Study H-603 December 4, 1996

Memorandum 96-87

Severance of Joint Tenancy by Dissolution of Marriage

INTRODUCTION

At the November 1996 meeting the Commission noted *Estate of Layton*, 52 Cal. Rptr. 251 (1996). That case involved marital joint tenancy property. After the divorce, both ex-spouses purported to will their share of the property to their heirs. The court held that the will of the first ex-spouse to die was ineffective as regarding the joint tenancy property, which all went to the estate of the surviving ex-spouse by virtue of the joint tenancy title.

The Commission has instructed the staff to consider whether dissolution of marriage should automatically sever the right of survivorship in property held by the former spouses as joint tenants.

This memorandum examines the effect of dissolution of marriage on property held in joint tenancy. The memorandum discusses the issues involved and includes draft legislation on the matter.

The memorandum and attached draft focus narrowly on the incidents of valid joint tenancies and do not address the complex question of when marital property is and should be characterized as community property or separate property held in joint tenancy.

NATURE OF JOINT TENANCY

Real property versus personal property

Both real and personal property can be held in joint tenancy form. Civ. Code. § 683. In general, the same rules apply to both real and personal joint tenancy property. Relevant differences will be identified and discussed.

Survivorship

The "distinguishing incident" of joint tenancy is the right of survivorship. DeWitt v. San Francisco, 2 Cal. 289, 297 (1852); see also Tenhet v. Boswell, 18 Cal.

3d 150, 155-56, 133 Cal. Rptr. 10, 554 P.2d 330 (1976) (survivorship is the "principal feature" of joint tenancy). "Upon the death of one of two joint tenants the survivor becomes the sole owner in fee by right of survivorship and no interest in the property passes to the heirs, devisees, or legatees of the joint tenant first to die." Nathaniel Sterling, *Joint Tenancy and Community Property in California*, 14 Pac. L. J. 927, 951-52 (1983). Sole ownership by the surviving joint tenant does not derive from any transfer or succession, but rather from the termination of the deceased joint tenant's interest. Id.

Note that survivorship is statutory for jointly-owned bank accounts (see Prob. Code § 5302), United States savings bonds (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)), and vehicles (see Veh. Code §§ 4150.5 & 5600.5).

Other incidents of joint tenancy

Three important consequences result from survivorship. First, the survivor can acquire fee ownership without probate. See discussion, Nathaniel Sterling, *Joint Tenancy and Community Property in California*, 14 Pac. L. J. 927, 953-54 (1983).

Second, because a deceased joint tenant's interest terminates on death, a joint tenancy interest cannot be devised. See, e.g., Estate of England, 233 Cal. App. 3d 1, 4, 284 Cal. Rptr. 361 (1991). Note that tenancy in common interests, which survive the death of the interest-holder, can be devised. Id.

Finally, the right of survivorship can affect a creditor's ability to reach a debtor's interest in joint property. A creditor can only reach the interest a debtor has in a joint tenancy, not the entire property. Because a joint tenant's interest ceases to exist on the tenant's death, an unexercised lien on that interest also terminates. See, e.g., People v. Nogarr, 164 Cal. App. 2d 591, 330 P.2d 858 (1958).

Of course, if a creditor forecloses and executes a sale of the debtor's interest before the debtor-tenant's death, the joint tenancy is severed and the purchaser of the interest takes as a tenant in common with any other joint tenants. See Hammond v. McArthur, 30 Cal. 2d 512, 515-16, 183 P.2d 1 (1947). Also, if the debt was incurred for necessaries, a creditor may be able to reach the non-debtor spouse's separate interest in the joint property. See Civ. Code § 5121.

This memorandum does not consider the legal incidents that attach to joint tenancy as a form of separate property as distinguished from community property. The relevant distinction is between joint tenancy, a form of separate

property with the right of survivorship, and tenancy in common, a form of separate property without the right of survivorship.

Effect of severance

Severance of a joint tenancy terminates the right of survivorship and converts the joint tenancy into a tenancy in common. See, e.g., discussion in 4 B. Witkin, Summary of California Law *Real Property* §§ 277-278, at 476-77 (9th ed. 1987).

Where only two parties hold joint title, or where severance is by mutual assent, the conversion from joint tenancy to tenancy in common is straightforward. In cases where more than two parties hold title in joint tenancy and one party severs unilaterally the result is more complex. The severed interest is converted into a tenancy in common with regard to the other co-owners, while the other co-owners retain their joint tenancy as between themselves. Hammond v. McArthur, 30 Cal. 2d 512, 516, 183 P.2d 1 (1947).

Any reform that effects a severance of marital joint tenancy must be drafted to avoid unintentionally affecting the interests of non-spouse joint tenants that may exist.

Means of severance

Joint tenancy can be severed by mutual assent (see Estate of Blair, 199 Cal. App. 3d 161, 169, 244 Cal. Rptr 627 (1988)), a judgment of partition, or an execution sale (see Hammond v. McArthur, 30 Cal. 2d 512, 515, 183 P.2d 1 (1947)).

While a judge in a dissolution proceeding may, on request of either party, partition joint tenancy property (Family Code § 2650), dissolution of marriage itself does not sever joint tenancy (see Estate of Layton, 52 Cal. Rptr 2d 251 (1996).

Survivorship in joint real property can be severed unilaterally, by recording either the transfer of an individual's interest to a third party by deed or a written instrument that evidences an intent to sever. See Civ. Code § 683.2. Unilateral severance is ineffective if contrary to a written agreement of the parties. Civ. Code § 683.2(b).

Survivorship in jointly held United States savings bonds is 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 problem

The problem this memorandum addresses arises where spouses acquire property as joint tenants, subsequently seek dissolution or annulment of their marriage, and one spouse then dies before the division of the joint tenancy property. See, e.g., Estate of Layton, 52 Cal. Rptr 2d 251 (1996); Estate of Blair, 199 Cal. App. 3d 161, 244 Cal. Rptr 627 (1988). Because dissolution alone does not sever the right of survivorship in a joint tenancy, the surviving spouse in these circumstances will hold the joint property in toto, despite the parties' presumed intent to divide their marital property.

Courts have expressed dissatisfaction with this result, suggesting that the Legislature consider reform. See, e.g., Estate of Blair, 199 Cal. App. 3d at 169 ("troubled" by "unfairness" of result); Estate of Layton, 52 Cal. Rptr 2d at 255-56 ("concerns about divorcing parties' expectations regarding joint tenancy survivorship fall more suitably within the domain of the Legislature").

Presumed intent

Previous Commission studies suggest that married couples who acquire property in joint tenancy do not ordinarily understand and intend all of the legal incidents that attach to that form of ownership. See, e.g., discussion in *Effect of Joint Tenancy Title on Marital Property*, 23 Cal. L. Revision Comm'n Reports 1013 (1993). In particular, a party who divorces without partitioning or otherwise severing separate interests in joint tenancy form may not understand that the continuing right of survivorship prevents the party from disposing of those separate interests by will.

As the court in *Blair* noted, it is illogical to think that a party awaiting division of marital property would intend the continued operation of survivorship, where "[a]n untimely death results in a windfall to the surviving spouse, a result neither party presumably intends or anticipates." Estate of Blair, 199 Cal. App. 3d at 169. To suggest that a party intends this result is to presume that party is engaged in a "macabre gamble" as to who will be the survivor if one spouse should die before property division. Id.

The *Blair* court's common sense approach is compelling. It is unlikely that parties who have chosen divorce intend to continue a form of joint ownership

that deprives them of the right to devise their interest and will potentially give that interest to their ex-spouse on their death.

This is especially true given the increasing incidence of remarriage. A party with children by a previous marriage who marries and divorces a second spouse probably intends property to pass to the party's children. Survivorship thwarts this intent by passing the decedent's interest in a joint tenancy to the surviving spouse in fee.

There may be friendly divorces where an ex-spouse feels some ongoing obligation of mutual support and intends jointly-held property to pass by survivorship. However, common sense suggests that in most cases a party would want property to pass to the party's own heirs rather than to an ex-spouse.

Analogy to wills

The unfriendly divorce assumption underlies Probate Code Section 6122, which automatically revokes will provisions advantageous to the testator's spouse on dissolution or annulment of marriage. In relevant part, the section provides:

> (a) Unless the will expressly provides otherwise, if after executing a will the testator's marriage is dissolved or annulled, the dissolution or annulment revokes all of the following:
>
> (1) Any disposition or appointment of property made by the will to the former spouse.
>
> (2) Any provision of the will conferring a general or special power of appointment on the former spouse.
>
> (3) Any provision of the will nominating the former spouse as executor, trustee, conservator, or guardian.
>
> ...
>
> Prob. Code § 6122.

In its report recommending the adoption of this section, the Commission explained that preservation of will provisions beneficial to a spouse after dissolution is "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." *Tentative Recommendation Relating to Wills and Intestate Succession* 16 Cal. L. Revision Comm'n Reports 2301, 2325 (1982).

This is analogous to the question of severance of joint tenancies on dissolution, especially given the use of survivorship as a will substitute. In each case a divorcing party probably does not intend to continue legal arrangements that benefit their spouse at the expense of their own estate. The risk of continuing

these unintended benefits outweighs the inconvenience to the minority who do intend to continue these benefits and must act to reestablish them after dissolution.

It could be argued that unintended spousal benefits in wills are a greater problem than unintended survivorship interests, and therefore merit greater protection. The parties may pay closer attention to marital property, which is ordinarily before the court in a dissolution proceeding, than to the provisions of their wills, which often are not.

Even granting this distinction, the basic analogy between Section 6122 and the reform considered here is sound. Both are based on a general belief that a divorcing party should be protected from the unintended consequences of pre-dissolution legal arrangements.

Analogy to undivided community property

Absent a will, one hundred percent of community property passes to a surviving spouse. See Prob. Code § 6401. In case of intestacy, this is analogous to joint tenancy survivorship.

However, when community property is left undivided in a dissolution proceeding, the parties are deemed to hold that property as tenants in common (subject to future litigation and contrary characterization). Henn v. Henn, 26 Cal. 3d 323, 330, 161 Cal. Rptr. 502, 605 P.2d 10 (1980). Tenancy in common property passes to the decedent's heirs rather than the ex-spouse, as community property would. Thus, dissolution has the effect of terminating the survivorship-like aspect of undivided community property.

This result is presumably based on the same common sense assumption supporting the reform proposed in this memorandum – that a party will not want a property arrangement beneficial to the party's spouse to survive dissolution of the marriage.

COUNTERVAILING CONSIDERATIONS

Reluctance to disturb existing arrangements

The principal argument against reform is based on a reluctance to disturb the private arrangements of spouses by second-guessing their intentions. A party who chooses to acquire property in joint tenancy presumably intends the incident of survivorship, and if the party later wishes to terminate survivorship, it can be easily and unilaterally severed at any time before the party's death. The

court in *Layton* expressed this reluctance in holding that dissolution does not sever joint tenancy. Estate of Layton, 52 Cal. Rptr 2d at 255-56.

On balance, the staff finds the *Blair* assumption the more convincing position; i.e. that most divorcing spouses would not intentionally preserve joint tenancy beyond dissolution of their marriage if they understood that it could enrich their ex-spouse at the expense of their estate. Furthermore, a rule severing survivorship interests on dissolution does not break new policy ground, but simply applies the policy expressly underlying Probate Code Section 6122 and implicit in the treatment of undivided community property as tenancy in common.

Competent counsel should recommend severance

Another argument that can be raised against reform is that the problem can and should be addressed by divorce attorneys. Given the clear holding of *Layton*, that a dissolution judgment alone does not sever a joint tenancy, it would seem that any competent divorce counsel would recommend an immediate unilateral severance of any joint tenancy at the outset of dissolution proceedings. The court in *Blair* hints at this, suggesting that failure to move for immediate partition of joint tenancy property might be legal malpractice. Estate of Blair, 199 Cal. App. 3d 161 at 169.

However, as the court in *Blair* goes on to note, a rush to sever joint property may be difficult where a non-managing spouse has inaccurate or incomplete knowledge as to the extent and form of title of marital property. Id. Also, many people choose to divorce without assistance of counsel. A rule that automatically severs joint tenancy would protect a spouse who is unaware of the existence of a joint tenancy, or is not represented by counsel, and would permit attorneys and the court to take the time necessary to properly identify and characterize marital property.

STAFF RECOMMENDATION

The staff recommends that the law be reformed so that a judgment of dissolution or annulment automatically severs a right of survivorship in property held jointly by the spouses, as between those spouses. A draft to accomplish this is attached as Exhibit pp. 1-2.

SUBSIDIARY ISSUES

In order to implement this reform, it is necessary to resolve a number of subsidiary policy questions.

Should severance occur on filing or on judgment?

Throughout this memorandum, it has been assumed that severance would be triggered by a judgment of dissolution or annulment. Such a rule would not have affected the outcome in *Blair*, where one spouse died before judgment was entered, but would have affected *Layton*, where the joint tenant died after a status-only judgment of dissolution (with jurisdiction to divide property reserved).

An alternative, that would have affected the outcome in *Blair*, would be to sever a joint tenancy on filing for dissolution or annulment, rather than on judgment.

The staff recommends against this, as it would affect the property interests of parties who might later change their minds and not pursue dissolution through to judgment. There is no basis to assume that parties who file for dissolution and then change their minds intend to divide their property, or otherwise alter their marital property arrangements.

Should legal separation sever a joint tenancy?

It is unclear whether severance should be triggered by legal separation. As with dissolution and annulment, legal separation can result in a division of marital property. See Fam. Code § 2550. In keeping with the *Blair* assumption that a party would not intend to continue survivorship while awaiting division of marital property, it may be appropriate to sever survivorship on legal separation.

However, legal separation does not terminate marital status, leaving intact the marital obligation of support. See, e.g., discussion in 12 B. Witkin, Summary of California Law *Husband and Wife* § 325, at 362-63 (9th ed. 1990). A party who chooses to leave this obligation intact, may intend to maintain mutually supportive property relationships, such as survivorship. On the other hand, the party may choose legal separation over divorce for purely religious reasons.

Note that Probate Code Section 6122, revoking certain will provisions on dissolution, does not apply to legal separation. Prob. Code § 6122(d).

Given the heightened uncertainty as to a party's intentions in a proceeding for legal separation, as reflected in Probate Code Section 6122's exemption of legal separation, the staff recommends limiting the operation of severance to judgments of dissolution and annulment.

Should severance apply to joint bank accounts?

Joint bank accounts present unique issues which justify excluding them from the effect of this reform.

First, the need for the reform discussed in this memorandum is less clear in the context of joint bank accounts. Considering the fungibility of joint funds and the freedom with which either party may withdraw those funds, it is unlikely that funds in a joint account will remain undivided after dissolution. The risk that joint account funds will be inadvertently left in joint tenancy after dissolution is therefore low.

Also, automatic severance of a joint bank account would create uncertainty as to a bank's payment obligations. Probate Code Section 5303 defines the exclusive means for modifying the terms of a joint account, providing banks with actual notice as to how and to whom funds should be paid. Severance by dissolution would alter the ownership of a joint bank account without providing any actual notice to the bank.

The staff recommends excepting joint bank accounts from operation of the reform.

Should parties be warned of the severance effect of dissolution and annulment?

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

Given the analogous effect of the reform proposed in this memorandum, it is sensible to offer a similar warning regarding the effect of judgment on joint tenancy. This would alert a party who wishes to preserve a joint tenancy that the party must act to do so.

The staff recommends also warning of the severance effect of dissolution or annulment under Family Code § 2024.

Protection of innocent third parties.

One problem with severance by dissolution is that the fact of the dissolution may not be apparent to a third party dealing with a surviving joint tenant. The third party may be misled by the apparent survivorship right, and believe the survivor is entitled to transfer the entire interest in the property.

One solution to this problem would be to implement strict recording requirements. This would ensure that a title search would reveal the severance effected by dissolution. However, this solution is inadequate because many people do not record, and recording is inappropriate for personal property joint tenancy.

A simpler and more comprehensive solution is to preserve the rights of the innocent purchaser. The deceased joint tenant's estate would have a remedy against the surviving spouse, rather than the innocent third party.

This approach to protecting innocent third parties is already taken in very similar circumstances. An attempt to unilaterally sever a joint tenancy is ineffective if contrary to a written agreement between the tenants. Civ. Code § 683.2(b). Therefore, an apparently effective recorded severance would be rendered ineffective by a previous unrecorded agreement. Section 683.2(b) addresses this by stating that "a severance contrary to a written agreement does not defeat the rights of a purchaser or encumbrancer for value in good faith and without knowledge of the written agreement." The staff recommends adopting similar language in the context of severance on dissolution.

Should dissolution sever where the parties have agreed not to sever?

If spouses affirmatively agree that dissolution should not sever a marital joint tenancy, that agreement should control. The assumption that a party does not wish joint tenancy to survive dissolution does not apply where that party has expressly agreed to preserve joint tenancy after dissolution.

This is consistent with Civil Code Section 683.2(b), providing that unilateral severance of a joint tenancy in real property contrary to agreement is ineffective, and with the common law rule that unilateral severance of personal property joint tenancy can be avoided by agreement of the joint tenants. See Estate of Propst, 50 Cal. 3d 448, 460 (1990).

Note also that dissolution does not revoke a will provision beneficial to the testator's spouse if the will expressly provides that it should not. See Prob. Code

§ 6122(a). Express preservation of a beneficial will provision is analogous to an agreement to preserve joint tenancy.

The staff recommends that severance by dissolution be ineffective if contrary to a written agreement of the parties.

Should survivorship be revived if parties remarry?

Probate Code Section 6122(b) provides that "[i]f any disposition or other provision of a will is revoked solely by this section, it is revived by the testator's remarriage to the former spouse." Given the analogous effect and underlying assumption of the reform proposed in this memorandum, it may be appropriate to provide for revival of a right of survivorship severed solely as a result of a judgment of dissolution or annulment.

However, reviving joint tenancy on remarriage to a former spouse would compound the innocent purchaser problem discussed supra, by effecting another unrecorded change in title.

Furthermore, unlike revival of will provisions, which have no effect until the testator's death, revival of joint tenancy would immediately affect an existing property interest. A spouse or third party may rely on severance of joint tenancy only to have that joint tenancy revived by remarriage to a former spouse.

The staff recommends against marital revival of a joint tenancy severed by dissolution.

Should severance be retroactive?

Because a party's right of survivorship is contingent on surviving the party's joint tenant, and can be unilaterally severed by the party's joint tenant at any time prior to death, the right of survivorship is not a vested property right. See In re Marriage of Hilke, 4 Cal. 4th 215, 222, 14 Cal. Rptr. 2d 371, 841 P.2d 891(1992). In a case where both joint tenants are still alive, retroactive application of severance by dissolution would not unconstitutionally impair a vested property right without due process of law. See Id.

There are, however, cases where retroactive severance would be improper or unconstitutional. Retroactive application in a case where all but one joint tenant have died would disturb a vested property right because survivorship would have vested in the survivor. This is probably unconstitutional. See Id. at 222-23. Retroactive severance of a joint tenancy where both tenants are alive, while

constitutional, could cause relitigation of long settled property divisions, and could sever a joint tenancy that was actually intended to survive dissolution.

A joint tenancy which has remained undivided and unsevered for a long period of time after dissolution may well be intended to retain survivorship. This was the case in *Layton*, where the court speculated that a joint tenancy which remained undivided nearly ten years after dissolution might have been intended to retain survivorship. The assumption of unintended survivorship which justifies severance on dissolution is therefore questionable in the context of a long term undivided joint tenancy.

The simplest approach to avoiding these problems is to limit the reform to prospective effect.

A compromise approach is to initially limit the statute to prospective effect, with retroactive effect one year after enactment. This would provide a grace period during which parties to a previous dissolution who wish joint tenancy to continue can act to reestablish that joint tenancy.

However, a grace period may not be adequate to protect the intentions of those who wish to retain survivorship. A party may have become incompetent since dissolution or may not be aware of the change in the law and therefore fail to reestablish a joint tenancy in the grace period. Considering that this reform is based on an assumption that a party to a divorce will not understand the continuing nature of survivorship, it is unlikely that a party will understand that survivorship will be severed by operation of law long after dissolution.

This approach is complex and would require careful drafting. It must be clear that retroactive severance would not apply to property which has already passed by virtue of survivorship. It must also be clear that a joint tenancy reestablished during the grace period would not be severed by retroactive operation of the statute. It would also be necessary to decide whether remarriage to a former spouse followed by a second dissolution would sever a joint tenancy created in the first marriage and reestablished in the grace period.

The staff recommends limiting the reform to prospective operation only.

Respectfully submitted,

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Staff Counsel

Exhibit

SEVERANCE OF JOINT TENANCY BY DISSOLUTION OF MARRIAGE

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, and may automatically terminate your right of survivorship in marital property held jointly with your former spouse."

(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, and may automatically terminate your right of survivorship in marital property held jointly with your former spouse."

Comment. Section 2024 is amended to refer to the effect of dissolution or annulment on joint tenancy. See Fam. Code § 2651.

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) This section does not apply to a joint tenancy in a multiple-party account.

(d) 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.

(e) This section governs the effect on joint tenancy only 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, 52 Cal. Rptr 2d 251 (1996); In re Marriage of Hilke 4 Cal. 4th 215, 14 Cal. Rptr. 2d 371, 841 P.2d 891(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 registered 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)), or multiple-party accounts (see subdivision (c); Prob. Code § 5302).

The method provided in this section for severing a joint tenancy is not exclusive. See, e.g., Civ. Code § 683.2. This section is intended to apply 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 (d) 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.