

Community Property with Right of Survivorship†

ROBERT L. MENNELL*

In California, property cannot be both joint tenancy and community property. This article examines the California rule and concludes that the rule should be reversed. The author proposes the creation of a voluntary addition to the community ownership of the right of survivorship, as is done in Idaho, Nevada, and Washington.

INTRODUCTION

In California and seven other states¹, property acquired onerously during marriage by a married couple is generally² community property, unless the couple agrees otherwise. The community property system is derived from the civil law system.³

One form of holding title at common law is joint tenancy⁴ with

† Copyright 1983 Robert L. Menzell.

* Professor of Law, Hamline University School of Law.

1. The other states having community property systems are: Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

2. R. MENNELL, *COMMUNITY PROPERTY IN A NUTSHELL* 3 (1982). This broad generalization obviously requires substantial modification for complete accuracy. For example, Louisiana and Texas have—until recently—completely or partly limited the right of married persons to change the character of their property from community to separate or vice versa. *Id.* at 31, 32-33.

3. The civil law system is generally rejected in favor of the common law system in the United States; but an area in which the civil law system is incorporated into the California common law system includes the method of computing kinship. See CAL. PROB. CODE § 253 (West 1956). Compare the common law method explained in 2 W. BLACKSTONE, *COMMENTARIES*** 206-07 (1883).

4. Although loose usage may refer to other forms of joint *ownership*, the term "joint tenancy" in California refers to that joint tenancy which contains a right of survivorship.

right of survivorship.⁵ The right of survivorship is an "incident of" the joint tenancy. Laypersons often believe that joint tenancy is a more convenient or advantageous method of holding title because of its right of survivorship. Many married persons desire to hold their property as joint tenants in order to avoid probate.

In California, case law⁶ has established the rule that property cannot be both joint tenancy and community property. Laypersons have difficulty understanding this rule. This rule is circumvented by statute for some assets.⁷ However, only Idaho, Nevada and Washington have been bold enough to enact statutes authorizing the addition of the desired survivorship characteristic to community property in general.

This article accepts the view that property could and should simultaneously be community and possess the incident of the right of survivorship. It suggests that cases establishing the contrary rule should be reexamined and reversed. As an alternative for judicial removal of ancient obstacles, this article suggests legislative remedies, taken from existing models both within and outside of California.

WHY CALIFORNIANS DESIRE A RIGHT OF SURVIVORSHIP

The popularity of joint tenancy has long been recognized by the courts⁸ and writers.⁹ A recent study¹⁰ indicates that joint tenancy

5. Precision and Texas usage seem to require that the right of survivorship be spelled out in order to avoid confusion between a joint tenancy and other forms of concurrent ownership, such as tenancy in common, which could loosely be called "joint." J. MENNELL, *supra* note 2, at 118-40; TEX. PROB. CODE ANN. § 46 (Vernon 1980). If one wishes to astonish friends with erudition, they may refer to the right of survivorship by its Latin name, *jus accrescendi*.

6. See, e.g., Jacquemart v. Jacquemart, 142 Cal. App. 2d 794, 299 P.2d 281 (1956); Schindler v. Schindler, 126 Cal. App. 2d 597, 272 P.2d 566 (1954); Perdicalis v. Perdicalis, 92 Cal. App. 2d 274, 206 P.2d 650 (1949); Tomaier v. Tomaier, 23 Cal. 2d 754, 146 P.2d 905 (1944); Estate of Taitmeyer, 60 Cal. App. 2d 699, 141 P.2d 504 (1943); Estate of Watkins, 16 Cal. App. 2d 793, 104 P.2d 389 (1940), *rev'd on other grounds*, 16 Cal. 2d 793, 108 P.2d 417 (1941); Gwin v. Camp, 25 Cal. App. 2d 10, 76 P.2d 160 (1938); Estate of McCoin, 9 Cal. App. 2d 480, 50 P.2d 114 (1935); Estate of Putnam, 131 Cal. App. 2d, 20 P.2d 783, *aff'd*, 219 Cal. 608, 28 P.2d 27 (1933); Estate of Fingland, 129 Cal. App. 395, 18 P.2d 747 (1933); Young v. Young, 126 Cal. App. 306, 14 P.2d 580 (1932); Delanoy v. Delanoy, 216 Cal. 23, 13 P.2d 513 (1932); Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003 (1932); Estate of Gurnsey, 177 Cal. 211, 170 P. 402 (1918).

7. CAL. CIV. CODE § 704 (West 1982); see *infra* notes 60-66 and 88-89 and accompanying text.

8. See, e.g., Young v. Young, 126 Cal. App. 306, 308-09, 14 P.2d 580, 581 (1932).

9. See e.g., Griffith, *Community Property in Joint Tenancy Form*, 14 STAN. L. REV. 87, 88 n.4 (1961); Marshall, *Joint Tenancy, Taxwise and Otherwise*, 40 CALIF. L. REV. 501, n.2 (1952); Comment, *Community Property: Status of Property Conveyed to Husband and Wife as Co-Grantees*, 20 CALIF. L. REV. 546 (1932).

10. The author recognizes, with gratitude, the efforts of Cheryl L. Edwards, a second-year student at the University of San Diego School of Law, for a statistical

is the form preferred by spouses taking title to realty: in a survey of 900 consecutive deeds to grantees described as husband and wife,¹¹ 163 deeds (slightly over 18%) specified community property, while the remaining 737 (almost 82%) named the spouses as joint tenants.

Why is joint tenancy preferred over community property? Contrasting the present¹² legal consequences of joint tenancy against those of community property probably provides the answer: Although a joint tenancy is more difficult to create in California,¹³

study of 900 consecutive deeds to husbands and wives recorded between September 22, 1982, and October 5, 1982, in the office of the County Recorder of San Diego County, California.

11. The study disregarded deeds to married and unmarried persons which did not show the names of both husband and wife, and also disregarded instruments other than deeds. Between 4,000 and 5,000 deeds were recorded in that office each month of 1982. Although no recent similar survey or statistical report is available from title companies or recorders' offices, there is no reason to believe that the surveyed group of deeds is atypical.

12. In addition to the present distinctions between community property and joint tenancy, a number of historic differences have been eliminated by the California legislature:

(1) Intestate distribution of husband's half of community property: prior to 1923, the husband's half of community property passed by intestacy to others instead of to his widow. Joint tenancy property, of course, belonged to the surviving joint tenant. After 1923, the widow was the sole intestate taker of the husband's half of community property. *See infra* note 36 and accompanying text;

(2) Intestate distribution of property received from a predeceased spouse: the intestate distribution was treated differently when the property received by the intestate widow or widower from the predeceased spouse was community property, as opposed to joint tenancy property. *See* Estate of Kessler, 217 Cal. 32, 17 P.2d 117 (1932); Zeigler v. Bonnell, 52 Cal. App. 2d 217, 126 P.2d 118 (1942). That distinction was eliminated by legislation, 1939 CAL. STAT. c. 1065, § 1, which is reflected in the present wording of CAL. PROB. CODE § 229 (West Supp. 1982). *See infra* note 60;

(3) Inheritance Tax: McDougald v. Boyd, 172 Cal. 753, 159 P. 168 (1916) and Estate of Gurnsey, 177 Cal. 211, 170 P. 402 (1918), both held that the then existing inheritance tax statutes did not reach joint tenancies created before their effective date, while community property of the same decedent was reached by the statutes. Subsequent tax statutes eliminated this distinction;

(4) Divorce: *see infra* note 53 and accompanying text.

See also Miller, *Joint Tenancy as Related to Community Property*, 19 CAL. ST. B.J. 61, 63-64 (1944). A couple would be unlikely to prefer joint tenancy over community property in order to obtain any of these advantages. The gradual elimination of the distinctions shows a legislative tendency to blend joint tenancy and community property attributes.

13. CAL. CIV. CODE § 683 (West Supp. 1982) requires an express declaration in the conveyance or transfer that the estate created is joint tenancy. That statute also provides exceptions to the usual rule that the "four unities" of interest, title,

can be terminated unilaterally,¹⁴ and can cause a different income tax basis¹⁵ for the survivor, it possesses the right of survivorship. Of these four differences, the first three usually work to the disadvantage of one or more of the joint tenants. Therefore, it appears that the reason for the popularity of joint tenancy is the right of survivorship. The right of survivorship allows the surviving joint tenant to avoid probate administration, including creditors' claims, and permits bank and transfer agents to transfer title with a minimum of risk.

Avoiding Probate

The "evils" of probate include 1. loss of privacy, 2. delay in clearing title and the resulting suspension of the power to change investments, and 3. the cost.

Privacy is sacrificed for the protection offered by judicial supervision to the extent that any court proceeding is used, whether for a full probate administration,¹⁶ summary administration of community property¹⁷ or to clear title to joint tenancy property.¹⁸

Delay is caused by litigation, determination of death taxes, and the required procedures. Litigation delay is both frequent and unpredictable. The joint tenancy form does not guarantee exemption from litigation. Probate procedures do, however, present a convenient forum for litigation. The delay involved in determination and payment of death taxes due is approximately the same regardless of the form of title; the delay in clearing title is generally greater in administering a probate of community property than in terminating a joint tenancy.

Costs of administering a decedent's estate include the following items which are presented in order of decreasing amounts:

- i. Attorneys' fees and executors' commissions (if not waived):¹⁹ in a joint tenancy termination, an executor is

time, and possession are required. *See* *Siberell v. Siberell*, 214 Cal. 767, 7 P.2d 1003 (1932).

14. Community property can generally be terminated unilaterally by one spouse donating his or her interest to the other spouse. The unilateral termination of joint tenancy differs because the former joint tenants retain an aliquot portion of the property. Further, the termination of a joint tenancy by one joint tenant does not require the consent, or even the knowledge, of the other joint tenant. *See infra* note 32.

15. *See* Comment, *Joint Tenancy v. Community Property in California: Possible Effect Upon Federal Income Tax Basis*, 3 U.C.L.A. L. REV. 636, 638-41 (1956).

16. *See* CAL. PROB. CODE §§ 300-1106 (West Supp. 1982).

17. *See* CAL. PROB. CODE §§ 202, 650-657 (West Supp. 1982).

18. *See* CAL. PROB. CODE §§ 1170-1175 (West 1981).

19. Attorneys' fees and executors' commissions are fixed by CAL. PROB. CODE §§ 900-904, 910 (West 1981) in California for probate estates, but the authorization by CAL. PROB. CODE § 903 (West 1981) of fees or commissions for extraordinary

neither necessary nor required. An attorney is often necessary, although not required. The fees for the attorney are not regulated by statute. The attorney is able to charge whatever is deemed appropriate, limited only by the very loose test of California Rule of Professional Conduct 2-107.²⁰

ii. Death taxes (which is the largest cost item in estates which exceed one million dollars in value): neither community property nor joint tenancy presently has an advantage over the other in this category.

iii. Bond (if not waived): if a bond is required, substantial cost is usually involved if the value of the estate's personal property is large. Bonding is not required in joint tenancy terminations.

iv. Miscellaneous court costs, such as filing and certification fees: these tend to be relatively small amounts. The costs of joint tenancy termination include modest recording fees and may be close to the amount of a probate proceeding if a judicial joint tenancy termination procedure is used. Certain other costs, such as income taxes, appraisals, litigation expenses, and costs of maintaining or selling property, vary too greatly from estate to estate to permit generalization.

In summary, probate administration tends to cost more because of personal representatives' commissions, bonds, and miscellaneous court costs. Usually attorneys' fees are higher for probate administration than for terminating a joint tenancy.

Clearing of title after the death of a joint tenant is relatively simple. The surviving joint tenant²¹ absorbs the former interest

services (which have become very ordinary in estates) increases the total fees by an unpredictable amount.

20. CAL. RULE OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA, Rule 2-107 (West 1981) provides:

(A) A member of the State Bar shall not enter into an agreement for, charge or collect an illegal or unconscionable fee.

(B) A fee is unconscionable when it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience of lawyers of ordinary prudence practicing in the same community. . . .

It is uncertain which is the more difficult task—to find a "lawyer of ordinary prudence" or to shock his or her conscience. Suffice it to say that disciplinary proceedings for excessive fees are rare.

21. There may be two or more joint tenants. If there are three or more joint tenants, the surviving joint tenants acquire the interest of each successively dying joint tenant until either there is only one survivor or the joint tenancy with its right of survivorship is destroyed. Because joint tenancy between two members of

of the deceased joint tenant. The absorption is more than immediate; it is retroactive. The entire interest of the surviving joint tenant is deemed to have been acquired from the conveyance which created the original transfer.²² The decedent's share expires and is therefore not subject to any will provision.²³

There can be disadvantages to avoiding probate; certainty is achieved at the expense of flexibility. The deceased joint tenant's desires—for example, to pass the property to persons other than the surviving joint tenant or to impose trust conditions (such as a spendthrift or bypass trust) upon the surviving joint tenant—are thwarted.

Creditors' Claims Against the Property

Joint tenancy property is not subject to the debts of a deceased joint tenant. Of course, where a debt is owed by the survivor or by both the deceased and the surviving joint tenant, it can be collected from both halves of the former joint tenancy property.²⁴

Alternatively, a spendthrift trust can achieve some²⁵ protection from creditors' claims in California. A predeceased spouse can create a testamentary spendthrift trust for his or her half of the community property for the surviving spouse. But a spendthrift trust cannot be created for oneself.²⁶ Property received under a right of survivorship, therefore, is incapable of being used by the

a married couple is the main focus of this article, joint tenancies will be treated as if there were only two joint tenants.

22. *Hannon v. Southern Pac. R. Co.*, 12 Cal. App. 350, 355-56, 107 P. 335, 338 (1909) states:

By the well-established rules of the common law, upon the death of one joint tenant, the title did not 'vest in the survivor.' The notion of the nature of a joint tenancy entertained by the ancient law writers and jurists was a very peculiar one. The title did not vest or descend upon the death of one tenant. In contemplation of law each tenant was seised of the whole estate from the first, and no change occurred in his title on the death of his co-tenant. It simply 'remained' to him. He did not derive the title or estate or any part or interest therein from his co-tenant, but wholly from the original grant

It is therefore a mistake to say of joint tenants that the title vests in the survivor upon the death of the co-tenant, or that it descends to him from his co-tenant; for it had already vested in him by and at the time of, the original grant.

23. Even though joint tenancy property cannot be directly devised or bequeathed, a will can force an election by which the surviving joint tenant may either retain the joint tenancy property or take under the will of the decedent in exchange for surrendering rights in the former joint tenancy property. See *Estate of Kennedy*, 135 Cal. App. 3d 676, 681, 185 Cal. Rptr. 540, 542 (1982).

24. *Zeigler v. Bonnell*, 52 Cal. App. 2d 217, 221, 126 P.2d 118, 120 (1942).

25. In California spendthrift trusts can partially, but not completely, protect their assets from the claims of creditors of the beneficiary. CAL. CIV. CODE §§ 726, 859, 867 (West 1982).

26. See *Nelson v. California Trust Co.*, 33 Cal. 2d 501, 202 P.2d 1021 (1949).

surviving joint tenant for a spendthrift trust for his or her own benefit.

Advantages to Banks and Transfer Agents

Financial institutions prefer joint tenancy bank accounts²⁷ so that the institution is free to surrender any portion or all of the balance of the joint account or certificate upon the demand of either depositor. If the funds are community property, a bank might commit an error in disbursing funds to a spouse who does not have management and control of those particular community funds.

DIFFERING INCIDENTS

The incidents of joint tenancy and community property differ, but are the incidents so antithetical that the best features of each cannot be combined? The determination that property cannot be held as both community and joint tenancy at the same time has been traditionally justified²⁸ by the mere statement that the incidents of the two forms are not identical.

An examination of the two forms does reveal a number of differences:

Joint Tenancy Incidents: "For the creation of a joint tenancy, four unities are required, namely unity of interest, unity of title, unity of time, unity of possession."²⁹ Each joint tenant possesses a present, vested right of ownership, management, and control of the property.³⁰ Joint tenancy has the incidents of survivorship³¹

27. Joint accounts are authorized for banks, savings and loan associations and credit unions by statute. *See, e.g.*, CAL. FIN. CODE §§ 852, 7602, 7603, 7603.5, 7604, 11204, 11205, 11206.5, 14854 (West 1981). The provisions are more liberal than the common law form of joint tenancy in that the funds of either person or both can be deposited into such an account and withdrawals of the entire amount may be made by either joint tenant unless the joint tenants instruct the financial institution to the contrary.

28. *See supra* note 6 and accompanying text.

29. *Siberell v. Siberell*, 214 Cal. 767, 771, 7 P.2d 1003, 1004 (1932) (quoting *De Witt v. San Francisco*, 2 Cal. 289, 297 (1852)).

30. The joint tenants are holders of proportional fractional shares for the purpose of alienation, but they are seized of the entire realty for the purpose of tenure and survivorship, according to 2 W. BLACKSTONE, COMMENTARIES *182 (1883). Occasionally courts forget the distinction and refer to the ownership of joint tenancy between husband and wife by stating that "each is the owner of an undivided one-half interest therein in his [or her] separate right." *Barba v. Barba*, 103 Cal. App. 2d 395, 396, 229 P.2d 465, 466 (1951). *See also* *Miller v. Miller*, 227 Cal. App. 2d

and destructibility by nongratuitous unilateral severance;³² these two incidents have never been part of community property.

Community Property Incidents: Originally,³³ the wife's interest in community property in California was neither equal nor vested. That historic community interest thus lacked the unities of interest and possession between husband and wife; additionally, the unity of title was not required for community property because the title could be in the names of both husband and wife or in the name of the husband alone.

Most of the differences between joint tenancy and California historic community property have been eliminated. A list of major changes in California's community property system shows the increasing rights of the wife:

- 1891: Husband's previously unlimited right to give away community property without the wife's consent was curtailed.³⁴
- 1917: Husband's prior ability to mortgage or convey for consideration without the wife's signature was limited.³⁵
- 1923: Wife was granted equal right to devise or bequeath community property and given greater intestacy rights

322, 327, 38 Cal. Rptr. 571, 574 (1964); *Squibb v. Squibb*, 190 Cal. App. 2d 766, 769, 12 Cal. Rptr. 346, 348 (1961).

31. The survivorship feature of joint tenancy is steeped in a mysticism which only a first-year law student is willing to believe. According to the ancient documents (and certainly not supported by logic), each of the joint tenants owns the entire property, subject only to the rights of the other joint tenant(s). There is a 200% (or 300% if three joint tenants exist, etc.) ownership of the property until the death of one joint tenant. Thus, the ancient dogma recites, the joint tenant acquires nothing by the death of other joint tenant(s); the survivor owned it from the time of the original conveyance. Of course, this is poppycock, but upon such poppycock is the common law concept of joint tenancy founded.

32. In California, the married couple can agree bilaterally to change the character or form of the property from or into community property or joint tenancy. A *gratuitous* unilateral transfer of one's half to the other owner is possible in either joint tenancy or community property; the result is that the nonacting party owns the entire property as his or her separate property. The term "non-gratuitous unilateral severance" is used to indicate the ability of one owner, acting alone, to terminate the form of co-ownership (joint tenancy or community property) and retain ownership of one half of the property. The non-gratuitous unilateral severance can be a transfer of one half for consideration (which is a conversion of both form and ownership) or a transfer to oneself (which is a conversion of ownership only). It is a "cashing-out" from the joint or community form. See *infra* note 39.

33. In classic, but not California, community property systems, the spouses did not have complete freedom to agree to transmute the character of property from community to separate or vice versa. As late as 1970, Louisiana and Texas still had substantial limitations upon the ability of spouses to change ownership back and forth from community to separate. See R. MENNELL, *supra* note 2, at 21, 31, 32-33.

34. See CAL. CIV. CODE §§ 5125(b), 5127 (West Supp. 1982).

35. See CAL. CIV. CODE § 5127 (West Supp. 1982). But see CAL. CIV. CODE § 5124 (West 1970).

in husband's community share.³⁶

1927: Wife's interest in community property was declared to be present, vested and equal.³⁷

1975: Wife was given approximately equal management and control of community property.³⁸

These changes can be interpreted as modifications of California's community property system toward the joint tenancy form.

The following table compares the incidents of historic and current community property and joint tenancy:

<u>INCIDENT</u>	<u>CALIFORNIA COMMUNITY PROPERTY</u>		<u>JOINT TENANCY</u>
	<u>HISTORIC</u>	<u>CURRENT</u>	
Each owner entitled to:			
Vested Right:	NO	YES	YES
Possession:	NO	YES	YES
Management and Control:	NO	YES	YES
Non-gratuitous Severance:	NO	NO	YES ³⁹
Survivorship:	NO	NO	YES

THE MAJOR CASES

Although a number of California cases have stated that commu-

36. See CAL. CIV. CODE §§ 5124, 5127 (West Supp. 1982). See also CAL. PROB. CODE § 201 (West 1956).

37. See CAL. CIV. CODE § 5105 (West Supp. 1982).

38. See CAL. CIV. CODE §§ 5125, 5127, 5127.5 (West Supp. 1982).

39. California has moved joint tenancy toward community property instead of the other way around in dealing with the termination of joint tenancies by the destruction of one of the unities. At common law, any unilateral or bilateral conveyance or withdrawal of a joint tenant's aliquot portion of the property operated to terminate the joint tenancy as to that person. 2 W. BLACKSTONE, COMMENTARIES *1883. The California adaptation requires the intention of both joint tenants in order to terminate the joint tenancy in many cases; otherwise, the proceeds of a joint tenancy are also joint tenancy. See *Fish v. Security-First Nat'l Bank*, 31 Cal. 2d 378, 189 P.2d 10 (1948). Tracing proceeds is a technique used by community property law, but not done for joint tenancy at common law. One of the consequences of this California doctrine is that property can be owned in joint tenancy without an express statement that it is joint tenancy (thus avoiding the requirement of CAL. CIV. CODE § 683 (West 1982) that it be "expressly declared in the . . . transfer to be a joint tenancy") because it is traced to property which was so expressly stated and which was changed in form without the intention to sever the joint tenancy. See R. MENNELL, CALIFORNIA DECEDENTS' ESTATES 8 n.2 (1973). Note that regardless of which doctrine moved, this is further evidence of the trend in California to blend the incidents of community property and joint tenancy.

nity property cannot simultaneously be held in joint tenancy,⁴⁰ the three most significant are *Estate of Gurnsey*,⁴¹ *Siberell v. Siberell*⁴² and *Tomaier v. Tomaier*.⁴³

The leading case is *Estate of Gurnsey*; the court held that property "passed out of the community"⁴⁴ when a joint tenancy bank account deposit was made. In 1918 when *Gurnsey* was decided, the wife did not have a present, vested, and equal interest in the community property; the husband had full management and control. When the joint tenancy account was created, exclusive management and control passed from the husband, and the wife's interest expanded from an expectancy⁴⁵ to vested ownership in the property. In view of such differences in the incidents of title, it is understandable that the *Gurnsey* court refused to permit co-existence of community property and joint tenancy.

In *Siberell v. Siberell*, the most scholarly modern case to distinguish community property from joint tenancy, the court quoted and followed *Estate of Gurnsey*. *Siberell* recited the gradual growth of the wife's rights in community property from an expectancy to a vested interest, but failed to consider those changes in evaluating the doctrine that joint tenancy and community property are mutually exclusive.⁴⁶

In *Tomaier v. Tomaier*, Justice Traynor repeated the *Siberell* rule that property held in joint tenancy cannot also be held as community property because certain incidents of the former would be inconsistent with the incidents of the latter.⁴⁷ The *Tomaier* case broke new ground, however, by reducing the degree of formality necessary to rebut the presumption that property in joint tenancy form was intended to be joint tenancy in fact.

Neither *Siberell* nor *Tomaier* considered the extent to which the changes in the incidents of community property coincided with the ownership interests in joint tenancy. Rather, in these cases, the courts concerned themselves with other previously unresolved issues.⁴⁸

40. See cases cited *supra* note 6.

41. 177 Cal. 211, 170 P. 402 (1918); see also *Estate of Harris*, 169 Cal. 725, 147 P. 967 (1915); *De Witt v. San Francisco*, 2 Cal. 297 (1852).

42. 214 Cal. 767, 7 P.2d 1003 (1932).

43. 23 Cal. 2d 754, 146 P.2d 905 (1944).

44. 177 Cal. 211, 213, 170 P. 402, 403 (1918).

45. Such expectancy is commonly called a "mere expectancy" to distinguish it from a vested right.

46. 214 Cal. 767, 772, 7 P.2d 1003, 1005 (1932).

47. 23 Cal. 2d 754, 758, 146 P.2d 905, 907 (1944).

48. In *Siberell* the court was trying to avoid the unfortunate holding of *Dunn v. Mullan*, 211 Cal. 583, 296 P. 604 (1931), that property deeded to husband and wife without explanation was presumed to vest a half-interest therein in the wife as her separate estate and in the husband the remaining half as community property,

The retention of the distinction between community property and joint tenancy proved to be unwise. The *Tomaier* holding gave rise to a large number of cases⁴⁹ and scholarly articles⁵⁰ which

thereby creating a 75% ownership in the wife. This result was dictated by CAL. CIV. CODE § 164, a predecessor to CAL. CIV. CODE § 5110 (West Supp. 1982), which provides that property deemed to a married woman before 1975 is presumed to be her separate property. In *Tomaier*, the court authorized the admission of parol evidence to prove that the parties did not intend to create a joint tenancy by the express statement in writing that a joint tenancy was intended. 23 Cal. 2d 754, 757, 146 P.2d 905, 906.

49. The floodgate-opening by the *Tomaier* decision is evinced by many subsequent cases. See cases cited *infra* notes 51-53. See also the following appellate cases which decided whether property held in joint tenancy form was really community property:

(i) Divorce cases: Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980); LaMar v. LaMar, 30 Cal. 2d 898, 186 P.2d 678 (1947); Dickson v. Dickson, 225 Cal. App. 2d 752, 37 Cal. Rptr. 718 (1964); Isom v. Slaughter, 200 Cal. App. 2d 700, 19 Cal. Rptr. 541 (1962); McChesney v. McChesney, 182 Cal. App. 2d 268, 5 Cal. Rptr. 896 (1960); Palazuelos v. Palazuelos, 103 Cal. App. 2d 826, 230 P.2d 431 (1951); Perdicalis v. Perdicalis, 92 Cal. App. 2d 274, 206 P.2d 650 (1949); Cairo v. Cairo, 87 Cal. App. 2d 558, 197 P.2d 208 (1948); Tompkins v. Tompkins, 83 Cal. App. 2d 71, 187 P.2d 840 (1947); Wood v. Wood, 81 Cal. App. 2d 727, 185 P.2d 53 (1947); Silverstein v. Silverstein, 76 Cal. App. 2d 872, 174 P.2d 486 (1946);

(ii) Death cases (usually these suits arise between the surviving joint tenant and the executor of a will attempting to dispose of the property): Socol v. King, 36 Cal. 2d 342, 223 P.2d 627 (1950); Thompson v. Boyd, 217 Cal. App. 2d 365, 32 Cal. Rptr. 513 (1963); Lich v. Carlin, 184 Cal. App. 2d 128, 7 Cal. Rptr. 555 (1960); Edwards v. Deitrich, 118 Cal. App. 2d 254, 257 P.2d 750 (1953); Mademann v. Sexauer, 117 Cal. App. 2d 400, 256 P.2d 34 (1953); Estate of Jameson, 93 Cal. App. 2d 35, 208 P.2d 54 (1949); Silver v. Shemanski, 89 Cal. App. 2d 520, 201 P.2d 418 (1949); Hausfelder v. Security-First Nat'l Bank of Los Angeles, 77 Cal. App. 2d 478, 176 P.2d 84 (1946); Horsman v. Maden, 69 Cal. App. 2d 11, 157 P.2d 882 (1945); Estate of Wilson, 64 Cal. App. 2d 123, 148 P.2d 390 (1944);

(iii) Miscellaneous cases: United States v. Pierotti, 154 F.2d 758 (9th Cir. 1946) (estate tax); Bordenave v. United States, 150 F. Supp. 820 (N.D. Cal. 1957) (income tax basis); Schoenfeld v. Norberg, 11 Cal. App. 3d 755, 90 Cal. Rptr. 47 (1970) (enforcement of judgment); Lovetro v. Steers, 234 Cal. App. 2d 461, 44 Cal. Rptr. 604 (1965) (management and control; signature of both joint tenants required in order to release portion of promissory note); Turknette v. Turknette, 100 Cal. App. 2d 271, 223 P.2d 495 (1950) (putative spouse cases decided by analogy to divorce situation).

50. See articles cited *supra* notes 9 and 15, and *infra* note 69. See also Basye, *Joint Tenancy: A Reappraisal*, 30 CAL. ST. B.J. 504 (1950); Brown & Sherman, *Joint Tenancy or Community Property: Evidence*, 28 CAL. ST. B.J. 163 (1953); Effland, *Arizona Community Property Law: Time for Review and Revision*, 1982 ARIZ. ST. L.J. 1, 11-14 (1982); Ferrari, *Conversion of Community Property into Joint Tenancy Property in California: The Taxpayer's Position*, 2 SANTA CLARA LAWYER 61 (1962); Knutson, *California Community Property Laws: A Plea for Legislative Study and Reform*, 39 S. CAL. L. REV. 240, 252 (1966); Lyman, *Oral Conversion of Property by Husband and Wife from Joint Tenancy to Community Property*, 23 CAL. ST. B.J. 146 (1948); Miller, *Joint Tenancy as Related to Community Property*, 19 CAL. ST. B.J. 61 (1944); Mills, *Community Joint Tenancy—A Paradoxical Prob-*

elaborated the rules for establishing that property held in joint tenancy form of title was really community property. In many cases, the testimony as to the character of title was suspicious⁵¹ and vague.⁵² The undesirable flood of litigation abated only after two major changes in the law. First, special legislation was enacted which set forth a presumption that a single-family residence acquired during marriage as joint tenants is community property for the purposes of dissolution of marriage or legal separation only.⁵³ Second, the divorce laws⁵⁴ eliminated the concept of fault and the distinction between grounds as to whether an equal or unequal division of the community property is required.

The *Tomaier* case and its progeny suggest that abuses do occur

lem in Estate Administration, 49 CAL. ST. B.J. 38 (1974); Reppy, *Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management and Invalid Marriage*, 18 SAN DIEGO L. REV. 143 (1980); Comm. on Death Taxation of Estates and Trusts, *Property Owned with Spouse: Joint Tenancy, Tenancy by the Entireties and Community Property*, 11 REAL PROP., PROB. & TRUST J. 405, 426-31 (1976); Note, *Community Property: Admissibility of Evidence of Agreement that Property Invested in Joint Tenancy in California or in Non-community Property State Retain Community Character*, 32 CALIF. L. REV. 182 (1944); Comment, *Community Property—Joint Tenancy—Admissibility of Parol Evidence to Show Community Character of Property Deeded to Husband and Wife as Joint Tenants*, 17 S. CAL. L. REV. 401 (1944).

51. See, e.g., *Sears v. Rule*, 27 Cal. 2d 131, 163 P.2d 443 (1945), cert. denied, 328 U.S. 843 (1946); *Gloden v. Gloden*, 240 Cal. App. 2d 465, 49 Cal. Rptr. 659 (1966); *Opp v. Frye*, 70 Cal. App. 2d 478, 161 P.2d 235 (1945).

52. See, e.g., *Mears v. Mears*, 180 Cal. App. 2d 484, 4 Cal. Rptr. 618 (1960); *Schindler v. Schindler*, 126 Cal. App. 2d 597, 272 P.2d 566 (1954); *Walker v. Walker*, 108 Cal. App. 2d 605, 239 P.2d 106 (1952); *Nelson v. Nelson*, 100 Cal. App. 2d 348, 223 P.2d 636 (1950); *Luminoso v. Luminoso*, 75 Cal. App. 2d 472, 171 P.2d 516 (1946).

53. CAL. CIV. CODE § 5110 (West Supp. 1982). The statute would not have eliminated the need for litigation in the following cases as the realty involved was other than a single-family residence: *Beck v. Beck*, 242 Cal. App. 2d 396, 51 Cal. Rptr. 491 (1966); *Blankenship v. Blankenship*, 212 Cal. App. 2d 736, 28 Cal. Rptr. 176 (1963); *Borgerding v. Mumolo*, 153 Cal. App. 2d 821, 315 P.2d 347 (1957); *Tischhauser v. Tischhauser*, 142 Cal. App. 2d 252, 298 P.2d 551 (1956); *Rogers v. Rogers*, 86 Cal. App. 2d 817, 195 P.2d 890 (1948); *Andrews v. Andrews*, 82 Cal. App. 2d 521, 186 P.2d 744 (1947); *Waters v. Waters*, 75 Cal. App. 2d 265, 170 P.2d 494 (1946); *Huber v. Huber*, 27 Cal. 2d 784, 167 P.2d 708 (1946).

54. Until the adoption of no-fault divorce in 1970, community property was divided equally if the divorce was granted for any of four of the seven statutory grounds. If, however, the divorce was granted to one of the parties for any of the other three grounds of divorce (adultery, incurable insanity or the most popular ground, extreme cruelty) the divorce court was authorized to divide community property unequally "in such proportions . . . as the court . . . may deem just;" that is, the spouse who was not "at fault" could be awarded a larger share of the community property. Former CAL. CIV. CODE § 146 (West 1954), repealed by 1969 CAL. STAT. 1608, § 3. The courts were not authorized, however, to divide joint tenancy property unequally or to award the separate property (as joint tenancy was held to be) of one spouse to the other. See *Robinson v. Robinson*, 65 Cal. App. 2d 118, 150 P.2d 7 (1944). Therefore, it was advantageous for the plaintiff to allege a ground for divorce authorizing an unequal division of the community and to allege further that property held in joint tenancy form had been intended to be, and was, community property.

and special problems of proof have been created. It is desirable to minimize the differences between joint tenancy and community property in California to reduce the incentive to create false evidence (or suppress true evidence) of either the transmutation of joint tenancy to community property, or the severance of joint tenancy.

HOW CASE LAW COULD BE CHANGED

The differences between joint tenancy and community property will be reduced if community property is allowed to possess the incident of the right of survivorship for which joint tenancy is coveted. Two possible judicial routes are available. First, the courts could reverse the *Gurnsey, Siberell* and *Tomaier* rule that community property cannot be held as joint tenancy. Second, the courts could permit the addition of the incident of survivorship to community property.

The rule that the same property cannot be community property and joint tenancy at the same time should be reversed. The court should permit property to be held simultaneously as joint tenancy *and* community property, retaining the right of survivorship (and its non-gratuitous unilateral termination) but otherwise considering the property to be community property for the purposes of dissolution or divorce and claims by creditors during the lifetime of the joint tenants.

Reversal of the *Gurnsey, Siberell* and *Tomaier* line of cases is appropriate because the changes from historic community property law which now make the co-owners equal have eliminated the major differences between the two forms. Reversal would conform the law to the expectations of laypersons about a popular form of ownership, reduce the incentive for presentation of questionable evidence, and simplify probate and marriage dissolution⁵⁵ hearings.

55. The Second District Court of Appeal commented in *Schindler v. Schindler*, 126 Cal. App. 2d 597, 601, 272 P.2d 566, 568 (1954):

Usually not until marital discord reaches the critical stage of dividing community assets does one of the spouses—generally the one found to be innocent of wrong-doing and therefore entitled to more than half of the community property—first learn of the disadvantages of joint tenancy. At that point the issue of lack of comprehension, or absence of consent to the creation of the joint tenancy estate inevitably arises. Rare indeed is the contested divorce case today in which the trial court is not concerned with this issue.

Reversal of those cases would not disrupt reasonable expectations. The effect would be to allow joint tenancy property to be treated as community property. It would not have the effect of adding a right of survivorship to existing community property which is not in joint tenancy form because an express statement in the transfer is required in order to create a joint tenancy.⁵⁶

Community ownership of property is terminated either during life (which termination is usually a dissolution of the marriage) or at death. Problems are created by the desire of laypersons to combine the features of community property during life and joint tenancy at the moment of death, while courts insist that only one form will be permitted. Nevertheless, the combination has been partially authorized for divorce and separation cases. California presumes that a single-family residence acquired during marriage as joint tenants is community property for the purpose of dissolution.⁵⁷ The combination of features is thus authorized by statute for dissolution (by which joint tenancy is treated as community), but not for death (in which community property would be treated as joint tenancy).

RIGHT OF SURVIVORSHIP SEPARATE FROM JOINT TENANCY

Can a right of survivorship exist in California without the property being held in joint tenancy? The right of survivorship is found in tenancies by the entirety and in United States bonds. However, the common law tenancy by the entirety does not exist in California.⁵⁸ United States savings bonds registered in two names joined by "or" also create a right of survivorship under federal regulations and *Free v. Bland*,⁵⁹ as well as California Civil Code section 704. But, aside from that section (which could be a reflection of prevailing federal law), there is serious question whether a separate right of survivorship has been or will be recognized in California.

Legislation has suggested⁶⁰ that there may have been a sepa-

56. CAL. CIV. CODE § 683 (West Supp. 1982).

57. CAL. CIV. CODE § 5110 (West Supp. 1982).

58. See *Swan v. Walden*, 156 Cal. 195, 198, 103 P. 931, 932 (1909); *Delanoy v. Delanoy*, 216 Cal. 23, 26, 13 P.2d 513, 514 (1932); *Tischhauser v. Tischhauser*, 142 Cal. App. 2d 252, 256, 298 P.2d 551, 554 (1956).

59. 369 U.S. 663 (1962).

60. Griffith theorized in *Community Property in Joint Tenancy Form*, 14 STAN. L. REV. 87, 102 (1961), that the legislature accepted the proposition that community property could also be held in joint tenancy form because of an amendment to former CAL. PROB. CODE § 228 (West 1956) (as amended by 1939 CAL. STAT. 1065, § 1), dealing with the intestate distribution of a widow's or widower's property held as community property at the death of the predeceased spouse. That section, repealed by 1980 CAL. STAT. 136, stated that: "if . . . the estate . . . was community

rate right of survivorship at various times for bank accounts⁶¹ and the civil homestead.⁶² However, *Fingland's Estate*⁶³ and *Schuler v. Savings & Loan Soc.*,⁶⁴ held that the declaration of a right of survivorship creates a joint tenancy in the civil homestead; and *McDougald v. Boyd*⁶⁵ and *Hurley v. Hibernia Savings & Loan*,⁶⁶ held that bank deposits payable to the survivor of two or more depositors were joint tenancy property. The tradition of those cases⁶⁷ suggests that a right of survivorship separate from a joint tenancy is unlikely to be recognized by California courts.

It is wise jurisprudence to declare the right of survivorship to be an indispensable element of a joint tenancy. This avoids the necessity of stating "joint tenancy with right of survivorship" in California to distinguish a joint tenancy from other forms of common ownership, such as a tenancy in common. The term "joint tenancy" should imply a right of survivorship, and an attempt to create a joint tenancy without the right of survivorship should

property of the decedent and a previously deceased spouse, and . . . became vested in the decedent . . . by right of survivorship . . . in a joint tenancy between such spouse and the decedent . . . such property goes . . . to the children of the deceased spouse . . ." Griffith argued that "otherwise the emphasized material is superfluous since section 228 [then dealt] with separate property in joint tenancy form that comes to the survivor by right of survivorship." Griffith, *supra*, at 102.

A similar argument could be made regarding CAL. PROB. CODE § 229(b)(3) (West Supp. 1982), which defines "portion of the decedent's estate attributable to the decedent's predeceased spouse" to include "[t]hat portion of any community property in which the predeceased spouse had any incident of ownership and which vested in the decedent upon the death of the predeceased spouse by right of survivorship." Two interpretations are possible of the word "had" in CAL. PROB. CODE § 229(b)(3): "ever during the marriage had" or "had at the moment of his or her death." If the latter interpretation is used, the legislature can fairly be said to have recognized the possibility of the co-existence of community property and joint tenancy ownership. The argument is punctured, however, by comparing the result of *Estate of Kessler*, 217 Cal. 32, 17 P.2d 117 (1932), with *Estate of Taitmeyer*, 60 Cal. App. 2d 699, 141 P.2d 504 (1943) and *Estate of Nielsen*, 65 Cal. App. 2d 60, 149 P.2d 737 (1944). In *Kessler*, the Court accepted the "at the moment of his or her death" interpretation; the *Taitmeyer* and *Nielsen* courts accepted the "ever during the marriage" interpretation.

61. 1909 CAL. STAT. 76, § 16.

62. Former CAL. CIV. CODE § 1265, deleted by 1980 CAL. STAT. c. 119.

63. 129 Cal. App. 395, 397, 18 P.2d 747, 748 (1933).

64. 64 Cal. 397, 1 P. 480 (1883).

65. 157 Cal. 753, 159 P. 168 (1916).

66. 126 Cal. App. 314, 14 P.2d 574 (1932).

67. California law appears to diverge from common law in finding the right of survivorship and joint tenancy inseparable; generally an attempt to destroy the right of survivorship destroys a joint tenancy. See *infra* note 68. But see cases cited *supra* notes 63-66 (attempt to create a right of survivorship creates a joint tenancy).

fail.⁶⁸ The converse, however, is not necessarily true. If one cannot have a joint tenancy without a survivorship, it does not necessarily follow that one cannot have a right of survivorship without the property being held in joint tenancy.

Reversal of an established line of cases or institution of a new doctrine of separability of the right of survivorship is unlikely. The remedy, therefore, appears to lie with the California legislature rather than the courts. Such legislation needs to be explicit in its intention to avoid the interpretation that it intends to create a joint tenancy.

EXISTING SURVIVORSHIP RIGHTS IN CALIFORNIA

The right of survivorship does not offend public policy. There is nothing inherently wrong with avoiding probate. The same effect as a right of survivorship can be obtained by drafting legal or equitable joint life estates with alternate contingent remainders to the survivors upon each death. The same disposition (but not avoidance of the first probate) could be obtained by reciprocal contracts to devise and bequeath the property between two or more tenants in common.

The question is not whether probate should be avoidable by a right of survivorship, but whether a right of survivorship should be readily and easily available without the need for professional assistance. The argument has been made⁶⁹ that because the consequences of joint tenancy are not understood by laypersons, joint tenancy should be abolished. The same argument could be made for community property, motor vehicle registration and a vast number of legal relationships. The intention of that author was not to eliminate joint tenancies, but to insist that their creation be supervised by attorneys. Disregarding possible allegations of self-serving interests, other difficulties arise. The concept that only lawyer-supervised transactions affecting the disposition of property at death should be permitted is somewhat similar to control of certain medical preparations by requiring a doctor's prescription and a pharmacist's preparation. Without the doctor's prescription, the patient is deprived of the use of the medicine. Part of the justification for the prescription requirement is that the doctor can tailor the prescription to the patient's particular needs. Similarly, the lawyer can tailor joint tenancies to the appropriate cases. Unfortunately, the expense of both doctor and lawyer further limits the availability and utilization of their serv-

68. See *McDonald v. Morley*, 15 Cal. 2d 409, 101 P.2d 690 (1940).

69. See *Nossaman, The Joint Tenancy Problem*, 27 CAL. ST. B.J. 21, 25 (1952).

ices. Stricter requirements for creation limit access. Although this paper points out disadvantages of joint tenancy,⁷⁰ the author believes that there are not sufficient dangers in joint tenancy to warrant restricting access. The California legislature seems to agree, based upon the number of statutes which authorize joint tenancy forms of title.

California has two types of statutory provisions which authorize titles in joint tenancy—general provisions and provisions dealing with specific types of assets. The general provisions are Civil Code sections 682 and 5104.⁷¹ The special provisions authorize joint tenancy forms of title for such varied assets as United States savings bonds or other bonds or obligations of the United States,⁷² bank accounts,⁷³ savings and loan association accounts,⁷⁴ mutual savings and loan association accounts,⁷⁵ credit unions,⁷⁶ mobile homes⁷⁷ and motor vehicles.⁷⁸ In addition, other code sections⁷⁹ protect transfer agents⁸⁰ and financial institutions,⁸¹ which rely upon the joint tenancy form of title to transfer property or funds to a surviving joint tenant.

The general statutory provisions⁸² appear to lend grammatical support to the established rule that property cannot be both joint tenancy and community property. Civil Code section 5104 states that “[a] husband and wife may hold property as joint tenants, tenants in common, *or* as community property.”⁸³ Civil Code section 682 states that “[t]he ownership of property by several persons is *either*:

1. Of joint interests;
2. Of partnership interests;
3. Of interests in common;

70. See *supra* notes 11-14 and accompanying text.

71. CAL. CIV. CODE § 682 (West Supp. 1982); CAL. CIV. CODE § 5104 (West 1970).

72. CAL. CIV. CODE § 704 (West 1982).

73. CAL. FIN. CODE § 852 (West 1968).

74. CAL. FIN. CODE § 7602 (West 1968).

75. CAL. FIN. CODE § 11204 (West 1981).

76. CAL. FIN. CODE § 14854 (West 1981).

77. CAL. HEALTH & SAFETY CODE § 18080 (West Supp. 1982).

78. CAL. VEH. CODE §§ 4150.5, 5600.5, 39045 (West 1971).

79. CAL. CORP. CODE § 420 (West Supp. 1982); CAL. FIN. CODE §§ 852, 7603, (West 1968); CAL. FIN. CODE §§ 11204, 14854 (West 1981).

80. CAL. CORP. CODE § 420 (West Supp. 1982).

81. CAL. FIN. CODE §§ 852, 7603 (West 1968); CAL. FIN. CODE §§ 11204, 14854 (West 1981).

82. See *supra* note 71.

83. CAL. CIV. CODE § 5104 (West 1970) (emphasis added).

4. Of community interest of husband and wife.”⁸⁴

The use of the language suggesting alternatives (“or”, “either”) seems to indicate that property cannot be both joint tenancy *and* community property. But there are two other areas where duplication of the sub-parts of Civil Code sections 682 and 5104 exists: a tenancy in common may be either community or separate property;⁸⁵ and a partnership interest, as opposed to an interest in specific partnership assets, can be community property.⁸⁶ The statutory language does not mandate that community property never can possess the incident of the right of survivorship.

Even when the statute appears to be mandatory, there are exceptions. Civil Code section 683 requires an express intention to create a joint tenancy; but multiple fiduciaries hold title as joint tenants⁸⁷ unless an express provision to the contrary is made.

There are also certain statutes which create what is, in effect, a right of survivorship without necessarily creating a joint tenancy. Powers of appointment vested in several persons may be executed by the surviving competent donees of the power.⁸⁸ On the death of a partner, his or her right in specific partnership property vests in the surviving partners.⁸⁹

EXISTING SURVIVORSHIP RIGHTS OUTSIDE CALIFORNIA

The right of survivorship can be attached to many forms of holding title. Nevada permits attachment of a right of survivorship to community property.⁹⁰ All of the community property states except Louisiana attach a right of survivorship to joint tenancy property.⁹¹ Washington permits a community property agreement which not only allows a right of survivorship, but also permits disposition of the property to a third person.⁹² Idaho advances the Washington model still further by permitting separate property as well as community to be subject to the agreement.⁹³ The proposed Uniform Marital Property Act “Discussion Draft,” Section 16, provides for “Survivorship Marital Property” which is

84. CAL. CIV. CODE § 682 (West Supp. 1982) (emphasis added).

85. See Comment, *supra* note 15, at 636 n.2.

86. CAL. CORP. CODE § 15025(e) (West 1977).

87. CAL. CIV. CODE § 2288 (West 1954). See also *Moxley v. Title Ins. & Trust Co.*, 27 Cal. 2d 457, 165 P.2d 15 (1946); *Drinkhouse v. Birch Ranch & Oil Co.*, 97 Cal. App. 2d 923, 219 P.2d 45 (1950).

88. CAL. CIV. CODE § 860 (West 1982).

89. CAL. CORP. CODE § 15025(2)(d) (West 1977).

90. See *infra* note 95 and accompanying text.

91. See *supra* notes 1, 4 and 5 and accompanying text.

92. See *infra* note 100 and accompanying text.

93. See *infra* note 101 and accompanying text.

conceded to be a "novel idea."⁹⁴

Each of these statutes should be examined for the manner in which legitimate public policy concerns are addressed or ignored. Among such concerns are the formality and precision necessary to create, amend, and revoke the arrangement; the coverage (subsequently-acquired property, proceeds, rents, issues or profits, etc.) of the statute; and protection of creditors. The following detailed examination of the statutes shows that adequate drafting models exist for the California legislature to create a permissive right of survivorship as an incident to community ownership of property.

Nevada

Legislation in Nevada shows the ease with which a right of survivorship can be attached to community property:

Nevada Revised Statutes section 111.064(2) provides:

A right of survivorship does not arise when an estate in community property is created in a husband and wife, as such, *unless the instrument creating the estate expressly declares that the husband and wife take the property as community property with a right of survivorship*. This right of survivorship is extinguished whenever either spouse, during the marriage, transfers his interest in the community property.⁹⁵

Some questions are not answered by Nevada Revised Statutes section 111.064(2). For example, since the statute deals only with creation of the right of survivorship at the time of the creation of the interest in the property, can a right of survivorship be created by deeding property out and back?⁹⁶ Questions also arise as to what exact words are necessary to create a right of survivorship. Will the terms "or survivor" or "the survivor of" be sufficient?

The level of formality required is that of the statute of frauds, that is, "a writing" which is more than the oral conversation sufficient for a transmutation of the character of the property⁹⁷ and

94. UNIFORM MARITAL PROPERTY ACT 30-32 (Discussion Draft 1982).

95. NEV. REV. STAT. §§ 111.064(2) (1981) (emphasis added).

96. There appears to be very little risk of adverse property tax consequences in California from deeding out property between spouses in order to create the right of survivorship. Interspousal deeds are not a "change of ownership . . . after the 1975 assessment" within the meaning of CAL. CONST. art. XIII A, § 2. See also CAL. REV. & TAX. CODE § 63 (West Supp. 1982).

97. Although oral transmutions of the character of property from community to separate or vice versa were known in California before the decision in *Tomaier v. Tomaier*, 23 Cal. 2d 754, 146 P.2d 905 (1944), that case established the principle that oral testimony would be allowed to vary the written form required for joint

less than that necessary to record a deed. The still more formal requirements of the statute of wills could have been required on the theory that the right of survivorship has consequences similar to a will.

The Nevada statute deals only with property which is, or could be, acquired by an instrument in writing. Does the right of survivorship attach to the rents, issues, or profits or to the proceeds of a sale of such property?⁹⁸

Most of the major assets of a family are acquired by a written instrument. What of those items for which the documentation is simply a receipt for the purchase price, such as furniture, jewelry, cash, and collections of items such as stamps, coins, and rifles?

What type of transfer of the community property will terminate the right of survivorship? Will a unilateral transfer be sufficient? If so, there may be an extension of some of the questionable practices involved in terminating joint tenancies. Should involuntary transfers terminate the right of survivorship? If a creditor of a dying spouse attaches the property, what interest does the surviving spouse have in the property? Would an assignment or pledge by one of the spouses terminate the right of survivorship?⁹⁹

Another concern not answered by the Nevada statute is the protection of creditors. Although a creditor secured by joint tenancy property could properly be required to obtain the signature of both debtors, a creditor of community property might have dealt with only one of the spouses (who, naturally, is the first to die) and is therefore not be protected by the promise of the survivor spouse to pay.

Washington

Washington has the oldest and most complete statute permitting community property to have a right of survivorship. Revised Code of Washington section 26.16.120¹⁰⁰ permits spouses to cre-

tenancy. The converse situation, oral transmutation from community property to joint tenancy, is not possible because of the requirement of a writing in order to establish a joint tenancy imposed by CAL. CIV. CODE § 683 (West Supp. 1982).

98. In California, the proceeds of joint tenancy property, in the absence of contrary agreement, retain the character of the property from which they were acquired. *See Fish v. Security-First Nat'l Bank of Los Angeles*, 31 Cal. 2d 378, 387, 189 P.2d 10, 15 (1948); *Estate of Kessler*, 217 Cal. 32, 35, 17 P.2d 117, 118 (1932). It is probable that a parallel rule will be instituted for non-joint tenancy property.

99. CAL. FIN. CODE § 7603.5, (West 1968) and CAL. FIN. CODE § 11206.5 (West 1981), provide that no assignment or pledge to a savings and loan association by less than all of the survivors of the joint tenants shall operate to sever or terminate, either in whole or in part, the continuance of the joint tenancy, subject to the effect of such pledge or assignment.

100. WASH. REV. CODE § 26.16.120 (1979) provides in part:

ate, alter, and amend community property agreements with the formality required for deeds of realty. An agreement may affect all or part of present or future community property and may direct the disposition of the property after the death of either spouse. The rights of creditors are expressly protected.

The Washington statute is perhaps the best model by which the California legislature could respond to the desires of California couples to own community property with the right of survivorship.

Idaho

Idaho Code section 15-6-201¹⁰¹ modifies an otherwise-uniform

Nothing . . . in any law of this state, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterwards to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband and wife by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged and certified in the same manner as deeds to real estate are required to be, under the laws of the state, and the same may at any time thereafter be altered or amended in the same manner: *Provided, however*, that such agreement shall not derogate from the right of creditors, nor be construed to curtail the powers of the superior court to set aside or cancel such agreement for fraud or under some other recognized head of equity jurisdiction, at the suit of either party.

For a thorough analysis of this code section see Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 729, 798-802 (1974).

101. IDAHO CODE § 15-6-201 (1979) provides:

(a) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, conveyance, agreement to pass property at death to the surviving spouse or any other written instrument effective as a contract, gift, conveyance, or trust is deemed to be nontestamentary, and this code does not invalidate the instrument or any provision:

(1) that money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently; . . .

(2) that any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

(b) Nothing in this section limits the rights of creditors under other laws of this state.

(c) In the case of agreements to pass property at death to the surviving spouse, such agreements shall be executed in writing, acknowledged or proved in the same manner as deeds to real property, contain a description of all real property, be altered or amended in the same way, and shall be revoked in the event husband and wife are subsequently divorced. The existence of such an agreement shall not affect the rights of creditors and

Uniform Probate Code by adding material (similar to the Washington provisions) permitting a community property agreement which controls the passage of the property upon the death of either spouse. Idaho requires that the agreement be recorded.¹⁰² The Idaho provisions also specify that the agreement is revoked upon divorce.¹⁰³

CONCLUSION

The right of survivorship is a desired incident of various forms of holding title, including joint tenancy. California cases unnecessarily concluded that community property cannot simultaneously be joint tenancy. These cases do not, however, preclude the creation of a voluntary addition to the community ownership of the right of survivorship. Additionally, the cases are based upon former differences between community property and joint tenancy.

The Idaho, Nevada, and Washington examples demonstrate that the voluntary addition of the right of survivorship to community property can be achieved. California should respond to the legitimate needs of its citizens by permitting the addition of an optional right of survivorship to community property.

any debt, cause of action or any obligation which could have been presented as a claim against the property of the decedent's estate shall survive against the other parties to the agreement; statutes of limitations on any such debts, causes of action, choses in action, or other legal obligations shall continue to run as though the deceased person had survived and any action brought against the persons succeeding to such property shall be brought within the period limited for the commencement of such action, provided that recovery against the person succeeding to such property shall be limited to the fair market value of the property at the time of the death of the decedent.

(d) No such agreement shall be effective to pass title to property until it has been recorded, prior to the death of any party thereto, in the recorder's office of the county of the domicile of the decedent and of each county in which real property described therein is located; nor shall any amendment to any such agreement be effective for any purpose until such amendment has been recorded in like manner prior to the death of any party thereto.

102. IDAHO CODE § 15-6-201(d) (1979).

103. IDAHO CODE § 15-6-201(c) (1979).