

**Memorandum 97-50****Severance of Joint Tenancy on Dissolution of Marriage:  
Draft Recommendation**

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In March 1997, the Commission circulated a tentative recommendation proposing that a marital joint tenancy be severed by divorce of the joint tenants. Public comment received was generally favorable and the Commission instructed the staff to prepare a draft recommendation incorporating certain minor changes suggested by the commentators.

Memorandum 97-43 and its First Supplement were drafted to address two difficult and related questions: (1) can the definition of divorce in the proposed law be made consistent with the definition of divorce in similar provisions of the Probate Code, and (2) should remarriage of former spouses to each other “revive” a joint tenancy severed by their earlier divorce — as would result under similar provisions of the Probate Code? This memorandum (which supersedes Memorandum 97-43 and its First Supplement) briefly revisits these questions and proposes a new approach that should resolve them. A revised staff draft recommendation implementing this new approach is attached.

A letter from the Executive Committee of the State Bar Estate Planning, Trust, and Probate Law Section (“Executive Committee”) is also attached. This letter reiterates the Executive Committee’s strong preference for consistency between the proposed law and similar provisions in the Probate Code, including consistent treatment of former spouses who remarry each other. It was originally attached as an exhibit to the First Supplement to Memorandum 97-43.

**Consistent Treatment of Divorce**

The Executive Committee has consistently maintained that the effectiveness of a divorce to sever a joint tenancy under the proposed law should be determined by reference to whether the divorce would be effective to exclude a former spouse as a “surviving spouse” under Section 78 of the Probate Code. This makes sense, as other spousal inheritance rights are also conditioned on whether a person is a surviving spouse. See, e.g., Prob. Code §§ 6122 (will

provision benefiting spouse revoked by a divorce if that divorce excludes former spouse as a surviving spouse), 6401 (intestate share of surviving spouse), 6560 (surviving spouse who is omitted from will may be entitled to share of decedent's separate property).

Probate Code Section 78 defines "surviving spouse" negatively, by listing circumstances that exclude a person as a surviving spouse:

"Surviving spouse" does not include any of the following:

(a) A person whose marriage to the decedent has been dissolved or annulled, unless, by virtue of a subsequent marriage, the person is married to the decedent at the time of death.

(b) A person who obtains or consents to a final decree or judgment of dissolution of marriage from the decedent or a final decree or judgment of annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they (1) subsequently participate in a marriage ceremony purporting to marry each to the other or (2) subsequently live together as husband and wife.

(c) A person who, following a decree or judgment of dissolution or annulment of marriage obtained by the decedent, participates in a marriage ceremony with a third person.

(d) A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

### **Effect of an Invalid Divorce**

The principal problem with determining the effectiveness of a divorce to sever a joint tenancy by reference to whether the divorce excludes a person as a surviving spouse arises in the context of invalid divorce. As a matter of policy, an invalid divorce (i.e., a divorce granted by a court without proper jurisdiction) should not affect inheritance rights. This is the general rule of Section 78. This general rule is qualified, however, by a codified estoppel exception. Under this exception a person who obtains, consents to, or remarries in reliance on an invalid divorce is excluded from the definition of surviving spouse as a consequence of the invalid divorce. See Prob. Code § 78(b), (c).

This exception is fair when determining the rights of a single person — the survivor. The inquiry then properly focuses on whether the survivor has done anything (i.e. obtained, consented to, or remarried in reliance on an invalid divorce) that would make it unfair for that person to be treated as the decedent's surviving spouse.

Application of the codified estoppel exception to severance of joint tenancy at divorce would be unfair, however, because severance affects the title of both joint tenants. For example, if H obtains an invalid divorce, without W's consent, H would be excluded as a surviving spouse, and the invalid divorce would be effective to sever the joint tenancy. This would terminate both H's and W's rights of survivorship, even though W did nothing that would exclude W as H's surviving spouse.

### **Proposed Solution**

The problem of an invalid divorce terminating the right of survivorship of a spouse who would not otherwise be excluded as a surviving spouse arises because severance occurs during the lives of the joint tenants, while both still possess a right of survivorship. If, however, severance is deferred until one of the joint tenants has died, then only the survivor would have a meaningful right of survivorship to be affected by severance. Section 78 could then be applied to determine whether the *survivor* is excluded as a surviving spouse. If so, the joint tenancy would be severed and the survivor's right of survivorship terminated. This would not affect the decedent's right of survivorship, which was already terminated by the decedent's death.

The staff recommends that the following language be added to the Probate Code (in lieu of proposed Family Code Section 2651):

§ 5500. (a) Subject to the limitations of this section, a joint tenancy created between spouses during their marriage to each other is severed as between the spouses by the death of either of them if the survivor is not the surviving spouse of the decedent.

(b) A joint tenancy is not severed by operation of this section if a written agreement of the joint tenants or a court order provides otherwise.

(c) Nothing in this section affects the rights of a subsequent purchaser or encumbrancer for value in good faith who relies on an apparently effective severance by operation of this section or who lacks knowledge of a severance by operation of this section.

(d) This section does not affect survivorship in a multiple party account as defined in Section 5132.

(e) This section governs the effect of the death of a joint tenant on or after January 1, 1999.

## **Remarriage**

The Commission and the staff have struggled with the question of whether a joint tenancy that is severed by divorce should be revived if the former spouses remarry each other. The question of whether typical former spouses would expect and intend remarriage to revive a joint tenancy that had been severed by their earlier divorce is a close one, on which opinion in the legal community is divided (with the Executive Committee believing that typical former spouses would expect and intend revival on remarriage and the San Francisco Bar Association taking the opposite position).

The proposed approach discussed above substantially simplifies the policy question in two ways.

(1) It eliminates the possibility of actual “revival” — because joint tenancy is not severed until one joint tenant dies, there can be no subsequent remarriage of the joint tenants to each other and therefore no possibility of revival on remarriage. In other words, changes in marital status will not affect the joint tenancy title during the lives of the joint tenants. Note that this eliminates the possibility of injury to a third person who relies on an apparently effective severance by divorce that is later reversed by remarriage.

(2) It shifts the focus of the question away from what typical parties intend or expect at each successive change in their marital status — instead focusing on their likely intentions regarding how joint tenancy will operate on one of their deaths. The resulting question is more straightforward: would typical spouses intend joint tenancy property to pass to a surviving spouse, regardless of whether they had previously been divorced? Take the following example:

H and W marry. They buy a home and take title in joint tenancy form, intending that the house pass without probate to the survivor on one of their deaths. They then divorce, but never reach agreement on property matters, leaving their interests in the house unaffected. They then remarry each other and remain married until H’s death.

In such a case, it seems likely that H and W intend survivorship to operate on H’s death.

## **Recommendation**

The staff recommends the changes discussed above. These changes would provide for greater consistency between the proposed law and similar

provisions in the Probate Code, and would avoid the complexity of a revival on remarriage rule while achieving the policy goal of such a rule — effecting the likely intentions of parties who divorce and then remarry each other.

Respectfully submitted,

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Staff Counsel

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**MEMORANDUM**

**TO:** California Law Revision Commission

**FROM:** Executive Committee, Estate Planning, Trust & Probate Section, State Bar of California

**RE:** Severance of Joint Tenancy by Dissolution of Marriage: Definition of "Dissolution" and Revival by Remarriage

**COMMENTS**

The Executive Committee, Estate Planning, Trust & Probate Section, State Bar of California, reiterates its position that the use of one definition of "surviving spouse" for purposes of intestate succession and bequests and the use of a different definition for joint tenancies would defeat the purpose of the proposed legislation to effect a severance of joint tenancy by dissolution of marriage. To use differing definitions, as suggested in the First Amendment to Memorandum 97-18, dated April 25, 1997, would perpetuate the existing discrepancies of the law concerning testamentary revocations, such discrepancies being the initial impetus for the proposed legislation.

A definitional reference to Probate Code Section 78 is necessary to eliminate these existing differences between the tests for revocation of similar, but not identical, testamentary dispositions of property to former spouses. Attention is directed to Sections 78, 6401 and 6122(d) of the Probate Code, the source of the definition of "surviving spouse" for purposes of intestate succession and the revocation of bequests to a former spouse under a Will.

The California Law Revision Commission ("CLRC") has long supported the idea that similar tests should be used. In the CLRC's tentative recommendation for this proposed legislation, pages 6-7, and noting Probate Code Sections 6122(b), 4154(b) and 4727, and the Uniform Probate Code Section 2-804(e), the Commission noted that

[i]f divorcing parties subsequently remarry there is no reason to think that the parties would not want and expect a spousal disposition from the former marriage to continue.

The Commission also mentioned that the proposed legislation would *not* revive the joint tenancy if a third party acquired an interest in the property or if another severing event occurred after the marriage dissolution.

The staff of the CLRC in its Memorandum 97-18, dated April 21, 1997, (page 9) suggested that the Commission reconsider its support of revival on remarriage. This suggestion was apparently based on comments of the Bar Association of San Francisco's Family Law Section that an "automatic switch back to community property [sic]...is not appropriate" apparently because of there only being "a slight burden" to re-transfer the property. *Bar Association of San Francisco, Family Law Section, Statement of Position on Proposed Legislation.*

As the staff correctly notes on page 8 of the Memorandum, the issue of revival should not be analyzed according to the ease or difficulty with which joint tenancy may be restored but should be analyzed as "how to effect the intentions" of the parties. The Executive Committee would also add that the issue should be analyzed as to what the parties believe the law to be and suggests that, because other testamentary dispositions are revived upon remarriage, the parties are likely to believe

that the testamentary aspects of joint tenancy are likewise revived.

While the Executive Committee supports the suggestions of the staff to add certain phrases and make certain changes to Proposed Section 2651(a) and (c), the Executive Committee does **not**, however, support the notion that the survivorship provisions should not be revived on remarriage.

The Executive Committee again respectfully suggests that an identical test as used with other testamentary dispositions be used to determine the revocation of the automatic survivorship provisions in joint tenancy property. The Executive Committee again suggests the following following language be added to proposed Family Law Code Section 2651:

(g) For purposes of this section, dissolution or annulment means any dissolution or annulment which would exclude the spouse as a surviving spouse within the meaning of Probate Code Section 78. A decree of legal separation which does not terminate the status of husband and wife is not a dissolution for purposes of this section.

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cc: Mr. Don E. Green, Chair, Estate Planning, Trust and Probate Law Section  
Mrs. Diana Hastings Temple, Chair, Ad Hoc Subcommittee  
Mr. James L. Deeringer  
Mr. Richard A. Gorini  
Mr. Lynard C. Hinojosa  
Ms. Sandra Price  
Ms. Susan Orloff



## MARITAL JOINT TENANCY AND DIVORCE

1 Many spouses choose to acquire marital property in joint tenancy form.<sup>1</sup>  
2 Avoidance of probate on the death of a spouse, through operation of joint tenancy  
3 survivorship, accounts in part for the popularity of joint tenancy title among  
4 spouses.<sup>2</sup> However, experience suggests that spouses do not consider or anticipate  
5 the potential effect of joint tenancy survivorship after a dissolution or annulment  
6 of marriage.

7 After dissolution or annulment most parties probably intend their estate to pass  
8 to their devisees or heirs rather than to a former spouse.<sup>3</sup> This is particularly likely  
9 where the decedent has children from a previous marriage. In the relatively rare  
10 case where a person dies after dissolution or annulment of marriage but before  
11 property division, this intention is frustrated by joint tenancy survivorship, by  
12 which the decedent's interest passes entirely to the decedent's former spouse.

13 The Law Revision Commission proposes that a marital joint tenancy be severed  
14 by the death of one joint tenant if the surviving joint tenant is not the "surviving  
15 spouse" of the decedent as a consequence of the dissolution or annulment of their  
16 marriage.<sup>4</sup> The decedent's cotenancy interest will then pass to the decedent's  
17 devisees or heirs rather than to the decedent's former spouse.

## EXISTING LAW

18  
19 The distinguishing feature of joint tenancy is the right of survivorship. On the  
20 death of one joint tenant the decedent's interest in the joint tenancy property is  
21 terminated and the surviving joint tenant owns the entire estate. An attempt on the  
22 part of a joint tenant to devise an interest in joint tenancy property is therefore  
23 ineffective.<sup>5</sup>

24 A joint tenancy may be severed, converting the joint tenancy into a tenancy in  
25 common, with no right of survivorship.<sup>6</sup> Severance can occur in a number of

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1. See Fam. Code § 750 (husband and wife may hold property as joint tenants); Civ. Code § 683 (joint tenancy may be created in real and personal property).

2. See Sterling, *Joint Tenancy and Community Property in California*, 14 Pac. L.J. 927, 929 (1983).

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 joint tenancy after divorce or can provide for a former spouse by devise or other means.

4. See Prob. Code § 78.

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

6. *Id.* §§ 276-78, at 475-77.

ways.<sup>7</sup> However, dissolution or annulment of marriage alone does not sever a marital joint tenancy.<sup>8</sup>

There is a presumption, on dissolution of marriage, that property acquired during marriage in joint form is community property regardless of the form of title.<sup>9</sup> This presumption substantially limits the scope of the problem addressed by this recommendation. However, there are two circumstances in which the problem still arises:

(1) Where the community property presumption is adequately rebutted.

(2) Where one spouse dies and the presumption is inapplicable because the dissolution of marriage preceded the death of the former spouse by four years or more.<sup>10</sup> In such a case the form of title presumption applies<sup>11</sup> and property acquired in joint tenancy form during marriage is presumed to be a true joint tenancy.<sup>12</sup>

#### SEVERANCE OF MARITAL JOINT TENANCY IF SURVIVOR NOT “SURVIVING SPOUSE”

Severance of a marital joint tenancy on the death of one joint tenant, if the surviving joint tenant is not the decedent’s “surviving spouse,” would effectuate the intent of most people and would conform the treatment of joint tenancy to the treatment given by California law to other spousal property dispositions.

#### **Effectuating Intent of Parties**

A typical person will not want marital joint tenancy survivorship to operate after dissolution or annulment of marriage. As one court noted, it is illogical to think that a person 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.”<sup>13</sup> The

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

8. Estate of Layton, 44 Cal. App. 4th 1337, 1343, 52 Cal. Rptr. 2d 251, 255 (1996). 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.

9. 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, 893-95, 14 Cal. Rptr. 2d 371, 373-75 (1992).

10. See Fam. Code § 802.

11. See Estate of Blair, 199 Cal. App. 3d 161, 167, 244 Cal. Rptr. 627, 630 (1988) (“For purposes of determining the character of real property on the death of one spouse, there is a presumption that the property is as described in the deed and the burden is on the party who seeks to rebut the presumption.”).

12. See, e.g., Estate of Layton, 44 Cal. App. 4th at 1339-41, 52 Cal. Rptr. 2d at 253-54 (1996).

13. See Estate of Blair, 199 Cal. App. 3d at 169, 244 Cal. Rptr. at 632. 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.

1 court went on to observe that concerns about the operation of survivorship after  
2 divorce should be addressed by the Legislature.<sup>14</sup>

3 It is particularly unlikely that a person will wish joint tenancy survivorship to  
4 operate after dissolution or annulment of marriage where the person has children  
5 by a former marriage.<sup>15</sup> So long as property remains in joint tenancy form it cannot  
6 pass to these children by intestacy or devise.

### 7 **Treatment of Other Types of Revocable Spousal Dispositions**

8 In California, as in many states, the dissolution or annulment of a person's  
9 marriage automatically revokes a disposition to a former spouse in the person's  
10 will.<sup>16</sup> To do otherwise would be contrary to what the typical person would have  
11 wanted had the person thought about the matter. In most cases where a person fails  
12 to change a will following dissolution of marriage, the failure is inadvertent.<sup>17</sup>

13 A divorcing person would also likely revoke a spousal disposition in a will  
14 substitute such as marital joint tenancy. This is the rationale of Uniform Probate  
15 Code Section 2-804, which attempts to unify the treatment of probate and non-  
16 probate transfers on divorce. Under Section 2-804, dissolution or annulment of  
17 marriage automatically revokes spousal dispositions in a will, and in a wide range  
18 of will substitutes — including marital joint tenancy.<sup>18</sup> Eight states have  
19 substantially adopted Section 2-804 since 1993.<sup>19</sup>

20 Many other states have implemented this general policy in a piecemeal fashion  
21 by adopting measures that revoke specific spousal dispositions on dissolution or  
22 annulment of marriage. For example, five states sever a marital joint tenancy on

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Rptr. 2d 916, 919 (1992) (operation of survivorship after divorce not “consistent with what the average decedent and former spouse would have wanted had death been anticipated”).

14. Estate of Blair, 199 Cal. App. 3d at 169-70, 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.”).

15. 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).

16. See Prob. Code § 6122.

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

18. See Unif. Prob. Code § 2-804 (1993); see also Waggoner, *supra* note 15 at 694 (“The severance of spousal joint tenancies upon divorce merely applies the general principle ... that all revocable dispositions are presumptively revoked upon divorce.”); McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 Brook. L. Rev. 1123, 1161 (1993) (revocation of spousal dispositions on divorce gives “effect to the average owner’s presumed intent....”).

19. See Alaska Stat. § 13.12.804 (Westlaw 1996); Ariz. Rev. Stat. Ann. § 14-2804 (Westlaw 1996); Colo. Rev. Stat. Ann. § 15-11-804 (Westlaw 1996); Haw. Rev. Stat. Ann. § 560:2-804 (Westlaw 1996); Mont. Code. Ann. § 72-2-814 (Westlaw 1996); N.M. Stat. Ann. § 45-2-804 (Westlaw 1996); N.D. Cent. Code § 30.1-10-04 (2-804) (Westlaw 1995); S.D. Codified Laws § 29A-2-804 (Westlaw 1997).

1 dissolution or annulment of marriage.<sup>20</sup> Other spousal dispositions revoked by  
2 dissolution or annulment of marriage include inter-vivos trusts<sup>21</sup> and life insurance  
3 beneficiary designations.<sup>22</sup>

4 In California, dissolution or annulment revokes the designation of a spouse as  
5 attorney-in-fact<sup>23</sup> and the designation of a death benefit beneficiary under the  
6 Public Employees' Retirement law.<sup>24</sup>

7 All of these provisions, whether revoking a spousal disposition in a will or will  
8 substitute, embody the same policy assumption — that a typical divorcing person  
9 would not intentionally maintain a disposition benefiting a former spouse.

#### 10 **Consistency with Treatment of Community Property**

11 Under the proposed law, dissolution or annulment of marriage prevents  
12 operation of the right of survivorship in a marital joint tenancy. This is consistent  
13 with the effect of dissolution or annulment on intestate succession of community  
14 property.

15 Absent a will, a decedent's share of community property passes entirely to the  
16 decedent's surviving spouse, without administration.<sup>25</sup> Thus, in cases of intestacy,  
17 community property passes in a manner similar to joint tenancy survivorship.

18 On dissolution or annulment of marriage, community property that remains  
19 undivided is treated as tenancy in common property.<sup>26</sup> Absent a will, a decedent's  
20 interest in tenancy in common property passes by the general rules of intestate  
21 succession — not to the decedent's former spouse.<sup>27</sup> In other words, dissolution or  
22 annulment terminates the survivorship-like feature of community property. This is  
23 analogous to the effect of the proposed law.

#### 24 **SUBSIDIARY ISSUES**

25 Implementation of the proposed law requires resolution of three subsidiary  
26 issues: effect of legal separation, treatment of a multiple party account, and  
27 protection of a third person.

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20. See Conn. Gen. Stat. Ann. § 47-14g (Westlaw 1997); Mich. Comp. Laws Ann. § 552.102 (Westlaw 1996); Minn. Stat. § 500.19(5) (Westlaw 1996); Ohio Rev. Code Ann. § 5302.20(c)(5) (Westlaw 1997); Va. Code Ann. § 20-111 (Westlaw 1996).

21. See, e.g., Ohio Rev. Code Ann. § 1339.62 (Westlaw 1997).

22. See, e.g., *id.* § 1339.63 (Westlaw 1997).

23. Prob. Code §§ 3722, 4154, 4727(e).

24. Gov't Code § 21492.

25. See Prob. Code §§ 6401 (intestate share of surviving spouse), 13500-13506 (passage of property to surviving spouse without administration).

26. 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).

27. See Prob. Code § 6402.

1   **Legal Separation**

2    While it is clear that a judgment of legal separation may result in a division of  
3   property as thorough as a dissolution or annulment of marriage,<sup>28</sup> it is not clear  
4   that parties choosing legal separation over dissolution of marriage intend to  
5   completely sever marital property and support arrangements. Legal separation  
6   does not dissolve marital status.<sup>29</sup> Spouses may therefore choose legal separation  
7   over dissolution in order to maintain rights contingent on marital status.

8    For example, under the Probate Code, “surviving spouse” includes legally  
9   separated spouses, unless there has been an order dividing all marital property.<sup>30</sup>  
10   Thus if a court enters a judgment of legal separation, but does not divide all  
11   marital property (the very facts the proposed law would address), the separated  
12   spouses retain statutory inheritance rights in each other’s separate property.<sup>31</sup> Also,  
13   of the provisions already discussed revoking a spousal disposition on dissolution  
14   or annulment of marriage, only one is also effective on legal separation.<sup>32</sup>

15   Where parties choose legal separation in order to maintain existing marital  
16   property and support arrangements, automatic severance of a joint tenancy would  
17   be inappropriate. Because of the uncertainty as to legally separating parties’  
18   intentions regarding existing marital arrangements, and in order to be consistent  
19   with the treatment of spousal inheritance rights under the Probate Code, the  
20   proposed law is not triggered by a judgment of legal separation.

21   **Multiple Party Accounts**

22    The proposed law does not apply to survivorship in a multiple party account for  
23   two reasons:

- 24           (1) Termination of survivorship in a multiple party account is regulated  
25           under the Probate Code as part of an integrated statutory scheme<sup>33</sup> and is  
26           expressly excluded from the coverage of statutes governing the creation  
27           and severance of a joint tenancy.<sup>34</sup>

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

30. See Prob. Code § 78.

31. See, e.g., Prob. Code §§ 6401 (intestate share of surviving spouse), 6540 (surviving spouse entitled to family allowance during administration of estate), 6560 (share of surviving spouse who is omitted from a will).

32. The exception is the designation of a spouse as attorney-in-fact by a federal absentee. See Prob. Code § 3722. This represents a special case, as a federal absentee (e.g., POW-MIA) obviously cannot act to revoke a revocable disposition. Stricter controls are justified to protect an absentee’s likely intentions.

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

34. See Civ. Code § 683(b).

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36. Fam. Code § 2024.

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

38. See Gov't Code § 21492.



## PROPOSED LEGISLATION

### 1 **Prob. Code § 5500 (added). Effect of Divorce on Joint Tenancy**

2 SECTION 1. Part 3 (commencing with Section 5500) is added to Division 5 of  
3 the Probate Code, to read:

### 4 PART 3. SPOUSAL DISPOSITIONS

#### 5 **§ 5500. Marital joint tenancy severed if survivor not decedent's surviving spouse**

6 5500. (a) Subject to the limitations of this section, a joint tenancy created  
7 between spouses during their marriage to each other is severed as between the  
8 spouses by the death of either of them if the survivor is not the surviving spouse of  
9 the decedent.

10 (b) A joint tenancy is not severed by operation of this section if a written  
11 agreement of the joint tenants or a court order provides otherwise.

12 (c) Nothing in this section affects the rights of a subsequent purchaser or  
13 encumbrancer for value in good faith who relies on an apparently effective  
14 severance by operation of this section or who lacks knowledge of a severance by  
15 operation of this section.

16 (d) This section does not affect survivorship in a multiple party account as  
17 defined in Section 5132.

18 (e) This section governs the effect of the death of a joint tenant on or after  
19 January 1, 1999.

20 **Comment.** Section 5500 establishes the rule that a joint tenancy between spouses is severed on  
21 one spouse's death if the survivor is not the decedent's surviving spouse. See Section 78  
22 (surviving spouse). This reverses the common law rule that dissolution or annulment of marriage  
23 does not sever a joint tenancy between spouses. See *Estate of Layton*, 44 Cal. App. 4th 1337, 52  
24 Cal. Rptr. 2d 251 (1996). See also *In re Marriage of Hilke*, 4 Cal. 4th 215, 841 P.2d 891, 14 Cal.  
25 Rptr. 2d 371 (1992); *Estate of Blair*, 199 Cal. App. 3d 161, 244 Cal. Rptr. 627 (1988).

26 This section does not affect community property. Note that property acquired during marriage  
27 in joint tenancy form is presumed to be community property on dissolution of marriage or legal  
28 separation. See Fam. Code § 2581.

29 This section applies to both real and personal property joint tenancies, and affects property  
30 rights that depend on the law of joint tenancy. See, e.g., Veh. Code §§ 4150.5, 5600.5 (property  
31 passes as though in joint tenancy). This section does not affect United States Savings Bonds,  
32 which are subject to federal regulation. See *Conrad v. Conrad*, 66 Cal. App. 2d 280, 152 P.2d 221  
33 (1944) (federal regulations controlling).

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

36 Severance by operation of this section only affects survivorship as between the spouses. In the  
37 rare case where a joint tenancy is created between spouses and one or more other persons during  
38 the spouses' marriage to each other, severance by operation of this section does not affect the  
39 right of survivorship as between the spouses and the non-spousal joint tenants. The decedent's  
40 share would then pass to the non-spousal joint tenants by operation of survivorship, leaving an  
41 intact joint tenancy between all surviving joint tenants. For example, husband, wife, and child

1 create a joint tenancy during husband and wife's marriage to each other. On husband's death,  
2 wife is no longer husband's surviving spouse and the joint tenancy is severed between husband  
3 and wife by operation of this section. Child takes husband's share by right of survivorship. Wife  
4 and child are now joint tenants, with child holding a two-thirds interest in the property.

5 Subdivision (c) makes clear that nothing in this section affects the rights of a good faith  
6 purchaser or encumbrancer who relies on an apparently effective severance by operation of this  
7 section or who lacks knowledge of a severance by operation of this section. For purposes of this  
8 subdivision, "knowledge" of a severance of joint tenancy includes both actual knowledge and  
9 constructive knowledge through recordation of a judgment of dissolution or annulment or other  
10 relevant document. See Civ. Code § 1213 (recordation as constructive notice to subsequent  
11 purchasers and mortgagees). The remedy for a joint tenant injured by a transaction with an  
12 innocent purchaser or encumbrancer is against the transacting joint tenant.

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

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

16 2024. (a) A petition for dissolution of marriage, nullity of marriage, or legal  
17 separation of the parties, or a joint petition for summary dissolution of marriage,  
18 shall contain the following notice:

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

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

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

42 **Comment.** Section 2024 is amended to refer to the effect of dissolution or annulment on a  
43 spousal joint tenancy, the designation of a spouse as attorney-in-fact, and the designation of a



- 1 death benefit beneficiary under the Public Employees' Retirement System. Gov't Code § 21492
  - 2 (Public Employees' Retirement System); Prob. Code §§ 3722, 4154, 4727(e) (power of attorney),
  - 3 5500 (joint tenancy).
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