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Joint Tenancy and Community Property

Yale B. Griffith

JOINT TENANCY AND COMMUNITY PROPERTY

YALE B. GRIFFITH*

The public demand in Washington which led to the adoption of the joint tenancy initiative is not surprising in view of the widespread use of this form of title in other states. However, Washington is still a community property state and the people's desire for joint tenancy with its popular survivorship feature does not necessarily indicate their intention to change the community property system. Laymen will commonly use community funds to buy property and will now take title in joint tenancy, fully hoping to have some of the advantages of each. This practice has led to a deluge of litigation in California and some in other states,[1] and will undoubtedly give rise to problems in Washington.

Laymen usually select the joint tenancy form of title because of its survivorship feature, with no thought given to tax consequences or problems rising on severance or divorce or even to the matter of treating creditors and other beneficiaries fairly. Taking title to property in both names has a strong emotional or psychological appeal.[2] People do not realize that except for very small "no tax" situations the work of the lawyer and the resulting expense is just as great if property is in joint tenancy as if it is in some other form. Before examining the problems surrounding the interrelation of community property and joint tenancy, it is first necessary to examine a few of the more important joint tenancy characteristics and contrast them with community property rules.

CHARACTERISTICS OF SURVIVORSHIP

The characteristics of joint tenancy have their origin in the common law and the feudal system. Joint tenancy was favored in early England because the feature of survivorship meant that upon death the land

* Member, California Bar Association. Partner, Griffith & Thornburg, Santa Barbara, California.

[1] Brown & Sherman, *Joint Tenancy or Community Property:Evidence,* 28 CALIF. S.B.J. 163 (1953); and see cases collected in 41 C.J.S. *Husband & Wife* 1030, 1051 (1944).

[2] "Another advantage, just as intangible as the peace of mind which the availability of funds may give to a widow, is the benefit to family relationships which may result from the joint ownership of property. Very frequently such an arrangement is felt to be a vote of confidence. . . ." Powell, *Joint Ownership in Estate Planning,* 22 OHIO ST. L.J. 292, 294 (1961).

would not be divided among the heirs, and the surviving joint tenant would hold the entire fee thus enabling the feudal lord to continue to deal with just one owner. The unfairness of this means of cutting out other heirs has led to a complete change of legislative and judicial preference.[3]

Many states declared that the joint tenancy itself or at least the right of survivorship was abolished. Other states declared that a conveyance to two or more persons created a tenancy in common in the absence of clear language showing an intention to create a joint tenancy.[4] "Courts of equity, regarding the right of survivorship as productive of injustice in making no provision for posterity, lay hold of any indication of intention, in order to construe an instrument as creating a tenancy in common and not a joint tenancy."[5] Most lawyers favor this trend because it gives much greater flexibility in drawing wills and because of the many objectionable features of joint tenancy, including the possibility of severance and its tax disadvantages.[6]

The nature of survivorship in joint tenancy is well set forth in TIFFANY, REAL PROPERTY.

> The doctrine of survivorship appears to be the result of, or at least associated with, the theory that the joint tenants together own but one estate, a theory which, rigidly applied, would recognize no distinct interest in one to pass on his death to his heir or devisees, his claim being, as against the others, merely extinguished in that case. The survivor takes no title by survivorship but holds under the deed by virtue of which he was originally seized of the whole.
>
> The right of the survivor to succeed to the interest of the deceased joint tenant takes precedence over any devise made by the latter, nor can it be affected by any charge placed by the latter on his interest, or by a grant by him of a right of use or profit. It may, however, be destroyed at the option of either joint tenant by a severance of the tenancy.[7]

The survivorship feature also cuts out the creditors of the first to

[3] It is positively stated in 4 THOMPSON, REAL PROPERTY 310 (1940), "The present policy of the law is to regard joint tenancies with disfavor."

[4] The types of legislation on this matter are well compared in 2 NILES & WALSH, AMERICAN LAW OF PROPERTY § 6.3 (1952, Supp. 1960). The statutes and decisions abolishing or limiting joint tenancy are collected in 4 THOMPSON, *op. cit. supra* note 3, at § 1785.

[5] Shipley v. Shipley, 324 Ill. 560, 561, 155 N.E. 334, 335 (1927).

[6] Arnoldy, *Should Joint Tenancy Be Abolished?* 12 L.A.B. BULL. 6 (1936); Knecht, *Correcting Joint Tenancy Evils,* 93 TRUSTS & ESTATES 8 (1954); Marshall, *Joint Tenancy, Taxwise and Otherwise,* 40 CALIF. L. REV. 501 (1952); Nossaman, *The Joint Tenancy Problem,* 27 CALIF. S.B.J. 21 (1952); Young, *Tax Incidents of Joint Ownership,* 1959 U. ILL. L.F. 972 (1959).

[7] TIFFANY, REAL PROPERTY 198 (3d ed. 1939).

die.[8] This follows from the theory of *jus accrescendi* and that each joint tenant owns *per mi et per tout;* the death of one co-tenant merely terminates his interest. The survivor does not inherit; he already owned it all subject to sharing with his joint tenant. The interest of the survivor cannot, therefore, be burdened with the obligations of the deceased whose own rights have terminated.

Until inheritance tax statutes were changed to apply specifically to joint tenancy this tax was denied the standing of an estate obligation and was held to have no application to a termination of joint tenancy because the survivor already owned it.[9] Even a judgment against one joint tenant would be lost by his death unless the creditor had pushed through to an execution sale, and thereby obtained a deed severing the joint tenancy.[10]

The use of the joint tenancy form does not establish that the survivorship principle will always apply. Even though the form may strictly follow the conventional language necessary to create a joint tenancy, there are a number of situations where no right of survivorship is recognized.

When the Uniform Simultaneous Death Act applies. This act has now been widely adopted and provides that in cases where survivorship cannot be proven the property is divided equally between the estates of the joint tenants.[11]

When one joint tenant murders another. There is a divergence of authority on this point. The leading case of *Bradley v. Fox*[12] treated the murder as a severance and the property held as tenants in common. The constructive trust theory, that the murderer takes by survivorship but holds the property in trust, is now favored by such writers as Bogert and Scott, and is adopted in the RESTATEMENT.[13]

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[8] Zeigler v. Bonnell, 52 Cal. App. 2d 217, 126 P.2d 118 (Dist. Ct. App. 1942); Musa v. Segelke & Kohlaus Co., 242 Wis. 432, 272 N.W. 657 (1937). See also 111 A.L.R. 168 (1937).

[9] *In re* Gurnsey's Estate, 177 Cal. 211, 170 Pac. 402 (1918); McDougald v. Boyd, 172 Cal. 753, 159 Pac. 168 (1916).

[10] Zeigler v. Bonnell, 52 Cal. App. 2d 217, 126 P.2d 118 (Dist. Ct. App. 1942); Swenson & Degnan, *Severance of Joint Tenancies,* 38 MINN. L. REV. 466 (1954).

[11] RCW 11.05.030; CAL. PROB. CODE § 296.2. See Comment, *Effect of Simultaneous Death of Joint Tenants,* 14 N.Y.U. INTRA. L. REV. 130 (1959).

[12] 7 Ill. 2d 106, 129 N.E.2d 699 (1955).

[13] SCOTT, TRUSTS 3203 (2d ed. 1956); RESTATEMENT, RESTITUTION § 188 (1937); BOGERT, TRUSTS & TRUSTEES § 478 (2d ed. 1960). The case of Abbey v. Lord, 168 Cal. App. 2d 499, 336 P.2d 226 (Dist. Ct. App. 1959), followed constructive trust theory and the property was held by the surviving murderer to be divided upon the basis of contribution or source of funds.

When one joint tenant has conveyed his interest to a third person or has in some other manner caused a severance. Then the co-tenant relationship becomes a tenancy in common. The matter of severance is a separate and large one in itself and presents one of the reasons for the great criticism of joint tenancy. What constitutes severance is beyond the scope of this article, but the fact that severance may take place and thereby defeat the survivorship is significant.[14]

When the deceased joint tenant puts the survivor to election by will. The result is that the survivor must waive survivorship rights and permit the property to go by will in order to receive other and greater benefits by the will.[15]

When property, although in joint tenancy form, is community property by agreement or understanding of the spouses. This situation exists in such a large proportion of the cases that joint tenancy is now coming to be recognized as one of the most widely used methods of holding title to community property.[16] However the difficulty of proving the understanding or agreement gives rise to much litigation.[17] Once the community property character is established, the community property characteristics all follow, including the right of testamentary disposition, community treatment of creditors' rights and taxes.[18]

Community property differs completely from joint tenancy in that there is no principle of survivorship in the former. The basic roots of the community property system are in the civil law. Property is community in character depending upon its source and the form of title

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[14] Reichelderfer, *Severance of Joint Interests,* 1959 U. ILL. L.F. 932; Romig & Shelton, *Severance of a Joint Tenancy in California,* 8 HASTINGS L.J. 290 (1957); Swenson & Degnan, *Severance of Joint Tenancies,* 38 MINN. L. REV. 466 (1954).

[15] Bird v. Stein, 204 F.2d 122 (5th Cir. 1953); Security First Nat. Bank v. Stack, 32 Cal. App. 2d 586, 90 P.2d 337 (Dist. Ct. App. 1939); Effland, *Estate Planning: Co-Ownership,* 58 WIS. L. REV. 507 (1958); Mann, *Some Current Problems Involving Joint Tenancies,* 40 ILL. B.J. 370 (1952); Wilson, *Title Examiner Requirements in Event of Death of a Joint Tenant,* 18 KAN. B.A.J. 211 (1950). The writer urges that, in view of the accepted doctrine of election, any title examiner must determine whether there is a will putting a surviving joint tenant to election.

[16] Griffith, *Community Property in Joint Tenancy Form,* 14 STAN. L. REV. 87 (1961).

[17] Brown & Sherman, *Joint Tenancy or Community Property: Evidence,* 28 CALIF. S.B.J. 163 (1953).

[18] Sandrini v. Ambrosetti, 111 Cal. App. 2d 439, 244 P.2d 742 (Dist. Ct. App. 1952). Will of deceased wife in favor of her children was upheld as disposing of her half of community property even though the property was held in joint tenancy form with surviving husband. See also *In re* United States v. Pierotti, 154 F.2d 758 (9th Cir. 1946) (Federal Estate Tax); McCollum v. United States, 2 AM. FED. TAX R. 2d 6170 (D.C. Okla. 1958) (Income tax basis); Hulse v. Lawson, 212 Cal. 614, 299 Pac. 525 (1931) (creditor of deceased husband); Chase v. Leiter, 96 Cal. App. 2d 439, 215 P.2d 756 (Dist. Ct. App. 1950) (Joint will); *In re* Pearson's Estate, 93 Cal. App. 2d 35, 203 P.2d 52 (Dist. Ct. App. 1949) (Will).

is immaterial. The rights of a surviving spouse are governed by the law of wills and of descent.[19]

Today in California, Idaho, New Mexico and Nevada the surviving spouse succeeds to the decedent's share of community property in the absence of a will. In Arizona, Louisiana, Washington and Texas the decedent's share goes in whole or in part to his or her descendants. There are widely varying statutes of descent in the eight community property states, each of which gives the surviving spouse some share of the decedent's half, either as a first or alternate heir, with varying provisions for the children. All community property states recognize the right of testamentary disposition by the first to die except New Mexico where only the husband is given that right.[20]

The fundamental difference between joint tenancy and community property so far as the effect of the death of a spouse is concerned is that under the former the survivor takes upon the principle of survivorship regardless of any will. Under community property it is only in the absence of a will, and when there are no descendants in Washington,[21] that the surviving spouse may inherit, as heir, the decedent's half of the community property.

PROBLEMS ARISING WHEN PEOPLE PUT THEIR COMMUNITY PROPERTY INTO A JOINT TENANCY FORM

An investigation made during the last year in California, through analysis of recordings and of several thousand escrows, showed that over 85 per cent of all husband and wife deeds were in joint tenancy form.[22] It also showed that over 80 per cent of those were being paid for in monthly installments, thus indicating the overwhelming use of community funds. While the use of the joint tenancy form may be solely to save expense on death, there are many problems which may arise from its use. Let us see how the wife comes out.

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[19] 1 DE FUNIAK, COMMUNITY PROPERTY 554 and 558 (1943). "Under the Spanish Law, both husband and wife were authorized to dispose of their respective properties by will, and each spouse could dispose by will of his or her share in the community property to the same extent as his or her separate property. . . . In the absence of testamentary disposition by a deceased spouse, his or her share of the community property, as well as his or her separate property, passed to his or her heirs according to the law of succesion or inheritance."

[20] 1 DEFUNIAK, COMMUNITY PROPERTY 562 (1943).

[21] RCW 11.04.050.

[22] Griffith, *Community Property in Joint Tenancy Form*, 14 STAN. L. REV. 87 (1961). The title report in 3398 escrows in eleven different California counties over the period of 1957 to August, 1961 were examined. In 83.23 per cent of these there were one or more encumbrances. In 89.76 per cent of all title reports where title is vested in husband or wife or both the form is joint tenancy.

Assume that Mr. and Mrs. *A* use their community earnings to buy real estate taking title as joint tenants. Their total estates have a value of $200,000, of which $20,000 is made of car, bank accounts, furniture and securities, all in the husband's own name, and $180,000 is the joint tenancy real estate. When they bought this real estate it cost them $80,000, and they had no discussion concerning the form of title. The real estate broker had the deed made out in the form which is now most commonly used in California: "To John *A* and Mary *A*, husband and wife, as joint tenants." He told them that this was the usual and most economical way to take title and they both signed escrow instructions approving this form. Neither had any thought or intention of changing from community property, but they had no real understanding of the various characteristics of each type of property.

The husband died leaving a will in which his half of the community property was left to his son by a prior marriage. He also had an unsecured business debt of $15,000. Here are some of the problems faced by the wife.

1. She finds herself involved in a major quarrel and litigation with the son. She claims that putting the property into a joint tenancy form constituted a definite transmutation from community property and therefore she gets it all as the surviving joint tenant. The son insists that there has been no intention to give up the community property and his father's will definitely shows that he intended to keep his property as community in spite of any changes in form.[23]

2. After the payment of administration expenses and the funeral bill there is not enough community property left to pay more than a small fraction of the $15,000 business debt. The wife therefore tells the creditor she is sorry but since joint tenancy property goes to her free of claims owing by the deceased joint tenant she does not intend to sell or encumber her real estate to pay. The creditor insists that the real estate was community property and she has more litigation.[24]

3. When the attorney presents his bill the wife objects strongly and points out that she voted for initiative measure No. 208 in order to cut out such attorneys' fees. Her attorney explains that the joint tenancy form did not reduce or simplify his work in any way. He had to have the same title search and inventory prepared in order to file a Federal

[23] See Sandrini v. Ambrosetti, 111 Cal. App. 2d 439, 244 P.2d 742 (Dist. Ct. App. 1952).

[24] *In re* McNair & Ryan, 95 F. Supp. 434 (S.D. Cal. 1951); *In re* Trimble's Estate, 57 N.M. 51, 253 P.2d 805 (1953).

Estate Tax Return. He had to deal with creditors. He had to get a court adjudication that taxes were paid and the joint tenancy terminated. There is no reason for his charging the widow any less than if the property had been all community property.

4. The wife sells the real estate for $180,000, the same amount reported for Federal Estate Tax purposes. On her income return she reports no gain since the entire community property gets a new basis on the death of either spouse. The internal revenue agent assesses a deficiency income tax upon the theory that since the property was joint the wife's half was not subject to estate tax and retains its original basis—one half of $80,000. The profit, claims the agent, is the difference between $40,000 basis and $90,000 sale price for her half.[25]

5. We may vary the facts only to the extent of having the husband convey his interest in the real estate to his son as a gift during his lifetime. The son now claims that his father had a perfect right to sever the joint tenancy during his life and there are no legal restrictions on the right of a joint tenant to give away and transfer his own half of the property. The wife claims that the property was community and that the husband could not give away any part of community real estate without her signature on the deed. The husband sits helplessly by as his wife and his son litigate the matter.[26]

6. Let us assume that the real property has a value of only $20,000 and there are no liabilities or other assets except a joint bank account and except household furniture, and the husband dies. The wife conscientiously pays all funeral bills and all of the incidental current bills. There is a will leaving everything to her, and she files it in court but does not offer it for probate. She pays the small state inheritance tax and gets a release. Then she sells the real estate and demands that the title insurance company insure her title without the delay or expense of probating the will. The title company refuses to get involved because the property might be community. She wonders why this new joint tenancy initiative was ever passed.

The problem in all of these illustrations is determining when community property has been transmuted into true joint tenancy as one half the separate property of each. Unfortunately the law is not clear

[25] McCollum v. United States, 2 AM. FED. TAX R. 2d 6170 (D.C. Okla. 1958); Bordenove v. United States, 150 F. Supp. 820 (D.C. Cal. 1957).

[26] See Mademann v. Sexauer, 117 Cal. App. 2d 400, 256 P.2d 34 (Dist. Ct. App. 1953).

and differs widely among the community property states. Washington appears to follow the rule which most favors community property. In *Munson v. Haye,*[27] the court held that the presumption from the joint tenancy form of a savings and loan account "was met and destroyed when proof was presented that the funds deposited were community property. That fact being established, evidence that was clear, certain and convincing was required to establish that Mr. and Mrs. Munson intended to change the status of community property." This is also in accord with the Arizona rule which is well stated in *Baldwin v. Baldwin:*[28]

> As between husband and wife a joint tenancy is an exception to the community property rule of this state and in derogation of the general policy of that system of holding property, and this being true, a clause in a deed creating a joint tenancy between them should be effective only when it clearly appears that both spouses have agreed that the property should be taken in that way . . . . We think that the party who relies on a joint tenancy clause in a deed should bear the burden of showing that the spouse whose property he claims is governed thereby knew that the deed so provided.[29]

In New Mexico there have been a number of cases and legislative changes. It was early established that there could be no transmutation from community property to joint tenancy or vice versa.[30] Then by overruling these cases it was determined that intent was controlling.[31] This was followed by *In re Trimble's Estate,*[32] where the court held, in favor of a community creditor, that merely putting property into a joint tenancy form did not cause a transmutation. The court stated:

> Stripping aside the technicalities of evidentiary force, the root spirit of all these decisions is *intent* and rightly so. Ultimately, if the dual estates of common law and the civil law can exist together compatibly, the amalgam must be the true intention of the parties. To preserve the virility of our indigenous form of marital ownership we have declared in the *Chavez* case that proof to support such transmutation must be "clear, strong and

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[27] 29 Wn.2d 733, 189 P.2d 464, 470 (1948).
[28] 50 Ariz. 265, 71 P.2d 791, 795 (1937).
[29] This principle was reaffirmed in Collier v. Collier, 73 Ariz. 405, 242 P.2d 537, 540 (1952), where property was held to be true joint tenancy because the deed contained a signed endorsement of acceptance in these words: "The above deed is accepted and approved by the grantees; it being their intention to acquire said premises as joint tenants with right of survivorship, and not as community property or as tenants in common."
[30] Newton v. Wilson, 53 N.M. 480, 211 P.2d 776 (1949); McDonald v. Lambert, 43 N.M. 27, 85 P.2d 78 (1938).
[31] Chavez v. Chavez, 56 N.M. 393, 244 P.2d 781 (1952).
[32] 57 N.M. 51, 253 P.2d 805, 813 (1953).

convincing" and more than "a mere preponderance of the evidence." We have no desire to retreat from this declaration.

To uphold the appellant in her contention we would have to rule that the deed, made out on a form for joint tenancy was alone such "clear, strong and convincing" proof, and further say that when one spouse was totally ignorant of the fact that deed was in such form, but believed the property was held as community property, that, nevertheless the proof of the intention of husband and wife to so convert the community property into an estate in joint tenancy had been established by more than a "mere preponderance of the evidence." This we cannot do.

In California the cases have been numerous and there has been much written about the problem. The major difficulty started with the famous dictum in the *Siberell*[33] case in 1932 where an attempt was made to emphasize the inconsistencies between joint tenancy and community property. This dictum is often quoted and used as a point of departure.

First, from the very nature of the estate, as between husband and wife, a community estate and a joint tenancy cannot exist at the same time and in the same property. The use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property but instead as a joint tenancy with all the characteristics of such an estate.

The confusion caused by this rigid and unrealistic rule was such that further interpretation became immediately necessary. In the same year *Delanoy v. Delanoy*,[34] modified the rule by saying that it applied "in the absence of any evidence of intent to the contrary."

The leading case of *Tomaier v. Tomaier*[35] in 1944 was a clear departure from the *Siberell* rule, and held that it was error to refuse to admit parol evidence to show that in spite of the joint tenancy form the parties intended to retain the community property character of their property.

This was followed by a deluge of cases in an attempt to determine just how much evidence was required in order to prove that the joint tenancy property was really community.[36]

[33] Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003, 1005 (1932).
[34] 216 Cal. 23, 26, 13 P.2d 513, 514 (1932).
[35] 23 Cal. 2d 754, 146 P.2d 905 (1944).
[36] Brown & Sherman, *Joint Tenancy or Community Property: Evidence*, 28 CALIF. S.B.J. 163 (1953). These writers made an excellent attempt to reconcile the cases on the matter of proof of agreement or understanding to continue the property as community. The present California rule regarding the ownership of marital property is

A typical judicial statement of the modern California rule is that of Judge Edmonds in *Gudelj v. Gudelj:*

> It is well settled in this state that the form of the instrument under which a husband and wife hold title is not conclusive as to the status of the property and that property acquired under a joint tenancy deed may be shown to be actually community property or the separate property of one spouse according to the intention, understanding or agreement of the parties. Whether the evidence against the presumption is sufficient to overthrow it is a question of fact. However, the presumption arising from the form of the deed may not be rebutted solely by evidence as to the source of the funds used to purchase the property.[37]

In California the problem is accentuated by the prevailing practice of taking title for husband and wife in joint tenancy form and paying for it with community property funds. The intent, to the extent that any real intent exists, is to have the benefit of joint tenancy termination on death but, for all other purposes, to retain the community characteristics. The courts have generally permitted this although a decision in California may go either way when the proof of intention is hazy and circumstantial. The trend is definitely toward a better support of community property and this would appear to more nearly follow the true intent of the parties.[38]

The courts of Washington will undoubtedly be faced with the

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simply stated in ARMSTRONG, CALIFORNIA FAMILY LAW. "The husband and wife, by informal arrangement between them, may hold the property in any marital property character they select and change that character at their pleasure, however it may differ from the formal title."

[37] 41 Cal. 2d 202, 259 P.2d 656, 662 (1953).

[38] Courts have recently upheld the community character upon the theory that neither husband nor wife really understand in spite of both parties signing the joint tenancy papers. See Martinelli v. California Pac. Title Co., 14 Cal. Rptr. 542 (1961).

The difficult problem of determining intent is well expressed by Judge Bray in Bowman v. Bowman, 149 Cal. App. 2d 773, 777, 308 P.2d 906, 908 (Dist. Ct. App. 1957). "The intent to avoid probate is not inconsistent with the intent to have the property as community property. . . . [T]he intricacies of the law and subtle distinctions in respect to real estate titles, community property in particular, are not generally understood by laymen. Certainly the real nature of a particular transaction rather than the verbal form in which it is cast, must always be the decisive factor in cases of this nature." A modern statement showing practice and intention is that of Presiding Justice Shinn in Jenkins v. Jenkins, 147 Cal. App. 2d 527, 528, 305 P.2d 289, 290 (Dist. Ct. App. 1957). "It is a common practice for a husband and wife who have acquired funds as community property to use the same in the purchase of real property and to take title thereto as joint tenants, being motivated solely by a desire to have the privileges of survivorship. It frequently happens that they had no intention of abandoning community ownership and do not understand that placing the title in joint tenancy would affect a change of ownership or would serve any purpose other than to avoid the necessity of proceedings in probate. If evidence is sufficient to convince the court that the parties had no agreement and no intention to alter the community character of the property, it may properly be determined that it remains community property notwithstanding the fact that title was knowingly taken in joint tenancy."

problems arising when real estate is purchased with community funds and the title is put into a joint tenancy form. If the policy indicated in the case of *Munson v. Haye*[39] is followed, then many of the disadvantages of joint tenancy may be avoided. Once property is clearly community in character or source, the mere use of a joint tenancy form is not enough to change that status. In dealing with bank accounts, savings and loan accounts and savings bonds, all under special statutes, the courts have required more than form alone as proof of intent to give up the community character.[40] It would seem that people owning real estate are entitled to the same treatment.

In the six illustrations given above the one claiming the property to be community should prevail in the first five. If the informed intention of property owners could be determined as of the time the property is acquired it is probable that they would choose community treatment. It also appears to be fairer to creditors and heirs. There is no "clear, certain and convincing" evidence of any intent to give up community property as required by the Washington decisions.[41]

If people really want joint tenancy, they should use the Arizona form[42] of a signed acceptance on the deed stating that the grantees take it as joint tenancy with right of survivorship and not as community property. However, it is hoped that this form will not ordinarily be used because it is advantageous only in small estates where the problems illustrated above do not exist.

The last of these illustrations show the one occasion when the joint tenancy survivorship could be of real benefit. A title examiner should be able to determine without undue risk that the property will go to the widow anyway under the will and that there are no creditors. There is no need for a Federal Estate Tax Return or other extensive work by a lawyer. The joint tenancy, as the "poor man's will," works well this time. We, as lawyers, have an obligation to help people of modest means get their property transferred at a minimum of expense. This is more a service to needy people than real legal work. It is to be hoped that by the cooperation of the bar and the title insurance companies the use of joint tenancy in small estates may be made effective and inexpensive.

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[39] 29 Wn.2d 733, 189 P.2d 464 (1948).

[40] *In re* Allen's Estate, 54 Wn.2d 616, 343 P.2d 867 (1959) (U.S. savings bonds in POD form); *In re* Hickman's Estate, 41 Wn.2d 519, 250 P.2d 524 (1952) (Joint bank account); Tacoma Sav. & Loan Ass'n v. Nadham, 14 Wn. 2d 576, 128 P.2d 982 (1942) (Savings acct.).

[41] Munson v. Haye, 29 Wn.2d 733, 189 P.2d 464 (1948).

[42] Collier v. Collier, 73 Ariz. 405, 242 P.2d 537 (1952).

FEDERAL TAXATION

Any consideration of the relative merits of community property or joint tenancy must compare the tax consequences. We omit discussion of state tax matters since they should be left to a lawyer experienced in Washington practice. The federal tax treatment would be the same in all states and joint tenancy and community property have been the subject of much federal litigation, legislation, and writing.[43]

The Internal Revenue Service must follow state determinations of the character of property. Consequently the California rule which permits very informal agreements or understandings to establish that property in joint tenancy form is really community property has been accepted and followed in federal tax cases.[44]

The federal estate tax today falls about equally on community property and joint tenancy because of the marital exemption. Half of the property is taxed ordinarily when either spouse dies whether it is community property or true joint tenancy.[45] There is one exception; when the survivor can prove that he or she furnished more than half of the consideration then less than half of property which is true joint tenancy will be taxed.[46] The burden of proving the source may be difficult, and neither the government nor the taxpayer may like the uncertainty. The possibility of reducing the share of the property subject to estate tax to less than half gives an occasional advantage to joint tenancy.

The federal gift tax treatment of joint tenancy is definitely preferable to its treatment of community property. Normally it makes no difference whether property transferred as a gift is joint or community because the marital exemption will cause one half to be taxed in either case.[47] However, the adoption of a new section 2515 of the Internal Revenue Code in 1954 gives preferred treatment to joint tenancy. The gift tax may, at the election of the donor, be postponed when one spouse

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[43] See cases and statutes collected in 7 P.H. FED. TAX ¶¶ 125,150, 120,400; Nossama, *The Impact of Estate and Gift Taxes upon Disposition of Community Property*, 38 CALIF. L. REV. 71 (1950); Kragen, *The Marriage Undone Taxwise*, 42 CALIF. L. REV. 408, 431, (1954); Stacey, *Tax Consequences of Joint Ownership of Property*, 61 W. VA. L. REV. 167 (1959); Young, *Tax Incidents of Joint Ownership*, 59 U. ILL. L.F. 972 (1959); Thurman, *Federal Estate and Gift Taxation of Community Property Life Insurance*, 9 STAN. L. REV. 239 (1957).

[44] United States v. Pierotti, 154 F.2d 758 (9th Cir. 1946). A good analysis of the application of federal rules for following state court determinations is found in the comment, *Joint Tenancy v. Community Property in California: Possible Effects upon Federal Income Tax Basis*, 3 U.C.L.A. L. REV. 636 (1956).

[45] INT. REV. CODE OF 1954, § 2056(e) (5); 7 P.H. FED TAX ¶ 120,561.

[46] INT. REV. CODE OF 1954, § 2040; 7 P.H. FED. TAX ¶¶ 120,401, 120,403.1.

[47] INT. REV. CODE OF 1954, §§ 2501 and 2511; 7 P.H. FED. TAX ¶ 125,111.

puts real estate into the joint names of husband and wife.[48] The tax will arise when one joint tenant takes a larger share of the proceeds than he contributed. The putting of separate property of one spouse into community property is an immediate gift and there is no provision for postponement.[49]

The income tax treatment of community property and joint tenancy differs only in regard to the basis available for capital gain purposes. Here community property has a substantial advantage. The entire community property takes a new basis at date of death value if one spouse dies.[50] In a rising market and with continuing inflation this is important. The basis for property received upon the death of one joint tenant is split. The portion which was subject to federal estate tax gets as a new basis the value used for the estate tax.[51] The portion, normally one half, which was not subject to estate tax retains its original basis which may be very old and difficult to prove.

A bill before Congress to bring joint tenancy property which had been community into the same position as ordinary community property with a new basis for both portions has recently failed of passage.[52] The entire property owned by a husband in a common law state and in his name will get a new basis on his death even though only half was subject to federal estate tax because of the marital exemption. If community property is converted into true joint tenancy, however, there may be a very heavy capital gains tax after the death of one spouse due to the old cost on a part.

In an excellent article by Magnus E. Robinson in SOUTHERN CALIFORNIA LAW REVIEW[53] the unfairness of the present treatment for basis purposes of such joint tenancy property is well demonstrated. The fect that remedial legislation is supported by the American Bar Association Section on Taxation may be encouraging. Until this law is changed, however, the use of joint tenancy may prove very costly even to poor people who normally have no tax problems. The sale of a small

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[48] INT. REV. CODE OF 1954 § 2515; Treas. Reg. 25.2515-1-4; 7 P.H. FED. TAX ¶ 125,150.

[49] INT. REV. CODE OF 1954 Section 2515 is limited to joint tenancies and tenancies by the entirety, and to real estate owned by husband and wife and contains no comparable provision for community property so the usual gift tax obligation of section 2501 applies.

[50] INT. REV. CODE OF 1954, § 1014(b)(9); McCollum v. United States, 2 Am. Fed. Tax R. 2d 6170 (D.C. Okla. 1958). See Treas. Depart. ruling 59-220 CG 59-1; 2 1962 P.H. FED. TAX ¶ 10,425.

[51] INT. REV. CODE OF 1954, § 1014 (b)(9).

[52] See proposed amendment to INT. REV. CODE OF 1954, § 1014 (b) (6).

[53] Robinson, *The Basis of a Surviving Spouse's Interest in Transmuted Community Property*, 32 So. CAL. L. REV. 244 (1959).

home by a widow at a profit may deprive her of all other possible advantages of joint tenancy.

CONCLUSION

The development of Washington law regarding the relationship of joint tenancy to community property will depend very largely upon the forms which come into common use to create joint tenancies. If the language suggested by the Washington Land Title Association[54] including a signed acceptance by the grantees is to be used it may cut out all opportunity for the courts to determine that property is community in spite of the form of title. This will mean that creditors and property owners will find themselves saddled with all the disadvantages of joint tenancy and no hope of establishing an understanding that the property should remain community.

It would appear that property owners are faced with three choices. First, if they really want to give up all community property advantages they should use the Arizona or Washington Land Title Association form with its clear statement of intent to have true joint tenancy and not community property. Second, if they want community property they should take title in one name or both and avoid the joint tenancy form. Third, if they really want some of the advantages of both and if the Washington courts will permit it they should use the California form of joint tenancy and have an agreement that they retain the property as community.

Since the principal advantage of joint tenancy is the simple termination in "no tax" and no will or creditor situations, an effort should be made to keep it for those situations. The California form which does not provide for an acceptance and which permits the community property character to remain has much to commend it. The disadvantages of joint tenancy are so great that both lawyers and title companies would appear justified in avoiding the use of the positive form which denies community property character to property in joint tenancy form. It may then be possible to do what the layman really wants. Let him keep the advantages of community property but in small estates without problems, to have the joint tenancy survivorship convenience.

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[54] WASHINGTON LAND TITLE ASSOCIATION, PRINTED REPORT ON JOINT TENANCY, dated Jan. 24, 1961, for circulation to all title insurance companies.