Study H-603 April 21, 1997

Memorandum 97-18

Severance of Joint Tenancy by Dissolution of Marriage: Comments on Tentative Recommendation

This memorandum reviews comments we have received on the Tentative Recommendation on *Severance of Joint Tenancy by Dissolution of Marriage* (February 1997). Additional letters of comment are anticipated and will be discussed in a supplement to this memorandum. Comment letters and other items of interest are attached in the Exhibit as follows:

OVERVIEW

The commentators all generally support the proposal. Specific suggestions for improvement include:

(1) The proposal should be expanded to revoke other revocable spousal dispositions on dissolution or annulment of marriage (hereinafter divorce) — not just joint tenancy.

(2) Severance of joint tenancy should occur on legal separation as well as on divorce.

(3) Remarriage of former spouses should not revive a joint tenancy severed by divorce.

We have adopted suggestions for improving the clarity and accuracy of the preliminary part of the recommendation where appropriate. See draft attached as Exhibit pp. 19-28.

Background

The original purpose of study H-603 was to devise a quick remedy for the narrow problem presented by *Estate of Layton*. That case held that a joint tenancy between spouses is not severed by a status-only judgment of dissolution of marriage. Instead, the decedent's share in the joint tenancy passes by survivorship to the surviving former spouse. See Estate of Layton, 44 Cal. App. 4th 1337, 52 Cal. Rptr. 2d 251 (1996). This is contrary to the presumed intent of divorcing parties.

Eight states have adopted variations of Uniform Probate Code Section 2-804. See Exhibit pp. 13, 21. Uniform Probate Code Section 2-804 revokes a wide range of revocable spousal dispositions, not just marital joint tenancy, on divorce. The policy rationale for this section of the Uniform Probate Code is the same as that for severance of joint tenancy on divorce — that divorcing parties do not intend dispositions benefiting their spouse, often at the expense of their estate, to survive divorce.

California law already provides that divorce revokes a spousal disposition in a will, a spousal designation as attorney-in-fact, and spousal death benefits under the Public Employees' Retirement System (PERS).

The staff has previously suggested that the Commission consider widening the scope of this project to study whether other revocable spousal dispositions (besides joint tenancy, will provisions, power of attorney and PERS death benefits) should be revoked on divorce.

The Commission rejected this suggestion, based in part on the Commission's hope that a bill to reform the effect of divorce on marital joint tenancy could be introduced as part of the Commission's 1997 legislative program. The additional time required to expand the study would probably have prevented implementing this suggestion.

Public Comment

Two commentators expressly suggest expansion of the proposal to revoke other revocable spousal dispositions on divorce.

Paul Gordon Hoffman, of Hoffman, Sabban & Watenmaker, wrote (see Exhibit p. 3):

> I would urge the Commission to reconsider its decision to limit this policy to joint tenancy severance. Inheritance rights would now be eliminated under a joint tenancy, a will, public employee benefit

> plans and by severance of community property. What possible rationale exists for not extending the same policy to revocable trusts and life insurance (following the lead of Ohio, as discussed on page 3 of the Tentative Recommendation?)

Professor Howard S. Erlanger, University of Wisconsin Law School, noted that Wisconsin is currently revising its Probate Code and is likely to adopt a variant of Uniform Probate Code Section 2-804. See Exhibit p. 2. After reading the Commission's tentative recommendation he wondered why the Commission was not recommending the adoption of a similar provision in California.

Although Professor Grace Ganz Blumberg, UCLA Law School, did not suggest expansion of the proposal's scope, she did point out that the problem remedied by the proposal is very narrow.

Professor Blumberg cites *In re Marriage of Hilke*, 4 Cal. 4th 215, 841 P.2d 891, 14 Cal. Rptr. 2d 371 (1992), for the proposition that "when a spouse dies after divorce but before the reserved property distribution, property titled in joint tenancy shall be distributed 50-50 as though it were community property at the subsequent property distribution." See Exhibit p. 7. Therefore, the *Layton* problem only exists where more than four years have passed between divorce and the death of a party, rendering the community property presumption inapplicable. See Fam. Code § 802.

In fact, there is one other circumstance in which the problem exists — where the community property presumption applies, but is successfully rebutted. Still, Professor Blumberg's general point is valid. As the revised staff draft acknowledges, the cases addressed by the proposal will be "relatively rare." See Exhibit p. 19.

Staff Recommendation

It is unlikely that the project will be complete in time for the current session. The Commission has already expended the resources to consider the basic policy underlying revocation of a revocable spousal disposition on divorce. The additional effort required to expand the scope of the policy is probably justified in light of the much broader range of benefits that would result. *The staff recommends expanding the study to consider the revocation of other revocable spousal dispositions.*

Background

The tentative recommendation concludes that a marital joint tenancy should not be severed by legal separation.

Unlike divorce, legal separation leaves marital status intact. This suggests that separating parties may also intend to leave marital property and support arrangements intact. See, e.g., Practice Under the California Family Code: Dissolution, Legal Separation, Nullity § 3.35, at 35-36 (Cal. Cont. Ed. Bar 1997) (reasons for choosing legal separation include maintenance of medical insurance coverage and derivative social security benefits). Where this is the case, it would be inappropriate to sever a marital joint tenancy.

This view of legal separation is consistent with the prevailing statutory treatment of revocable spousal dispositions. Of the statutes discussed in the revised staff draft (see Exhibit pp. 21-22), only one includes legal separation as a triggering event. That statute represents a special case, revoking attorney-in-fact status of the spouse of a federal absentee (i.e., POW-MIA) on *commencement* of an action for dissolution, annulment, or legal separation. Prob. Code § 3722. Obviously, a federal absentee cannot act to revoke a revocable disposition and special protection of that person's interests is required.

Although the staff could find no legislative history clarifying why most statutes revoking a spousal disposition on divorce exclude legal separation as a trigger, it seems likely that uncertainty as to separating parties' intentions was a factor.

However, it is also likely that some parties choose legal separation for religious reasons. See Practice Under the California Family Code: Dissolution, Legal Separation, Nullity § 3.35, at 35-36 (Cal. Cont. Ed. Bar 1997). In such a case, legal separation may be intended to terminate all marital property and support arrangements. Severance of joint tenancy would then be appropriate.

Comment received on whether legal separation should sever a marital joint tenancy is evenly divided, with two letters in favor of the Commission's recommendation that joint tenancy not be severed by legal separation, and two against.

Public Comment — Support for Commission Position

Lisa M. Burkdall, of Musick, Peeler & Garrett, writes in favor of the Commission's tentative recommendation (see Exhibit p. 1):

> I do not believe that it would be appropriate to include legal separation as an event that automatically severs a marital joint tenancy. As noted in your recommendation, the intentions of the separating parties are much less clear than those of divorcing parties, and the parties' marital status is not dissolved.

Paul Gordon Hoffman agrees that legally separated spouses should not be treated in the same manner as divorced spouses. See Exhibit p. 3.

Public Comment — Opposition to the Commission's Position

Professor Blumberg and the Bar Association of San Francisco argue that the reform should apply to legal separation as well as divorce. However, neither address the question of legally separating parties' intentions. Instead their comments emphasize the similarities between legal separation and divorce, concluding that the reform should therefore also treat them similarly.

The Bar Association of San Francisco writes (see Exhibit p. 12):

> To the extent that a dissolution judgment would terminate a joint tenancy, the section believes that a legal separation judgment should also do so. Except for the marital status issue, a judgment of legal separation works almost identically to a dissolution judgment, and it makes little sense to distinguish the two. … As a practical matter, we think the legislation should be consistent.

The Bar Association of San Francisco also suggests that the tentative recommendation's assertion that legal separation does not terminate the marital obligation of support is incorrect. ("A dissolution may not terminate the obligation of support either, and a legal separation may have a marital agreement or judgment that does just that.") *Id.* This point is well taken and has been corrected in the revised draft.

Professor Blumberg writes: "The severance legislation should probably be extended to legal separation as well. … a judgment of legal separation seems indistinguishable from a divorce with respect to the issue of severance." See Exhibit p. 6. "As compared to divorce, the only thing missing from a decree of legal separation is, effectively, a permit to remarry." See Exhibit p. 5.

Professor Blumberg also points out that the tentative recommendation did not adequately distinguish between "de facto" separation (see Fam. Code § 771 (property acquired while living separate and apart is separate property)), and a judgment of legal separation. See Exhibit pp. 5-6. This point is also well taken and the discussion of legal separation has been revised to avoid any confusion

between a judgment of legal separation and de facto separation. See Exhibit pp. 23-24.

Discussion

The commentators overstate the similarities between legal separation and divorce. While it is true that legal separation can achieve much the same effect as divorce, the "marital status issue" has greater relevance than merely determining whether parties may remarry. Because legal separation does not dissolve marital status, some incidents of marital status still attach to legally separated parties.

Legally Separated Surviving Spouse. For example, under the Probate Code, "surviving spouse" includes legally separated spouses, unless there has been an order dividing all marital property. See Prob. Code § 78. This definition of surviving spouse is modeled closely on Uniform Probate Code Section 2-802. Commentary to that section makes clear that "[w]here there is only a legal separation, rather than a divorce, succession patterns are not affected; but if the separation is accompanied by a complete property settlement, this may operate […] as a waiver or renunciation of benefits under a prior will and by intestate succession." See Unif. Prob. Code § 2-802, Comment (1993).

California's rules of intestate succession provide that a share of a decedent's separate property passes to a surviving spouse. See Prob. Code § 6401. Therefore, if a court enters a judgment of legal separation, but does not divide all marital property (the very facts this reform would address) the separated parties retain statutory inheritance rights in each other's separate property.

Furthermore, a legally separated "surviving spouse" may be entitled to a share of devised property as an omitted spouse. See Prob. Code §§ 6560-6561. Also, a spousal disposition in a will is not revoked by legal separation. See Prob. Code § 6122. Nor is a designation as attorney-in-fact (other than for a federal absentee) or PERS death benefits. See Exhibit pp. 23-24.

These are substantial differences between legal separation and divorce in their treatment of probate and nonprobate transfers.

Legal Separation and Community Property. There are also differences in the treatment of community property in divorce and legal separation. For example, the rule that precludes application of the community property presumption if four or more years have passed between divorce and the death of a former spouse does not apply to legal separation. See Fam. Code § 802.

Therefore, the outcome of *Layton* could have been different if the Laytons had legally separated rather than divorced. Section 802 would not have precluded

application of the family law presumption and the property in question would likely have been divided as community property rather than as a joint tenancy. However, see Professor Blumberg's discussion, at Exhibit p. 9-10, of other possible obstacles to application of the community property presumption.

Also, as Professor Blumberg points out, the rule automatically converting undivided community property to tenancy in common property at divorce is based on the status of community property as a "peculiarly marital" form of title. See Exhibit p. 4. Legal separation does not terminate marital status, so should not automatically convert undivided community property to tenancy in common property.

These are substantial differences between legal separation and divorce that bear directly on the characterization of property as community or as joint tenancy.

Staff Recommendation

Divorce and legal separation are not identical as regards treatment of spousal dispositions. The consequences of legal separation and divorce are different for intestate succession, rights under a will, the operation of community property presumptions, the effect of a judgment on undivided community property, power of attorney law, and PERS death benefits.

The staff believes that the Commission's tentative decision regarding legal separation is sound — a judgment of legal separation should not sever a marital joint tenancy.

EFFECT OF REMARRIAGE

Background

Current California law and the Uniform Probate Code revive a spousal disposition revoked by divorce if the divorcing parties subsequently remarry. See Exhibit p. 25. This is consistent with the likely intent of parties who divorce and then remarry each other. This is also consistent with the treatment of will provisions and certain forms of power of attorney under California law, and the treatment of most revocable spousal dispositions under the Uniform Probate Code.

Revival of a joint tenancy could create problems for third parties who reasonably rely on an apparently effective severance that is subsequently revived. These problems are avoided by limiting revival to circumstances where neither of the following occurs in the period between divorce and remarriage:

(1) Any third party acquires an interest in the property.
(2) Any event occurs that would be sufficient to sever the joint tenancy under other law.

Subject to these limitations, the Commission approved a provision reviving joint tenancy severed by divorce on remarriage of the former spouses.

Public Comment

The Bar Association of San Francisco opposes revival of joint tenancy on remarriage. They believe that, because parties enter a remarriage with separate property that they can easily convert to community property if they wish, it is inappropriate to automatically switch a property back into joint tenancy form (especially without regard for how much time has passed between the divorce and remarriage.) See Exhibit p. 12.

Discussion

It is true that former spouses can easily restore a joint tenancy severed by divorce on remarriage to each other. However, it is also true that divorcing parties can easily sever a marital joint tenancy.

The problem that this recommendation addresses is not the ease with which joint tenancy can be severed or restored, but how to effect the intentions of a divorcing party who is presumed not to understand or think about the effect of divorce on marital joint tenancy, and therefore does not understand the need to act to effectuate that intent.

The relevant question, then, is whether divorced parties who remarry each other understand the effect of their prior divorce on their marital joint tenancy, and whether they intend that the joint tenancy from that former marriage exist on remarriage.

If we assume that divorcing parties do not understand or think about the effect of divorce on joint tenancy, there is little reason to believe that divorced parties who remarry each other will understand or think about the effect of divorce on joint tenancy.

Furthermore, if we assume that divorce should sever joint tenancy because a divorcing party will find a property arrangement benefiting a spouse inappropriate after divorce, this does not mean that this party would object to such a property arrangement once marriage has been restored.

Based on these assumptions, divorcing parties who remarry each other would probably assume that an undivided marital joint tenancy continues to exist in their second marriage and would have no objection to its continuation.

Countervailing Arguments

While one can assume that the average divorcing party would intend to sever a marital joint tenancy, it is less clear what former spouses who remarry each other intend, particularly when the time between divorce and remarriage is long, or other marriages intervene between the divorce and remarriage. As the State Bar points out, property brought to a marriage is separate, regardless of whether the parties have previously been married to each other.

Also, the notice to divorcing parties proposed in this recommendation may be sufficient to actually inform divorcing parties of the effect of divorce on their marital joint tenancy property. Therefore, former spouses who remarry each other might in fact understand the need to act to restore a joint tenancy, if that is their intent.

Furthermore, the revival rule is awkward. It raises complex issues such as how to handle an act, in the period between divorce and remarriage, that would be sufficient to sever the marital joint tenancy, if it had not already been severed by divorce. The proposed language is adequate to address such questions, but is not straightforward.

A simpler approach, in terms of policy and implementation, would be to eliminate the revival provision.

Staff Recommendation

The staff believes that the question of revival is a close call and recommends that the Commission reconsider its tentative recommendation in favor of revival.

Respectfully submitted,

Brian Hebert
Staff Counsel

MUSICK, PEELER & GARRETT LLP
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February 27, 1997

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Re: Tentative Recommendation Regarding Severance of Joint Tenancy by Dissolution of Marriage

Dear Commission Members:

I have reviewed the above-referenced tentative recommendation. I approve of the tentative recommendation.

I do not believe that it would be appropriate to include legal separation as an event that automatically severs a marital joint tenancy. As noted in your recommendation, the intentions of the separating parties are much less clear than those of divorcing parties, and the parties' marital status is not dissolved. Moreover, the notice contained on both the petition for legal separation and the judgment for legal separation advising the parties to review certain dispositive documents and other matters and consider making changes to them should suffice to draw the parties' attention to these issues. Of course, counsel should discuss these matters with their separating clients, as well.

Thank you for your excellent work.

Very truly yours,

Lisa M. Burkdall

LMB:lmb

X-Sender: hserlang@facstaff.wisc.edu
Date: Sat, 01 Mar 1997 11:39:01 -0600
To: sulrich@clrc.ca.gov
From: Howard Erlanger <erlanger@ssc.wisc.edu>
Mime-Version: 1.0
Status: RO
X-Status:

Dear Stan--

I am at work drafting a major revision of the Wisconsin Probate Code, working with a committee of the Wisconsin State Bar. We have gone through the new UPC line by line, and although we will not become a UPC state, we are adopting alot of their provisions.

Seeing your post made me wonder why CLRC doesn't just adopt a variant of UPC 2-804, which would revoke all revocable transfers in favor of a former spouse or relative of the former spouse [who is not also a relative of the decedent]. This is the approach we will take in Wisconsin, although we will differ from the UPC in that we will allow extrinsic evidence to show the contrary intent of the decedent. [I find it inexplicable that the UPC allows extrinsic evidence virtually everywhere else in the Code, but not here.]

If you would like to talk about this, or any other Probate Code matters, please let me know. I think I am on top of just about all the issues at this point.

Howard

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March 3, 1997

Paul Gordon Hoffman

Mr. Stan Ulrich
California Law Revision Commission
Room D-1
4000 Middlefield Road
Palo Alto, CA 94303-4739

Re: Study H-603, Severance of Joint Tenancy by Dissolution of Marriage

Dear Mr. Ulrich:

I support the Commission's tentative recommendation, since it clearly is the intent of most individuals to eliminate inheritance rights of a former spouse upon divorce. I concur with the decision not to treat legally separated spouses in the same manner as divorced spouses.

However, I would urge the Commission to reconsider its decision to limit this policy to joint tenancy severance. Inheritance rights would now be eliminated under a joint tenancy, a will, public employee benefit plans and by severance of community property. What possible rationale exists for not extending the same policy to revocable trusts and life insurance (following the lead of Ohio, as discussed on page 3 of the Tentative Recommendation?)

Very truly yours,

Paul Gordon Hoffman

PGH:gt
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March 11, 1997

Re: Severance of Joint Tenancy by Dissolution of Marriage

California Law Revision Commission
4000 Middlefield Road, Room D-1
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Dear Commission:

California Family Law Monthly recently sent me one of your tentative recommendations to review for their publication, and I thought you might be interested in my comments. So I attach the commentary I wrote for CFLM and make some additional remarks in the body of this letter.

More generally, it occurs to me that I might provide you with useful (albeit critical) feedback if you were to send me your community property tentative recommendations yourself.

In any event, I have no problems with the proposed legislation, but I do have some critical comments on the accompanying report. In addition to those I mention in the CFLM commentary, I think that your discussion at page 4 is gratuitously inaccurate. I agree with your nice point that intestacy rights with respect to community property are destroyed at divorce by the rule, most recently articulated in Henn v. Henn, that community property unadjudicated at divorce becomes tenancy in common. Similarly, in the common law states, tenancy by the entirety property changes its character immediately upon divorce. But the historical reason for this is not a policy to destroy rights of survivorship, as you suggest, but rather that the property interests by definition can only be held my married persons. So when the marriage ends, so does the peculiarly marital title, be it community property or tenancy by the entirety. These are the old rigid notions of title.

I used to teach, inter alia, real property in New York and we would spend some time on tenancy by the entirety, still a pervasive form of ownership in New York. One of the questions, which I left unanswered above, is: So what exactly does the tenancy by the entirety become at divorce? As I recall, different states have answered differently, and some of them have decided on joint tenancy rather than tenancy in common. So the point has not been to destroy rights of survivorship so much as to avoid a common law impossibility, married persons' title in persons who are not married.

This inconvenient historical fact does not undercut your ultimate point, which is that in any event when title in California is held in community property, the only possible right of survivorship, that of community property passing in intestacy, is destroyed when the community property automatically by virtue of divorce becomes tenancy in common. It's not so important why it happens as that it does happen and we want consistency in the law. The persuasive justification today may be the one you give, but it is not the historical justification, as you assert.

I found the treatment of legal separation confused and unpersuasive. It is important to distinguish Section 771 de facto separation, which ends the economic community, from a decree of legal separation, which normally entails a property distribution as well. (Footnote 30, in the quote from *Allen*, seems to confuse the two.) As compared to divorce, the only thing missing from a decree of legal separation is, effectively, a permit to remarry. Indeed, aside from Estate of Layton, which I think was wrongly decided (see second attachment), there is no reason why, following *Hilke*, the estate of a deceased legally separated spouse could not bring a property distribution proceeding and secure Section 2581 treatment of the joint tenancy as community property.

I found the treatment of Multiple Party Accounts unilluminating and confusing. I could not follow the first paragraph.

In remarriage (page 6), it would helpful to the reader if you specified "remarry each other." I was initially confused.

I hope these comments and the attachments are helpful.

Sincerely yours,

Grace Ganz Blumberg
Professor of Law

2 attachments

The legislation is sensible and would make divorce treatment of joint tenancy title more consistent with existing California treatment of community property title. Property held as community property loses its intestacy survivorship feature [Probate Code Section 6401(a)] upon divorce, because divorce alone transforms it into tenancy in common. [Henn v. Henn, 26 Cal.3d 323, 330 (1980).]

The severance legislation should probably be extended to legal separation as well. The Law Revision Commission Report accompanying the legislation invites comment on this issue. The Report may be read to indicate that the Commission tentatively decided against inclusion of legal separation because it confused legal separation with the de facto physical separation that brings the economic community to an end under Family Code Section 771. [See particularly *Report*, note 30.] Although mere de facto separation should not sever a joint tenancy because the couple may later reconcile, a judgment of legal separation seems indistinguishable from a divorce with respect to the issue of severance.

Even though the proposed legislation is unexceptionable, the Commission's Report is disconcerting. It implies that the

legislation would cure a larger problem than actually exists. The Report reads as though it were written before the Supreme Court's decision in In re Marriage of Hilke, 4 Cal.4th 215 (1992). Indeed, the Report does not even mention *Hilke*, which holds that when a spouse dies after divorce but before the reserved property distribution, property titled in joint tenancy shall be distributed 50-50 as though it were community property at the subsequent property distribution. [Family Code Section 2581] Thus the only remaining problem is presented by Estate of Layton, 44 Cal.App.4th 1337 (1996), a case which reached doubtful results [see criticism on these pages at 1996 California Family Law Monthly 146-148 (June)] when both parties died more than four years after divorce and before there was any distribution of the joint tenancy property. Thus the proposed legislation may be understood to rectify the result in *Layton*; under the proposed legislation the joint tenancy would have been severed, and the right of survivorship destroyed, upon the Laytons' divorce.

Grace Ganz Blumberg

Commentary for June, 1996
Cal. Family Law Monthly
Estate of Layton
Grace Ganz Blumberg
May 7, 1996

Estate of Layton is unexceptionable in its holding --that a status-only dissolution judgment in which the court reserves jurisdiction to divide the parties' property does not by itself work a severance of joint tenancy property. Yet the opinion raises more questions than it answers.

The court seems to limit the appellant to just one argument, the automatic severance claim, even though the trial (probate) court decided the case on different grounds. The probate court held that the family court reservation of jurisdiction to divide the property did not survive the death of both parties and thus the probate court had original jurisdiction to decide the issue. It then applied Family Code Section 802: "The presumption that property acquired during marriage is community property does not apply to any property to which legal or equitable title is held by a person at the time of the person's death if the marriage during which the property was acquired was terminated by dissolution of marriage more than four years before the death." The effect of applying Section 802 was to block the application of Section 2581 (the presumption that property held in joint tenancy is community property unless there is a writing to the contrary).

The court of appeal discusses the trial court's analysis only in a footnote [footnote 4] and assumes both that it is correct and that any objection to the probate court's reasoning has been abandoned by the appellant on appeal in favor of the automatic severance claim. The opinion would be more adequate and satisfying if the court had, in the alternative, examined both holdings of the probate court. Particularly doubtful is the application of Family Code Section 802, which antedates the adoption of Section 2581 and applies to the presumption that "property acquired during marriage is community property." This is the weakest community property presumption, the presumption that arises merely from acquisition during marriage. Section 802 seems to be intended to protect decedents divorced more than four years before their death from claims that property in their estate is community property merely because it was acquired during marriage. It is doubtful whether Section 802 should apply to property for which the community property presumption arises not from mere acquisition during marriage, but rather from the form of title, such as community property or joint tenancy title, forms of title which themselves strongly evidence joint ownership, as opposed to sole ownership by one party alone.

If Section 802 is inapplicable, the remaining issues are: (i) Did the family court's jurisdiction abate at the death of both parties? and (ii) Even if it did, should the probate court

apply Section 2581 in a probate proceeding where the parties were divorced in a status-only judgment before their death? On the first question, it is not clear why reserved family court jurisdiction to divide the community property should abate at the death of the second party, when it certainly does not abate at the death of the first party. [In re Marriage of Hilke, 4 Cal.4th 215, 841 P.2d 891, 14 Cal.Rptr.2d 371 (1992)] On the second question, although the language of Section 2581 does not contemplate its application in a probate proceeding, it may nevertheless be appropriate to apply it in a probate proceeding when the parties divorced but never had their joint tenancy property divided in a reserved jurisdiction distribution proceeding.

Grace Ganz Blumberg

ANNIVERSARY 125th 1872–1997

THE BAR ASSOCIATION OF SAN FRANCISCO

March 27, 1997

Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Dear Mr. Sterling:

The Bar Association of San Francisco received your request for review and comment of the Commission's tentative recommendation concerning joint tenancy by dissolution of marriage. Our Board of Directors voted to adopt the enclosed statement of position of our Family Law Section as that of the Association.

Thank you for the opportunity to review and comment on the proposal.

Sincerely,

Joan Firestone

Joan Firestone

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BAR ASSOCIATION OF SAN FRANCISCO
FAMILY LAW SECTION

Statement of Position on Proposed Legislation

Severance of Joint Tenancy by Dissolution of Marriage

The Family Law Section of the Bar Association of San Francisco generally supports this proposed legislation with the following modifications:

a. To the extent that a dissolution judgment would terminate a joint tenancy, the section believes that a legal separation judgment should also do so. Except for the marital status issue, a judgment of legal separation works almost identically to a dissolution judgment, and it makes little sense to distinguish the two. (Although page 5 of the tentative recommendation cites Witkin for the proposition that, unlike a dissolution, a legal separation does not terminate the marital obligation of support, that authority is not borne out. A dissolution may not terminate the obligation of support, either, and a legal separation may have a marital agreement or judgment that does just that.) As a practical matter, we think the legislation should be consistent.

b. The Section believes that it would be problematic to have a terminated joint tenancy revive on remarriage. In the event the parties remarry, they come into the remarriage with separate property which they can then decide to make community. An automatic switch back to community property (especially regardless of how much time has transpired between the dissolution and remarriage) is not appropriate. It is a slight burden to transfer a property back to joint tenancy if in fact that is the parties' intent.

March 12, 1997

Respectfully submitted by:

Family Law Section, BASF
Subcommittee on Legislation and
Judicial Council Forms
Arlene Kostant
Arlene Kostant, Chair

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Uniform Probate Code Section 2-804(1993).

(a) **[Definitions.]** In this section:

(1) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(2) "Divorce or annulment" means any divorce or annulment, or any dissolution or declaration of invalidity of a marriage, that would exclude the spouse as a surviving spouse within the meaning of Section 2-802. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.

(3) "Divorced individual" includes an individual whose marriage has been annulled.

(4) "Governing instrument" means a governing instrument executed by the divorced individual before the divorce or annulment of his [or her] marriage to his [or her] former spouse.

(5) "Relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.

(6) "Revocable," with respect to a disposition, appointment, provision, or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of his [or her] former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate himself [or herself] in place of his [or her] former spouse or in place of his [or her] former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.

(b) **[Revocation Upon Divorce.]** Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:

(1) revokes any revocable (i) disposition or appointment of property made by a divorced individual to his [or her] former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse, (ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse, and (iii) nomination in a governing instrument, nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian; and

(2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship [or as community property with the right of survivorship], transforming the interests of the former spouses into tenancies in common.

(c) **[Effect of Severance.]** A severance under subsection (b)(2) does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(d) **[Effect of Revocation.]** Provisions of a governing instrument are given effect as if the former spouse and relatives of the former spouse disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.

(e) **[Revival if Divorce Nullified.]** Provisions revoked solely by this section are revived by the divorced individual's remarriage to the former spouse or by a nullification of the divorce or annulment.

(f) **[No Revocation for Other Change of Circumstances.]** No change of circumstances other than as described in this section and in Section 2-803 effects a revocation.

(g) **[Protection of Payors and Other Third Parties.]**

(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in good faith reliance on the validity of the governing instrument, before the payor or other third party received written notice of the divorce, annulment, or remarriage. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section.

(2) Written notice of the divorce, annulment, or remarriage under subsection (g)(2) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of the divorce, annulment, or remarriage, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall

order disbursement or transfer in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(h) **[Protection of Bona Fide Purchasers; Personal Liability of Recipient.]**

(1) A person who purchases property from a former spouse, relative of a former spouse, or any other person for value and without notice, or who receives from a former spouse, relative of a former spouse, or any other person a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a former spouse, relative of a former spouse, or other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a former spouse, relative of the former spouse, or any other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

Comment. Purpose and Scope of Revision. The revisions of this section, pre-1990 Section 2-508, intend to unify the law of probate and nonprobate transfers. As originally promulgated, pre-1990 Section 2-508 revoked a predivorce devise to the testator's former spouse. The revisions expand the section to cover "will substitutes" such as revocable inter-vivos trusts, life-insurance and retirement-plan beneficiary designations, transfer-on-death accounts, and other revocable dispositions to the former spouse that the divorced individual established before the divorce (or annulment). As revised, this section also effects a severance of the interests of the former spouses in property that they held at the time of the divorce (or annulment) as joint tenants with the right of survivorship; their co-ownership interests become tenancies in common.

As revised, this section is the most comprehensive provision of its kind, but many states have enacted piecemeal legislation tending in the same direction. For example, Michigan and Ohio have statutes transforming spousal joint tenancies in land into tenancies in common upon the spouses' divorce. Mich.Comp.Laws Ann. s 552.102; Ohio Rev.Code Ann. s 5302.20(c)(5). Ohio, Oklahoma, and Tennessee have recently enacted legislation effecting a revocation of provisions for the settlor's former spouse in revocable inter- vivos trusts. Ohio Rev.Code Ann. s 1339.62; Okla.Stat.Ann. tit. 60, s 175; Tenn.Code Ann. s 35-50-115 (applies to revocable and irrevocable inter-vivos trusts). Statutes in Michigan, Ohio, Oklahoma, and Texas relate to the consequence of divorce on life-insurance and retirement-plan beneficiary designations. Mich.Comp.Laws Ann. s 552.101; Ohio Rev.Code Ann. s 1339.63; Okla.Stat.Ann. tit. 15, s 178; Tex.Fam.Code ss 3.632-.633.

The courts have also come under increasing pressure to use statutory construction techniques to extend statutes like the pre-1990 version of Section 2-508 to various will substitutes. In Clymer v. Mayo, 473 N.E.2d 1084 (Mass.1985), the Massachusetts court held the statute applicable to a revocable inter-vivos trust, but restricted its "holding to the particular facts of this case--specifically the existence of a revocable pour-over trust funded entirely at the time of the decedent's death." 473 N.E.2d at 1093. The trust in that case was an unfunded life-insurance trust; the life insurance was employer-paid life insurance. In Miller v. First Nat'l Bank & Tr. Co., 637 P.2d 75 (Okla.1981), the court also held such a statute to be applicable to an unfunded life-insurance trust. The testator's will devised the residue of his estate to the trustee of the life-insurance trust. Despite the absence of meaningful evidence of intent to incorporate, the court held that the pour-over devise incorporated the life-insurance trust into the will by reference, and thus was able to apply the revocation-upon-divorce statute. In Equitable Life Assurance Society v. Stitzel, 1 Pa.Fiduc.2d 316 (C.P.1981), however, the court held a statute similar to the pre-1990 version of Section 2-508 to be inapplicable to effect a revocation of a life-insurance beneficiary designation of the former spouse.

Revoking Benefits of the Former Spouse's Relatives. In several cases, including Clymer v. Mayo, 473 N.E.2d 1084 (Mass.1985), and Estate of Coffed, 387 N.E.2d 1209 (N.Y.1979), the result of treating the former spouse as if he or she predeceased the testator was that a gift in the governing instrument was triggered in favor of relatives of the former spouse who, after the divorce, were no longer relatives of the testator. In the Massachusetts case, the former spouse's nieces and nephews ended up with an interest in the property. In the New York case, the winners included the former spouse's child by a prior marriage. For other cases to the same effect, see Porter v. Porter, 286 N.W.2d 649 (Iowa 1979); Bloom v. Selfon, 555 A.2d 75 (Pa.1989); Estate of Graef, 368 N.W.2d 633 (Wis.1985). Given that, during divorce process or in the aftermath of the divorce, the former spouse's relatives are likely to side with the former spouse, breaking down or weakening any former ties that may previously have developed between the transferor and the former spouse's relatives, seldom would the transferor have favored such a result. This section, therefore, also revokes these gifts.

Consequence of Revocation. The effect of revocation by this section is that the provisions of the governing instrument are given effect as if the divorced individual's former spouse (and relatives of the former spouse) disclaimed all provisions revoked by this section (see Section 2-801(d) for the effect of a disclaimer). Note that this means that the antilapse statute applies in appropriate cases in which the divorced individual or relative is treated as having disclaimed. In the case of a revoked nomination in a fiduciary or representative capacity, the provisions of the governing instrument are given effect as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment. If the divorced individual (or relative of the divorced individual) is the donee of an unexercised power of appointment that is revoked by this section, the gift-in-default clause, if any, is to take effect, to the extent that the gift-in-default clause is not itself revoked by this section.

ERISA Preemption of State Law. The Employee Retirement Income Security Act of 1974 (ERISA) federalizes pension and employee benefit law. Section 514(a) of ERISA, 29 U.S.C. s 1144(a), provides that the provisions of Titles I and IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA.

ERISA's preemption clause is extraordinarily broad. ERISA Section 514(a) does not merely preempt state laws that conflict with specific provisions in ERISA. Section 514(a) preempts "any and all State laws" insofar as they "relate to" any ERISA-governed employee benefit plan.

A complex case law has arisen concerning the question of whether to apply ERISA Section 514(a) to preempt state law in circumstances in which ERISA supplies no substantive regulation. For example, until 1984, ERISA contained no authorization for the enforcement of state domestic relations decrees against pension accounts, but the federal courts were virtually unanimous in refusing to apply ERISA preemption against such state decrees. See,

e.g., American Telephone & Telegraph Co. v. Merry, 592 F.2d 118 (2d Cir. 1979). The Retirement Equity Act of 1984 amended ERISA to add Sections 206(d)(3) and 514(b)(7), confirming the judicially created exception for state domestic relations decrees.

The federal courts have been less certain about whether to defer to state probate law. In Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. H.F. Johnson, Inc., 830 F.2d 1009 (9th Cir. 1987), the court held that ERISA preempted the Montana nonclaim statute (which is Section 3-803 of the Uniform Probate Code). On the other hand, in Mendez-Bellido v. Board of Trustees, 709 F.Supp. 329 (E.D.N.Y. 1989), the court applied the New York "slayer-rule" against an ERISA preemption claim, reasoning that "state laws prohibiting murderers from receiving death benefits are relatively uniform [and therefore] there is little threat of creating a 'patchwork scheme of regulations' " that ERISA sought to avoid.

It is to be hoped that the federal courts will continue to show sensitivity to the primary role of state law in the field of probate and nonprobate transfers. To the extent that the federal courts think themselves unable to craft exceptions to ERISA's preemption language, it is open to them to apply state law concepts as federal common law. Because the Uniform Probate Code contemplates multistate applicability, it is well suited to be the model for federal common law absorption.

Another avenue of reconciliation between ERISA preemption and the primacy of state law in this field is envisioned in subsection (h)(2) of this section. It imposes a personal liability for pension payments that pass to a former spouse or relative of a former spouse. This provision respects ERISA's concern that federal law govern the administration of the plan, while still preventing unjust enrichment that would result if an unintended beneficiary were to receive the pension benefits. Federal law has no interest in working a broader disruption of state probate and nonprobate transfer law than is required in the interest of smooth administration of pension and employee benefit plans.

Cross References. See Section 1-201 for definitions of "beneficiary designated in a governing instrument," "governing instrument," "joint tenants with the right of survivorship," "community property with the right of survivorship," and "payor."

References. The theory of this section is discussed in Waggoner, "Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code," 26 Real Prop. Prob. & Tr. J. 683, 689-701 (1992). See also Langbein, "The Nonprobate Revolution and the Future of the Law of Succession," 97 Harv.L.Rev. 1108 (1984).

Historical Note. This Comment was revised in 1993. For the prior version, see 8 U.L.A. 164 (Supp.1992).

SEVERANCE OF JOINT TENANCY BY DISSOLUTION OF MARRIAGE

Many spouses choose to acquire marital property in joint tenancy form.[1] Avoidance of probate on the death of a spouse, through operation of joint tenancy survivorship, probably accounts for the popularity of joint tenancy title among spouses.[2] However, the automatic transfer of a decedent's interest in marital property to a surviving spouse is probably not intended where the parties have dissolved or annulled their marriage. After dissolution or annulment most parties intend their estate to pass to their devisees or heirs.[3]

In the relatively rare case where a spouse dies after dissolution or annulment of marriage but before property division, this intention is frustrated by joint tenancy survivorship, by which the decedent's interest passes entirely to the decedent's former spouse.

Under this recommendation, unless the parties have agreed otherwise, dissolution or annulment of marriage will sever a marital joint tenancy, creating a tenancy in common. A deceased party's estate will then pass to the party's devisees or heirs rather than to the party's former spouse.

EXISTING LAW

A husband and wife can hold both real and personal property in joint tenancy form.[4]

However, when property is divided on dissolution of marriage there is a presumption that property acquired during marriage in joint form is community property regardless of the form of title.[5] This presumption substantially limits but does not eliminate the scope of the problem addressed by this recommendation.[6]

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1. See Sterling, *Joint Tenancy and Community Property in California*, 14 Pac. L.J. 927, 928-29 (1983).

2. *Id*. at 929.

3. Of course, some divorcing parties may wish property to pass to their former spouse. These parties, who are probably few in number, can easily reestablish a marital joint tenancy after divorce or can provide for a former spouse by devise.

4. See Fam. Code § 750 (husband and wife may hold property as joint tenants); Civ. Code § 683 (joint tenancy includes real and personal property). Note, however, that the statutory definition of joint tenancy excludes a joint account in a financial institution subject to Part 2 of Division 5 of the Probate Code (commencing with Section 5100), i.e., a "Multiple Party Account." Civ. Code § 683(b).

5. Fam. Code § 2581. Note that the death of a former spouse does not preclude application of this presumption where a court has previously entered a judgment of dissolution or annulment with jurisdiction over property matters reserved. See In re Marriage of Hilke, 4 Cal. 4th 215, 219-21, 841 P.2d 891, 893-895, 14 Cal. Rptr. 2d 371. 373-375 (1992).

6. For example, if the community property presumption is adequately rebutted or is inapplicable because the dissolution preceded the death of a former spouse by four years or more (See Fam. Code § 802), then the form of title controls and property acquired during marriage in joint tenancy form is a true

The distinguishing incident of joint tenancy is the right of survivorship, by which the death of one joint tenant terminates that joint tenant's interest in the property.[7] The surviving joint tenant then acquires the decedent's former interest automatically.[8]

Survivorship in a joint tenancy may be severed, converting the joint tenancy into a tenancy in common.[9] Severance can occur in a number of ways.[10] However, dissolution or annulment of marriage alone does not sever a marital joint tenancy.[11]

SEVERANCE OF MARITAL JOINT TENANCY ON DISSOLUTION OR ANNULMENT OF MARRIAGE

Severance of a marital joint tenancy on dissolution of marriage would effectuate the intent of most parties and would conform the treatment of joint tenancy to the treatment given by California law to other spousal property dispositions.

Effectuate Intent of Parties

A party will not generally want marital property to continue in joint tenancy form after dissolution or annulment of marriage.

As one court considering the relationship of marital joint tenancy and dissolution of marriage noted, it is illogical to think that a party awaiting division of marital property would intend the continued operation of survivorship, where an "untimely death results in a windfall to the surviving spouse, a result neither party presumably intends or anticipates."[12] The court went on to observe that the court's concerns over the operation of survivorship after divorce should properly be addressed by the Legislature.[13]

It is particularly unlikely that a party will wish joint tenancy survivorship to continue after dissolution or annulment of marriage where the party has children

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joint tenancy with the right of survivorship. See, *e.g.*, Estate of Layton, 44 Cal. App. 4th 1337, 1339-41, 52 Cal. Rptr. 2d 251, 253-54 (1996).

7. See 4 B. Witkin, Summary of California Law *Real Property* § 257, at 459-60 (9th ed. 1987).

8. *Id.*

9. *Id.* §§ 276-78, at 475-77.

10. *Id.* See also Civ. Code § 683.2 (severance of joint tenancy in real property).

11. Estate of Layton, 44 Cal. App. 4th at 1343, 52 Cal. Rptr. 2d at 255. Note that division of marital property on dissolution or annulment of marriage may sever marital property held in joint tenancy form. See Fam. Code § 2650.

12. See Estate of Blair, 199 Cal. App. 3d 161, 169-70, 244 Cal. Rptr. 627, 631-32 (1988). The Blair court's belief that divorcing parties will not ordinarily desire continued operation of survivorship has been echoed by other courts considering similar situations. See, e.g., *In re* Marriage of Allen, 8 Cal. App. 4th 1225, 1231, 10 Cal. Rptr. 2d 916, 919 (1993) (operation of survivorship after divorce not "consistent with what the average decedent and former spouse would have wanted had death been anticipated").

13. Estate of Blair, 199 Cal. App. 3d at 169, 244 Cal. Rptr. at 632. See also Estate of Layton, 44 Cal. App. 4th at 1344, 52 Cal. Rptr. 2d at 256 ("[C]oncerns about divorcing parties' expectations regarding joint tenancy survivorship fall more suitably within the domain of the Legislature.").

by a former marriage.[14] So long as property remains in joint tenancy form it cannot pass to these children by intestacy or devise. Instead, on the party's death it will pass to the party's former spouse.

Treatment of Other Types of Revocable Spousal Dispositions

In California, as in many states, the dissolution or annulment of a party's marriage automatically revokes a disposition to the party's former spouse in the party's will.[15] To do otherwise would be contrary to what the average person would have wanted had the person thought about the matter. In most cases where the testator fails to change a will following dissolution of marriage, the failure is inadvertent.[16]

A divorcing party would also likely revoke a spousal disposition in a will substitute such as marital joint tenancy. This is the rationale of Uniform Probate Code Section 2-804, which attempts to unify the treatment of probate and non-probate transfers on divorce. Under Section 2-804, dissolution or annulment of marriage automatically revokes spousal dispositions in a will, and in a wide range of will substitutes — including marital joint tenancy.[17] Eight states have substantially adopted Section 2-804 since 1993.[18]

Many other states have implemented this general policy in a piece-meal fashion, by adopting measures that revoke specific spousal dispositions on dissolution or annulment of marriage. For example, five states have statutes severing a marital joint tenancy on dissolution or annulment of marriage.[19] Examples of other spousal dispositions revoked by other states on dissolution or annulment of marriage include an inter-vivos trust[20] and a life insurance beneficiary designation.[21]

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14. Note that remarriage and reconstituted families are increasingly common. See Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 Real Prop. Prob. & Tr. J. 683, 685-87 (1992).

15. See Prob. Code § 6122.

16. *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301, 2325 (1982).

17. See Unif. Prob. Code § 2-804 (1993). "The severance of spousal joint tenancies upon divorce merely applies the general principle … that all revocable dispositions are presumptively revoked upon divorce." See Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 Real Prop. Prob. & Tr. J. 683, 689-701 (1992). Revocation of spousal dispositions on divorce gives "effect to the average owner's presumed intent…." See McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 Brook. L. Rev. 1123, 1161-63(1993).

18. Alaska Stat. § 13.12.804; Ariz. Rev. Stat. Ann. § 14-2804 (1995); Colo. Rev. Stat. § 15-11-804 (1996); Haw. Rev. Stat. § 560:2-804 (1996); Mont. Code. Ann. § 72-2-814 (1993); N.M. Stat. Ann. § 45-2-804 (1995); N.D. Cent. Code § 30.1-10-04 (2-804) (1995); S.D. Codified Laws Ann. § 29A-2-804 (1996).

19. Conn. Gen. Stat. § 47-14g (1995); Mich. Comp. Laws § 552.102 (1988); Minn. Stat. § 500.19 (1990); Ohio Rev. Code Ann. § 5302.20(c)(5) (1996); Va. Code Ann. § 20-111 (1996).

20. See, *e.g.*, Ohio Rev. Code Ann. § 1339.62 (1996).

21. See, *e.g.*, Ohio Rev. Code Ann. § 1339.63 (1996).

In California, dissolution or annulment of marriage also revokes the designation of a spouse as attorney in fact[22] and the designation of a death benefit beneficiary under Public Employees' Retirement law.[23]

All of these provisions, whether revoking a spousal disposition in a will or will substitute, embody the same policy consideration — that a divorcing party would not intentionally maintain a disposition to the party's spouse. These statutes, and the reform proposed in this recommendation, protect a divorcing party's intentions by revoking a revocable spousal disposition on dissolution or annulment of marriage.

Consistency with Treatment of Community Property

Under this proposal dissolution or annulment of marriage terminates survivorship in a marital joint tenancy. This is consistent with the effect of dissolution or annulment of marriage on the intestacy survivorship feature of community property.

Absent a will, one hundred percent of community property passes to a surviving spouse.[24] Therefore, in cases of intestacy, community property passes as if by survivorship.

On dissolution or annulment of marriage, community property that remains undivided is treated as tenancy in common property.[25] An intestate decedent's share of tenancy in common property does not pass to the party's former spouse as community property would,[26] instead passing by the ordinary rules of intestate succession.[27]

Dissolution or annulment of marriage thus terminates the survivorship-like aspect of community property in cases of intestacy.

SUBSIDIARY POLICY ISSUES

Implementation of the rule severing a marital joint tenancy on dissolution or annulment of marriage requires resolution of several subsidiary issues.

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22 Prob. Code §§ 3722, 4154, 4727(e).

23. Gov't Code § 21492.

24. See Prob. Code § 6401.

25. This characterization is subject to later litigation and contrary characterization. See Henn v. Henn, 26 Cal. 3d 323, 330, 605 P.2d 10, 13,161 Cal. Rptr. 502, 505 (1980).

26. See Prob. Code § 6401.

27. See Prob. Code § 6402.

Legal Separation

While it is clear that a judgment of legal separation may result in a division of property as complete and final as a dissolution or annulment of marriage,[28] it is not clear that parties choosing legal separation over dissolution of marriage intend to completely sever marital property and support arrangements.

Legal separation does not dissolve marital status.[29] Therefore, legally separated parties may continue to exercise rights contingent on marital status. Parties may therefore choose legal separation over dissolution in order to maintain these incidents of marital status.

For example, under the Probate Code, "surviving spouse" includes legally separated spouses, unless there has been an order dividing all marital property.[30] California's rules of intestate succession provide that a share of a decedent's separate property passes to a surviving spouse.[31] Therefore, if a court enters a judgment of legal separation, but does not divide all marital property (the very facts this reform would address) the separated parties retain statutory inheritance rights in each other's separate property. Furthermore, a legally separated "surviving spouse" may be entitled to a share of devised property as an omitted spouse.[32]

Also, as discussed, a spousal disposition in a will is not revoked by legal separation.[33] Neither are a designation as attorney-in-fact (other than for a federal absentee) or PERS death benefits.[34]

These are substantial differences between legal separation and divorce in their treatment of probate and nonprobate transfers.

Where parties choose legal separation in order to maintain existing marital property and support arrangements, automatic severance of a joint tenancy would be inappropriate. Because of the uncertainty as to legally separating parties' intentions regarding existing marital arrangements, the reform recommended here is not triggered by a judgment of legal separation.

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28. See, e.g., Fam. Code § 2550 (equal division of community estate available on dissolution of marriage or legal separation).

29. See D. Samuels & F. Mandabach, Practice Under the California Family Code: Dissolution, Legal Separation, Nullity § 3.35, 35-36 (Cal. Cont. Ed. Bar 1997).

30. See Prob. Code § 78.

31. See Prob. Code § 6401.

32. See Prob. Code §§ 6560-6561.

33. See Prob. Code § 6122.

34. See Prob. Code §§ 3722, 4154, 4727(e); Gov't Code § 21492.

This is consistent with other laws revoking revocable spousal dispositions on dissolution of marriage. Of the statutes discussed in this recommendation,[35] only one is effective on legal separation.[36]

Multiple Party Accounts

For two reasons, the reform recommended here does not apply to survivorship in a multiple party account:

(1) The potential for funds in a multiple party account remaining undivided after dissolution of marriage is very low. Funds in a multiple party account are fungible and can be freely withdrawn by either spouse. Withdrawal of funds from a multiple party account terminates survivorship as to the funds withdrawn.[37] The need for reform in regard to a multiple party account is therefore minimal.

(2) Severance of survivorship in a multiple party account is regulated under the Probate Code as part of an integrated statutory scheme[38] and is expressly excluded from the coverage of statutes governing the creation and severance of a joint tenancy.[39]

Note, too, that exclusion of a multiple party account from severance of a joint tenancy on dissolution of marriage is consistent with Uniform Probate Code Section 2-804.[40]

Effect on Third Parties

Severance by dissolution or annulment of marriage may not be apparent to a third party dealing with a surviving former spouse. A third party unaware of a dissolution or annulment may be misled, by the form of title and proof of death of a former spouse, into believing that the survivor is entitled to transfer or encumber the entire property. In such a case the actual interest purchased or encumbered would only be the survivor's share in a tenancy in common, with the decedent's estate as cotenant.

An innocent purchaser or encumbrancer for value is currently protected against unrecorded transfers generally[41] and against apparently effective severance of joint tenancy in real property specifically.[42] The proposed law extends similar protection to a purchaser or encumbrancer who relies on an apparent right of

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35. See *supra* notes 17-23.

36. The exception represents a special case, revoking attorney-in-fact status of the spouse of a federal absentee (i.e., POW/MIA). Prob. Code § 3722. Obviously, an indefinitely missing person cannot act to revoke a revocable disposition and special protection of that person's interests is required.

37. See Prob. Code § 5303(c).

38. See Prob. Code § 5100 *et seq.* See also *Recommendation Relating to Nonprobate Transfers*, 16 Cal. L. Revision Comm'n Reports 129 (1982).

39. See Civ. Code § 683(b).

40. See Unif. Prob. Code § 1-201(26) (1993).

41. See Civ. Code § 1214.

42. See Civ. Code § 683.2(b).

survivorship without actual or constructive knowledge of severance caused by dissolution or annulment of marriage.

Remarriage

If divorcing parties subsequently remarry each other there is no reason to think that the parties would not want and expect a spousal disposition from the former marriage to continue.[43] Both current California law[44] and the Uniform Probate Code[45] revive, on remarriage of former spouses, a spousal disposition previously revoked by dissolution or annulment of marriage.

The proposed law likewise revives a marital joint tenancy severed by dissolution or annulment of marriage on remarriage of the former joint tenants, with two exceptions.

(1) Joint tenancy is not revived if a third party acquires an interest in the property in the period between dissolution or annulment and remarriage. Revival in such a case would injure the third party by transforming the transferred or encumbered interest from a tenancy in common into a joint tenancy, subject to defeasance by survivorship.

(2) Joint tenancy is not revived if an event occurs that would be sufficient to sever joint tenancy in the property if it had not already been severed by dissolution or annulment of marriage. For example, if after dissolution of marriage, a former spouse records an instrument purporting to sever joint tenancy in marital property that had already been severed by dissolution or annulment of marriage, this would prevent revival on remarriage of the former joint tenants.[46] To revive a joint tenancy in such a case would frustrate a party's demonstrated intent.

CONFORMING REVISIONS

Family Code Section 2024 requires that a petition for, or judgment of, dissolution or annulment be accompanied by a written warning that dissolution or annulment may revoke provisions of the parties' wills under Probate Code Section 6122.[47] The warning alerts a party who wishes to retain the revoked provisions that the party must execute a new will to do so.

The proposed law amends Family Code Section 2024 to include warnings of the effect of dissolution or annulment of marriage on a marital joint tenancy, the

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43. This is especially true given that the parties never affirmatively revoked the disposition and may be unaware of the effect of divorce upon the disposition.

44. See Prob. Code §§ 6122(b), 4154(b), 4727(e).

45. See Unif. Prob. Code § 2-804(e) (1993).

46. See Civ. Code § 683.2. Note that a joint tenancy severed by dissolution of marriage is no longer subject to severance under Section 683.2 which only affects a joint tenancy, not a tenancy in common. It may be that an event sufficient to sever a joint tenancy under Section 683.2 would automatically sever a joint tenancy revived by remarriage, as such a joint tenancy would again be subject to Section 683.2, but it is better to make this effect clear in the statute.

47. Fam. Code § 2024.

designation of a spouse as attorney in fact,[48] and the designation of a spouse as a death benefit beneficiary under the Public Employees' Retirement System.[49]

48. See Prob. Code §§ 4154, 4727(e), 6122(b).

49. See Gov't Code § 21492.

PROPOSED LEGISLATION

Fam. Code. § 2651 (added). Joint tenancy severed by dissolution or annulment of marriage

SECTION 1. Section 2651 is added to the Family Code, to read:

2651. (a) Subject to the limitations of this section, a final judgment of dissolution or annulment of marriage severs a joint tenancy as between the parties to the dissolution or annulment. Legal separation is not dissolution for the purpose of this section.

(b) Dissolution or annulment of marriage does not sever a joint tenancy if the joint tenants agree in writing otherwise.

(c) Severance by operation of this section does not affect the rights of a subsequent purchaser or encumbrancer for value in good faith and without knowledge of the severance.

(d) Except as otherwise provided in this subdivision, a joint tenancy severed by operation of this section is revived by remarriage of the joint tenants to each other. A joint tenancy is not revived if, after dissolution or annulment of marriage but before remarriage, either of the following occurs:

(1) The property or an interest in the property is transferred or encumbered.

(2) An event occurs sufficient to sever the joint tenancy had the joint tenancy not been severed by operation of this section.

(e) This section does not apply to survivorship in a multiple-party account.

(f) This section governs the effect of a judgment of dissolution or annulment in an action initiated on or after January 1, 1999. Actions pending on January 1, 1999 are not affected by this section.

Comment. Section 2651 establishes the rule that a final judgment of dissolution or annulment of marriage severs a joint tenancy between spouses. This reverses the common law rule. *See* Estate of Layton, 44 Cal. App. 4th 1337, 52 Cal. Rptr. 2d 251 (1996). *See also In re* Marriage of Hilke, 4 Cal. 4th 215, 841 P.2d 891, 14 Cal. Rptr. 2d 371 (1992); Estate of Blair, 199 Cal. App. 3d 161, 244 Cal. Rptr 627 (1988).

Severance by operation of Section 2651 occurs on the effective date of a final judgment terminating marital status. See Fam. Code §§ 2337-2343.

Section 2651 applies to both real property and personal property joint tenancies, and affects property rights that depend on the law of joint tenancy. *See, e.g.,* Veh. Code §§ 4150.5, 5600.5 (property passes as though joint tenancy). This section does not affect United States Savings Bonds, which are subject to federal regulation. *See* 31 C.F.R. §§ 315.0-315.93, 353.0-353.92 (1996); *see also* Conrad v. Conrad, 66 Cal. App. 2d 280, 152 P.2d 221 (1944) (federal regulations controlling). The section does not affect multiple-party accounts. *See* subdivision (e); *cf.* Civ. Code § 683(b).

The method provided in this section for severing a joint tenancy is not exclusive. *See, e.g.,* Civ. Code § 683.2.

This section does not affect community property that is held or appears of record in joint tenancy form. On dissolution or annulment of marriage, community property is treated as a tenancy in common between the former spouses, subject to later litigation and contrary

characterization. *See* Henn v. Henn, 26 Cal. 3d 323, 330, 605 P.2d 10, 13,161 Cal. Rptr. 502, 505 (1980).

Subdivision (c) makes clear that nothing in this section affects the rights of a bona fide purchaser or encumbrancer without knowledge of a severance due to dissolution or annulment. For purposes of this subdivision, "knowledge" of a severance of joint tenancy includes both actual knowledge and constructive knowledge of the dissolution or annulment. The remedy for a deceased joint tenant's estate injured by the surviving joint tenant's transaction with an innocent purchaser or encumbrancer is against the surviving joint tenant.

Revival under subdivision (d) does not affect community property left undivided on dissolution of marriage. Only joint tenancy property severed under Section 2651 is affected by subdivision (d).

Subdivision (f) provides that the section has prospective effect only. This supersedes the Family Code's general transitional rule. See Fam. Code § 4.

Fam. Code § 2024 (amended). Notice concerning effect of judgment on will, insurance, and other matters

SEC 2. Section 2024 of the Family Code is amended to read:

2024. (a) A petition for dissolution of marriage, nullity of marriage, or legal separation of the parties, or a joint petition for summary dissolution of marriage, shall contain the following notice:

"Please review your will, insurance policies, retirement benefit plans, credit cards, other credit accounts and credit reports, and other matters that you may want to change in view of the dissolution or annulment of your marriage, or your legal separation. However, some changes may require the agreement of your spouse or a court order (see Part 3 (commencing with Section 231) of Division 2 of the Family Code). Dissolution or annulment of your marriage may automatically change a disposition made by your will to your former spouse, automatically terminates your right of survivorship in marital property held jointly with your former spouse, automatically revokes a power of attorney designating your spouse as your attorney in fact, and automatically revokes your designation of a death benefit beneficiary under the Public Employees' Retirement System."

(b) A judgment for dissolution of marriage, for nullity of marriage, or for legal separation of the parties shall contain the following notice:

"Please review your will, insurance policies, retirement benefit plans, credit cards, other credit accounts and credit reports, and other matters that you may want to change in view of the dissolution or annulment of your marriage, or your legal separation. Dissolution or annulment of your marriage may automatically change a disposition made by your will to your former spouse, automatically terminates your right of survivorship in marital property held jointly with your former spouse, automatically revokes a power of attorney designating your spouse as your attorney in fact, and automatically revokes your designation of a death benefit beneficiary under the Public Employees' Retirement System."

Comment. Section 2024 is amended to refer to the effect of dissolution or annulment on a spousal joint tenancy, the designation of a spouse as attorney in fact, and the designation of a spouse as a death benefit beneficiary under the Public Employees' Retirement System. *See* Fam. Code § 2651 (joint tenancy); Gov't Code § 21492 (Public Employees' Retirement System); Prob. Code §§ 3722, 4154, 4727(e) (power of attorney).