

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Severance of Joint Tenancy by Dissolution of Marriage

February 1997

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN March 31, 1997.

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

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
(415) 494-1335 FAX: (415) 494-1827

SUMMARY OF TENTATIVE RECOMMENDATION

The Law Revision Commission recommends that a judgment of dissolution or annulment of marriage should sever a joint tenancy between the spouses. Under existing law, dissolution or annulment of marriage does not sever marital joint tenancy property, with the result that in the relatively rare case where a joint tenant dies after dissolution or annulment of marriage but before property division, the property may pass to the ex-spouse rather than to the decedent's heirs or devisees. The proposed law corrects this defect so that the law conforms to the likely intent of the parties.

This recommendation was prepared pursuant to Resolution Chapter 38 of the Statutes of 1996.

SEVERANCE OF JOINT TENANCY BY DISSOLUTION OF MARRIAGE

1 Many spouses choose to acquire marital property in joint tenancy form.¹
2 Avoidance of probate on the death of a spouse, through operation of joint tenancy
3 survivorship, probably accounts for the popularity of joint tenancy title among
4 spouses.²

5 However, the automatic transfer of a decedent's interest in marital property to a
6 surviving spouse is probably not intended where the parties have dissolved or
7 annulled their marriage. After dissolution or annulment most parties intend the
8 party's estate to pass to the party's devisees or heirs. In the relatively rare case
9 where a spouse dies after dissolution or annulment of marriage but before property
10 division, this intention is frustrated by joint tenancy survivorship, by which the
11 decedent's interest passes entirely to the decedent's ex-spouse.

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

EXISTING LAW

16
17 A husband and wife can hold both real and personal property in joint tenancy
18 form.³ However, when property is divided on dissolution of marriage there is a
19 presumption that property acquired during marriage is community property
20 regardless of the form of title.⁴ This presumption limits but does not eliminate the
21 scope of the problem addressed by this recommendation.⁵

22 The distinguishing incident of joint tenancy is the right of survivorship, by
23 which the death of one joint tenant terminates that joint tenant's interest in the

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

2. *Id.* at 929.

3. 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).

4. Fam. Code § 2581.

5. For example, if the community property presumption is adequately rebutted or is inapplicable because the dissolution preceded the death of one ex-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 joint tenancy with the right of survivorship. *See, e.g.,* Estate of Layton, 44 Cal. App. 4th 1337, 1339-41, 52 Cal. Rptr. 251, 253-54 (1996).

1 property.⁶ The surviving joint tenant then acquires the decedent's former interest
2 automatically.⁷

3 Survivorship in a joint tenancy may be severed, converting the joint tenancy into
4 a tenancy in common.⁸ Severance can occur in a number of ways.⁹ However,
5 dissolution or annulment of marriage alone does not sever a marital joint
6 tenancy.¹⁰

7 SEVERANCE OF MARITAL JOINT TENANCY ON DISSOLUTION 8 OR ANNULMENT OF MARRIAGE

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

12 **Effectuate Intent of Parties**

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

15 As one court considering the relationship of marital joint tenancy and
16 dissolution of marriage noted, it is illogical to think that a party awaiting division
17 of marital property would intend the continued operation of survivorship, where an
18 “untimely death results in a windfall to the surviving spouse, a result neither party
19 presumably intends or anticipates.”¹¹ The court went on to observe that the court's
20 concerns over the operation of survivorship after divorce should properly be
21 addressed by the Legislature.¹²

22 It is particularly unlikely that a party will wish joint tenancy survivorship to
23 continue after dissolution or annulment of marriage where the party has children
24 by a former marriage.¹³ So long as property remains in joint tenancy form it

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

7. *Id.*

8. *Id.* §§ 276-78, at 475-77.

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

10. *Estate of Layton*, 44 Cal. App. 4th 1337, 52 Cal. Rptr. 251 (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.

11. 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, 10 Cal. Rptr. 2d 916 (1993) (operation of survivorship after divorce not “consistent with what the average decedent and former spouse would have wanted had death been anticipated”).

12. *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. at 256 (“[C]oncerns about divorcing parties' expectations regarding joint tenancy survivorship fall more suitably within the domain of the Legislature.”).

13. 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).

cannot pass to these children by intestacy or devise. Instead, on the party's death it will pass to the party's ex-spouse.

Treatment of Other Types of Spousal Property Transfers

In California, as in many states, the dissolution or annulment of a party's marriage automatically revokes a disposition to the party's ex-spouse in the party's will.¹⁴ 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.¹⁵

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 law of probate and non-probate transfers. This statute would revoke on divorce not only a revocable disposition to a spouse in a will but also in a wide range of will substitutes — including marital joint tenancy.¹⁶ Eight states have substantially adopted Uniform Probate Code Section 2-804 since 1993.¹⁷

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.¹⁸ Examples of other spousal dispositions revoked by other states on dissolution or annulment of marriage include an inter-vivos trust¹⁹ and a life insurance beneficiary designation.²⁰

In California, dissolution or annulment of marriage also revokes the designation of a spouse as attorney in fact²¹ and the designation of a death benefit beneficiary under Public Employees' Retirement law.²²

¹⁴. See Prob. Code § 6122.

¹⁵. *Tentative Recommendation Relating to Wills and Intestate Succession* 16 Cal. L. Revision Comm'n Reports 2301, 2325 (1982).

¹⁶. 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, 1161-64 (Winter, 1993).

¹⁷. 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).

¹⁸. 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).

¹⁹. See, e.g., Ohio Rev. Code Ann. § 1339.62 (1996).

²⁰. See, e.g., Ohio Rev. Code Ann. § 1339.63 (1996).

²¹ Prob. Code §§ 3722, 4154, 4727(e).

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.

Analogous Treatment of Comparable Types of Marital Property

The general policy that spousal dispositions in wills and will substitutes should be revoked on dissolution or annulment of marriage is also expressed in the treatment the law gives other forms of marital property.

Community property. On dissolution or annulment of marriage, community property that remains undivided is treated as tenancy in common property.²³ A party's share of tenancy in common property does not pass to the party's ex-spouse as community property would,²⁴ instead passing by the ordinary rules of intestate succession.²⁵

Dissolution or annulment of marriage thus terminates the survivorship-like aspect of community property. This reflects the policy that a property rule transferring a decedent's interest in marital property to a surviving spouse is inappropriate or unintended after dissolution or annulment of marriage.

Tenancy by the entirety. Many states recognize tenancy by the entirety, a form of joint ownership with a right of survivorship.²⁶ Tenancy by the entirety is similar to joint tenancy with two important differences — it is limited to co-ownership of real property between spouses, and a cotenant by the entirety cannot unilaterally convey, partition, sever, or in many jurisdictions, encumber the cotenant's interest in the property.²⁷

Because tenancy by the entirety is limited to spouses, divorce typically severs survivorship, resulting in a tenancy in common.²⁸ This likewise reflects the policy that a property rule transferring a decedent's interest in marital property to a

²². Gov't Code § 21492.

²³. 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).

²⁴. *See Prob. Code* § 6401.

²⁵. *See Prob. Code* § 6402.

²⁶. *See Null, Tenancy By The Entirety As An Asset Shield: An Unjustified Safe Haven For Delinquent Child Support Obligors*, 29 Val. U. L. Rev. 1057, 1081-91 (1995). Tenancy by the entirety is not a valid form of title in California. *See Civ. Code* § 682.

²⁷. *Id.*

²⁸. *See, e.g., Mich. Comp. Laws* § 552.102 (1996) (tenancy by entirety becomes tenancy in common on divorce, except as otherwise provided by divorce decree); *but see Shepherd v. Shepherd*, 336 So. 2d 497 (Miss. 1976) (tenancy by entirety becomes joint tenancy on divorce).

1 surviving spouse is inappropriate or unintended after dissolution or annulment of
2 marriage.

3 SUBSIDIARY POLICY ISSUES

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

6 Legal Separation

7 The intentions of separating parties are much less clear than those of divorcing
8 parties. Legal separation does not dissolve marriage status, nor does it terminate
9 the marital obligation of support.²⁹ It may be inferred that a party to a legal
10 separation intends to leave mutually supportive property arrangements intact.
11 However, a party may choose legal separation because of a religious prohibition
12 on divorce, rather than because of a desire to preserve the marital obligation of
13 mutual support.

14 Because of the uncertainty of the intentions of separating parties, the proposed
15 law does not sever a joint tenancy on legal separation. This is consistent with other
16 statutes revoking spousal dispositions.³⁰ **However, the Commission is particularly**
17 **interested in public comment on this point.**

18 Multiple Party Accounts

19 In California, a multiple party account in a financial institution is excluded from
20 the coverage of joint tenancy statutes.³¹ The Uniform Probate Code excludes
21 multiple party accounts from its severance of a joint tenancy on dissolution of

²⁹. See, generally 12 B. Witkin, Summary of California Law *Husband and Wife* § 325, at 362-63 (9th ed. 1990).

³⁰. In *Allen*, the court stated its approval of family law statutes that trigger on dissolution rather than on legal separation:

“We believe ... that the Legislature has wisely chosen not to use the date of separation as the benchmark for determining whether jurisdiction continues under the Family Law Act, since this date is frequently in dispute and spouses commonly separate and then reconcile. By contrast, there can be no dispute about the date of a judgment terminating marital status, or that after that date the parties no longer expect to receive the benefits available to married persons.”

In re Marriage of Allen, 8 Cal. App. 4th 1225, 1230, 10 Cal. Rptr. 2d 916, 919 (1992)

Of the statutes discussed in this recommendation, only one is effective on legal separation. The statute revokes a designation of a spouse as attorney in fact where the designating party is a federal absentee (e.g., a POW or MIA). A missing spouse obviously cannot terminate the marital obligation of support by filing for dissolution instead of legal separation and cannot reconcile with the estranged petitioner. In such a case legal separation has a measure of finality not present in a typical legal separation. See Prob. Code § 3722.

³¹. See Civ. Code § 683(b).

1 marriage.³² Survivorship in a multiple party account and its termination are
2 determined as part of an integrated statutory scheme.³³

3 Because funds in a multiple party account are fungible and can be freely
4 withdrawn by either spouse, the likelihood that such funds will inadvertently
5 remain undivided after dissolution of marriage is low.

6 For these reasons the proposed law excludes a multiple party account from
7 severance on dissolution or annulment of marriage.

8 **Effect on Third Parties**

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

16 An innocent purchaser or encumbrancer for value is currently protected against
17 unrecorded transfers generally³⁴ and against apparently effective severance of joint
18 tenancy in real property specifically.³⁵ The proposed law extends similar
19 protection to a purchaser or encumbrancer who relies on an apparent right of
20 survivorship without actual or constructive knowledge of severance caused by
21 dissolution or annulment of marriage.

22 **Remarriage**

23 If divorcing parties subsequently remarry there is no reason to think that the
24 parties would not want and expect a spousal disposition from the former marriage
25 to continue.³⁶ Both current California law³⁷ and the Uniform Probate Code³⁸
26 revive, on remarriage, a spousal disposition previously revoked by dissolution or
27 annulment of marriage.

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

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

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 § 1214.

35. See Civ. Code § 683.2(b).

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

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

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

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

6 (2) Joint tenancy is not revived if an event occurs that would be sufficient to
7 sever joint tenancy in the property if it had not already been severed by dissolution
8 or annulment of marriage. For example, if after dissolution of marriage a former
9 spouse records an instrument purporting to sever joint tenancy in marital property
10 that had already been severed by dissolution or annulment of marriage, this would
11 prevent revival on remarriage of the former joint tenants.³⁹ To revive a joint
12 tenancy in such a case would frustrate a party's demonstrated intent.

13 CONFORMING REVISIONS

14 Family Code Section 2024 requires that a petition for, or judgment of,
15 dissolution or annulment be accompanied by a written warning that dissolution or
16 annulment may revoke provisions of the parties' wills under Probate Code Section
17 6122.⁴⁰ The warning alerts a party who wishes to retain the revoked provisions
18 that the party must execute a new will to do so.

19 The proposed law amends Family Code Section 2024 to include warnings of the
20 effect of dissolution or annulment of marriage on a marital joint tenancy, the
21 designation of a spouse as attorney in fact,⁴¹ and the designation of a spouse as a
22 death benefit beneficiary under the Public Employees' Retirement System.⁴²

³⁹. 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.

⁴⁰. Fam. Code § 2024.

⁴¹. See Prob. Code §§ 6122(b), 4154(b), 4727(e).

⁴². See Gov't Code § 21492.

PROPOSED LEGISLATION

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

SECTION 1. 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, may automatically terminate your right of survivorship in marital property held jointly with your former spouse, may automatically revoke a power of attorney designating your spouse as your attorney in fact, and may automatically revoke 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, may automatically terminate your right of survivorship in marital property held jointly with your former spouse, may automatically revoke a power of attorney designating your spouse as your attorney in fact, and may automatically revoke 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).

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

SEC. 2. Section 2651 is added to the Family Code, to read:

2651. (a) Subject to the limitations of this section, 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 have agreed in writing that the joint tenancy is not severed by dissolution or annulment.

(c) Severance under 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 the joint tenants' remarriage 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 this section.

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

(f) This section governs the effect on joint tenancy of a judgment of dissolution or annulment entered on or after January 1, 1998.

Comment. Section 2651 establishes the rule that 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).

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 jointly owned 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 applies only to true joint tenancy property and not community property of married persons that is held or appears of record in joint tenancy form.

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.

☞ **Note.** The Commission solicits comments on whether severance should occur on legal separation.