILLER, BUSH & MINNOTT
ATTORNEYS AT LAW
1235 NORTH HARBOR BOULEVARD, SUITE 200
FULLERTON, CALIFORNIA 92632

AREA CODE 714
TELEPHONE
992-0800

JACK M. MILLER
WILLIAM M. BUSH
JOHN M. MINNOTT
LOIS RUBIN
STANLEY L. MOERBEEK
ELENA REYES-JONES

February 23, 1983

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306

Re: California Law Revision Commission Proposed Creation of "Community Property With Right of Survivorship"

Dear Mr. DeMoully:

Legislation which would erase the grounds for a differentiation of step up in basis for property held between spouses in community property form and property held between spouses which is community property but is held in joint tenancy form, would be valuable. However, such legislation would have to be effective without the necessity of changing title to that property currently held between spouses in joint tenancy form. Such legislation must provide that if a surviving spouse could establish that the property held in joint tenancy was in fact comprised of community property that for step up in basis purposes the entire value of the interest would be stepped up. In my opinion, any requirement that the form of the title be changed would render such legislation useless and redundant.

California law already provides for the passage of a deceased spouse's interest in community property to a surviving spouse without probate. The biggest hurdle which faces the public is the time and money required to transfer title to property previously held in joint tenancy form into community property. Requiring a change into a new form of joint tenancy would face the same problems.

Limiting the proposed legislation to the sole purpose of providing for a total step up in cost basis would also seem to avoid the difficulty of harmonizing the differences in possession and control which exist between joint tenancy and community property ownership.

Sincerely,

John M. Minnott

JMM:le

KENNETH D. ROBIN
ATTORNEY AT LAW
2204 UNION STREET
SAN FRANCISCO, CALIFORNIA 94123
(415) 563-2400

February 23, 1983

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94306

Re: Tentative Recommendation Relating to Joint Tenancy and Community Property

Dear Sir:

While I am in agreement with this Recommendation, I would like to discuss two points that perhaps bear mentioning in the comments:

As I understand it, the gist of the Recommendation is to ensure that in joint tenancy situations, creditors who take a lien in the property on the basis of a debt of one of the joint tenants or who obtain a long term lease from one of the joint tenants will have those interests preserved in the event of the death of that joint tenant. The comment makes it relatively clear that such rights could be defeated to the unfair windfall of the surviving tenant in the absence of such new law. The Recommendation, however, is unclear as to what the current law is when such actions take place vis-a-vis community property. If but one of two married partners executes a deed of trust in favor of the creditor, or executes a long term lease for a tenant, and following dissolution or death the other spouse becomes the sole proprietor of the property, does not that spouse hold the property subject to the creditor's encumbrance or the tenant's long term lease? If so, is not one additional reason for adopting the Commission's Recommendation regarding joint tenancy to make the rights of the creditor and the tenant consistent under both situations; an admirable solution considering the likelihood that none of the parties involved (creditor, tenant, or either spouse) might have any thought or intention at the time of the transactions in question that there was any difference. If, indeed, the results are not the same and the rights of the creditor and/or the tenant are not superior to the rights of the remaining spouse, should there not be some recommendation to make sure that they are?

In passing, I note that I have assumed in my reading of the Recommendation, and in my preparation of this comment in response thereto, that the Recommendation of the Commission would limit the creditor's interest or the tenant's interest in the subject property to the interest of the joint tenant who executed the lease or who was the debtor. That is, on a $200,000 property with a $150,000 lien, I have assumed that the creditor foreclosing on the property could only take $100,000. If I am confused here, I would suspect that others reading the recommendation might also be confused. I assume that I am correct in that it has not been the purpose of the Commission to change the laws regarding the need for a creditor, hoping to have an interest over the entirety of the property, to get the signature of both spouses on the deed of trust in either a joint tenancy or community property situation. There is a little bit more confusion in terms of how such a limitation, if I am correct and it indeed exists, works out in a long term lease situation. That is, it's one thing to limit the creditor's interest to one half of the value of the property where only one of the two joint tenants has executed the mortgage (and is not to be deemed to be the agent for the other joint tenant in connection therewith), but it's a little more difficult to conceive of such a division with respect to a long term tenancy. That is, if one has a long term lease executed by one of two joint tenants (and, again, we are not presuming any agency which binds the remaining joint tenant), how do we limit the tenant's right to but one half of the property when he has a possessory right with respect to the whole thing. I'm not really sure that the Recommendation resolves this with its statement that: "If the survivor and the lessee are unable to work out their possessory rights, they can partition. The solution will more equitably accommodate the interests of both lessor and lessee than existing law."

Sincerely,

Kenneth D. Robin

KDR/mks

LAW OFFICES OF
FARRAND, MALTI & COOPER
A PROFESSIONAL CORPORATION

GEORGE M. MALTI
STEPHEN R. FARRAND
WAYNE B. COOPER
ROGER J. METZLER, JR.
TERENCE L. BRUNIERS

OF COUNSEL
NANCY A. JARVIS

701 SUTTER STREET
SAN FRANCISCO, CA 94109

TEL.(415) 775-0680

P. O. BOX 7329
SAN FRANCISCO, CA 94120

FILE NO.

February 24, 1983

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306

Gentlemen:

This is to advise the Commission of our wholehearted support of the recommendation relating to joint tenancy and community property, especially the concept of community property "with right of survivorship." The changes recommended by the Commission are a much-needed step toward rationalizing the ownership of property by married couples.

Very truly yours,

STEPHEN R. FARRAND

NANCY J. JARVIS

RICHARD J. SENSENBRENNER
ATTORNEY AT LAW
23962 MALIBU ROAD
P. O. BOX 877
MALIBU, CALIFORNIA 90265
TELEPHONE (213) 678-7657

February 24, 1983

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

I have reviewed the Tentative Recommendation Relating To Joint Tenancy and Community Property. I commend the commission for both an excellent idea and a fine execution of that idea.

I have only one suggestion, and offer it most tentatively, since I am sure the commission carefully considered my idea long before it occurred to me and chose the language dealing with it most carefully. But here goes:

> It seems to me that proposed Civil Code Section 745.310 does not make clear that the written declaration of severance need only be executed by one of the joint tenants. A court, somewhere down the line, might buy the argument that all joint tenants must join in the declaration. To avoid this "problem", subdivision (a) of Section 745.310 might be revised to read:
>
> 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 executed by one or more of the joint tenants. Except as provided in subdivision (b), a severance by written declaration is effective at the time of execution of the written declaration.

Yours truly,

RICHARD J. SENSENBRENNER

RJS/ms

LAW OFFICES OF

ALLEN, IVEY, CORNELL, MASON [redacted]

A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

650 WEST 19TH STREET
POST OFFICE BOX 2184
MERCED, CALIFORNIA 95344
(209) 723-4372

LOS BANOS OFFICE:
840 6TH STREET
POST OFFICE BOX 471
LOS BANOS, CALIFORNIA 93635
(209) 826-1584

REPLY TO: Merced

TERRY L. ALLEN*
WILLIAM T IVEY, JR.
DENNIS A. CORNELL
MICHAEL L. MASON
[redacted]
GARY B. POLGAR
DONALD J. PROIETTI
KENNETH M. ROBBINS
NANCY I. SMITH
MICHAEL A. KIRKPATRICK
*A PROFESSIONAL CORPORATION

March 29, 1983

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, Ca 94306

Re: Joint Tenancy and Community Property

Gentlemen:

I am writing to comment on your recommendation concerning joint tenancy and community property. Generally, I agree with most of the provisions contained in that recommendation, with the exception of the failure to more particularly specify the tracing problems in the jointly owned family residence.

As tracing poses real practical problems for trial counsel and courts, I think that your legislation would be much improved if it would specify what factors would be taken into account during the tracing. Specifically, some of the factors set forth in the Moore case, cited by you, concerning the credit for principal reduction only, and not payments on interest and homeowners insurance, should be included in the legislation.

By the way, this particular problem is currently addressed by two bills which have been introduced in the state legislature. The first bill would provide a dollar for dollar refund of the separate property contribution made by either spouse. There would be no tracing, no accounting for appreciation or other payments made by the separate estate. This is a simple straight forward approach which is a compromise to those people who are concerned with long marriages versus short marriages.

The other bill that is currently pending will allow the Court the discretion to award an interest in the appreciation in the residence over and above the actual refund of the down payment..

I think it would be a great assistance if you could provide specific guidelines to the Court when making such a determination.

Very truly yours,

ALLEN, IVEY, CORNELL & MASON

By Dennis A. Cornell
DENNIS A. CORNELL

DAC:kej

BLAIR & LeGRAND

SANDRA BLAIR
ATTORNEY AT LAW
Certified Family Law Specialist
CAMILLE LeGRAND
ATTORNEY AT LAW

FOX PLAZA, SUITE 701, 1390 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE: 415/626-5472

April 6, 1983

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306

Re: Tentative Recommendation Relating to Joint Tenancy and Community Property

Dear Commission Members:

I am writing to convey my approval of your recommendation regarding joint tenancy and community property. I am a Certified Family Law Specialist and the Chair of the Family Law Section of the San Francisco Bar Association. I am writing to you as an individual.

Civil Code Section 5110 certainly needs amendment and clarification. The most important part of your tentative recommendation is the clarification of the special presumptions found in Civil Code Section 5110 in that tracing contributions to a separate property source should be sufficient to overcome these community property presumptions. The inability of spouses to trace separate property contributions to jointly-held property has worked hardship on many of my clients.

Your commentary correctly states the problem. The joint tenancy title form is often selected by spouses upon the advice of laypersons. Not only are these laypersons ignorant of the differences in legal treatment of joint tenancy title and community property title, these laypersons are also ignorant of the special community property presumption created by the joint tenancy title form for a community property residence.

The Conference of Delegates of the State Bar approved a resolution with similar intent in 1982. This Resolution

spoke only to recapture of separate property contributions from a single-family residence held in joint tenancy. I believe that your more comprehensive proposals are a better way to approach this problem.

Your proposals clarify and simplify a currently confused area of the law. I also believe that your proposals will eliminate the current flurry of litigation regarding whether or not there was an agreement or understanding between the spouses at the time title was acquired in joint tenancy form.

Thank you for your consideration of this letter.

Sincerely,

Sandra Blair

SANDRA BLAIR

SB:ps

Dear Jack, I don't understand the Bar! For your information. Paul Goda

THE UNIVERSITY OF SANTA CLARA

SCHOOL OF LAW
984-4286

April 7, 1983

Real Property Law Section
555 Franklin Street
P. O. Box 7908
San Francisco, California 94120
Attn: Mr. Jerome Fishkin

Dear Mr. Fishkin:

The latest issue of the Journal of the State Bar of California asks that we send copies of comments on certain proposals on family law now before the California Law Revision Commission to you. I am a Professor of Law here at the University of Santa Clara and I teach the course in Community Property.

On Feb. 15, 1983, I wrote to the California Law Revision Commission to indicate that I agreed with their Tentative Recommendation #H-510, Joint Tenancy and Community Property. I do not send a copy of that letter to you since I only stated agreement. However, I do send a letter to you dated April 12, 1982. I disagreed with their recommendation at that stage because I felt that California should abolish joint tenancy as between spouses. Community property solves the problems that joint tenancy was meant to solve. I thought then, and still think that joint tenancy as between spouses simply brings complexity into the property arrangements between spouses which can only cause increased fees to lawyers.

I finally wound up in agreement with the latest version of Study #H-510 since it effectively solves the problems that exist and eliminates the complexities of Lucas. I simply do not think that many couples really want joint tenancy and I believe that current laws solve the problems that joint tenancy was meant to solve. For example, spouses want ease of transmission at death. That problem is simply solved by PrC 650 et seq which allow community property going to the surviving spouse to go to that spouse without administration. If the property were originally separate property, the property may be transmuted into community property in order to achieve that effect. If the deceased spouse wants all to go to the surviving spouse, a will may achieve that effect.

There are simply two cases illustrating the complexity of joint tenancy with respect to spouses. Those cases illminate the need to have a true community property system.

Sincerely,

PJG:jw
Encl.

Paul J. Goda, S.J.
Professof of Law

CROCKER NATIONAL BANK

SAN FRANCISCO TRUST AND INVESTMENT OFFICE - LIVING TRUST DIVISION
111 SUTTER STREET, SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE (415) 477-2756

CHARLES A. DUNKEL
VICE PRESIDENT
AND TRUST OFFICER

April 21, 1983

The California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Gentlemen:

Your tentative recommendation relating to awarding family home to spouse having custody of children meets with my approval as drafted.

Your tentative recommendation relating to joint tenancy and community property merits a few comments.

In Section 745.310 must the written declaration of severance be signed by both parties? If not, then can't you eliminate in Section 5110.440(b) the words "... or by an express declaration in a written instrument executed by either spouse." As superfluous?

In Section 5110.440(a) the word "taxation" should be added to this list of "purposes". How will this section affect the revenue and taxation code sections concerning cost basis of a community property or a joint tenancy asset acquired from a decedent? Will a "community property with right of survivorship" asset receive a step-up in cost basis upon the death of a spouse?

Subparagraph (c) of Section 5110.440 talks about tracing the contributions of the spouses to a separate property source. Shouldn't this subparagraph be a part of Section 5110.420 which discusses the presumption of community property with the right of survivorship? If the spouses provide in a written declaration or instrument that property is community, this should override a later attempt to deny community property by tracing the acquisition of the property to a separate property source. If the spouses have by an expressed declaration in a written instrument converted the property to community property there is no community property presumption to overcome.

Sincerely,

Charles A. Dunkel
Vice President and Trust Officer

CAD:BW:1371

County Recorders' Association
of the State of California

Bernice A. Peterson • P.O. 6124 • Santa Rosa, CA 95406 • (707) 527-2651

April 21, 1983

Mr. John H. DeMoully
California Law Revision Commission
400 Middlefield Road, Suite D-2
Palo Alto, California 94306

Dear Mr. DeMoully:

It is my understanding that the California Law Revision Commission will be meeting on May 6, 1983 to discuss the joint tenancy method of holding title to real property. The County Recorders' Association of California would like to submit the following for your consideration.

Currently County Recorders accept Affidavits of Death of Joint Tenant, Life Estate, Homestead Interest and Community Property Interest. Although these documents are not specifically required or permitted by statute to be recorded they are accepted based on their notification value to third parties and the lack of liability to the recorder recording these documents.

As practically all of the documents recorded are specifically provided for by law, the Association respectfully requests your consideration of developing statutory authority to record the affidavits discussed above. Such authority will provide for uniformity in recording practices throughout the State.

Please let me know if you have any further questions regarding this matter.

Very truly yours,

Dick Hughes

DICK HUGHES
Chairman, Legislative Committee
227 North Broadway, Suite 35
Los Angeles, CA 90012
(213) 974-6603

ao
cc: Bernice Peterson
Legislative Committee

April 22, 1983

Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road
Palo Alto, Ca. 94306

Dear Nat:

I have several comments to make with regard to Tentative Recommendations relating to Joint Tenancy and Community Property, study H-510. They all relate to the same theme and so I will state my basic position first.

You state in your introduction (page 3), "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." I think that is only part of it. I think the spouses also expect that the survivorship feature is indestructible, i.e., that neither spouse should be entitled, unilaterally, to deprive the other of the intended inheritance. Our reported appellate decisions on this matter reveal a distressing pattern of secret, death bed conveyances by a spouse intended to deny the widowed survivor full ownership of the jointly held property. I think it is unfair to permit this to happen, and doubly unfair to permit it to happen without even the knowledge of the other - who generally first learns of it after the funeral. From that premise, I make the following comments regarding your recommendations.

745.310(a). You do not state whether a declaration of severance is a unilateral or bilateral document. At the very least, you should specify what you mean. Better yet, you should require that both parties execute the declaration.

745.310(b). You require the declaration of severance to be recorded, but apparently do not expect the same for other methods of severance. I recommend that you also require that any deed purporting to sever a joint tenancy of record be recorded in oreder to accomplish that effect.

5110.440. All of my concerns regarding an indestructible right of survivorship would be eliminated if you revised the second sentence of subdivision (b) so as to require a jointly executed instrument by both spouses. I conceive the current

rule to require that both spouses execute any instrument of conveyance affecting community property (see, e.g., Andrade Dev. Co. v Martin, 138 Ca.3d 330 (1983), so that this rule I propose would be entirely consistent with that. Furthermore, it would give spouses a useful election: if they desired a guaranteed right of survivorship, they could take title as community property with right of survivorship or, alternatively, if they were willing to permit either one to destroy the survivorship aspect, they could take a conventional joint tenancy.

As matters stand now, only a lawyer can draft a document guaranteeing either spouse a protected right of survivorship (by way, e.g., of joint life estates with a contingent remainder in the survivor). I find no public policy ordaining that the spouses should be unable to accomplish this purpose when they so desire or being forced to retain counsel in order to affectuate that purpose.

Yours truly,

Roger Bernhardt
Professor of Law

RB/gm

LAW OFFICES
STEPHANIE NORDLINGER
3231 OCEAN PARK BLVD., SUITE 121
SANTA MONICA, CALIFORNIA 90405

TELEPHONE (213) 452-5010

April 28, 1983

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306

RE: Your Tentative Recommendation relating to Joint Tenancy and Community Property, issued January 22, 1983.

Dear Sirs:

While I strongly agree that the law needs clarification and change, I have the following comments about this proposal.

1. The proposal does not go far enough. Sometimes married people take title to property as joint tenants on the advice of a real estate broker or other non-professional and yet expect to be able to trace their shares of separate property should there be a disssolution of the marriage. The proposal should protect these people.

2. Regarding paragraph No. 24840 at p. 19 (Civil Code section 5110.490, Transitional Provisions:
The new law should be retroactive to all family law cases pending in the courts as of the date of its enactment. While it can be prospective as to third parties dealing with a married couple, it should not be prospective as to the couple. If it is prospective as to them, the family law courts are going to be applying the old, unfair rules for at least another generation. As there will be two sets of rules operating simultaneously, there will be confusion.

3. The target date for enactment should be January 1, 1984 instead of January 1, 1985. The problems need to be dealt with NOW.

4. We should seriously consider reinstating the Statute of Frauds in the Civil Code (sections 1624, 1698) so that a person cannot sue on a transaction involving $ 500 (or perhaps $ 1,000) or more unless there is a writing evidencing the obligation. This part of the statute is now only in Article 2 of the Commercial Code (section 2201) and therefore only applies to merchants.

As a pro tem judge in Small Claims Court, I have frequently seen the problems caused by oral contracts. I am now handling the appeal of a family law case that need never have become so involved and expensive if there had been a prenuptial agreement. The opportunities for fraud that

occur in both marriages and affairs are legion. Many people cannot afford, or do not obtain, Marvin or prenuptial agreements. We could save much litigation and abuse if we put in the Statute of Frauds at Civil Code section 1624 the provision mentioned above and applied this law in family law situations. See also Civil Code sections 5133 and 5134 regarding marital settlement agreements, which must be in writing and apparently notarized.

5. I oppose your paragraph number 15342 (proposed Civil Code section 5110.420 on page 17) because the methods of proof in subdivision (b) are too limited. As between the spouses, proof of separate property interests by tracing should not be limited to proof of a "written agreement" or "a clear statement in the deed or other documentary evidence of title". If a spouse can show that the property was bought with separate property funds or property, he or she should be allowed that separate property interest. If there was more than one source of the money or property, then each source should be credited with its proportionate share. See your proposed section 5110.440 (c) (paragraph 31493 at p. 18), which contains no such limitation. As to title companies and bona fide purchasers for value, all joint tenants should be required to sign any deed, etc. regardless of the relative interests of each joint tenant.

I also oppose this proposed code section because of its seven-digit number.

6. My feeble mind refuses to remember 6-digit and 7-digit code section numbers. This is a bad trend that should not be extended. I would leave these code sections in the 683 C.C. area, for the most part. I see no good reason for moving them.

7. Liens On Joint Tenancy Property: I have another client who has a small claims court judgment against a woman whose only significant asset seems to be a joint tenancy apartment house. He asked about his position if she were to die. You know the result. I strongly agree with the first sentence of the third paragraph on p. 5, which would allow such a judgment to attach to the property conveyed at death to the surviving joint tenant. This is the only fair thing to do. Could it be done this year?

Sincerely yours,

Stephanie Nordlinger

STEPHANIE NORDLINGER

xc: Mr. Jerome Fishkin,
State Bar, Real Property Law Section

#H-510 5/6/83

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

RIGHTS AMONG COTENANTS IN POSSESSION AND OUT OF POSSESSION OF REAL PROPERTY

May 6, 1983

Important Note: This tentative 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 tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN AUGUST 31, 1983.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative 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, California 94306

#H-510 5/6/83

TENTATIVE RECOMMENDATION

relating to

RIGHTS AMONG COTENANTS IN POSSESSION
AND OUT OF POSSESSION OF REAL PROPERTY

A distinctive feature of joint tenancy and tenancy in common tenure of real property is that each cotenant is entitled to concurrent possession of the entire premises--the cotenants share an undivided possessory interest. Each cotenant is entitled to occupy the premises and neither can exclude the other.[1]

In the ordinary case the manner of sharing possession is worked out by agreement of the cotenants. Absent an agreement, a cotenant in possession need not account to a cotenant out of possession for the use value of the property,[2] unless the cotenant in possession has depleted the property by extraction of minerals,[3] has rented the property to a third party,[4] or has ousted the other cotenant from possesion.[5]

The rule against accounting between cotenants except in special circumstances appears generally sound and consistent with the nature of cotenancy tenure that each cotenant is entitled to the occupation of the entire premises. A cotenant should not be required to pay rent as a condition of the exercise of the legal right to occupy the property.[6]

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1. See, e.g., Swartzbaugh v. Sampson, 11 Cal. App.2d 451, 54 P.2d 73 (1936).

2. See, e.g., Black v. Black, 91 Cal. App.2d 328, 204 P.2d 950 (1949); McWhorter v. McWhorter, 99 Cal. App. 293, 278 P. 454 (1929).

3. See, e.g., McCord v. Oakland Quicksilver Mining Co., 64 Cal. 134, 27 P. 863 (1883); Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237 (1935).

4. See, e.g., Howard v. Throckmorton, 59 Cal. 79 (1881); Goodenow v. Ewer, 16 Cal. 461 (1860); Rutledge v. Rutledge, 119 Cal. App.2d 114, 259 P.2d 79 (1953).

5. See, e.g., Zaslow v. Kroenert, 29 Cal.2d 541, 176 P.2d 1 (1946).

6. Pico v. Columbet, 12 Cal. 414 (1859).

California law is the same as nearly all other common law jurisdictions in this respect,[7] and is supported by the overwhelming weight of legal scholarship.[8] If the cotenants are unable to agree as to the manner of sharing possession, or for payment of rent by a cotenant in exclusive possession, the remedy of partition is available as a matter of right.[9]

One difficulty with existing law is that, although a cotenant in possession is required to account to a cotenant out of possession in case of an ouster, it is not always clear when an ouster has occurred.[10] If one cotenant exclusively occupies property that is susceptible to occupany only by one cotenant, is this an ouster? If one cotenant exclusively occupies property and refuses a request by another cotenant to share occupancy, is this an ouster? California law is that in order for the cotenant in possession to be held to account for a proportionate share of the use value of the property, the cotenant must forcibly exclude or prevent use by the cotenant out of possession.[11]

The Commission recommends that the procedure outlined below be provided by statute so that a tenant out of possession of property may establish an ouster and recover damages, without the need to show that the tenant in possession has forcibly excluded or prevented use of the property by the tenant out of possession. To establish that an ouster has occurred, a cotenant out of possession serves a written demand on a

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7. 4A R. Powell, The Law of Real Property § 603 (1982); W. Burby, Handbook of the Law of Real Property § 98 (3d ed. 1965); Annot., 51 A.L.R.2d 388 (1957); Weibel, Accountability of Cotenants, 29 Iowa L. Rev. 558 (1944); Note, 32 Notre Dame Lawyer 493 (1957).

8. See, e.g., C. Moynihan, Introduction to the Law of Real Property 226 (1962); 2 American Law of Property § 6.14, p. 62, n.19 (1952); Comment, 25 Calif. L. Rev. 203 (1937); Note, 24 Marquette L. Rev. 148 (1940); Note, 19 Wash. L. Rev. 218 (1944); Note, 12 Wyoming L.J. 156 (1958); Comment, 37 Wash. L. Rev. 70 (1962). For an exception, see Berger, An Analysis of the Economic Relations Between Cotenants, 21 Ariz. L. Rev. 1015 (1979).

9. Code Civ. Proc. § 872.710.

10. 4A R. Powell, The Law of Real Property § 603, p. 610 (1982) ("The practical borderline between privileged occupancy of the whole by a single cotenant and unprivileged greedy grabbing which subjects the greedy one to liability to his cotenant is not crystal clear.").

11. See, e.g., Brunscher v. Reagh, 164 Cal. App.2d 174, 330 P.2d 396 (1958); De Harlan v. Harlan, 74 Cal. App.2d 555, 168 P.2d 985 (1946).

cotenant in possession to share possession of the premises. If the cotenant in possession does not offer to share possession within 60 days, an ouster has occurred. If an ouster is so established, the cotenant in possession is liable for damages either directly or in another action such as for possession or partition of the property. In the ordinary case, damages will be the reasonable rental value of the ousted cotenant's share.

This new statutory remedy would have a number of advantages. It would enable a cotenant out of possession to assert his or her rights by means of a demand, rather than by attempting to take physical possession, with the resultant confrontation and possible violence. It would help clarify the acts that amount to an ouster and give assurance that the ouster could be determined with some certainty; this would also be economically efficient in that it would reduce litigation over whether an ouster has occurred. It would put the cotenant in possession on notice that either a sharing agreement must be reached by the cotenants or liability will be imposed, thereby encouraging private agreement between the cotenants. It would not be inequitable to require the cotenant in possession to account for the value of the possesion thereafter if the cotenant refused to share possession or to reach an agreement such as payment of rent to the cotenant out of possession. Nor would it preclude either party from seeking a judicial partition of the property where agreement is not possible.

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

An act to add Section 843 to the Civil Code, relating to owners of real property.

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

13601

SECTION 1. Section 843 is added to the Civil Code to read:

843. (a) If real property is owned concurrently by several persons, a tenant out of possession may establish an ouster from possession by a tenant in possession in the manner provided in this section. This section does not apply if the tenant out of possession is not entitled

to possession under the terms of an agreement between the cotenants or the instrument creating the cotenancy. This section supplements and does not limit any other means by which an ouster may be established.

(b) A tenant out of possession may serve on a tenant in possession a written demand for concurrent possession of the property. The written demand shall make specific reference to this section and to the time within which concurrent possession must be offered under this section. Service of the written demand shall be made in the same manner as service of summons in a civil action. An ouster is established 60 days after service is complete if, within that time, the tenant in possession does not offer concurrent possession of the property to the tenant out of possession.

(c) A claim for damages for an ouster established pursuant to this section may be asserted by an independent action or in an action for possession or partition of the property or another appropriate action or proceeding, subject to any applicable statute of limitation.

(d) Nothing in this section precludes the cotenants, at any time before or after a demand is served, from seeking partition of the property or from making an agreement as to the right of possession among the cotenants, the payment of reasonable rental value in lieu of possession, or any other terms that may be appropriate.

Comment. Section 843 provides a procedure by which a tenant out of possession of property may establish an ouster and recover damages, without the need to show that the tenant in possession has forcibly excluded or prevented use of the property by the tenant out of possession. Cf. Brunscher v. Reagh, 164 Cal. App.2d 174, 330 P.2d 396 (1958); De Harlan v. Harlan, 74 Cal. App.2d 555, 168 P.2d 985 (1946) (forcible exclusion or prevention of use). One cotenant ousted by another is entitled to recover damages resulting from the ouster, which ordinarily amounts to a proportionate share of the value of the use and occupation of the land from the time of the ouster. Zaslow v. Kroenert, 29 Cal.2d 541, 176 P.2d 1 (1946). Establishment of an ouster under this section, however, may also mark the beginning of the period required for the tenant in possession to establish title by adverse possession against the tenant out of possession.

045/210

SEC. 2. This act applies to property acquired before, on, or after the operative date of the act.

#H-510 March 1982

BACKGROUND STUDY

JOINT TENANCY AND COMMUNITY PROPERTY IN CALIFORNIA*

*This background study was prepared for the California Law Revision Commission by Nathaniel Sterling. No part of this study may be published without prior written consent of the Commission.

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CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-2
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JOINT TENANCY AND COMMUNITY PROPERTY IN CALIFORNIA

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BACKGROUND STUDY

JOINT TENANCY AND COMMUNITY PROPERTY IN CALIFORNIA

by Nathaniel Sterling*

A husband and wife in California may hold property as joint tenants, tenants in common, or as community property.[1] The California Supreme Court has noted that "we have a modified form of certain estates known to the common law and have them operating alongside of the community property system, an importation from the Spanish law. Naturally, therefore, at times there will appear to be difficulty in harmonizing these systems."[2]

The manner of tenure of property has significant legal and practical consequences for the parties, and a substantial body of jurisprudence has grown up in California about joint tenancy and community property and their interrelation. While the Supreme Court refers to the difficulty in harmonizing the different types of property tenure, other commentators have been less charitable, stating that the California law is "confused and inconsistent,"[3] and has generated a "deluge of litigation;[4] they

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* B.A. 1967, University of California at Berkeley; J.D. 1970, University of California at Davis. Member of the legal staff of the California Law Revision Commission. Member of the California Bar.

This study was prepared by the author to provide the California Law Revision Commission with background information to assist it in its study of joint tenancy and community property law. Any conclusions, opinions, or recommendations contained herein are entirely those of the author and do not necessarily represent or reflect the views of the California Law Revision Commission or its individual members.

1. Civil Code § 5104.

2. Siberell v. Siberell, 214 Cal. 767, 771, 7 P.2d 1003, ___ (1932); the court also notes that "our statutes have been amended from time to time, so altering the original provisions of each of the systems as to allow them both a place in our jurisprudence."

3. Mills, Community Joint Tenancy - A Paradoxical Problem in Estate Administration, 49 Cal. St. B.J. 38, 39 (1974).

4. Griffith, Joint Tenancy and Community Property, 37 Wash. L. Rev. 30 (1962).

have referred to the "joint tenancy debacle,"[5] and noted that the two important bodies of law appear to be "headed in opposite directions."[6] One authority states that, "in sober truth, this grafting by statute of tenancies of common-law origin upon the community property system is entirely inconsistent with the community property system."[7]

This study reexamines the California law of joint tenancy and community property and their interrelation.

I. JOINT TENANCY

Incidence of Joint Tenancy in California

Although California statutes proclaim that community property is property acquired by either spouse during marriage,[1] the vast majority of property acquired by married persons for which documentary evidence of title exists is taken as joint tenancy. Approximately 85 percent of recorded real property deeds to husbands and wives are in joint tenancy form.[2] Most joint savings accounts and brokerage accounts are held in joint tenancy form.[4] Joint tenancy of stocks, promissory notes, and United States Savings bonds is common. Joint tenancy is a widely used form of property tenure among married persons in California.[5]

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5. Knutson, California Community Property Laws: A Plea for Legislative Study and Reform, 39 S. Cal. L. Rev. 240, 252 (1966).

6. Sims, Consequences of Depositing Separate Property in Joint Bank Accounts, 54 Cal. St. B.J. 452, 457 (1979).

7. W. deFuniak & __ Vaughn, Principles of Community Property 333 (2d ed. 1971).

1. Civil Code §§ 687, 5110.

2. Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87, 88 (1961); Basye, Joint Tenancy: A Reappraisal, 30 Cal. St. B.J. 504, 506 (1955); Marshall, Joint Tenancy, Taxwise and Otherwise, 40 Cal. L. Rev. 501 (1952).

3. Marshall, Joint Tenancy, Taxwise and Otherwise, 40 Cal. L. Rev. 501, 520 (1952).

4. Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity, 85 (1981).

5. Marsh, Property Ownership During Marriage, 1 California Family Lawyer § 4.6 (Cal. Cont. Ed. Bar 1961).

Joint tenancy, like community property, is for all practical purposes solely a form of husband and wife property tenure. One study of real property joint tenancies found that over 98 percent of all joint tenancy deeds were to husband and wife.[6] The study pointed out that, "joint tenancy today is almost exclusively a husband and wife holding. Joint tenancies between related persons other than husbands and wives are rare, survivorship arrangements between unrelated persons virtually non-existent."[7]

A number of reasons have been advanced for the popularity of joint tenancy as a form of marital property tenure. Legally untrained persons connected with real estate and other property transactions frequently advise and even insist that title be taken in joint tenancy.[8] Husbands and wives have been advised that joint tenancy is less expensive, that it avoids probate, even that it minimizes taxes.[9] Some commentators have discerned a deep-rooted need for survivorship--the people want it.[10] One thing is clear: it is common for husband and wife to take title in joint tenancy and when they discover the legal incidents of joint tenancy one of them is frequently dissatisfied, with the result that joint tenancy is "the fertile source of much litigation."[11]

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6. Hines, Real Property Joint Tenancies: Law, Fact, and Fancy, 51 Iowa L. Rev. 582 (1966) (study made in Iowa).

7. Id. at 623.

8. See discussion in Marsh, Property Ownership During Marriage, 1 California Family Lawyer § 4.6 (Cal. Cont. Ed. Bar 1961); Benam v. Benam, 178 Cal. App.2d 837, 3 Cal. Rptr. 410 (1960); Jones v. Jones, 135 Cal. App.2d 52, 286 P.2d 908 (1955); Schindler v. Schindler, 126 Cal. App.2d 597, 272 P.2d 566 (1954).

9. See, e.g., Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87, 89-90 (1961); Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity 85 (1981).

10. See, e.g., Basye, Joint Tenancy: A Reappraisal, 30 Cal. St. B. J. 504, 511 (survivorship "furnishes personal, individual feelings of security to the parties which outweigh pure considerations of property rights.").

11. Edwards v. Deitrich, 118 Cal. App.2d 254, 255, 257 P.2d 750, 751 (1953).

Origin and Development of Joint Tenancy

Despite the current use of joint tenancy for husband and wife property holding, the joint tenancy estate originated at common law in the feudal need to pass property to successive generations without splitting the incidents of tenure.[1] Joint tenancy was a technical feudal estate, founded, like the laws of primogeniture, on the principal of the aggregation of landed estates in the hands of a few, and opposed to their division among many persons.[2]

For creation of a joint tenancy at common law, four "unities" were required. "The properties of a joint estate are derived from its unity, which is fourfold; the unity of interest, the unity of title, the unity of time, and the unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession."[3] Although the California courts still announce the requirement of four unities for joint tenancy,[4] in fact as this study will demonstrate the four unities are unnecessary for a valid joint tenancy. This is amply illustrated by the mere fact that husand and wife can now hold property in joint tenancy.

At common law a husband and wife could not hold property in joint tenancy. The theory of the four unities of joint tenancy dictated this result. "Joint tenants are said to be seised per my et per tout, by the half or moiety, and by all; that is, they each of them have the entire possession, as well of every parcel as of the whole."[5] But since husband and wife were one person in law, they could not hold by moieties, but

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1. Blackstone notes the common law preference for joint tenancy because "the divisible services issuing from land (as rent, etc.) are not divided, nor the entire services (as fealty) multiplied, by joint tenancy." Blackstone, Commentaries *193.

2. DeWitt v. San Francisco, 2 Cal. 289 (1852).

3. Blackstone, Commentaries *180.

4. See, e.g., DeWitt v. San Francisco, 2 Cal. 289 (1852); Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003 (1932); Hammond v. McArthur, 30 Cal.2d 512, 183 P.2d (1947); People v. Nogarr, 164 Cal. App.2d 591, 330 P.2d 858 (1958); Tenhet v. Boswell, 18 Cal.3d 150, 554 P.2d 330, 133 Cal. Rptr. 10 (1976).

5. Blackstone, Commentaries *182.

both were seised of the entirety, per tout et non per my. This gave rise to the common law tenancy by the entireties.

Tenancy by the Entireties

Tenancy by the entireties, like joint tenancy, has the quality of survivorship. However, it differs from joint tenancy in the essential respect that neither spouse can convey his or her interest so as to affect the right of survivorship in the other. In the eye of the law the spouses are not seized of moieties but of entireties. Thus, while in the case of joint tenancy a severence of any of the unities, as a conveyance by one of the joint tenants to a third person, terminates the joint tenancy and transforms the new estate into a tenancy in common, this cannot be done in the case of tenancy by the entireties, owing to the fiction of the law that, in the latter tenancy, each holds an undivided right to the whole and not, as in joint tenancy, a right to an undivided half.[6] Of course it is well settled, where tenancy by the entireties is recognized, that neither spouse can so destroy the character of the estate as to prevent the survivor becoming sole owner.

Tenancy by the entireties is not recognized in California, however.[7] The reason that obtained at common law, and that forced the development of tenancy by the entireties, did not exist in California. The right of the wife to hold property and to contract was fully recognized and upheld. With the ending of the reason for the rule, the rule itself ceased. The spirit of the California law made against the recognition of such an estate.[8] The catalog of coownership tenures in the 1872 Civil Code excluded tenancy by the entireties.[9] The statute in effect abolished the tenancy by entireties by refusing to recognize any estate

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6. See discussion in Comment, 5 S. Cal. L. Rev. 144 (1931); Crawford, Destructibility of Joint Tenancies in Real Property, 45 Cal. St. B.J. 222 (1970).

7. Delanoy v. Delanoy, 216 Cal. 23, 13 P.2d 513 (1932).

8. Swan v. Walden, 156 Cal. 195, 196 103 P. 931, ___ (1909).

9. Civil Code Section 682 provides:
   682. The ownership of property by several persons is either:
   1. Of joint interests;
   2. Of partnership interests;
   3. Of interests in common;
   4. Of community interest of husband and wife.

other than those enumerated.[10] The 1872 Civil Code also made clear that a husband and wife may hold property in joint tenancy.[11]

Presumption Against Joint Tenancy

Joint tenancy was both a common and preferred form for holding land at early common law. The feudal system opposed a division of tenures and favored joint tenancy with the right of survivorship to such a degree that there was a presumption that a conveyance to two or more persons was in joint tenancy and express language was necessary to negate the presumption.[12]

In time, with the passing of the feudal system, joint tenancy became disfavored. The complete loss of one tenant's investment upon the tenant's death offended a natural sense of justice.[13] California early adopted a statute reversing the common law preference for joint tenancy, and creating a preference for tenancy in common "unless expressly declared in the grant or devise to be a joint tenancy."[14]

California retains its statutory departure from the common law preference in favor of joint tenancy. Under Civil Code Sections 683 and

10. Hannon v. Southern Pac. R.R. Co., 12 Cal. App. 350, 107 P. 335 (1909). An interesting footnote is that the major revision of the Civil Code proposed by the Commission for Revision and Reform of the Law and enacted by 1901 Cal. Stats., ch. 157, amended Section 682 to add to the enumerated estates: "5. Of property held by a husband and wife as tenants by the entireties." The entire revision project was invalid for failure to republish the entire code. Cf. Lewis v. Dunne, 134 Cal. 291, 66 P. 478 (1901) (Code of Civil Procedure).

11. Civil Code § 161, recodified by 1969 Cal. Stats., ch. 1608 § 8 as Civil Code § 5104 ("A husband and wife may hold property as joint tenants, tenants in common, or as community property."). Like Civil Code Section 682, former Section 161 was amended by 1901 Cal. Stats., ch. 157, to recognize tenancy by the entireties, but the enactment was invalid. See footnote 10, supra.

12. See Blackstone, Commentaries *193.

13. Basye, Joint Tenancy: A Reappraisal, 30 Cal. St. B.J. 504, 505-506 (1955).

14. 1855 Cal. Stats., ch. 140 § 1. See Dewey v. Lambier, 7 Cal. 347 (1857) and Greer v. Blanchar, 40 Cal. 194 (1870).

686 a joint tenancy must be expressly declared in the creating instrument, or a joint tenancy is not created.[15] In case of ambiguity, an instrument is construed to create a tenancy in common rather than a joint tenancy.[16]

Common Types of Joint Tenancy Property

Personal as well as real property may be held in joint tenancy.[1] A part ownership may be in joint tenancy.[2] And a less-than-fee interest may be held in joint tenancy, such as a life estate[3] or an equitable interest under a land sale contract.[4]

Because of the presumption against joint tenancy property tenure, the manner of holding title is not an issue for coownership of many types of property. It is only where there is a public record, registration, certificate, or transfer papers or documents that show title to be in joint tenancy that problems arise. This typically involves much of the wealth in the State of California: real property, bank accounts, safe deposit boxes, automobiles, notes and deeds of trust, stocks, and United States savings bonds.[5] Special rules and presumptions have developed for each of these types of property.

In addition, as a general rule, the form of joint tenancy title is subject to question pursuant to overriding doctrines such as lack of capacity for the transaction that created the joint tenancy,[6] fraud or undue influence in the creation of the joint tenancy,[7] and mistake or

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15. Tenhet v. Boswell, 18 Cal.3d 150, 554 P.2d 330, 133 Cal. Rptr. 10 (1976); Swartzbaugh v. Sampson, 11 Cal. App.2d 451, 54 P.2d 73 (1936).

16. See, e.g., Dalton v. Keers, 213 Cal. 204, 2 P.2d 355 (1931); Bill Froelich Motor Co. v. Estate of Kohler, 240 Cal. App.2d 897, 50 Cal. Rptr. 200 (1966).

1. Civil Code § 683.

2. Estate of Galletto, 75 Cal. App.2d 580, 171 P.2d 152 (1946); Gonzales v. Gonzales, 267 Cal. App.2d 428, 73 Cal. Rptr. 83 (1968).

3. Riley v. Turpin, 47 Cal.2d 152, 301 P.2d 834 (1956); Green v. Brown, 37 Cal.2d 391, 232 P.2d 487 (1951).

4. O'Neill v. O'Malley, 75 Cal. App.2d 821, 171 P.2d 907 (1946).

5. See generally Hines, Personal Property Joint Tenancies: More Law, Fact and Fancy, 54 Minn. L. Rev. 509 (1970).

6. E.g., Estate of Ginsberg, 11 Cal. App.2d 210, 53 P.2d 397 (1936).

7. E.g., Estate of Kreher, 107 Cal. App.2d 831, 238 P.2d 150 (1951).

lack of intent to create the joint tenancy.[8] It is in the area of intent that most of the litigation over whether the property is in fact joint tenancy or community property has occurred.

Safe Deposit Boxes

An excellent example of the difficulties created when title to property appears by documentary evidence to be joint tenancy can be found in safe deposit boxes. As a practical matter, if two persons wish to have access to the same safe deposit box, they may be required to sign a rental card that indicates that the contents of the box are held in joint tenancy. And in fact, it appears that many people may actually believe that property placed in a safe deposit box with joint access is actually held in joint tenancy.[9] However, it is equally clear that many people do not believe they are changing the character of their property by putting it in a safe deposit box.[10] The result is extensive litigation over the extent to which property in a joint safe deposit box is held in joint tenancy, and the extent to which parol evidence may be used to show intent.[11] California finally solved this problem in 1949 by enacting legislation to make clear that the signing of a safe deposit box rental card does not create a joint tenancy in the contents of the box.[12]

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8. E.g., Blankinship v. Blankinship, 104 Cal. App.2d 199, 230 P.2d 869 (1951); In re Marriage of Mahone, 123 Cal. App.3d 17, 176 Cal. Rptr. 274 (1981).

9. Hines, Personal Property Joint Tenancies: More Law, Fact and Fancy, 54 Minn. L. Rev. 509, 525 (1970).

10. Comment, The Unintentional Creation of a Joint Tenancy in the Contents of a Safe Deposit Box, 32 Cal. L. Rev. 301 (1944).

11. See, e.g., California Trust Co. v. Bennett, 33 Cal.2d 694, 204 P.2d 324 (1949); Hausfelder v. Security-First Nat. Bank, 77 Cal. App.2d 478, 176 P.2d 84 (1946); Estate of Dean, 68 Cal. App.2d 86, 155 P.2d 901 (1945); Security-First Nat. Bank v. Stack, 32 Cal. App.2d 586, 90 P.2d 337 (1939).

12. Civil Code § 683.1; enacted by 1949 Cal. Stats., ch. 1597 § 1; see Nossaman, The Joint Tenancy Problem, 27 Cal. St. B.J. (1952).

Joint Bank Accounts

A joint bank account is a common form of joint tenancy that is easily created and results in a simple means of transfer of the funds in the account at the death of one joint tenant to the surviving joint tenant.[13] Despite the appearance of joint tenancy form, joint bank accounts have presented continuing problems to the courts because they frequently are intended as executory gifts or trusts, rather than true joint tenancy.[14] The depositor frequently retains exclusive control of the funds during the depositor's life with the intent that they pass to the surviving joint tenant at the depositor's death.

Beginning in the early 1900's with the enactment of Section 15A of the Bank Act,[15] California gave express statutory recognition to the hybrid nature of the joint bank account. The effect of the Bank Act was to create two presumptions.[16] It was presumed that a joint account was the property of all the joint tenants during their lives; this presumption was rebuttable by proof that the depositor did not intend to create a true joint tenancy in the account.[17] It was also presumed that it was the intent of the depositor to vest title to the funds in the joint account in the survivor; this presumption was conclusive, absent proof of fraud or undue influence.[18]

When Section 15A of the Bank Act was recodified in 1952 as Section 852 of the Financial Code,[19] the conclusive presumption of survivorship intent was omitted. The effect of the omission is that the survivorship

13. Marshall, Joint Tenancy, Taxwise and Otherwise, 40 Cal. L. Rev. 501 (1952).

14. Kepner, The Joint and Survivorship Bank Account--A Concept Without a Name, 41 Cal. L. Rev. 596 (1953).

15. 1909 Cal. Stats., ch. 76 § 15a. See Wallace v. Riley, 23 Cal. App.2d 654, 74 P.2d 807 (1937).

16. Paterson v. Comastri, 39 Cal.2d 66, 244 P.2d 902 (1952).

17. Note, 4 Stan. L. Rev. 435 (1952).

18. The conclusive presumption was added in 1921. 1921 Cal. Stats., ch. 780 § 5.

19. 1951 Cal. Stats., ch. 364 § 852.

aspect of a joint account, like the ownership aspect of a joint account, is subject to litigation.[20] The proof required to rebut the presumption of joint tenancy is a common understanding or agreement by the joint account holders of the intent in creating the account that the property be other than joint tenancy.[21]

In 1980 the California Law Revision Commission recommended legislation based on the Uniform Probate Code to alter the existing presumptions.[22] The Commission recommended that a joint account belongs to the parties during their lifetimes in proportion to their net contributions unless there is clear and convincing evidence of a contrary intent, on the basis that many lay persons have the erroneous understanding that creation of a joint tenancy account has no effect until death;[23] this would reverse existing law that presumes equal ownership of the funds. The Commission also recommended that the presumption of survivorship in a joint account is rebuttable only by clear and convincing evidence of a different intent, to effectuate the concept that most persons who have joint accounts want the survivor to have all balances remaining at death; the Commission states that this would strengthen survivorship rights by making proof of a different intent more difficult.[24]

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20. Schmedding v. Schmedding, 240 Cal. App.2d 312, 49 Cal. Rptr. 523 (1966). It is interesting to note that the statutes creating conclusive presumptions of survivorship for joint accounts in savings and loan associations, as opposed to banks, were not omitted. Compare Financial Code Section 852 (banks) with Sections 7604 (state savings and loan associations) and 11205 (federal savings and loan associations). See Estate of Friedman, 20 Cal. App.3d 399, 97 Cal. Rptr. 653 (1971).

21. Sims, Consequences of Depositing Separate Property in Joint Bank Accounts, 54 Cal. St. B.J. 452 (1979); In re Marriage of Hayden, 124 Cal. App.3d 72, 177 Cal. Rptr. 183 (1981).

22. Recommendation Relating to Non-Probate Transfers, 15 Cal. L. Revision Comm'n Reports 1605 (1980).

23. State Bar of California, The Uniform Probate Code: Analysis and Critique 184-185 (1973).

24. Whether this would in fact change existing law is debatable in light of the difficult burden to overcome the present presumption of survivorship intent. See, e.g., In re Marriage of Mahone, 123 Cal. App.3d 17, 176 Cal. Rptr. 274 (1981); Sims, Consequences of Depositing Separate Property in Joint Bank Accounts, 54 Cal. St. B.J. (1979).

U.S. Savings Bonds

United States savings bonds may be registered in the names of two persons as coowners in the alternative.[25] However, the mere fact of registration as coowners does not necessarily create a joint tenancy. Parol evidence is admissible to show the intentions of the parties and the realities of ownership.[26] Civil Code Section 704 provides that upon the death of either of the registered coowners the bonds become the sole and absolute property of the surviving coowner. However, this provision only establishes the relationship between the coowners and the government and is not conclusive as to rights between the coowners.[27] The presumption of survivorship created by statute does not preclude the overriding doctrine of fraud or affect the application of community property principles.[28]

Automobiles

Although it is common for persons to register an automobile as joint owners, simple registration of names in the alternative (A or B) does not satisfy the statutory criteria for creating a joint tenancy.[29] As a consequence special legislation was adopted in 1965 to overcome the statutory presumption against joint tenancy in the case of transfer and ownership of automobiles.[30] Vehicle Code Sections 4150.5 and 5600.5 provide expressly that a vehicle registered in the names of two or more persons as coowners in the alternative by use of the word "or" is deemed to be held in joint tenancy and each coowner is deemed to have granted the other coowners the right to dispose of title and interest in the

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25. Conrad v. Conrad, 66 Cal. App.2d 280, 152 P.2d 221 (1944); 31 C.F.R. § 315.7 (___).

26. Estate of Hoefflin, 176 Cal. App.2d 619, 1 Cal. Rptr. 642 (1959).

27. Katz v. Driscoll, 86 Cal. App.2d 313, 194 P.2d 822 (1948).

28. See, e.g., Chase v. Leiter, 96 Cal. App.2d 439, 215 P.2d 756 (1950); 5 Santa Clara Lawyer 196 (1965).

29. Cooke v. Tsipouroglou, 59 Cal.2d 660, 381 P.2d 940, 31 Cal. Rptr. 60 (1963).

30. 1965 Cal. Stats., ch. 891 §§ 1, 2. See also Cooke v. Tsipouroglou, 59 Cal.2d at 667-668, 381 P.2d at ___, 31 Cal. Rptr. at ___: "Special legislation was found necessary to overcome difficulties arising with respect to multiple holders of bank deposits and safe deposit boxes (Fin. Code § 852; Civil Code, § 683.1), and the rules relating to vehicle ownership by multiple owners likewise appear in need of clarification."

vehicle. Presumably this presumption is subject to rebuttal, particularly if community property is involved, even though the Vehicle Code also provides expressly for registration as community property.[31] Registration in this form also creates a right of survivorship unless a contrary intention is set forth in writing upon the registration application.

Corporate Stock

Corporate stock may be held in joint tenancy form. The form of holding creates a presumption of joint tenancy that may be rebutted by evidence of intent.[32] Notwithstanding this general rule, the corporation by statute is authorized to deal with the ownership of the stock in accordance with the form of title on its books.[33]

Notes and Deeds of Trust

A note or other contract right may be held in joint tenancy; this frequently occurs where there has been a sale of real property that had been held in joint tenancy. The sellers may take a note or an installment contract in joint tenancy as the proceeds of the real property.[34] This results from the doctrine of tracing of proceeds.[35]

Creation of Joint Tenancy

At common law it was necessary for joint tenants to acquire their interests at the same time (unity of time) and by the same conveyancing instrument (unity of title). Thus one could not create a joint tenancy in himself or herself and another by a direct conveyance.[1] To avoid the possibility of the application of this archaic rule careful lawyers and even more cautious title companies insisted, in every case where a grantor wished to create a joint tenancy in which the grantor would be one of the joint tenants, that there be first a conveyance of the

31. Veh. Code §§ 4150.5(b), 5600.5(b). Cf. In re Marriage of Wall, 30 Cal. App.3d 1042, 106 Cal. Rptr. 690 (1973) (title in conjunctive; automobile acquired with separate property).

32. Crook v. Crook, 184 Cal. App.2d 745, 7 Cal. Rptr. 892 (1960).

33. Corp. Code § 420.

34. Hines, Personal Property Joint Tenancies: More Law, Fact and Fancy, 54 Minn. L. Rev. 509, 524 (1970).

35. See discussion, "Proceeds and Tracing," below.

1. See discussion in Riddle v. Harmon, 102 Cal. App.3d 524, 162 Cal. Rptr. 530 (1980).

property to a disinterested third person, a "strawman," who would then reconvey the title to the joint tenants.[2] This became an accepted technique for creating a joint tenancy in California.[3]

Although "strawman" creation of joint tenancy remains the prevailing practice in some jurisdictions, an increasing number of jurisdictions have done away with this archaic and senseless procedure which requires two deeds to accomplish the purpose of one.[4] California, by amendment of Civil Code Section 683, no longer adheres to the unities requirement and by statute authorizes creation of a joint tenancy by direct transfer.[5] Thus the strawman procedure is no longer necessary to create a joint tenancy in California.[6]

Artificial Persons

The common law rule is that joint tenancy can only be created between natural persons. An artificial person such as a corporation has perpetual existence, thus frustrating application of the standard principle of survivorship, the distinguishing incident of the joint tenancy estate.[7] It is arguable that California by statute has authorized joint tenancy by an artificial person.[8] In any case, it is clear that a transfer of property in joint tenancy to an artificial person with the

2. See discussion in Blevins v. Palmer, 172 Cal. App.2d 324, 342 P.2d 356 (1959).

3. See, e.g., Hill v. Donnelly, 56 Cal. App.2d 387, 132 P.2d 867 (1942).

4. Basye, Joint Tenancy, A Reappraisal, 30 Cal. St. B.J. 504 (1955). The application of the unities requirement has been called "one of the obsolete 'subtle and arbitrary distinctions and niceties of the feudal common law.'" 4A Powell on Real Property ¶ 616, p. 670 (1979) (citation omitted).

5. 1935 Cal. Stats., ch. 234 § 1; 1955 Cal. Stats., ch. 178 § 1. The purpose of these amendments is to "avoid the necessity of making a conveyance through a dummy." Third Progress Rep. to the Legislature (Mar. 1955) p. 54, 2 App. to Sen. J. (1955 Reg. Sess.). See also Review of Selected 1955 Code Legislation 23 (Cal. Cont. Ed. Bar 1955).

6. Donovan v. Donovan, 223 Cal. App.2d 691, 36 Cal. Rptr. 225 (1963).

7. Blackstone, Commentaries *184; DeWitt v. San Francisco, 2 Cal. 289 (1852).

8. Civil Code Section 683 defines joint tenancy as ownership by two or more "persons" without limitation, and Section 14 states that "the word person includes a corporation as well as a natural person."

intent that the artificial person take the property by right of survivorship can be implemented under trust doctrine if not under joint tenancy principles.[9]

Proceeds and Tracing

Despite the general rule that joint tenancy property can only be created by express written agreement, this rule does not apply to proceeds of joint tenancy property that can be traced.[10] These proceeds retain their joint tenancy character absent any agreement, and therefore violate the traditional "unity of title" requirement.[11] Thus, for example, funds withdrawn from a joint tenancy bank account and transferred to another bank account retain their joint tenancy character,[12] and proceeds of a joint tenancy note remain joint tenancy even though placed in a non-joint tenancy bank account.[13] This rule derives from a time when a joint tenancy in personal property could be made by oral agreement;[14] however, it has been held that notwithstanding the 1935 legislation requiring a written agreement for personal property joint tenancy,[15] tracing of joint tenancy proceeds is still the law.[16] This

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There appears to be no good reason why joint tenancy in an artificial person should not be recognized; the strictures of the common law unities have largely been abrogated. For a contrary view, see 1 A. Bowman, Ogden's Revised California Real Property Law § 7.11 (1974); 2 H. Miller & M. Starr, Current Law of California Real Estate § 13.4 (rev. 1977).

9. American Bible Soc. v. Mortgage Guar. Co., 177 Cal. 9, 17 P.2d 105 (1932); Bank of America v. Long Beach Fed. Sav. & Loan Assn., 141 Cal. App.2d 618, 297 P.2d 443 (1956).

10. E.g., Estate of Zaring, 93 Cal. App.2d 577, 209 P.2d 642 (1949).

11. Estate of Harris, 9 Cal.2d 649, 72 P.2d 873 (1937); 28 Cal. L. Rev. 224 (1940).

12. Wallace v. Riley, 23 Cal. App.2d 669, 74 P.2d 800 (1937).

13. Fish v. Security-First Nat. Bank, 31 Cal.2d 378, 189 P.2d 10 (1948).

14. Estate of Harris, 169 Cal. 725, 147 P. 967 (1915).

15. Civil Code § 683, as amended 1935 Cal. Stats., ch. 234, § 1.

16. Taylor v. Crocker-Citizens Nat. Bank, 258 Cal. App.2d 682, 65 Cal. Rptr. 771 (1968).

rule may be inapplicable, however, where the joint tenancy property can originally be traced to community property.[17] The rule of tracing to community property offers one possible solution to some of the problems surrounding the interrelation of joint tenancy and community property.[18]

Severance of Joint Tenancy

Severance of a joint tenancy may result from a conveyance, voluntary or involuntary, by one or all of the joint tenants, or by mutual agreement of the joint tenants.[1] Thereafter the former joint tenants hold the property as tenants in common, with all the incidents of tenancy in common, including the ability to make a testamentary disposition of the interest and corresponding lack of survivorship rights in the other coowners.

Since substantial rights may depend upon whether there has been a severance of the joint tenancy, it is important to determine whether a particular voluntary or involuntary conveyance amounts to a severance. A conveyance by one joint tenant to a third party is a severance.[2] Due to feudal technicalities of enfeoffment a joint tenant could not effect a severance by a conveyance to himself or herself until the right to do so was recognized in 1980.[3]

Whether other transfers than a direct conveyance of the whole interest by one or both joint tenants amounts to a severance depends upon the circumstances of the case.[4] Although the courts have worked out

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17. Sims, Consequences of Depositing Separate Property in Joint Bank Accounts, 54 Cal. St. B.J. 452 (1979).

18. See discussion, "Tracing of Community and Separate Funds in Joint Tenancy Property," below.

1. Swanson & Degnan, Severance of Joint Tenancies, 33 Minn. L. Rev. 466 (1954).

2. Delanoy v. Delanoy, 216 Cal. 23, 13 P.2d 513 (1932); Green v. Skinner, 185 Cal. 435, 197 P. 60 (1921); Crawford, Destructibility of Tenancies in Real Property, 45 Cal. St. B.J. 222 (1970).

3. Estate of Dean, 109 Cal. App.3d 156, ___ Cal. Rptr. ___ (1980); Riddle v. Harmon, 102 Cal. App.3d 524, 162 Cal. Rptr. 530 (1980); Clark v. Carter, 265 Cal. App.2d 291, 70 Cal. Rptr. 923 (1968). Because these cases are decided in different appellate districts, there is some question whether the rule of self-severance applies throughout the state. Legislation making clear that it does would be useful.

4. Hammond v. McArthur, 30 Cal.2d 512, 183 P.2d 1 (1947).

rules such as creation of a lien does not sever,[5] it appears generally that the courts will treat severance as a matter of intent of the parties.[6] A severance may occur only where the facts "clearly and unambiguously establish that either of the joint tenants desired to terminate the estate."[7] This rule is consistent with the modern function of joint tenancy as a testamentary device.[8] Whether the transfer is between joint tenants or between a joint tenant and a third party appears to affect the result. Because most joint tenancies are between spouses, the courts may be reluctant to find a severance in a transaction with a third party in order to protect the spouses' survivorship rights.[9]

The consequence of a failure of severance in a transaction with a third party is that the surviving joint tenant takes the property to the detriment of the third party. The theory is that the transferee took only what the decedent had to convey, and what the decedent had to convey, absent a severance of the joint tenancy, was a defeasible interest in the property.[10]

Application of this doctrine yields rather startling results. Imposition of a voluntary lien or encumbrance, judgment lien, or even levy by a creditor, on joint tenancy property does not sever the joint tenancy, so that upon the death of the debtor the nondebtor takes by right of survivorship free of all liens and encumbrances.[11]

A long-term lease 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.[12] This rule has been criticized as a cor-

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5. See discussion, "Rights of Creditors," below.

6. Comment, Severance of a Joint Tenancy in California, 8 Hastings L.J. 290 (1957).

7. Tenhet v. Boswell, 18 Cal.3d 150, 158, 554 P.2d 330, ___, 133 Cal. Rptr. 10, ___ (1976).

8. Comment, Consequences of a Lease to a Third Party Made by One Joint Tenant, 66 Cal. L. Rev. 69 (1978).

9. Comment, Joint Tenancy in California Revisited: A Doctrine of Partial Severance, 61 Cal. L. Rev. 231 (1973).

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

11. See discussion, "Rights of Creditors," below.

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

ruption of traditional joint tenancy theory and substitution of a rule of partial severance has been advocated.[13] Under a partial severance rule the lease would be effective to sever the possessory interests in the joint tenancy for the duration of the lease but not to extinguish the survivorship right in the reversion; upon the death of the joint tenant during the period of the lease the survivor would take the reversion subject to the lease.[14]

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. This preference recognizes that joint tenancy is primarily used in California as a means of passing marital property to a surviving spouse quickly and conveniently. 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 lessee specifically severs or intends to sever any joint tenancy tenure 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. At the very least the innocent lessee should be reimbursed for improvements and expenditures made in reliance on the lease, if the lease is to be terminated.

II. COMPARISON OF JOINT TENANCY AND COMMUNITY PROPERTY

Because joint tenants hold property as an undivided unity, questions inevitably arise as to their rights and duties during the joint tenure. There is no difference between the rights and duties of joint tenants and the rights and duties of tenants in common, and these rights and duties are well-understood.

The rights and duties of the spouses in community property are not nearly so well defined or understood. It has been clear since 1927 that

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13. Comment, Consequences of a Lease to a Third Party Made by One Joint Tenant, 66 Cal. L. Rev. 69 (1978).

14. Comment, Joint Tenancy in California Revisited: A Doctrine of Partial Severance, 61 Cal. L. Rev. 231 (1973).

the interests of the spouses in community property are "present, existing and equal,"[1] but it is only since 1975 that either spouse has had the management and control of community property.[2] The implications of these rules are not clear.[3]

Ownership Interest

The interests of joint tenants are owned in equal shares.[1] The ownership interest of a spouse is the separate property of the spouse.[2] Each spouse in effect owns a one-half interest in the property and can convey, encumber, and otherwise deal with that interest, the only limitation being that the joint tenant cannot dispose of the interest by will, absent a severance.

The ownership interests of spouses in community property are "present, existing and equal."[3] This does not amount to an effective one-half interest of each except at dissolution of marriage; at death each may dispose of a one-half interest by will.

Management and Control

Each spouse has an equal right to the management and control of property held in joint tenancy.[1] The consequences of this manner of tenure are well-defined as to such matters as right of possession, right to income and accounting, liability for waste, liability for contribution, and the effect of agreements made with respect to the property.[2]

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1. Marsh, Property Ownership During Marriage, 1 California Family Lawyer § 4.32 (1961); Civil Code § 5105.

2. Civil Code §§ 5125 (management and control of personal property), 5127 (management and control of real property).

3. Bruch, Management Powers and Duties Under California's Community Property Laws (1980).

1. Civil Code § 683.

2. Watson v. Peyton, 10 Cal.2d 156, 73 P.2d 906 (1937).

3. Civil Code § 5105.

1. Wagoner v. Silva, 139 Cal. 559, 73 P. 433 (1903).

2. See, e.g., 3 B. Witkin, Summary of California Law, Real Property §§ 211-220 (1973); 1 A. Bowman, Ogden's Revised California Real Property Law (§§ 7.28-7.33 (1974); 2 H. Miller & M. Starr, Current Law of California Real Estate §§ 13:2-13:12 (rev. 1977).

Each spouse likewise has an equal right to the management and control of community property.[3] However, this has been the law only since 1975, and there is little case law guidance as to the rights and duties of the spouses.[4] Presumably the law is generally similar to the law governing joint tenancy property.[5] One major difference is that income from the property is community property rather than the separate property of the spouses.[6]

In addition, each spouse must act in good faith with respect to the other spouse in the management and control of the community property.[7] Prior to adoption in 1975 of equal management and control and the corresponding duty of good faith, California law analogized the management duties between spouses to the law governing the relations of fiduciaries or partners.[8] The fiduciary standard has been superseded by the new standard of good faith, which apparently amounts to a requirement that a spouse act without fraudulent intent.[9] Whether this in effect imposes

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3. Civil Code §§ 5125 (personal property), 5127 (real property). Exceptions to this rule are that a spouse operating or managing a community property business has sole management and control of the business (Civil Code § 5125(d)) and a community property bank account in the name of one spouse is free of control of the other spouse (Fin. Code § 851). See also Prob. Code § 3051 (management and control by spouse having legal capacity where other spouse has conservator).

4. Comment, Equal Management and Control Under Senate Bill 569: "To Have and to Hold" Takes on New Meaning in California, 11 San Diego L. Rev. 999 (1974).

5. It has been stated that the obligations between spouses regarding payments of taxes and repairs are essentially the same for joint tenancy and community property. Mills, Joint Ownership: A Review of Joint Tenancy and Community Property 25 (Cal. Cont. Ed. Bar (1978).

6. Civil Code §§ 5107 (separate property of wife), 5108 (separate property of husband), and 5110 (community property).

7. Civil Code § 5125(e).

8. Bruch, Management Powers and Duties Under California's Community Property Laws 14-15 (1980).

9. Kahn & Frimmer, Management, Probate and Estate Planning Under California's New Community Property Laws, 49 Cal. St. B.J. 516 (1974); Reppy, Retroactivity of the 1975 California Community Property Reforms, 48 S. Cal. L. Rev. 977, 1013-1022 (1975); Comment, Toward True Equality: Reforms in California's Community Property Law, 5 Golden Gate L. Rev. 407 (1975); Comment, California's New Community Property Law--Its Effect on Interspousal Mismanagement Litigation, 5 Pac. L.J. 723 (1974).

a greater or lesser standard of conduct with respect to community property than that generally applicable to spouses as joint tenants is not clear.[10]

Transfers

A joint tenant cannot transfer title to the whole property, whether by sale, encumbrance, lease, or otherwise. The joint tenant is limited to transfers involving that joint tenant's interest in the property.[1] A conveyance severs the joint tenancy and converts it into a tenancy in common; an encumbrance or lease does not sever the joint tenancy and the rights of the encumbrancer or lessee are subject to the survivorship rights of the other joint tenant.[2] The result of this rule, as a practical matter, is that a person dealing with a joint tenant will require the joinder of the other joint tenants in the transaction, particularly because of the difficulty in ascertaining whether property that appears to be joint tenancy is in fact community property.

Community real property cannot be conveyed, encumbered, or leased for a period longer than a year by either spouse alone; both spouses must join in the transaction.[3] Likewise neither spouse may make a gift of community personal property or sell, convey, or encumber household goods and personal effects that are community personal property without the written consent of the other spouse.[4] For other types of community property such as bank accounts, automobiles, stocks, and the like it

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10. Spouses generally stand in a confidential relationship to each other (Civil Code § 5103; Crawford, Destructibility of Joint Tenancies in Real Property, 45 Cal. St. B.J. 222 (1970)), as do joint tenants generally (1 A. Bowman, Ogden's Revised California Real Property Law § 7.30 (1974); 3 B. Witkin, Summary of California Law, Real Property § 214 (1973)).

1. See, e.g., 1 A. Bowman, Ogden's Revised California Real Property Law § 7.31 (1974).

2. See discussion "Severance," above. If there are more than two joint tenants, a transfer by one severs the joint tenancy only as to the transferee; the others remain joint tenants as between each other. Shelton v. Vance, 106 Cal. App.2d 194, 234 P.2d 1012 (1951).

3. Civil Code § 5127.

4. Civil Code § 5125.

thus appears that unlike joint tenancy property either spouse alone may enter transactions that affect the whole property.[5] Also unlike joint tenancy property, one spouse alone cannot make a valid transaction that affects only the interest of that spouse in those types of community property for which joinder or consent is required. Such a transaction will not be recognized as a "severance" of the community and is not effective during marriage.[6] The transaction will be given effect as to the interest of the spouse after dissolution or death severs the community, however.[7]

Dissolution of Marriage

Because the interest of each spouse in joint tenancy property is the separate property of the spouse, joint tenancy property is not subject to division at dissolution of the marriage.[1] The dissolution has no effect on the joint tenancy, absent an agreement by the spouses, since, unlike community property, joint tenancy is not dependent on the marital status of the joint tenants.[2] The joint tenancy property remains joint tenancy with all its incidents, including survivorship, and is subject to partition and to claims of creditors to the same extent as during marriage.

Community property is divided equally between the spouses upon dissolution and thereafter is the separate property of each.[3] The separate

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5. Union Mut. Life Ins. Co. v. Broderick, 196 Cal. 497, 238 P. 1034 (1925).

6. Dynan v. Gallinati, 87 Cal. App.2d 553, 197 P.2d 391 (1948) (personal property). But see Mitchell v. American Reserve Ins. Co., 110 Cal. App.3d 220, 167 Cal. Rptr. 760 (1980) (encumbrance of real property by one spouse affects the spouse's half-interest). Prior to Mitchell a conveyance or encumbrance of real property by one spouse without the joinder of the other spouse was recognized as effective to convey the spouse's half-interest only after a severance of the community by death or divorce. See, e.g., Gantner v. Johnson, 274 Cal. App.2d 869, 79 Cal. Rptr. 381 (1969).

7. Marsh, Property Ownership During Marriage, 1 California Family Lawyer §§ 4.34-4.35 (1961).

1. Schindler v. Schindler, 126 Cal. App.2d 597, 272 P.2d 566 (1954); Walker v. Walker, 108 Cal. App.2d 605, 239 P.2d 106 (1952).

2. Brunscher v. Reagh, 164 Cal. App.2d 174, 330 P.2d 396 (1958); Cole v. Cole, 139 Cal. App.2d 691, 294 P.2d 494 (1956).

3. Civil Code § 4800.

property remains liable for debts for which it would have been liable as community property.[4] If the community property is not divided between the spouses at dissolution it becomes tenancy in common property by operation of law, each spouse having an equal interest as a tenant in common.[5]

Partition

One characteristic of joint tenancy is that although the interests of the joint tenants are equal and undivided, the tenants may divide their interests by partition.[1] The right of partition is absolute unless waived by the joint tenants.[2] The mere bringing of a partition action, however, does not sever the joint tenancy and if a joint tenant dies during the pendency of the action, the other takes by right of survivorship.[3]

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4. See, e.g., Bank of America v. Mantz, 4 Cal.2d 322, 49 P.2d 279 (1935); Vest v. Superior Court, 140 Cal. App.2d 91, 294 P.2d 988 (1956).

5. See, e.g., DeGodey v. DeGodey, 39 Cal. 157 (1870). This property is treated for all purposes as tenancy in common property, but is subject to division as community property. Comment, Post-Dissolution Suits to Divide Community Property: A Proposal for Legislative Action, 10 Pac. L.J. 825 (1979). Thus a spouse may convey the spouse's one-half tenancy in common interest. See, e.g., Huer v. Huer, 33 Cal.2d 268, 201 P.2d 385 (1945); Buller v. Buller, 62 Cal. App.2d 687, 145 P.2d 649 (2944). A homestead declaration is no longer applicable to the property. Lang v. Lang, 182 Cal. 765, 190 Pac. 181 (1920); California Bank v. Schlesinger, 159 Cal. App.2d Supp. 854, 324 P.2d 119 (1958). The property is treated as tenancy in common property for purposes of succession and testamentary disposition. See, e.g., Tarien v. Katz, 216 Cal. 554, 15 P.2d 493 (1932); see also Estate of Williams, 36 Cal.2d 289, 223 P.2d 248 (1950). The property is subject to partition just as any other tenancy in common property. See, e.g., Biggi v. Biggi, 98 Cal. 35, 32 P. 803 (1893); Lang v. Lang, supra. The general rules governing the management obligations and duties of tenants in common apply to former spouses who become tenants in common by operation of law. Thus, for example, neither may exclude the other from possession of the property. Brown v. Brown, 170 Cal. 1, 147 P. 1168 (1915).

1. At common law partition was not available except by common agreement of the joint tenants. An action for partition has been permitted by statute since 1539. Blackstone, Commentaries *185.

2. Code Civ. Proc. §§ 872.210(a), 872.710(b).

3. Dando v. Dando, 37 Cal. App.2d 371, 99 P.2d 561 (1940); see also Teteuberg v. Schiller, 138 Cal. App.2d 18, 291 P.2d 53 (1955).

Community property is not subject to partition during marriage.[4] At dissolution of marriage the community property is divided, however. Partition of community property during marriage has been advocated;[5] this would amount in effect to an involuntary conversion of community to separate property.

Adverse Possession

It is a general rule that one joint tenant may acquire title to the whole property by adverse possession against the other joint tenants.[1] However, where there is a close familial relationship between the coowners possession by one will not be considered adverse absent a clear showing of the assertion of a hostile claim and actual or constructive notice.[2]

Whether one spouse may acquire title to community property by adverse possession against the other spouse is not clear. Although spouses are in a position of confidentiality with respect to each other, so too are joint tenants and joint tenancy property can pass by adverse possession despite a confidential and familial relationship.

Rights of Creditors

Unsecured Creditors

Inter vivos. If a debtor is a joint tenant, the creditor can reach the joint tenancy property only to the extent of the joint tenant's interest in order to satisfy the debt.[1] The creditor must levy on the joint tenant's interest and have the interest sold at an execution sale; the sale severs the joint tenancy and the purchaser at the execution sale holds the former joint tenant's interest as a tenant in common with the remaining cotenants. Thereafter any of the cotenants can seek partition of the property.[2]

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4. Code Civ. Proc. § 872.210(b); Jacquemart v. Jacquemart, 142 Cal. App.2d 794, 299 P.2d 281 (1956).

5. Bruch, Management Powers and Duties Under California's Community Property Laws 82 (1980).

1. See, e.g., 3 B. Witkin, Summary of California Law, Real Property §§ 51-53 (8th ed. 1973).

2. Lobro v. Watson, 42 Cal. App.3d 180, 116 Cal. Rptr. 533 (1974).

1. If the nondebtor joint tenant is the spouse of the debtor, the nondebtor's interest in the property may be liable for the debt if the debt was incurred for necessaries. Civil Code Section 5121.

2. See, e.g., Strangman v. Duke, 140 Cal. App.2d 185, 295 P.2d 12 (1956); Pepin v. Stricklin, 114 Cal. App. 32, 299 P. 557 (1931); Hilborn v. Soale, 44 Cal. App. 115, 185 P. 982 (1919).

Treatment of community property is substantially different. The creditor of either spouse may reach all the community property to satisfy the debt, not just the interest of the debtor.[3]

The fact that if the debtor and nondebtor spouses hold property as joint tenancy only half is available to creditors whereas if they hold it as community property the whole is available has engendered substantial litigation to determine whether property in joint tenancy form is in fact community property.[4] If joint tenancy property is acquired with community funds, a creditor may show that despite the presumption created by the joint tenancy title form there was a common understanding that the property is community or that despite an actual intent that the property be held in joint tenancy the transmutation was in fraud of creditors.[5]

After death. After death of the debtor spouse the difference in treatment of joint tenancy and community property is even more marked. Joint tenancy property becomes vested in the surviving spouse by operation of law upon the death of the debtor spouse, who no longer has an interest in the property. Consequently the creditor of the decedent may no longer reach any portion of the former joint tenancy property to satisfy the debt,[6] unless the creditor can show that the property was placed in joint tenancy form in fraud of creditors.[7]

In the case of community property, however, the creditor of the decedent is in a much better position. Assuming that the community property has passed to the surviving spouse either by intestate succession

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3. Civil Code §§ 5116 (contracts), 5122 (torts). Community property earnings of the nondebtor spouse are not liable for prenuptial debts of the debtor spouse. Civil Code § 5120.

4. Schoenfeld v. Norberg, 11 Cal. App.3d 755, 90 Cal. Rptr. 47 (1970); In re Rauer's Collection Co., 87 Cal. App.2d 248, 196 P.2d 803 (1948).

5. Hansford v. Lassar, 53 Cal. App.3d 364, 125 Cal. Rptr. 804 (1975).

6. King v. King, 107 Cal. App.2d 257, 236 P.2d 912 (1951). Conversely, a creditor of the survivor, who prior to the death could have reached only the debtor's portion, upon death can reach the whole property owned by the survivor.

7. Rupp v. Kahn, 246 Cal. App. 2d 188, 55 Cal. Rptr. 108 (1966).

or because the decedent has willed the decedent's portion to the surviving spouse,[8] three possible courses of events may ensue: (1) Absent an election by the surviving spouse, all the community property passes directly to the surviving spouse without probate administration.[9] (2) If the surviving spouse so elects, the decedent's share of the community property may be subject to probate administration.[10] (3) Or if the surviving spouse so elects, both the decedent's share and the surviving spouse's share of the community property are subject to probate administration.[11] These three alternatives have differing consequences for creditors.

If the community property passes directly to the surviving spouse without probate administration, the creditor of the decedent will be unable to reach the community property during administration.[12] Nonetheless, the surviving spouse is personally liable for the debts for which the community property was liable, to the extent of the value of both spouses' interests in the community property (less liens and encumbrances) at the date of the decedent's death that is not exempt from execution.[13]

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8. If the decedent disposes by will of all or part of the decedent's interest in the community property to a person other than the surviving spouse, that part that is so willed is subject to probate administration, including the debts of the decedent.

9. Prob. Code § 202(a); a summary proceeding for determination or confirmation of the community property is available. Prob. Code §§ 650-657.

10. Prob. Code § 202(b).

11. Prob. Code § 202(b).

12. The creditor may nonetheless be well advised to file a claim in probate either because the debt may turn out not to be one for which the community property is liable or because the separate property of the decedent may also be liable for the debt. In the latter case an apportionment of liability pursuant to Probate Code Section 980 may be proper. See Meserve, Crary & Grant, Senate Bills, 570 and 1846: The Effects on Probate and Estate Planning Practice of the Recent Changes in the California Probate Code relating to Community Property, 50 L.A. Bar Bull. 9 (1974). If the surviving spouse elects to use summary determination or confirmation of community property pursuant to Probate Code Sections 650 to 657, business creditors of the deceased spouse may be protected. Prob. Code § 656.

13. Prob. Code § 205(a). This rule applies to community property that passes to the surviving spouse "without administration." Whether this extends to community property life insurance or community property in joint tenancy form that passes outside of probate is

The creditor may enforce the obligation directly against the surviving spouse in the same manner as if the decedent were still alive.[14] This amounts in effect to a substitute for probate administration, although the superiority of this scheme has been questioned.[15]

If the surviving spouse becomes personally liable for debts of the decedent, the surviving spouse may file a claim against the decedent's estate for payment of the debts.[16] In such a situation responsibility for the debts may be apportioned between the surviving spouse and the estate based on the amount of property of each that is liable for the debts.[17]

If the surviving spouse elects to have the share of the community property received from the decedent administered in probate, the surviving spouse remains personally liable for the debts of the decedent chargeable against the community property to the extent of the value of the property.[18] However, the surviving spouse may file a claim against the estate for payment of the debts,[19] and the debts are likewise subject to apportionment between the estate and the surviving spouse.[20]

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not clear. Kahn & Frimmer, California Probate of Community Property: The Final Picture Emerges, 50 Cal. St. B.J. 260, 291 (1975). If so, the creditor is in a better position than if the community property went through probate administration, where recovery is limited to the assets of the probate estate. Prob. Code § 205(b).

14. Prob. Code § 205(c); see also Code Civ. Proc. § 353.5 (four-month extension of statute of limitation for creditor in certain cases). Whether this scheme is actually workable remains to be seen.

15. See, e.g., 1 A. Marshall, California Probate Procedure § 110 (1980).

16. Prob. Code § 704.2.

17. Prob. Code § 980. In determining the amount of property of each that is liable for the debts, the argument has been made that reimbursement principles relating to "separate" and "community" debts must be taken into account. See, e.g., W. Reppy, Community Property in California 254-62 (1980); 1 A. Marshall, California Probate Procedure § 112 (1980).

18. Prob. Code § 205(a).

19. Prob. Code § 704.2. Likewise, the surviving spouse may file a claim against the estate for payment of debts of the surviving spouse for which the community property is liable. Prob. Code § 704.4.

20. Prob. Code § 980. See footnote 17, above.

If the surviving spouse elects to have all the community property administered in probate, the debts of the decedent may not be enforced against the surviving spouse.[21] In case of an apportionment of the debts to the surviving spouse pursuant to Probate Code Section 980, the surviving spouse may be ordered to make payment to the personal representative to the extent the surviving spouse's property being administered in the probate estate is insufficient to satisfy the allocation.[22]

In summary, when community property goes to the surviving spouse the creditors of the decedent may satisfy their debts against the surviving spouse to the extent of the community property or out of the community property in probate if the community property is administered in probate. This must be contrasted with the result under joint tenancy property where creditors of the decedent may reach no portion of the joint tenancy property. The difference in result is dependent solely upon the manner of tenure of the property. Legislation has been urged to equate rights of creditors against joint tenancy and community property, there being "no sound policy reason" for the difference in treatment.[23] The California Law Revision Commission has recommended that creditors of the decedent be authorized to reach the decedent's share of a joint tenancy account to the extent the decedent's estate is insufficient, characterizing existing joint tenancy law as "anachronistic" and stating that, "the existing rule gives the surviving joint tenant an unjustified windfall at the expense of the creditors of the deceased joint tenant."[24] This is also the position of the Uniform Probate Code.[25]

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21. Prob. Code § 205(b).

22. See footnote 17, above. The surviving spouse may also file a claim against the estate for payment of debts of the surviving spouse for which the community property is liable. Prob. Code § 704.4.

23. Kahn & Frimmer, Management, Probate and Estate Planning under California New Community Property Laws, 49 Cal. St. B.J. 516, 570 (1974). It should be noted that with regard to the debts of the surviving spouse, treatment of joint tenancy and community property going to the surviving spouse is the same: the creditor may reach all in satisfaction of the debt.

24. Recommendation relating to Non-Probate Transfers, 15 Cal. L. Revision Comm'n Reports 1620-21 (1980).

25. U.P.C. § 6-107.

Secured Creditors

Where both spouses have entered a security agreement or encumbrance of joint tenancy property or community property, a creditor has no problem enforcing the obligation against the property either during the lives of the spouses or after their deaths. However, where there is a lien or encumbrance on the property that affects only one of the spouses, complications arise.

By statute both spouses must join in an encumbrance of community real property[26] and must give written consent to an encumbrance of certain community personal property.[27] Suppose an encumbrance is made by only one spouse. If the encumbrance is on the community real property standing in the name of one spouse alone the encumbrance is apparently effective to bind the whole property unless an action is brought within one year to avoid the encumbrance.[28] Otherwise, it appears that notwithstanding the consent requirement, an encumbrance of the community property by one spouse encumbers that spouse's interest in the community property.[29] Presumably foreclosure of the encumbrance would sever the community property, much in the manner of severance of a joint tenancy, so that following the foreclosure sale the purchaser would hold the property as a tenant in common with the nonencumbering spouse, whose interest becomes separate property. Whether this would be a desirable result for the creditor would depend upon whether the underlying obligation for which the encumbrance was given was one for which the community property, separate property of either spouse, or some combination was liable. If the encumbrance is not foreclosed and one of the spouses dies with the property going to the survivor, the result is not clear. If the encumbering spouse is the decedent, logic would dictate that because the decedent's encumbrance was valid and because the survivor takes only that property passed on by the decedent, the surviving spouse would take the community property subject to an encumbrance only on the decedent's one-half interest. If the nonencumbering spouse is the decedent, an

26. Civil Code § 5127.

27. Civil Code § 5125.

28. Civil Code § 5127.

29. Mitchell v. American Reserve Ins. Co., 110 Cal. App.3d 220, 167 Cal. Rptr. 760 (1980).

argument could be made that the encumbrance of the survivor extends to the whole property on an after-acquired property doctrine or estoppel by deed theory. However, the more logical result, consistent with community property theory, would be that because the surviving spouse takes by descent or devise rather than by survivorship the interest of the decedent remains unencumbered. This would not, however, preclude the lienholder from seeking enforcement of the underlying obligation against the decedent's share as an unsecured creditor, assuming no applicable anti-deficiency legislation.

Unlike the rules applicable to community property, the principles governing liens and encumbrances on the interest of one joint tenant are well settled and somewhat surprising. A voluntary or involuntary lien on the interest of one joint tenant may be foreclosed, and upon sale of the joint tenant's interest there is a severance of the joint tenancy, with the purchaser becoming a tenant in common with the other joint tenants.[30] But if the joint tenant whose interest is subject to the lien dies before the foreclosure sale effects a severance of the joint tenancy, the remaining joint tenants take the property by survivorship free of the lien. This principle applies to voluntary liens such as mortgages[31] and deeds of trust[32] as well as involuntary liens such as judgment liens.[33]

This result derives from the basic principles that creation of a joint tenancy gives each joint tenant an interest in the whole property that is subject to defeasance by failing to survive the other joint tenants and that a lien or encumbrance on the interest of one joint tenant is not a severance of the joint tenancy in that it does not destroy any of the four unities of joint tenancy.[34]

The argument for preference of survivorship rights over the lien is based upon the "lien" theory (as opposed to the "title" theory) that a

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30. Russell v. Lescalet, 248 Cal. App.2d 310, 56 Cal. Rptr. 399 (1967).

31. People v. Nogarr, 164 Cal. App.2d 591, 330 P.2d 858 (1958).

32. Hamel v. Gootkin, 202 Cal. App.2d 27, 20 Cal. Rptr. 372 (1962). However, a deed of trust executed by one joint tenant on the joint tenant's own behalf as well as on behalf of the other joint tenant under power of attorney binds the interests of both joint tenants and the survivor does not take free of liens. Katsivalis v. Serrano Reconveyance Co., 70 Cal. App.3d 200, 138 Cal. Rptr. 620 (1977).

33. Zeigler v. Bonnell, 52 Cal. App.2d 217, 126 P.2d 118 (1942).

34. Hammond v. McArthur, 30 Cal.2d 512, 183 P.2d 1 (1947).

mortgage, deed of trust, or other encumbrance does not amount to a severance--unity of title of the joint tenants has not been interrupted, merely subjected to a lien. Although it might be possible to distinguish voluntary liens from involuntary liens, the California courts have not done so.[35] Nor have the courts analyzed the problem from the perspective of public policy but from the technicalities of common law joint tenancy. The reasoning is typified by Zeigler v. Bonnell:[36]

> The right of survivorship is the chief characteristic that distinguishes a joint tenancy from other interests in property. The surviving joint tenant does not secure that right from the deceased joint tenant, but from the devise or conveyance by which the joint tenancy was first created. (Green v. Skinner, 185 Cal. 435 [197 P. 60].) While both joint tenants are alive each has a specialized form of a life estate, with what amounts to a contingent remainder in the fee, the contingency being dependent upon which joint tenant survives. The judgment lien of respondent could attach only to the interest of his debtor, William B. Nash. That interest terminated upon Nash's death. After his death there was no interest to levy upon.

Although this argument appears to elevate the feudal technicalities of joint tenancy law over ordinary notions of equity, the Zeigler court also offered a policy jusitifcation for the rule that a lien on the interest of a joint tenant fails to survive the joint tenant's death:[37]

> This rule is sound in theory and fair in its operation. When a creditor has a judgment lien against the interest of one joint tenant he can immediately execute and sell the interest of his judgment debtor, and thus sever the joint tenancy, or he can keep his lien alive and wait until the joint tenancy is terminated by the death of one of the joint tenants. If the judgment debtor survives, the judgment lien immediately attaches to the entire property. If the judgment debtor is the first to die, the lien is lost. If the creditor sits back to await this contingency, as respondent did in this case, he assumes the risk of losing his lien.

Despite the technical justifications for permitting joint tenancy property to pass to the survivor free of liens on the interest of the decedent joint tenant, the commentators have pointed out the rule that has no real social policy justification. The notion that the survivor takes the property unencumbered to the detriment of the creditor offends

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35. Comment, Severance of a Joint Tenancy in California, 8 Hastings L.J. 290 (1957).

36. 52 Cal. App.2d 217, 219-20, 126 P.2d 118, 119 (1942).

37. 52 Cal. App.2d 217, 221-22, 126 P.2d 118, ___ (1942).

a sense of equity--"Loss of his security interest may cause the creditor substantial injury, while protecting him merely deprives the surviving joint tenant of a contingency destructible at will by either coowner."[38] This is particularly true in view of the fact that under any other type of coownership the lien creditor is protected--the joint tenancy tenure may be a mere fortuity.[39] In addition, the rule has the effect of restricting access of the joint tenant to credit; an informed lender will either require joinder of all joint tenants or will require severance of the tenancy.[40] An uninformed lender may fail to do this and have a reasonable expectation of security frustrated. Once the lien on the joint tenancy is created the lender may be unable to obtain further severance because the debtor may not default until death. If the debtor does default before death, the creditor is motivated to act immediately to foreclose or obtain execution, to the detriment of the debtor, because of the possibility that the debtor's debt will extinguish the creditor's security. In any case reliance on common law technicalities to resolve the dispute ignores the real policy issues.[41]

Death

Survivorship

The "grand" and "distinguishing" incident of the joint tenancy estate is the right of survivorship.[1] Upon the death of one of two joint tenants the survivor becomes the sole owner in fee by right of survivorship and no interest in the property passes to the heirs, devisees, or legatees of the joint tenant first to die. This results from the four unities of joint tenancy--each joint tenant is seized immediately upon creation of the joint tenancy of the title and the right of possession

38. Comment, 11 Stan. L. Rev. 574, 577 (1959).

39. Hines, Personal Property Joint Tenancies: More Law, Fact and Fancy, 54 Minn. L. Rev. 509, 545 (1970) ("[I]t is difficult to perceive the social policy underlying a rule that denies the enforcement of a lien simply because the decedent to whose property the lien attached happened to be a joint tenant.").

40. Mattis, Severance of Joint Tenancies by Mortgage: A Contextual Approach, 1977 S. Ill. U.L.J. 27 (1977).

41. Swenson & Degnan, Severance of Joint Tenancies, 38 Minn. L. Rev. 466, 500 (1954) ("Deciding modern social legislation problems by reference to a book written when the Elizabethan Poor Laws were hot off the press leads to foolish results.").

1. Blackstone, Commentaries *183-84; DeWitt v. San Francisco, 2 Cal. 289 (1852).

and enjoyment of the whole, so that when any joint tenant dies the survivors receive no new title or right but are merely relieved from further interference with their title and right.[2] "It is the old rule, in other words, that the joint tenant who survives does not take the moiety of the other from him or as his successor, but by right under the devise or conveyance by which the joint tenancy was created in the first place."[3]

Although the incident of survivorship is a consequence of the theory of joint tenancy, the incident is of such fundamental importance that has come to be the essence of the tenure. It is generally agreed that it is the feature of survivorship that has made the joint tenancy estate so popular today.[4] The parties to a joint tenancy may by agreement alter such fundamental characteristics or unities as the right of possession and the right of severance,[5] but if they alter the right of survivorship the joint tenancy is destroyed.[6]

Survivorship, though similar to intestate succession, passes the property not by testamentary disposition but by virtue of the instrument that created the joint tenancy.[7] Thus an attempt by a joint tenant to pass his or her proportionate share of the property by will is not effective.[8] Although this is the outcome of application of the technicalities of joint tenancy doctrine,[9] in theory at least an equally valid

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2. Estate of Gurnsey, 177 Cal. 211, 170 P. 402 (1918); Hannon v. Southern Pac. R.R., 12 Cal. App. 350, 107 P. 335 (1909).

3. Green v. Skinner, 185 Cal. 435, 440, 197 P. 60, ___ (1921).

4. See, e.g., Basye, Joint Tenancy: A Reappraisal, 30 Cal. St. B.J. 504 (1955); Hines, Personal Property Joint Tenancies: More Law, Fact and Fancy, 54 Minn. L. Rev. 509 (1970).

5. Cole v. Cole, 139 Cal. App.2d 691, 294 P.2d 494 (1956).

6. McDonald v. Morley, 15 Cal.2d 409, 101 P.2d 690 (1940).

7. Estate of Moore, 165 Cal. App.2d 455, 332 P.2d 108 (1958).

8. Estate of Moy, 217 Cal. App.2d 24, 31 Cal. Rptr. 374 (1963); Estate of Dow, 82 Cal. App.2d 675, 186 P.2d 977 (1947); Estate of Fritz, 130 Cal. App. 725, 20 P.2d 361 (1933); Comment, 5 S. Cal. L. Rev. 144 (1931).

9. Blackstone, Commentaries *185-86: "But a devise of one's share by will is no severance of the jointure: for no testament takes effect till the death of the testator, and by such death the right of the survivor (which accrued at the creation of the estate, and has therefore a priority to the other) is already vested."

application of joint tenancy principles would be that since a joint tenancy can be severed inter vivos, a will is treated as an inter vivos severance.[10] A will speaks as of the moment of death,[11] just as survivorship occurs at the moment of death,[12] and there appears to be no logical reason to prefer one result over the other.

The inability of a person to dispose of joint tenancy property by will is often cited as one of the problems with that form of tenure.[13] It is a trap for people who are not aware of the consequence of joint tenancy ownership.

By way of contrast, if property is held as community, on the death of a spouse one-half belongs to the surviving spouse and the other half is subject to the testamentary disposition of the decedent; if the decedent does not make a will, the decedent's half passes to the surviving spouse by intestate succession.[14]

Given the fact that married persons can hold property either in joint tenancy or as community, and that they can assure its passage to the survivor by right of survivorship in the case of joint tenancy property or by intestate succession or by testamentary disposition to the survivor in the case of community property, is there any inherent advantage in one form of property tenure or the other insofar as probate or estate planning considerations are concerned?

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10. A joint will may transmute joint tenancy to community property and dispose of the property. Estate of Watkins, 16 Cal. App.2d 793, 108 P.2d 417 (1940); Van Houten v. Whitaker, 169 Cal. App.2d 510. 337 P.2d 900 (1959); Chase v. Leiter, 96 Cal. App.2d 439, 215 P.2d 756 (1950); cf. Edwards v. Deitrich, 118 Cal. App.2d 254, 257 P.2d 750 (1953) (acquiescence by one joint tenant with desire of other joint tenant to will property not sufficient to convert joint tenancy property to community property); Security-First Nat. Bank v. Stack, 32 Cal. App.2d 586, 90 P.2d 337 (1939) (will by one joint tenant transmuting joint tenancy to community property and waiver by other joint tenant effective to dispose of joint tenancy property).

11. Prob. Code § 300.

12. Plante v. Gray, 68 Cal. App.2d 582, 157 P.2d 421 (1945).

13. See, e.g., Nossaman, The Joint Tenancy Problem, 27 Cal. St. B.J. 21 (1952).

14. Prob. Code § 201.

Avoidance of Probate

Traditionally the argument for joint tenancy property has been that it avoids probate--it provides a quick and inexpensive means of assuring the passage of the property to the survivor. But in reality some administrative steps are necessary to enable the survivor to deal with the property freely--for example, to clear title to joint tenancy real property or to obtain the release of funds held by a third party. One means of achieving the release of property is through the affidavit procedure--use of an affidavit of death along with a certified copy of the death certificate of the decedent and a release of the inheritance tax lien from the controller.[15]

As an alternative, an expedited proof of death proceeding is available pursuant to Probate Code Sections 1170 to 1175. In 1951 Section 1170 was amended to make the proof of death proceeding mandatory for joint tenancy property.[16] This change in the law caused such a furor among people who had placed property in joint tenancy primarily to avoid probate and other administrative procedures at death, that it had to be repealed on an urgency basis at the next session.[17]

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15. Marshall, Joint Tenancy, Taxwise and Otherwise, 40 Cal. L. Rev. 509 (1952).

16. 1951 Cal. Stats., ch. 779, § 2.

17. 1952 Cal. Stats., 1st Ex. Sess., ch. 3, § 1. The repealer stated:

> At the 1951 Regular Session of the Legislature certain legislation was enacted which, in terms at least, requires that upon the death of one joint tenant of real property the surviving joint tenant or joint tenants shall commence a prescribed judicial proceeding for the establishment of the fact of death of the deceased joint tenant. While the exact legal effect of this legislation is apparently misunderstood there nevertheless has been widespread criticism of the Legislature for having enacted such legislation. This criticism appears to be based upon the assumption that such legislation will operate to impair the security of the land titles of persons holding real property in joint tenancies. Even though such criticism is without foundation the effect of such legislation has been to instill a certain feeling of insecurity in the minds of many citizens, accompanied by some loss of confidence that the Legislature is watchful of their interests. It is essential to the functioning of a representative form of government that the confidence of the people in their elected representatives shall not be impaired and that any action which may have a tendency to impair such confidence should be undone as speedily as possible. This act will delete the 1951 amendment which has been the cause of certain unrest among the people.

See also Nossaman, The Joint Tenancy Problem, 27 Cal. St. B.J. 21 (1952).

As a rule, despite some administrative inconvenience, title procedures for joint tenancy property are relatively quick and easy.[18]

By statute the procedure for passing community property to a surviving spouse has been simplified to a point where joint tenancy no longer has the competitive advantage of enabling avoidance of probate. As of July 1, 1975, probate administration is unnecessary for community property that passes to a surviving spouse by intestate succession or by will.[19] The community property may be probated at the election of the surviving spouse, but if not, the surviving spouse is personally liable for the debts of the decedent for which the community property was liable.[20] Because passing title without administration may cause problems with respect to creditors' rights, taxes, and disputed claims to the property, a simple administrative procedure has also been provided by statute for determination or confirmation of the community property.[21] Whether the expedited administrative procedure is workable is not clear--it appears to be rarely used.[22] An affidavit procedure for clearing title to unprobated community property, analogous to that used for joint tenancy property, has been advocated.[23]

In general, it appears that either joint tenancy or community property tenure by spouses enables avoidance of probate. It can certainly be argued that this is no particular advantage, since probate can offer a more expeditious means of clearing title, tax, and creditor's problems than dealing with these problems through litigation in the civil courts.

Simultaneous Death

The survivorship feature of joint tenancy property is confounded in the case of the simultaneous death of the joint tenants. The arbitrary and complicated presumptions of survivorship applicable to the growing

18. C. Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity, 96 n.263 (1981).

19. Prob. Code § 202(a).

20. Prob. Code §§ 202(b), 205.

21. Prob. Code §§ 650-657; 1 A. Marshall, California Probate Procedure §§ 110-111 (4th ed. 1980).

22. Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity, 90 n.263 (1981).

23. Kahn & Frimmer, Management, Probate and Estate Planning under California's New Community Property Laws, 49 Cal. St. B.J. 516, (1974).

number of cases of simultaneous death of joint tenants due to automobile and airplane crashes were supplanted in 1945 by adoption of the Uniform Simultaneous Death Act.[24] Under the Uniform Act the normal rules of survivorship apply unless the joint tenants die at the same instant,[25] in which case the simultaneous death is treated as a severance and an equal share of the property goes to the testate or intestate heirs of each joint tenant.[26]

Although the Uniform Simultaneous Death Act does not deal with disposition of community property, the California statute includes a special provision that treats community property the same as joint tenancy property. In case of the simultaneous death of husband and wife, community property (whether or not the form of title appears as joint tenancy)[27] goes to the testate or intestate heirs of each spouse equally, as if each share were separate property.[28]

The result is that in case of simultaneous death, joint tenancy and community property are treated identically.[29] However, the Uniform Act is unduly limited in its requirement that death occur at the same instant. If persons involved in a common accident die within a close time span, simultaneous death treatment should be available. This would avoid litigation over the precise moment of death, avoid administrative expenses, and be consistent with the probable intent of the parties.

Murder

Where one joint tenant wrongfully kills the other, the courts have developed theories to avoid operation of the survivorship incident of joint tenancy, from severance to constructive trust.[30] Section 258 of

24. Prob. Code §§ 296-296.8; enacted by 1945 Cal. Stats., ch. 988, § 1. See Azvedo v. Benevolent Society of California, 125 Cal. App.2d Supp. 984, 270 P.2d 948 (1954).

25. Estate of Schmidt, 261 Cal. App.2d 262, 67 Cal. Rptr. 847 (1968); Thomas v. Hawkins, 96 Cal. App.2d 377, 215 P.2d 495 (1950).

26. Prob. Code § 296.2; Estate of Meade, 228 Cal. App.2d 169, 39 Cal. Rptr. 278 (1964).

27. Estate of Hudson, 158 Cal. App.2d 385, 322 P.2d 987 (1958).

28. Prob. Code § 296.4; Estate of Wedemeyer, 109 Cal. App.2d 67, 240 P.2d 8 (1952).

29. Estate of Meade, 228 Cal. App.2d 169, 39 Cal. Rptr. 278 (1964).

30. Abbey v. Lord, 168 Cal. App.2d 499, 336 P.2d 226 (1959).

the Probate Code provides that a person who has unlawfully and intentionally caused the death of a decedent is ineligible to inherit from the decedent; however, this provision does not apply to survivorship rights.[31] The court have used this provision by analogy, however, along with Sections 2224 and 3517 of the Civil Code[32] to preclude the survivorship right from benefiting the killer.[33] The current state of California law appears to be that survivorship rights are recognized, but the killer holds the decedent's proportionate share in trust for the decedent's heirs[34]--which in legal effect amounts to a severance of the joint tenancy.

Taxes

Death Taxes

If joint tenancy offers no particular advantages over community property for probate purposes, apart from its impact on creditors, does it have any tax advantages? Traditionally joint tenancy has had severe tax disadvantages--so severe in fact that estate planners uniformly advised against use of joint tenancy tenure.[1] Whether these tax disadvantages any longer exist is problematical in the light of ameliorating changes in the tax laws over the years.

By legislation enacted in 1980, California now exempts from inheritance taxation transfers of property between spouses.[2] Thus no inheritance tax would accrue either when a spouse takes joint tenancy property from

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31. Estate of Helwinkel, 199 Cal. App.2d 283, 18 Cal. Rptr. 473 (1962).

32. Civil Code Section 2224 provides that, "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Civil Code Section 3517 provides, "No one can take advantage of his own wrong."

33. Saltares v. Kristovich, 6 Cal. App.3d 504, 85 Cal. Rptr. 866 (1970); Whitfield v. Flaherty, 228 Cal. App.2d 753, 39 Cal. Rptr. 857 (1964).

34. Johansen v. Pelton, 8 Cal. App.3d 625, 87 Cal. Rptr. 784 (1970); see Note, 8 Hastings L.J. 330 (1957).

1. See, e.g., Marshall, Joint Tenancy, Taxwise and Otherwise, 40 Cal. L. Rev. 501 (1952); [Nossaman, The Impact of Estate and Gift Taxes Upon the Disposition of Community Property, 38 Cal. L. Rev. 71 (1950).]

2. Rev. & Tax. Code § 13805; enacted 1980 Cal. Stats., ch. 634, § 15.

the other spouse by survivorship or when the spouse takes community property from the other spouse either by intestate succession or by devise or bequest.

Under the Economic Recovery Tax Act of 1981 there is an unlimited federal marital deduction for transfers between spouses, whether in the form of survivorship pursuant to joint tenancy or succession, devise, or bequest of community property.[3]

Gift Taxes

The 1980 California legislation eliminated any gift tax consequences of a transfer between spouses.[4] Federal gift tax followed suit in 1981--there is no gift tax on transfer of property between spouses.[5]

Income Taxes

Federal income tax principles treat community property and joint tenancy property differently. Community property, upon passage to the surviving spouse, receives a new basis as to the interests of both spouses.[6] Joint tenancy property receives a new basis only as to the decedent's one-half interest.[7]

Treatment of joint tenancy and community property for state income tax purposes is not clear. Revenue and Taxation Code Section 18044 provides that the basis of property acquired from or passed from a decedent is the fair market value of the property at the time of acquisition. Whether the whole of the joint tenancy or community property receives a new basis, or only the portion attributable to the decedent, is not addressed by Revenue and Taxation Code Section 18045. The rule appears to be that one-half of the joint tenancy property and one-half of the community property receives a new basis, although the position of

3. Int. Rev. Code § 2056.

4. Rev. & Tax. Code § 15310; enacted 1980 Cal. Stats., ch. 634, § 40.

5. Rev. & Tax. Code § 2523.

6. Int. Rev. Code § 1014(a), (b)(6).

7. Int. Rev. Code § 1014(a), (b)(9).

the Franchise Tax Board is that no portion of joint tenancy property receives a new basis.[8]

Whether a new basis for the property is preferable depends upon the type of asset and whether it has appreciated or depreciated in value. In an inflationary economy it is likely that in most cases a new stepped-up basis is preferable for tax purposes, thereby giving the advantage to community property over joint tenancy.[9]

III. INTERRELATION OF JOINT TENANCY AND COMMUNITY PROPERTY

As a general rule, property acquired by married persons during marriage is community property.[1] One of the most troublesome problems in California jurisprudence arises when property acquired by married persons during marriage is evidenced by joint tenancy title.[2] Is the property community or is it joint tenancy? Because of the prevalence of joint tenancy as a manner of tenure by husband and wife, this situation is quite common and the question arises frequently.

Joint Tenancy and Community Property Conflict

The legal incidents of the two types of property tenure differ, and the differences become important when a creditor seeks to apply the property to the debt of one of the spouses, when the marriage dissolves and one spouse seeks to retain the family home, or when one of the spouses dies and attempts to dispose of the property by will (as well as when principles of taxation are applied to the property after death). For this reason the California courts have consistently held that the property cannot be both community and joint tenancy, the incidents of joint tenancy being inconsistent with the incidents of community property.[1]

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8. R. Bock, Guidebook to Calif. Taxes, ¶ 525 (1981); Handling a Decedent's Estate 79 (Cal. Cont. Ed. Bar 1981); Weinstock, Methods of Avoiding Probate, Estate Planning for the General Practitioner § 10.18 (Cal. Cont. Ed. Bar 1979).

9. Kahn & Frimmer, Management, Probate and Estate Planning Under California's New Community Property Laws, 49 Cal. St. B.J. 516 (1974).

1. Civil Code § 5110.

2. A husband and wife may hold property as joint tenants, tenants in common, or as community property. Civil Code § 5104.

1. Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905 (1944).

The fundamental rule was stated by the Supreme Court in the 1932 case of Siberell v. Siberell,[2] that "from the very nature of the estate, as between husband and wife, a community estate and a joint tenancy cannot exist at the same time in the same property."

The court in Siberell, in addition to pointing out the incompatibility of community property and joint tenancy, laid down the basic rule that, "The use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property but instead as a joint tenancy with all the characteristics of such an estate."[3] The reason for this rule is that if the joint tenancy character of the property can be impeached, litigation is invited over the character of the property any time the character of the property affects important legal rights. "It would be manifestly inequitable and a subversion of the rights of both husband and wife to have them in good faith enter into a valid engagement of this character and, following the demise of either, to have a contention made that his or her share in the property was held for the community, thus bringing into operation the law of descent, administration, rights of creditors and other complications which would defeat the right of survivorship, the chief incident of the law of joint tenancy."[4]

Siberell contained the seeds of its own destruction, however. For the court also held that a deed of community property not made with the purpose or intent that the community character of the property should be changed remains community.[5] One commentator at the time of the Siberell case remarked that "this is a startling doctrine, and one which will be difficult of application."[6]

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2. 214 Cal. 767, 773, 7 P.2d 1003, ___ (1932).

3. Id.

4. Id.

5. 214 Cal. at 774-75, 7 P.2d at ___ ("It is not disputed that the property was acquired with community funds and the testimony of the defendant with reference to the circumstances under which the deed of 1918 was executed is sufficient evidence to support the finding that the property was community property.")

6. Comment, 5 S. Cal. L. Rev. 144, 150 (1931).

This observation proved prophetic. Within six months the court restated the rule: When property is purchased with community property funds and the title is taken in the name of husband and wife as joint tenants, the community interest must be deemed severed by consent, and the interest of each spouse therein is separate property. This rule, according to the Court in Delanoy v. Delanoy[7] only applies "in the absence of an intent to the contrary."

The decision in Delanoy opened the way for the very sort of litigation questioning the actual status of title that the Siberell case sought to avoid yet expressly authorized. Within a dozen years the court was able to say in Tomaier v. Tomaier[8] that it is the general rule that evidence may be admitted to establish that property is community even though title has been acquired under a deed executed in a form that ordinarily creates a common law estate with incidents unlike those under community property. "It has in fact been held unequivocally that evidence is admissible to show that husband and wife who took property as joint tenants actually intended it to be community property."[9]

Litigation over this problem has exploded,[10] along with extensive analytical and generally critical comment.[11] By the time the Tomaier case came down in 1944 litigation over the community property-joint

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7. 216 Cal. 23, 13 P.2d 513 (1932).

8. 23 Cal.2d 754, 146 P.2d 905 (1944).

9. 23 Cal.2d at 757, 146 P.2d at _____.

10. See, e.g., Hulse v. Lawson, 212 Cal. 614, 299 P. 525 (1931); Socol v. King, 36 Cal.2d 342, 223 P.2d 627 (1950); In re Kessler, 217 Cal. 32, 17 P.2d 117 (1932); Watson v. Peyton, 10 Cal.2d 156, 73 P.2d 906 (1937); Estate of Watkins, 16 Cal.2d 793, 108 P.2d 417 (1940); Huber v. Huber, 27 Cal.2d 784, 167 P.2d 708 (1946); Machado v. Machado, 58 Cal.2d 501, 375 P.2d 55, 25 Cal. Rptr. 87 (1962); Gudelj v. Gudelj, 41 Cal.2d 202, 259 P.2d 656 (1953); Hotle v. Miller, 51 Cal.2d 541, 334 P.2d 849 (1959); Estate of Baglione, 65 Cal.2d 192, 53 Cal. Rptr. 139, 417 P.2d 683 (1966).

11. 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, Taxwise 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:

tenancy issue was frequent and, "In determining this question our courts have experienced no little difficulty, and it cannot be said the decisions are well settled."[12] Thirty years later, after innumerable cases considering the issue, the law could be characterized as "confused and inconsistent."[13] And litigation struggling with the issue continues unabated.[14]

Evidentiary Standards

Briefly stated, the major outlines of the law as it has developed in the cases appear deceptively clear.[1] The general rule that property acquired by the spouses during marriage is community does not apply

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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 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).

12. Miller, Joint Tenancy as Related to Community Property, 19 Cal. St. B.J. 61 (1944).

13. Mills, Community Joint Tenancy--A Paradoxical Problem in Estate Administration, 49 Cal. St. B.J. 38, 39 (1974).

14. See, e.g., Marriage of Lucas, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (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).

1. See, e.g., In re Marriage of Lucas, 27 Cal.2d 808, 813, 614 P.2d 285, ___, 166 Cal. Rptr. 853, ___ (1980).

where the title is taken in joint tenancy. Title in joint tenancy creates a rebuttable presumption that the property is in fact owned in joint tenancy rather than as community property. This presumption arising from the form of title can be overcome by evidence of an agreement or understanding between the parties that the interests were to be held as community. The presumption cannot be overcome, however, solely by evidence as to the source of the funds used to purchase the property. Nor can it be overcome by testimony of a hidden intention not disclosed to the other grantee at the time of the execution of the conveyance.

Parol evidence of an agreement or understanding to rebut the joint tenancy presumption is liberally admitted to show mutual intent. Thus, the joint tenancy presumption may be rebutted by such evidence as that one spouse didn't understand the implications of joint tenancy title, that the only reason for the joint tenancy was to avoid probate, that one spouse handled all the details of the purchase without consulting the other spouse, that no lawyer advised the spouses with respect to the nature of the title, or that one or both spouses attempted to dispose of the property by will.[2] Other evidence used to rebut the joint tenancy presumption includes statements made by the spouses as to the character of the property, whether in wills or otherwise, statements made by the spouses with respect to their rights in the property such as management and control and testamentary disposition, and other evidence indicating an understanding of the characteristics of the manner of tenure.[3] A common thread in the cases is the willingness of the courts to avoid joint tenancy deeds if the husband and wife were genuinely naive or uninformed about the manner of tenure.[4]

As if this were not enough, in addition to the possibility that property acquired in joint tenancy form may never have changed its community character, there is the complementary rule that community property that in fact became joint tenancy may subsequently be transmuted back to community. In California it is fundamental that the spouses may introduce evidence to show both a different original intent from the form of title and may contract between themselves to change the character

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2. See, e.g., Mills, Community Joint Tenancy--A Paradoxical Problem in Estate Administration, 49 Cal. St. B.J. 38, 44 (1974).

3. See, e.g., Brown & Sherman, Joint Tenancy or Community Property: Evidence, 28 Cal. St. B.J. 163, 179-80 (1953).

4. Mills, Community/Joint Tenancy--Avoid a Tax Doubleplay; Touch the Basis, 1979 S. Cal. Tax Inst. 951, 967 (1979).

of the property regardless of the form of title; the courts are liberal in recognizing and admitting evidence on both these matters.[5] Transmutation back to community may be by oral or written agreement or by conduct of the parties;[6] it is incredibly easy to precipitate a transmutation.[7]

Unfortunately, even though the cases are numerous, they offer no useful specific guidance as to when property in joint tenancy form will be found to be community in a particular case.[8] Efforts have been made to find patterns in the cases,[9] but commentators have not been able to reach agreement. "Depending on one's cynicism, one may label rules which govern marital property characterization as either conflicting or chaotic."[10]

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5. See, e.g., Comment, Joint Tenancy v. Community Property in California: Possible Effect Upon Federal Income Tax Basis, 3 UCLA L. Rev. 636, 649 (1956).

6. See, e.g., Miller, Joint Tenancy as Related to Community Property, 19 Cal. St. B.J. 61, 68 (1944); Lyman, Oral Conversion of Property by Husband and Wife from Joint Tenancy to Community Property, 23 Cal. St. B.J. 146 (1948).

7. See, e.g., Reppy, Debt Collection from Married Californians: Problems Caused by Transmutation, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143 (1981).

8. Marsh, Property Ownership During Marriage, 1 California Family Lawyer § 4.2, 97-98 (1961):

> A preliminary statement should be made concerning the nature of the legal rules in this area. Many of them are stated in a categorical fashion by the courts and in this chapter may appear deceptively simple and certain. In virtually every situation, however, another rule indicating the opposite result is also arguably applicable. Therefore, the rules merely furnish the framework of argument and do not dictate any given result. This is true of almost any field of law to some degree, but in no other field is it so pervasively true as in the marital property law in this state.

9. See, e.g., Brown & Sherman, Joint Tenancy or Community Property: Evidence, 28 Cal. St. B.J. 163 (1953) (purpose of article "not to inveigh against the rule that leaves the question in doubt, but, accepting the rule as laid down by the courts, to attempt to ascertain what circumstances should be inquired into to find the answer").

10. Mills, Community/Joint Tenancy--Avoid a Tax Doubleplay; Touch the Basis, 1979 S. Cal. Tax Inst. 951, 966 (1979).

Generally the cases can be analyzed in terms of relaxing the parol evidence rule and the statute of frauds in an effort to ascertain the true intent of the spouses.[11] However, this does not explain the seemingly contradictory cases in the area. Some commentators find the contradictions are based on the effort of the courts to arrive at what appears to be a fair, just, and equitable result in the facts of a particular case;[12] some find underlying preferences for community property and the source of funds rule (whereas others find a preference for joint tenancy, particularly in survivorship cases[13]), as well as a reluctance of appellate courts to overturn a trial court factual determination;[14] some find differences based on whether a third party who relied on record title is involved;[15] one notes that the same property may be found to be joint tenancy for some purposes and community for others;[16] one commentator believes the inconsistency in the cases can be explained by differences in the management powers of husband and wife at the time the cases came down;[17] and one commentator observes that some cases involve a bona fide marital dispute between spouses and others are post-mortem cases biased in favor of a community property determination for tax minimization purposes.[18] "Not only will the happenstance of

11. See, e.g., Miller, Joint Tenancy as Related to Community Property, 19 Cal. St. B.J. 61, 65-68 (1944); Ferrari, Conversion of Community Property into Joint Tenancy Property in California: The Taxpayer's Position, 2 Santa Clara Lawyer 54, 66 (1962); Knutson, California Community Property Laws: A Plea for Legislative Study and Reform, 39 S. Cal. L. Rev. 240, 254 (1966).

12. See, e.g., Marsh, Property Ownership During Marriage, 1 California Family Lawyer § 4.2, 98 (1961); Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87 (1961).

13. Comment, 3 Whittier L. Rev. 617, 630 (1981).

14. See, e.g., Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87, 92 (1961); Mills, Community/Joint Tenancy--A Paradoxical Problem in Estate Administration, 49 Cal. St. B.J. 38, 44 (1974).

15. See, e.g., Griffith, Community Property in Joint Tenancy Form, 14 Stan L. Rev. 87, 95 (1961).

16. Mills, Community Joint Tenancy--A Paradoxical Problem in Estate Administration, 49 Cal. St. B.J. 38, 43 (1974).

17. Brown & Sherman, Joint Tenancy or Community Property: Evidence, 28 Cal. St. B.J. 163, 177 (1953).

18. Mills, Community/Joint Tenancy--Avoid a Tax Doubleplay; Touch the Basis, 1979 S. Cal. Tax Inst. 951, 966-67 (1979).

court assignment often decide the question, but, even worse, since the law is clear that a couple may orally agree as to the character of this property and oral evidence of such an agreement may be used to overcome the presumption, the persuasiveness, forgetfulness, or downright untruthfulness of a spouse may be the deciding factor."[19]

An examination of the historical context of the cases reveals that the presumption of joint tenancy where title papers show joint tenancy, despite the community origin of the property, derives from a time when community property was not under equal ownership, management, and control of the spouses but was more the husband's than the wife's.[20] The law presumed, therefore, that when title was taken in the name of the wife it was intended to be the separate property of the wife.[21] Thus, where a husband and wife took property as tenants in common, the husband's share was presumed to be community property and the wife's share was presumed to be separate property, with the result that the husband was a one-fourth owner and the wife a three-fourths owner.[22] The Siberell case can be seen as a reaction to this unusual result;[23] the court found that joint tenancy title was in effect a transmutation of the husband's community interest to separate property. Later cases focusing on the intent of the parties thus inquired into the intent of the wife in the creation of the joint tenancy; if the wife was unaware of the manner in which title was taken, the joint tenancy deed was found not to effect a transmutation.

The result is that the law has continued to develop along the lines of a joint tenancy presumption with a court search for the spouses' intent or agreement otherwise, even though the historical reason for the joint tenancy presumption--the unequal ownership and management and control interests of the wife--and the statutes that led to it have long since disappeared. The law through stare decisis has developed a life of its own.

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19. Backus, Supplying or Providing Community Property Forms, 37 Cal. St. B.J. 381, 382 (1964).

20. See analysis in Note, 32 Cal. L. Rev. 182 (1944).

21. See former Civil Code § 164.

22. Dunn v. Mullan, 211 Cal. 583, 296 P. 604 (1931).

23. See, e.g., Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity 84 (1981).

Problems With Existing Law

This state of the law is not satisfactory. Relaxation of the parol evidence rule and statute of frauds and of the standard of proof of intent produces results that are confused, inconsistent, illogical, and unreasonable.[1] The uncertainty thereby introduced in the law invites litigation and encourages hazy recollection and perjury.[2] It causes uncertainties in title, requires courts to rely upon the flimsiest of evidence, makes possible flagrant frauds, and affects rights of third parties as well as relations between husband and wife.[3]

Commentators are unanimously of the opinion that as a general rule, when husband and wife take title as joint tenants in property acquired with community funds, they do so on the basis of the suggestion of a real estate broker, transfer agent, escrow or title officer, or notary, or because the forms provide only for joint tenancy, or because that's the way they think married people hold property. They do not actually intend to create joint tenancy property, are ignorant of the legal incidents of joint tenancy property, and actually believe the property is community or has the legal incidents of community property.[4] The one

1. See, e.g., Lyman, Oral Conversion of Property by Husband and Wife from Joint Tenancy to Community Property, 23 Cal. St. B.J. 146, 150 (1948); Mills, Community Joint Tenancy--A Paradoxical Problem in Estate Administration, 49 Cal. St. B.J. 38, 39 (1974).

2. See, e.g., Comment, Joint Tenancy v. Community Property in California: Possible Effect Upon Federal Income Tax Basis, 3 UCLA L. Rev. 636, 645 (1956); Marsh, Property Ownership During Marriage, 1 California Family Lawyer § 4.2, 98 (1961); Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87, 92 (1961); Reppy, Debt Collection from Married Californians: Problems Caused by Transmutation, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 167-68 (1981).

3. See, e.g., Knutson, California Community Property Laws: A Plea for Legislative Study and Reform, 39 S. Cal. L. Rev. 240, 254 (1966); 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, 64-65 (1966).

4. See, e.g., Miller, Joint Tenancy as Related to Community Property, 19 Cal. St. B.J. 61, 66 (1944); Lyman, Oral Conversion of Property by Husband and Wife from Joint Tenancy to Community Property, 23 Cal. St. B.J. 146, 148 (1948); Brown & Sherman, Joint Tenancy or Community Property: Evidence, 28 Cal. St. B.J. 163 (1953); Ferrari, Conversion of Community Property into Joint Tenancy Property in California: The Taxpayer's Position, 2 Santa Clara Lawyer 54, 61

major exception to this generalization is that the spouses may believe there is a right of survivorship associated with joint tenancy title that results in an automatic transfer of the property to the surviving spouse without the time and expense of probate and with a saving of taxes.[5] In fact, the spouses may well expect the property to have the benefit of both the survivorship aspects of joint tenancy and the remaining normal legal incidents of community property.[6]

In fact this belief is mistaken. Joint tenancy may be no less slow or expensive than probate of the same property[7] and in any event offers no advantage over community property, which also avoids probate if passed to the surviving spouse, whether by will or intestate succession.[8] Although the benefits of joint tenancy avoiding creditors' claims is sometimes mentioned, in practice probate proceedings often provide greater protection to the survivor because they may insulate the survivor against personal liability to a creditor.[9] The spouses may also be unaware that the right of survivorship in joint tenancy is inconsistent with the ability to devise the property and may make an ineffectual attempt to dispose of the property by will.[10] And in the usual case joint tenancy property is treated identically with community property for gift, estate, inheritance, and income tax purposes, with the exception of treatment of tax basis at death, for which joint tenancy receives

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(1962); Backus, Supplying or Prescribing Community Property Forms, 39 Cal. St. B.J. 381 (1964); Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity 85 (1981).

5. Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87 (1961).

6. Marshall, Joint Tenancy, Taxwise and Otherwise, 40 Cal. L. Rev. 501 (1952).

7. See discussion, "Avoidance of Probate," above; see also Knutson, California Community Property Laws: A Plea for Legislative Study and Reform, 39 S. Cal. L. Rev. 240, 255 (1966).

8. See discussion, "Avoidance of Probate," above; see also Mills, Community/Joint Tenancy--Avoid a Tax Doubleplay; Touch the Basis, 1979 S. Cal. Tax Inst. 951, 963 (1979).

9. Id. at 964-965; see discussion, "Rights of Creditors," above.

10. See discussion, "Survivorship," above.

less favorable tax treatment than community property if the property has appreciated in value.[11]

Joint tenancy disserves the needs of most spouses, and most spouses do not intend joint tenancy character when acquiring property with community funds. Yet the law creates a presumption of joint tenancy, then riddles the presumption with exceptions and relaxes evidentiary standards so that the true intent of the spouse can be shown, with the result of extensive litigation, perjury, and confusion in the law. A number of approaches are possible to remedy this problem.[12]

Possible Solutions

Discourage Use of Joint Tenancy

Because the problems of interrelation between joint tenancy and community property stem largely from the frequent but uninformed use of joint tenancy, many proposals center on ways of discouraging the use of joint tenancy. This could be done by revising joint tenancy law to make that form of tenure less attractive, by imposing procedural impediments to creation of joint tenancy tenure, by making available other alternatives that serve the same function as joint tenancy, and by making clear to spouses that community property is an available and suitable manner of tenure. Each of these approaches is examined below.

Revise law to make joint tenancy less attractive. The major attraction of joint tenancy is that it avoids probate; one obvious change in joint tenancy law that would lessen the appeal of joint tenancy is to require that joint tenancy property be probated. Such a change in the

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11. See discussion, "Taxes," above. This difference effectively favors the taxpayer over the Treasury, since the taxpayer can select joint tenancy or community property as the "true" character depending upon whether its value has increased or decreased. "Because of the fact that the spouses can switch from post-1927 community property to joint tenancy or vice versa, a properly planned transaction can take advantage of the different treatment of tax basis for income tax purposes. On the other hand, an unadvised taxpayer is penalized." 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).

12. See, e.g., Comment, 3 Whittier L. Rev. 617, 633 (1981) ("Court decisions regarding joint tenancy created a good deal of dissatisfaction with commentators, who offered a variety of suggestions to alleviate the 'joint tenancy or community property' dilemma."). For a collection of some proposals, see Cal. Assembly Interim Comm. on Judiciary, Final Report Relating to Domestic Relations, reprinted in 2 Appendix to the Journal of the Assembly, Cal. Leg. Reg. Sess. 122-25 (1965).

law would, however, essentially destroy the utility of joint tenancy tenure, which does provide an easy and convenient means of passing property at death in the small estate. It is commonly used outside the husband-wife relationship as a means of passing property from parent to child.

A more refined version of this proposal would be to require joint tenancy property to be probated as between spouses; this has been advocated.[1] This would preserve the survivorship incident of joint tenancy and have the incidental effect of dealing adequately with creditors' rights.[2]

Another suggestion is that when a joint tenancy between spouses is severed, notice must be given.[3] This would ensure that the non-severing spouse will not rely on survivorship rights but will be aware of the need to make proper disposition of the property;[4] this would create timing and proof problems, however.

Impose procedural impediments to creation. Although existing law requires an express written declaration for creation of joint tenancy,[5] this requirement has become meaningless by the widespread use of forms prescribing joint tenancy and by the lay assumption that joint tenancy is the preferred form of tenure among married persons. To help ensure that a married person knowingly creates a joint tenancy form of tenure, it has been suggested that an express written confirmation of the tenure be required. This written confirmation would be more than a simple signing of escrow instructions or a signature card, but would include an express negation of community property intent, signed by both spouses.[6]

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1. Mills, Community Joint Tenancy--A Paradoxical Problem in Estate Administration, 49 Cal. St. B.J. 38, 89 (1974).

2. See discussion, "Rights of Creditors," above.

3. See, e.g., Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity 92-93 (1981).

4. See, e.g., Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 237-38 (1981).

5. Civil Code § 683; see discussion, "Presumption Against Joint Tenancy," above.

6. See, e.g., Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 235-37 (1981); Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity 90-92 (1981).

One problem that has been raised with this suggestion is that it would merely result in a new deed form, "To husband and wife as joint tenants with right of survivorship and not as community property." The notion of joint tenancy is so endemic in the California property system that the end result would be substantial use of the new deed form just as joint tenancy is used now, so that after a few unsettling years of test cases, the situation would be back exactly where it is now.[7]

Make available other alternatives that serve the same function. Beneficiary designations in instruments such as life insurance policies serve as useful alternatives to joint tenancy with right of survivorship. Beneficiary designations in common joint instruments such as bank accounts and promissory notes could prove to be an effective means of passing property outside probate without the disadvantages of joint tenancy form of title. In particular, bank accounts have received scrutiny in recent years. The Uniform Probate Code authorizes the "pay-on-death" (P.O.D.) account, which is not now authorized in California. This new authority permits a depositor to use an account form that accomplishes his or her objective without the need to resort to trust theory or other legal fictions. When the depositor's intent in creating a multiple-party account is solely to provide for payment of the funds to a named beneficiary on the depositor's death, the P.O.D. account is superior to the joint account because the depositor retains sole ownership of the account funds during his or her lifetime. The California Law Revision Commission has recommended adoption of P.O.D. accounts and validation of P.O.D. provisions in a broad class of written instruments (including contracts, gifts, and conveyances).[8]

Another way to achieve the effect of joint ownership with right of survivorship and yet still avoid the undesirable effects of joint tenancy is to create a new form of title--community property with right of survivorship. This would give people what they really want--avoidance

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7. Cal. Assembly Interim Comm. on Judiciary, Final Report Relating to Domestic Relations, reprinted in 2 App. J. Assembly, Cal. Leg. Reg. Sess. 124 (1965).

8. Recommendations relating to Probate and Estate Planning: Non-Probate Transfers, 15 Cal. L. Revision Comm'n Reports 1601, 1620, 1623-24 (1980).

of probate--while preserving the basic incidents and protections of the community property system.[9] This would be implemented through a presumption that a recital of joint tenancy in any form, in a deed or other instrument conveying property purchased in whole or in part with community funds, does not transmute the property into joint tenancy property but merely affixes to the community ownership a right of survivorship.[10] This sort of hybrid could also be integrated with a "mixed" type of property, to yield a community and separate property mix in any combination, with the right of survivorship.[11]

One concern with such a hybrid form of property is whether it would qualify for the advantageous tax treatment of community property or whether it would be subject to the disadvantageous treatment of joint tenancy property, with respect to stepped-up basis.[12] Professor Reppy makes a case for treating the property as community for tax purposes, but points out that the matter is uncertain.[13]

Joint tenancy title is frequently taken not for purposes of survivorship, however, but for convenience of management. It may be used as an alternative to a conservatorship or to a power of attorney, and no ownership interest or survivorship rights are intended. To facilitate this type of arrangement, another alternative to full joint tenancy should be permitted--joint management tenure. This could be done by techniques such as offering on a bank account signature card the option of a joint management account, without right of survivorship. With a full range of options available there would be less dispute over the intent of the parties in selecting a specific option.

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9. Knutson, California Community Property Laws: A Plea for Legislative Study and Reform, 39 S. Cal. L. Rev. 240, 255 (1966).

10. Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 235-36 (1981).

11. Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity 93-97 (1981); see discussion, "Trace community and separate funds," below.

12. See discussion, "Income Taxes," above.

13. 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).

Make clear to spouses that community property is available and suitable. Since community property passes by intestate succession to the surviving spouse,[14] and since probate is unnecessary in such a situation,[15] community property has the same qualities as survivorship and probate avoidance sought in joint tenancy property. Educating not only spouses but also real estate brokers, stock transfer agents, title personnel, and others who serve in an advisory capacity about the suitability of community property tenure is necessary; in this regard, a clear statutory statement of the law of joint tenancy and community property, and their interrelation will be helpful. In addition, the availability of community property tenure could be reinforced by mandating that the choice be offered on printed forms.[16]

Deal Directly With the Interrelation of Joint Tenancy and Community Property

Apart from proposals to discourage use of joint tenancy as a manner of tenure among married persons, most of the approaches to resolving the joint tenancy-community property quagmire deal directly with the interrelation of the two types of tenure. The proposals seek primarily to change the effect of the current title presumptions involving joint tenancy property having its source in community property. California law already does this for the family home at dissolution of marriage, and refinements of that law have been suggested, along with analogous suggestions for tracing of community and separate funds in bank accounts and in mixed property generally. Other proposals would tighten the evidentiary rules relating to transmutation of community and separate property (the statute of frauds and the parol evidence rule) and would divide joint tenancy property along with community property at dissolution of marriage.

Change effect of current title presumptions. Existing California law presumes that property acquired during marriage is community except where title is taken in joint tenancy, in which case the property is presumed to be separate and held in joint tenancy.[17] Since most married

14. See discussion, "Survivorship," above.

15. See discussion, "Avoidance of Probate," above.

16. Backus, Supplying or Prescribing Community Property Forms, 39 Cal. St. B.J. 381 (1964).

17. See discussion, "Evidentiary Standards," above.

persons take title to major assets such as the family home in joint tenancy, and since most married persons do so in ignorance of the consequences, the joint tenancy presumption breeds litigation during marriage when the property is applied to a debt, at dissolution of marriage when the property is being divided, and at death when the property is being passed on.[18] An obvious solution to this problem is to make the law conform to married persons' reasonable expectations: when property is acquired during marriage in joint tenancy form, the property should be presumed to be community, absent clear evidence of an intent to the contrary; the form of title alone should not be controlling, except as to bona fide purchasers.[19] Such a scheme would be consistent with other community property jurisdictions, which either disfavor joint tenancy as a manner of holding property by married persons or preclude it outright.[20] A reversal of the presumptions to favor community property would also be in accordance with the long established public policy of California favoring community property.[21]

Family home at dissolution of marriage. Section 5110 of the Civil Code creates a community property presumption at dissolution of marriage for a single-family residence acquired by husband and wife during marriage as joint tenants.[22] This presumption can be rebutted only by evidence of an agreement or understanding to the contrary; it cannot be rebutted

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18. See discussion, "Problems with Existing Law," above.

19. Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87, 105 (1961).

20. Knutson, California Community Property Laws: A Plea for Legislative Study and Reform, 39 S. Cal. L. Rev. 240, 254 (1966); Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87, 107 (1961); Property Owned with Spouse: Joint Tenancy, Tenancy by the Entireties and Community Property, 11 Real Property, Prob. & Trust J. 405, 431 (1976).

21. Cal. Assembly Interim Committee on Judiciary, Final Report relating to Domestic Relations, reprinted in 2 App. J. Assembly, Cal. Leg. Reg. Sess. 123-24 (1965).

22. Civil Code Section 5110 provides, in relevant part, "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."

simply by tracing the funds used to acquire the property to a separate property source, or by evidence of a secret intent that the property was to be something other than community property.[23]

This scheme is a major step that has already been taken towards a general community property presumption notwithstanding joint tenancy form of title, since in many cases the family home is the major asset of the marriage. It was enacted expressly to address the problem of married persons taking title to property in joint tenancy without being aware of the consequences and in fact believing the property is actually community.[24] However, it is limited to the family home and applies only at dissolution.[25]

Trace community and separate funds. A rule that property acquired with community funds is presumed to be community despite joint tenancy form of title can create inequity in cases where separate property was also used in the acquisition. In re Marriage of Lucas,[26] for example, has been criticized for its holding that the family home community property presumption cannot be rebutted by evidence tracing its source to separate property.[27] As a corollary of the community property presump-

23. In re Marriage of Lucas, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).

24. Assembly Interim Committee on Judiciary, Final Report relating to Domestic Relations 123-25 (1965), 2 App. Assem. J. (1965 Reg. Sess.); Comment, 3 Whittier L. Rev. 617, 634-36 (1981); Lichtig, Characterization of Property, 1 California Marital Dissolution Practice § 7.39 (Cal. Cont. Ed. Bar 1981). However, it has also been stated that the primary purpose of this legislation was to enable the courts to award the residence to the wife and children whenever it was equitable to do so by making it community property and thereby bringing it within the jurisdiction of the courts. Review of Selected 1965 Code Legislation 40 (Cal. Cont. Ed. Bar 1965); In re Marriage of Bjornstead, 38 Cal. App.3d 801, 113 Cal. Rptr. 576 (1974); Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 164 (1981). This derives from a time when a greater share of the community property could be awarded to the innocent spouse. 1 A. Bowman, Ogden's Revised California Real Property Law § 7.12 (1974).

25. It applies also at legal separation and at annulment. Civil Code § 5110; In re Marriage of Trantafello, 94 Cal. App.3d 533, 156 Cal. Rptr. 556 (1979).

26. 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 583 (1980).

27. See, e.g., Joint Ownership of Marital and Nonmarital Property 33 (Program Material, January 1982, Cal. Cont. Ed. Bar); Comment, 3 Whittier L. Rev. 617, 638-41 (1981).

tion, it has been suggested that tracing, as well as a clear agreement between the spouses, be permitted to overcome the presumption.[28] The Law Revision Commission's recommendation that joint accounts between married persons be presumed to be community is a recommendation for a rebuttable presumption of precisely this type.[29]

A similar treatment would also apply to a proposed new form of title--"mixed property"--that preserves the ownership characteristics of the purchasing funds. If title were taken to "mixed" property, community property would be presumed, but tracing would be permitted to establish other ownership interests in the asset.[30]

Tighten evidentiary rules relating to transmutation. A major cause of confusion in the law governing joint tenancy and community property is the liberality with which the form of title and the title presumptions can be questioned, thus encouraging litigation and producing different results on similar facts.[31] To help give certainty and stability to the law, it has been suggested that ordinary evidentiary rules such as the statute of frauds and the parol evidence rule should be tightened rather than relaxed as applied to joint tenancy-community property disputes.[32]

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28. Assembly Interim Committee on Judiciary, Final Report relating to Domestic Relations 124 (App. J. Assembly 1965):

> The proposal would not preclude a husband and wife from actually holding property as joint tenants. It would merely impose upon them the burden of overcoming the contrary presumption. This same burden is presently upon them in reverse in that they must overcome the presumption the property has been changed from community property to joint tenancy. In either event, proof to rebut the presumption would be by tracing the funds which were used to make the purchase or showing an agreement between the parties.

29. Recommendation relating to Non-Probate Transfers, 15 Cal. L. Revision Comm'n Reports 1605, 1622 n.28 (1980):

> Under the proposed law, the presumption may be rebutted (1) by tracing the funds from separate property (absent an agreement expressing a clear intent to transmute the funds to community property) or (2) by an agreement separate from the deposit agreement which expressly provides that the funds are not community property.

30. Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity 93 (1981).

31. See discussion, "Problems with Existing Law," above.

32. See, e.g., Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 236-38 (1981).

Under these rules, for example, a transmutation of joint tenancy to community property or vice versa would require a written instrument; an oral transmutation would not be permitted.[33]

Divide joint tenancy at dissolution of marriage. Before the advent of no-fault divorce and equal division of community assets in California in 1970,[34] the characterization of property as joint tenancy or community was of critical importance at dissolution of marriage. The innocent party could be awarded more than one-half of the community assets, whereas the divorce court had no jurisdiction over joint tenancy assets which were owned in equal shares by the spouses. The legal status particularly of the family home held in joint tenancy form was thus frequently the focus of divorce litigation.[35]

The issue of characterization of joint tenancy and community property is no longer so crucial. However, it does remain an issue in terms of the ability of the court to award, for example, the family home to the wife and children and make an offsetting award of other property to the husband. For this reason it has been suggested that the court be given jurisdiction to divide joint tenancy and tenancy in common assets along with community property at dissolution of marriage.[36] This would not only increase the flexibility of the court in making property awards but would also avoid the need for a later severance or separate action for partition of the jointly held property. Other community property states require division of joint tenancy property at dissolution.[37]

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33. See, e.g., Lyman, Oral Conversion of Property by Husband and Wife from Joint Tenancy to Community Property, 23 Cal. St. B.J. 146 (1948).

34. Civil Code §§ 4506, 4800 (enacted Cal. Stats. 1969, ch. 1608 § 8).

35. See discussion "Family home at dissolution of marriage," above.

36. Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity 103-04 (1981).

37. See, e.g., Ariz. Rev. Stat. § 25.318 (Supp. 1980); Nev. Rev. Stat. § 125.150 (1979).