

## Memorandum 84-76

Subject: Study H-601 - Recording Severance of Joint Tenancy (Draft of Recommendation)

The Commission's bill (AB 2276) to permit unilateral severance of joint tenancy was enacted at the 1984 legislative session, but only after deletion of the requirement that a unilateral severance be recorded before the death of the severing joint tenant to be effective. The reason for the recording requirement was to prevent fraud by the severing joint tenant, who otherwise could conceal the fact of severance depending on his or her ultimate advantage.

The bill passed the Assembly 71 to zero, still containing the recording requirement, with broad support and no known opposition. The recording requirement was deleted in the Senate at the request of the Office of Legislative Affairs of the State Bar, because the Conference of Delegates had rejected such a provision in connection with its resolution endorsing the unilateral severance concept. However, the State Bar Estate Planning, Trust and Probate Law Section was in favor of the recording requirement to reduce "the risk of 'phantom' declarations of severance that would appear or disappear, depending on which joint tenant survives."

Others, such as the California Federation of Business and Professional Women's Clubs, thought that mere recording was not enough, and that notice of the recording should be sent to the other joint tenant. The Commission in the past has not wanted to require actual notice since it is an off-record act and would create title and proof problems, and would hamper the ability of a joint tenant to deal freely with his or her interest without interference from the other joint tenant.

The staff has prepared the attached staff draft of a Recommendation Relating to Severance of Joint Tenancy to renew the proposal that a unilateral severance of a joint tenancy be recorded before the death of the severing joint tenant to be effective. The recommendation does not require actual notice to the other joint tenant. The staff recommends

that the Commission approve the recommendation for submission to the 1985 Legislature.

Respectfully submitted,

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Staff Draft

## RECOMMENDATION

relating to

## RECORDING SEVERANCE OF JOINT TENANCY

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

1. Civil Code § 683.2, enacted by 1984 Cal. Stats. ch. 519.
2. Estate of Dean, 109 Cal. App.3d 156, 160, 167 Cal. Rptr. 138 (1980); Riddle v. Harmon, 102 Cal. App.3d 524, 527, 162 Cal. Rptr. 530 (1980); 3 B. Witkin, Summary of California Law Real Property § 222, at 1952 (1973).
3. Riddle v. Harmon, 102 Cal. App.3d 524, 526, 162 Cal. Rptr. 530 (1980). Joint tenancy is a popular form of title because people want the automatic survivorship feature. Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87, 88, 90, 108 (1961); Sterling, Joint Tenancy and Community Property in California, 14 Pac. L.J. 927, 952 (1983); Basye, Joint Tenancy: A Reappraisal, 30 Cal. St. B.J. 504, 506 (1955); Hines, Personal Property Joint Tenancies: More Law, Fact and Fancy, 54 Minn. L. Rev. 509, \_\_\_\_ (1970). They want the survivor to get all the property in the event of death. Griffith, supra at 108. They want the survivor to take the property automatically without the delay and expense of probate. Id. at 90. The joint tenancy has been called the "poor man's will," and it works well in practice for people of modest means. Id. at 108.
4. Estate of Dean, 109 Cal. App.3d 156, 159, 167 Cal. Rptr. 138 (1980); Burke v. Stevens, 264 Cal. App.2d 30, 35, 70 Cal. Rptr. 87 (1968); see Estate of Carpenter, 140 Cal. App.3d 709, 712, 189 Cal. Rptr. 651 (1983).
5. See Burke v. Stevens, 264 Cal. App.2d 30, 70 Cal. Rptr. 87 (1968). In the Burke case, the joint tenants were husband and wife. The husband had originally purchased a 60-acre orange grove, taking title with his wife as joint tenants. Some 19 years later, the wife discussed with her attorney the possibility of severing the joint tenancy and converting it to a tenancy in common so she could leave her half by will to her children of a former marriage. The

if the severing joint tenant dies first so the severed half may pass to his or her heirs or devisees. However, if the other joint tenant dies first, the secret severing instrument may be destroyed so that the surviving joint tenant will take the other half of the property by survivorship, thereby becoming owner of the entire property.

To preclude this situation, the Law Revision Commission recommends that severance of a real property joint tenancy of record by one joint tenant acting alone should be recorded before the death of that joint tenant in order to be effective.<sup>6</sup> This will prevent the severing joint tenant from suppressing the severing instrument if the other joint tenant dies first, yet will not place an undue burden on the severing joint tenant or create title or proof problems.<sup>7</sup>

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

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

6. This renews a portion of an earlier Commission recommendation. See Recommendation Relating to Severance of Joint Tenancy, 17 Cal. L. Revision Comm'n Reports 941 (1984).
7. The Commission has considered whether actual notice to the other joint tenant should also be required. While actual notice may give the other joint tenant the opportunity to revise his or her will to dispose of half of the new tenancy in common, the Commission thinks any benefit of requiring actual notice is outweighed by the title and proof problems created by requiring an act that does not appear in the record of title.

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

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

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

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

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

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

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

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

(c) Severance of a joint tenancy of record by deed, written declaration, or other written instrument pursuant to subdivision (a) is not effective to terminate the right of survivorship as to the joint tenant's interest unless the deed, written declaration, or other written instrument is recorded before the death of the joint tenant. Nothing in this subdivision limits the manner or effect of a severance joined in or made in writing pursuant to an agreement of the joint tenants, including a quitclaim deed between joint tenants.

~~(e)~~ (d) This section applies to all joint tenancies in real property, whether the joint tenancy was created before, on, or after January 1, 1985, except that in the case of death of a joint tenant before January 1, ~~1985~~ 1986, the validity of a severance is determined by the law in effect at the time of death.

Comment. Subdivision (c) is added to Section 683.2 to require that in the case of a recorded real property joint tenancy, severance by written declaration or by other instrument must be recorded during the lifetime of the severing joint tenant to be effective, unless all joint tenants have joined. Subdivision (d) is amended so that the new recording requirement will not make ineffective a nonrecorded severance where the severing joint tenant died before January 1, 1986.

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