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JOINT TENANCY FOR WASHINGTON?

HARRY M. CROSS*

Recurring proposals¹ to make joint tenancy ownership generally² available in Washington justify consideration of possible consequences of such a change from what has been the pattern of law since territorial days except for the aberration for a few years beginning in 1940.³ The absence of joint tenancies in general has probably put both the ordinary rules and the special complications of joint tenancy law beyond the ken of the typical Washington lawyer, hence a rudimentary summary of that law is desirable.

Joint tenancy is a form of co-ownership by two or more persons in which each co-owner stands in the same relationship to the asset as each other co-owner as regards the time of acquisition, the method of

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¹ There have been a number: Most recently H.B. No. 89 and H.B. No. 178, 1959 legislature, which did not pass; and currently Initiative No. 208.

² That is, other than in U.S. savings bonds held in co-ownership, where the survivor is stated to be sole owner, Treas. Reg., Code Fed. Reg. Title 31, part 315; RCW 11.04.230; and the "bank" accounts under RCW 30.20.015 as to commercial banks; RCW 32.12.030(3) as to mutual savings banks; RCW 33.20.030 as to savings and loan associations; and RCW 31.12.140 as to credit unions. This discussion does not purport to cover complications of ownership of these assets.

³ Although it is not entirely accurate to say joint tenancies, generally, do not exist in Washington because the statute only eliminated the incident of survivorship (but compare *Holohan v. Melville*, 41 Wn.2d 380, 393, 249 P.2d 777, 785 (1952)), that incident is most important and its elimination probably ends any particular utility of a joint tenancy. The present statute, RCW 11.04.070 enacted in 1953, is essentially a strengthening of the policy against survivorship, first adopted by the Act of Dec. 23, 1885, Wash. Terr. Laws 1885, p. 165, § 1, and unchanged until 1953, to preclude avoidance of the restriction by a contract for survivorship which the court first permitted in *In re Ivers' Estate*, 4 Wn.2d 477, 104 P.2d 467 (1940), or by exhibiting an intention to create a right of survivorship as suggested in *Holohan v. Melville*, *supra*. Avoidance of an anti-survivorship policy by contract is known elsewhere, see, e.g., 18 TEXAS L. REV. 232 (1940); 9 BAYLOR L. REV. 118 (1957); and even the present law probably does not prevent creation of an estate in a surviving cotenant by means of contingent remainders after a joint life estate or an executory limitation to a surviving co-owner, but these are not joint tenancy rights of survivorship and besides vary from the joint tenancy incident in being indestructible (probably). See O'Connell, *Are Joint Tenancies Abolished in Oregon*, 21 ORE. L. REV. 159 (1942); 4 POWELL, *Real Property* ¶ 616 (1954) [hereafter referred to as POWELL]; 2 AM. LAW PROP. § 6.3 (1952) [hereafter referred to as PROP.].

RCW 11.04.070 is as follows: "*Survivorship between joint tenants abolished—Exceptions.* The right of survivorship by agreement or otherwise as a principle and as an incident of joint tenancy or of tenancy by the entireties is abolished. If partition is not made between joint tenants, the parts of those who die first shall not accrue to the survivors, but descend, or pass by devise, and shall be subject to debts and other legal charges, or transmissible to executors or administrators, and be considered, to every intent and purpose, in the same view as if such deceased joint tenants had been tenants in common: *Provided*, That this section shall not apply in the following circumstances: (1) As between husband and wife in dealing with community property as otherwise provided by statute, (2) As to property and rights where the right of survivorship has been or may be revived by statute, (3) As to property and rights conveyed to trustees while subject to the trust. [1953 c 270 § 1; 1885 p 165 § 1; RRS § 1344.]"

acquisition, the interest acquired, and the right to possession. It is commonly stated that if these four "unities" (time, title, interest and possession) do not exist the co-owners are not joint tenants, even though there was an attempt to create a joint tenancy or there previously was a joint tenancy.⁴ The principal difference of consequence between the joint tenancy and a tenancy in common in the inter vivos relationship is in the "interest" unity;⁵ *i.e.*, the share size is the same for each joint tenant (if two, each a half; if three, each a third; etc.) whereas the share size of tenants in common can vary, usually according to the contribution each makes, although there is a presumption of equal shares;⁶ and the estates must be similar for each joint tenant, thus there could not be a joint tenancy if one owner had a life estate in half and the other a fee estate in the other half.⁷

"Survivorship" is the important incident of joint tenancy. The operative effect of this incident is to free the surviving joint tenant or tenants from the claims or interests of the deceased joint tenant. The theory is that each joint tenant has total ownership of the asset⁸ in addition to his share interest relevant only in determining inter vivos relationships. Taking by survivorship then does not amount to an inheritance or even a transfer at the death of one.⁹ The survivor, not being a successor, holds the asset free of any claims against the decedent.¹⁰ There is no comparable concept in tenancy in common; rather when one tenant in common dies his share goes to his successors (heirs or devisees) and not to the other tenant in common, as such. Hence the right of survivorship is operative only if there is a joint tenancy at the time of death of one co-owner.

"Severance" destroys the joint tenancy and therefore the right of survivorship. Much of joint tenancy law is concerned with this incident of severability. When one or more of the four unities is destroyed the joint tenancy is gone. Thus if A, joint tenant with B, conveys his interest to C there cannot be a joint tenancy between B and C for there is neither unity of time nor of title between B and C, and neither B

⁴ 2 PROP. §§ 6.1, 6.2; 14 AM. JUR. *Cotenancy* § 7; 48 C.J.S. *Joint Tenancy* § 3c. (Subsequent references to AM. JUR. and C.J.S. will be to these titles unless otherwise indicated.)

⁵ 2 PROP. § 6.1. For simplicity discussion herein is based on a joint tenancy between two persons though there can of course be more.

⁶ *Iredell v. Iredell*, 49 Wn.2d 627, 305 P.2d 805 (1957); 2 PROP., § 6.5; 4 POWELL ¶ 601; AM. JUR. § 17; 86 C.J.S., *Tenancy in Common* § 18.

⁷ 2 PROP. § 6.1.

⁸ 2 PROP. §§ 6.1, 6.2; 4 POWELL ¶ 619.

⁹ AM. JUR. § 6; C.J.S. § 1b.

¹⁰ 4 POWELL ¶ 618; AM. JUR. § 6; C.J.S. § 1b.

nor C would be total owner through survivorship if one died. Each joint tenant has the right voluntarily to sever the joint tenancy and further severance can occur involuntarily when a creditor sells the fractional interest of his joint tenant debtor. Severance is, however, an inter vivos phenomenon and the attempt of one joint tenant to dispose of his share by will fails against the operation of the right of survivorship.¹¹

In the early law the insulation of surviving joint tenants from creditors of a deceased joint tenant probably was an inducement to the use of joint tenancies, but the principal advantages were in avoidance of burdensome feudal incidents enforceable upon the death of an owner and in avoidance of dower estates for the widow of a deceased joint tenant. Elimination of the most burdensome feudal incidents also removed a principal demand for the use of joint tenancies, and the frustration of the reasonable expectations of heirs of a deceased joint tenant loomed larger in the appraisal of the device. The result in the United States and elsewhere has been a reversal of the preference for finding a joint tenancy rather than a tenancy in common. The modern preference is reflected in statutes which abolish joint tenancies, eliminate the incident of survivorship, or provide that co-ownership will be a tenancy in common unless there is a sufficient expression of an intent to create a joint tenancy rather than the preferred tenancy in common. The preference is frequently buttressed by rigorously applying technicalities of creation to frustrate even a clear expression of intention to create a joint tenancy.¹²

At one time use of a joint tenancy removed the asset from inheritance taxation comparably to the old avoidance of the feudal incident burdens at death, but this is no longer true¹³ and death tax burdens may even be greater when the device is used.¹⁴ Somewhat comparable is the desire to avoid the expenses of "probate" by removing an asset (through survivorship) from the estate of a deceased joint tenant. Experience in other states suggests there is substantial doubt whether as

¹¹ Severance, generally: 2 PROP., § 6.2; 4 POWELL ¶ 618; AM. JUR. § 14; C.J.S. § 4; Romig and Shelton, *Severance of a Joint Tenancy in California*, 8 HASTINGS L. J. 290 (1957).

¹² As to the preferences and modern statutes, generally: 2 PROP. § 6.3; 4 POWELL ¶ 602; AM. JUR. §§ 11, 12, 13; C.J.S. §§ 2, 3d.

¹³ 4 POWELL ¶ 619. Cf. *In re Peterson's Estate*, 182 Wash. 29, 45 P.2d 45 (1935) (account went by survivorship not inheritance, no inheritance tax) and *Nelson v. Olympia Fed. Sav. and Loan Ass'n*, 193 Wash. 222, 74 P.2d 1019 (1938) (change in inheritance tax statute made taking by survivorship taxable. Statute now RCW 83.04.020.)

¹⁴ See discussion *infra*, text for notes 49 *infra*.

a practical matter "death" costs are likely to be reduced by use of joint tenancies.¹⁵

But even if it is assumed that this saving may be realized in some instances there remains the question of whether the addition of joint tenancy possibilities to Washington law would not raise complexities which would be more expensive to resolve than the possible cost of not using the device. When it is appreciated that litigation, perhaps acrimonious, is likely against the person claiming ownership by survivorship when unintended results occur or heirs' or creditors' expectancies are frustrated if the joint tenancy rules control, the importance of the possibility of this sort of expense becomes apparent. While much of the following discussion is relevant to joint tenancies under any proposal, the language of the current proposal, Initiative 208, will frequently be used as a reference point.¹⁶

Initially there would arise problems of creation of the joint tenancy. Section 1 provides in part, "Joint tenancy may be created by written agreement, written transfer, deed, will or other instrument of conveyance, when expressly declared therein to be a joint tenancy . . ." The requirement of a writing probably would eliminate some controversy, but the proposal apparently contemplates writings of an informal character which might be prepared and become operative against a person unaware of the consequences. The problem of the sufficiency of a declaration of joint tenancy is also raised. Would a conveyance

¹⁵ See, e.g., Marshall, *Joint Tenancy, Taxwise and Otherwise*, 40 CALIF. L. REV. 501 (1952); Report of Comm. on State and Federal Taxation, 1954 Proceedings, Probate and Trust Law Divisions, Amer. Bar Ass'n. Section on Real Property, Probate and Trust Law at. 65.

¹⁶ [Initiative 208] AN ACT relating to joint tenancies permitting property to pass to the survivor without the cost or delay of probate proceedings, and protecting rights of creditors, and relating to other property interests, and repealing section 1, page 165, Laws of 1885, section 1, chapter 270, Laws of 1953 and RCW 11.04.070.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

Section 1. Whereas joint tenancy with right of survivorship permits property to pass to the survivor without the cost or delay of probate proceedings, there shall be a form of co-ownership of property, real and personal, known as joint tenancy. A joint tenancy shall have the incidents of survivorship and severability as at common law. Joint tenancy may be created by written agreement, written transfer, deed, will or other instrument of conveyance, when expressly declared therein to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants: PROVIDED HOWEVER, That such transfer shall not derogate from the rights of creditors.

Section 2. Every interest created in favor of two or more persons, in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint tenancy, as provided in section 1, or unless acquired as community property or unless acquired by executors or trustees.

Section 3. The provisions of this act shall not restrict the creation of a joint tenancy in a bank deposit or in other choses in action as heretofore or hereafter provided by law, nor restrict the power of husband and wife to make agreements as provided in RCW 26.16.120.

Section 4. Section 1, page 165, Laws of 1885, section 1, chapter 270, Laws of 1953, and RCW 11.04.070 are each repealed.

to two persons "jointly" be enough? Would conveyance to two persons "with right of survivorship" or some such language create a joint tenancy? Other possible variations¹⁷ will occur to the reader, and without definitive answers by the supreme court there would be no way to be sure that any language which did not expressly state "joint tenancy" did or did not create the relationship. Of course one could expect publication by the stationers of forms which would have language clearly sufficient to express the intent, and assuming that such a form was purposely used and the joint tenancy results were contemplated, the problem merely shifts to the technicalities of creating such an intended relationship.

If an owner, A, desires to create a joint tenancy for himself and B, the technicality of the unities of time and title must be considered. A common form used in this situation has been a deed from A to A and B as joint tenants, but since a person cannot convey to himself the effect of the deed could well be merely to create a tenancy in common for A and B, B having acquired his interest at a different time and by a different deed than did A. The effective method against this technicality is for A to convey to a stranger, X, who executes the joint tenancy deed to A and B.¹⁸ In many states statutes have been enacted to eliminate this foolishness, but with no relevant statutes in Washington there is no way of being sure what device can safely be used.¹⁹

If the two persons initially acquire the asset from a third person (no matter who pays for it) the problem of the preceding paragraph would not arise, but if the two are husband and wife and the acquisition is with community funds a different problem would arise. Unless both participate in the acquisition agreeing to the character of title taken and this can be proved, creation of a joint tenancy can be frustrated on a showing that this would be an unauthorized changing of the community property to separate property, depriving the non-acting spouse of her (or his) testamentary power.²⁰

¹⁷ 2 PROP. § 6.3; 4 POWELL ¶ 616; AM. JUR. §§ 11, 13; C.J.S. § 3d; Annot. 157 A.L.R. 566 (1945), 46 A.L.R.2d 523 (1956), 69 A.L.R.2d 1058 (1960). *Holohan v. Melville*, *supra* note 3, illustrates the possibility for controversy on the adequacy of the expression of intent to have survivorship.

¹⁸ 2 PROP. §§ 6.1, n. 10, 6.2; 4 POWELL ¶ 602, 616; AM. JUR. § 11; C.J.S. § 3 c; Anno. 62 A.L.R. 516 (1929).

¹⁹ *Ibid.*, as regards statutes elsewhere. The Washington case of *Volz v. Zang*, 113 Wash. 378, 194 Pac. 409 (1920) might be used to indicate direct conveyance, at least between husband and wife, would be effective, but the preferential position of community property ownership may be the principal support for the conclusion that one spouse can convey to both spouses (thereby changing separate property into community property).

²⁰ In this respect, for instance, a title insurance company could not safely contract that full title to a home was in a widower by survivorship if there were surviving

As to real property, there exists a further problem of establishing that survivorship has occurred. Not forgetting the problems of showing that survivorship could have occurred, somehow there would need to be a record showing that the death had occurred. Although there is statutory provision for the issuance of a death certificate,²¹ there is nothing which indicates that the certificate could be recorded by the county auditor who keeps the land records, yet without such a recording there would be the problem on each successive transfer of title to the land of establishing the fact of survivorship.²²

It is recognized, of course, that these possible complications could be avoided if the transaction was managed or arranged by a person knowledgeable in the matter, but in measuring the desirability of the adoption of joint tenancy law for Washington it cannot be ignored that the likelihood is that there would be widespread uninformed use of the device.²³ But if the joint tenancy is effectively created the problem

descendants of the deceased wife. Notice that the wife could not prevent the husband, as manager of community property, from investing the money in a home, and there is nothing in such an acquisition which would indicate the wife would necessarily know how the title was held. While this problem would not arise with regard to a "bank" account where both spouses signed the account cards, it could arise with reference to any asset where the acquirers did not somehow indicate acceptance of the form of ownership. As to U.S. savings bonds, see *In re Allen's Estate*, 154 Wash. Dec. 748, 343 P. 2d 867 (1959). For general discussion, see Comment *Joint Tenancy in New Mexico*, 27 ROCKY MTN. L. REV. 210 (1955); Miller, *Joint Tenancy as Related to Community Property*, 19 CALIF. S. B. J. 61, 63 ff (1944); Brown and Sherman, *Joint Tenancy or Community Property: Evidence*, 28 CALIF. S.B.J. 163 (1953).

In New Mexico to change from community property to joint tenancy holding requires clear and convincing proof of intent of both parties, see *In re Trimble's Estate*, 57 N. Mex. 51, 253 P.2d 805 (1953); in Arizona, both apparently must agree and in deed situations endorsement by the husband-wife joint tenant grantees on the deed seems to be the approved way, *Baldwin v. Baldwin*, 50 Ariz. 265, 71 P.2d 791 (1937); *Collier v. Collier*, 73 Ariz., 405, 242 P.2d 537 (1952) (but what about other sorts of assets?); in California, one spouse not knowing the joint tenancy form can recapture the asset for the community, or both can show community property ownership was intended despite the joint tenancy form, *Schindler v. Schindler*, 126 Cal. App.2d 597, 272 P.2d 566 (1954); *Siberell v. Siberell*, 214 Cal. 767, 7 P.2d 1003 (1932); and in Texas, a recent case held even knowledge and apparently agreement by both was not enough to change an asset from community property into a holding permitting survivorship, *Hilley v. Hilley*, 327 S.W.2d 467 (Tex. Civ. App. 1959). As to Idaho and Nevada, though no cases were found, it is believed a comparable problem exists, and in Louisiana which has no joint tenancy the approach with reference to U.S. saving bonds was comparable in *Slater v. Culpepper*, 222 La. 962, 64 So. 2d 234, 37 A.L.R.2d 1216 (1953) and the basis for the position of the Washington court in *In re Allen's Estate*, *supra*.

There might also arise the problem, in proving either the joint tenancy or community property character of an asset, of surmounting the barrier of the "dead man's statute" RCW 5.60.030. Cf. *Brown v. Davis*, 98 Wash. 442, 167 Pac. 1095 (1917) (W prevented from showing that community interest was to be preserved despite deed from her to H, now deceased.)

²¹ RCW 43.20.090.

²² A comparable problem now exists under community property agreements putting full title in the surviving spouse, and the bother and expense of getting the certified copy of a death certificate arises. The title companies now, apparently, require that the death certificate be delivered to them but do not try to have it recorded. Another possible complication to survivorship is discussed in Wilson, *Title Examiner Requirements*

becomes one of the likelihood that the purpose of saving "probate" costs would be realized. If there is to be any saving it can only result from the actual occurrence of survivorship.

As has been pointed out above, survivorship occurs only if the joint tenancy continues until the death of a co-owner, and anything which severs the joint tenancy prevents survivorship. In the simple situations of conveyance by one joint tenant of his share or involuntary sale on execution of a joint tenant's share there is no question that there is severance, but litigation to determine whether there has been a severance is a potential as regards a number of other possible manipulations of the share ownership.²⁴

At common law, execution of a mortgage by one joint tenant was a severance just as was an absolute conveyance, but where the mortgagee's interest is only a lien, as in Washington, there exists the possibility of arguing to the contrary on the analogy to a judgment lien, which normally does not in itself affect the joint tenancy. Would an attachment, with its interference with possession, result in severance? Apparently normally not. What is the effect of a lease executed only by one joint tenant? Is there such interference with the unities of interest and possession that there is severance? Or perhaps survivorship is only suspended and reattaches if the leasehold ends before death of a joint tenant. Similar problems are raised if a life estate is created by one of the joint tenants, though there may be more basis to argue this must effect a severance immediately. If a concept of suspension of the right of survivorship, without complete destruction of it, is recognized, would it be applicable also during the period for statutory redemption after the execution sale, with perhaps a relation-back operation in the event death occurred during the statutory year?²⁵

in Event of Death of a Joint Tenant, 18 J.B.A. KANS. 211 (1950). If the deceased joint tenant purports to devise the joint tenancy property to strangers and gives other property to the surviving joint tenant, the survivorship may disappear by reason of the election to take under the will, so the examiner must not only know of the death but also be sure that the decedent did not set up an election possibility by will.

²³ Here the lawyer is confronted with the economic complication common to most unauthorized practice problems. Uninformed use of the joint tenancy device might well engender litigation meaning substantial fees to lawyers, even greater than he would (or might) lose through adoption of the device. It is assumed that support or opposition to the proposed initiative will not have such a basis.

²⁴ Annot., 64 A.L.R.2d 918 (1959); 2 PROP. § 6.2; 4 POWELL ¶ 618; AM. JUR. § 14; C.J.S. § 4. See these references for the problems of the next paragraph of the text.

²⁵ Or putting it another way, could the debtor joint tenant surviving the non-debtor joint tenant acquire total ownership by redeeming from the execution sale after the death of the non-debtor? Notice, if he can, successors and creditors of the non-debtor would be wiped out by the relation-back survivorship!! And the same problem could arise if both co-owners were debtors and the survivor redeemed—would survivorship cut out heirs, etc., of the decedent?

If one joint tenant did not want to sell, but only to be free of co-ownership inconveniences, partition would accomplish his purpose (just as it does for tenants in common), and of course would sever the joint tenancy destroying the survivorship, but the partition action would have to reach judgment before the severance would occur. Does divorce sever a joint tenancy? The courts do not agree. It is even possible to find severance consequences when both joint tenants act and change the form of the asset, for example, by contracting to sell—the proceeds may be held in tenancy in common, not joint tenancy.²⁶ And there are of course additional circumstances under which severance problems arise.

While it may be that in most joint tenancy situations there would be no disturbance of the relationship through voluntary manipulations by one joint tenant, there is no way to predict whether creditors would exercise their rights with the resulting involuntary manipulations. But even if it be assumed that creditors would not sever the joint tenancy, a problem of interpretation of the language of the proposed initiative could and probably would arise.²⁷ In section 1 there is a proviso "That such transfer shall not derogate from the rights of creditors." An earlier sentence in the section states, "A joint tenancy shall have the incidents of survivorship and severability as at common law." The official *ballot* title (not the title of the proposed act) includes, "providing that the transfer of property to surviving joint tenants shall not derogate from the rights of creditors." If the purpose of the proviso is to permit a creditor to reach property in the hands of the survivor just as if there had been no joint tenancy, as the ballot title suggests, it is doubtful whether the language is sufficient. As pointed out above, survivorship is not transfer and the survivor's claim is not in derogation of a creditor's right; rather, as regards survivorship, the extent of the creditor's right is to prevent it by causing a severance of the joint tenancy; if he does not, his debtor's interest in the property upon which he depends has merely expired. Survivorship and severability "as at common law" ought to lead to these conclusions. Can the proviso have any other meaning? Probably yes, for it could permit a creditor to ignore the initial donative creation by his debtor of a joint

²⁶ Initiative 208 requires a writing to create a joint tenancy—to meet this requirement probably would necessitate an appropriate recital in the contract that payments were to be made to the sellers as joint tenants, otherwise the non-joint tenancy ownership of the proceeds would seem to be inevitable.

²⁷ Perhaps these observations merely demonstrate that legislation by initiative is usually poor without regard to the merit of the basic proposal.

tenancy between his debtor and another, and treat his debtor as sole owner even though the debtor's conveyance could not be shown to be in fraud of creditors; perhaps even permit the grantor's creditor to reach property in the hands of joint tenant grantees who were donees without showing the transfer was in fraud of creditors; and could permit a community creditor to reach all of an asset changed into a joint tenancy holding, even though he could not otherwise reach the half interest of the non-debtor spouse. But obviously, whatever the proviso means could not be stated with certainty without litigation.

Avoiding "probate" costs, as distinct from perhaps reducing them, would not be so certain as it might seem. Notice, first of all, that there would be no estate administration only if *all* assets were held in joint tenancy. This presents the practical problem of making sure that each asset, as acquired, was properly put into joint tenancy ownership. Section 1 of the initiative requires some sort of a writing to create a joint tenancy and would probably preclude establishing the joint tenancy character of ownership through tracing.²⁸ In this respect a not uncommon factual situation could involve the sale of a home owned in joint tenancy on an installment contract (or for that matter, for cash). As indicated above, in the absence of express provision in the contract there is disagreement among the courts whether the proceeds of the sale or the vendors' rights to future payments are held in joint tenancy.

Most of the above discussion concerns technicalities of joint tenancy law raising problems of real practical concern many, but not all of which, might be avoided by a careful use of the device, although a healthy skepticism can be held as to whether the problems would be avoided. Frustration of expectations and unintended consequences can follow from an uninformed use of the device, and certainly should be considered in measuring the desirability of adding joint tenancy to Washington law. Two illustrations may be used. It is not unknown for a surviving spouse to take most or all assets through joint tenancies to the exclusion of the children of the decedent, with an ultimate dis-

²⁸ It is conceivable, of course, that some sort of an agreement between spouses, who would be the ones most likely to be confronted with the problem, could be effective to control the character of ownership of future acquisitions as now can be done with respect to the community-separate property problems; but this would present problems of establishing the scope of the agreement in future transactions by the survivor as well as the necessity of definitive ruling by the supreme court on the efficacy of the attempt.

The problem of joint tenancy ownership of contents of safe deposit boxes held in "joint tenancy" has caused difficulties. Comment, 32 CALIF. L. REV. 301 (1944). The California Statute of 1949 changed the situation. Calif. Rev. Code § 683.1.

position either purposely or by intestacy to strangers when the survivor dies rather than to the stepchildren of the survivor. And probably most lawyers and many laymen know of situations where a bank account went totally to one of several children by survivorship even though the deceased parent had no desire or intention to prefer one child over the others. There does not appear to be need to foster the inadvertent promotion of family schisms.

To the extent that there may be much, the utility of joint tenancies is probably greatest as between husband and wife (ignoring the possible complications suggested above from second marriages), but measurement here requires consideration of community property rules. In other community property states which do have general joint tenancies it is recognized that one form of ownership is inconsistent with the other so that a husband-wife joint tenancy is an ownership of separate property by the two of them, not of community property.²⁹ Two differences are enough to indicate that this would be the expectable conclusion in Washington: First, neither joint tenant has the power to dispose of his share by will whereas either the husband or the wife can dispose by will of his or her half of the community property;³⁰ second, either joint tenant can convey his interest to strangers even by gift, whereas, neither the husband nor wife can convey his or her undivided interest in community property alone.³¹

It may well be doubted whether a joint tenancy property relationship between husband and wife rather than a community property relationship would be advantageous to them. In some instances, perhaps, but in others, no, and it seems to the writer that on balance the question should be answered, no. The differences are stated for the reader's own evaluation.

Neither husband nor wife alone can give community personal property (even a half interest therein)³² whereas either could give his or her half interest in joint tenancy property. The husband, as manager of community property, has power to transfer all interest in personal property, acting alone and for a community purpose—in effect, to sell,³³

²⁹ *Russo v. Russo*, 80 Ariz. 365, 298 P.2d 174 (1956); *Siberell v. Siberell*, 214 Cal. 767, 7 P.2d 1003 (1932); *Jacquemart v. Jacquemart*, 142 Cal. App.2d 794, 299 P.2d 281 (1956); *In re Trimble's Estate*, 57 N. Mex. 51, 253 P.2d 805 (1953) (in effect). Compare the problem of note 20, *supra*.

³⁰ RCW, 11.04.050.

³¹ The reasoning of *Stockand v. Bartlett*, 4 Wash. 730, 31 Pac. 24 (1892) is controlling: such division of community property is against public policy.

³² *Ibid*; *Marston v. Rue*, 92 Wash. 129, 159 Pac. 111 (1916).

³³ RCW 26.16.030.

whereas even to sell joint tenancy property both owners would have to act. The inconvenience to prospective purchasers might be great. The rules governing real property held in joint tenancy are the same as those applicable to personal property—either spouse can voluntarily (sell or give) or involuntarily transfer his or her interest without the concurrence of the other spouse. As to community real property, substantial protection is afforded the wife by the requirement that she participate in voluntary transfers or encumbrances, whether sale or gift.³⁴

Business transactions involving community personal property are likely to be simpler than those involving joint tenancy personal property as the transferee need deal only with the husband; and those involving real property are no more complex. Gift transactions involving full ownership are similar in both forms of ownership—both husband and wife must participate. Gifts by one spouse to third persons of a half interest are possible in joint tenancy holdings but not in community property holdings, but notice that this would eliminate any chance of taking by survivorship. Interference with the co-ownership by creditors of both spouses does not differ in one holding from the other, but creditors of one spouse alone could reach the debtor spouse's joint tenancy interest though not his or her community property interest.³⁵ Thus it would appear that the likelihood of the co-ownership continuing until the death of one spouse would be somewhat greater in community property holdings than in joint tenancy holdings.

If there has been no interference with the co-ownership prior to death of one spouse, total ownership will be in the surviving spouse through joint tenancy survivorship, whereas it will not as to community property unless the decedent dies intestate and without descendants or devises the share to the survivor.³⁶ The decedent spouse will not have been able to dispose of a half interest by will in joint tenancy but will have been able to do so in community property. Debts of the decedent cannot be enforced against the survivor in joint tenancy, but can against at least the decedent's half in community property.³⁷ Although this insulation from some debts may be thought advantageous it can well be doubted whether it is socially desirable,

³⁴ RCW 26.16.040, and, *e.g.*, *Campbell v. Webber*, 29 Wn.2d 516, 188 P.2d 130 (1947).

³⁵ Note 31, *supra*.

³⁶ RCW 11.04.050.

³⁷ *Crawford v. Morris*, 92 Wash. 288, 158 Pac. 957 (1916).

and of course the possible insulation from a limited amount of indebtedness (even the survivor's) through an award in lieu of homestead,³⁸ available as to community property, would not be available to joint tenancy property held outside of estate administration through survivorship.³⁹

But this is not the whole picture in Washington because of the unique statutory authorization for a "community property agreement" whereby the spouses can agree on the status and disposition of community property on the death of one of them.⁴⁰ The simplest form of agreement, that of survivorship to one spouse, may be first compared with a joint tenancy. By this device survivorship can be assured against the voluntary or involuntary act of one spouse alone, but no such assurance can be had through joint tenancy.⁴¹ Survivorship under either device would frustrate an attempt to dispose of an asset by will.⁴² The joint tenancy result as to creditors is stated above; the community property agreement survivorship would not defeat the rights of creditors of the decedent.⁴³ Disposition upon death by joint tenancy survivorship is limited to the simplest form, that is, the asset is owned totally by the survivor. Under the community property agreement statute there appears to be nothing to prevent the husband and wife providing for complicated dispositions in favor of the survivor, others, or the survivor and others, as they may desire,⁴⁴ which may have important tax advantages.⁴⁵ The lack of flexibility in disposition under joint tenancy may well be a serious disadvantage.

The joint tenancy rules as to the effect of survivorship on creditors could lead to a substantial change in credit practices. The careful creditor might demand that both spouses obligate themselves for credit

³⁸ RCW, c.11.52 particularly § 11.52.016.

³⁹ Although the decedent's debts would not be enforceable against the joint tenant survivor, the orderly settlement of debts promoted by the non-claim statute and notice to creditors (RCW, c.11.40) would also be lost and controversy might continue over the survivor's liability despite survivorship or on grounds of independent obligation of the survivor.

⁴⁰ RCW 26.16.120. Buckley, *The Community Property Agreement Statute*. 25 WASH. L. REV. 165 (1950).

⁴¹ That is, the inter vivos community property consequences outlined above are not changed. It should be noted, however, that when the community property agreement is made neither spouse alone can thereafter change the arrangement; as to joint tenancy either can change the scheme as to half.

⁴² *In re Brown's Estate*, 29 Wn.2d 20, 185 P.2d 125 (1947) (community property agreement controls against will).

⁴³ RCW 26.16.120 provides in part "[T]hat any such agreement shall not derogate from the right of creditors . . ." The sweep of the provision is unknown: for example, could the decedent's separate creditor reach a half interest in what had been community property, or are only "community" creditors protected?

⁴⁴ Cf. *In re Dunn's Estate*, 31 Wn.2d 512, 197 P.2d 606 (1948).

⁴⁵ Suggested below following text to note 52.

extended, whereas now the husband's act alone will obligate the family assets which are community property without there being any liability on the wife separately.⁴⁶ The existence of joint tenancies might therefore in practice result in more widespread liability of married women.⁴⁷

It could well be that many times none of the complications identified above would affect the ownership in particular situations⁴⁸ so that on death of one joint tenant all assets in which he was interested would be owned by the other joint tenant by survivorship. To what extent would there be likelihood of reduced cost of transfer? There would be no "probate" costs, as such; that is, there would be no administration of an estate because there would be no estate, and fees for a personal representative and an attorney *for the estate* would not be incurred. This is not the same as saying there would necessarily be no attorney's fees, for there could well be a necessity for an attorney's services, even though there was no estate, as regards such matters as satisfying the tax authorities as to the amount of death taxes due or that there were none due; and persuading third persons with whom the survivor has dealings that survivorship has perfected ownership. Some of these problems might well arise sometime after the death of one joint tenant with attendant difficulties (and extra expense) of getting adequate information and the possibility of interest costs added to the basic tax obligations. Such complications are at least simpler when the problems are promptly met during an estate administration. Even if an attorney's services should not prove to be necessary there would probably be costs to the survivor in time and money which cannot fairly be ignored in estimating whether there would be saving through joint tenancy use.

Tax burdens are not avoided by use of joint tenancies and they may be greater. If an unmarried person put his property in joint tenancy with another, there would then be a gift creating possible liability for gift taxes,⁴⁹ which if not paid at that time could result in additional

⁴⁶ Unless of course the three-way liability of the family expense statute attached. RCW 26.20.010.

⁴⁷ *CF.* Northern Bank & Trust Co. v. Graves, 79 Wash. 411, 140 Pac. 328 (1914).

⁴⁸ Though this seems to the writer to be an unduly optimistic estimate which should not be the basis of appraising the utility of adding joint tenancy to Washington law.

⁴⁹ Both state, RCW 83.56.030; and federal, 26 U.S.C. (I.R.C. 1954) § 2511, Reg. § 25.2511-1. In transactions involving modest amounts these taxes would not attach. Both federal and state laws provide an annual exclusion of \$3,000 for each donee 26 U.S.C. (I.R.C. 1954) § 2503 (b) and RCW 83.56.050; and the federal lifetime (cumulative) exemption of \$30,000 of gifts by the donor, 26 U.S.C. (I.R.C. 1954) § 2521 and the state cumulative exemption of \$10,000 for Class A donees and \$1,000 for Class B donees, RCW 83.56.040, would probably eliminate any likelihood of gift tax liability in most small transactions, though notice that reporting of gifts in excess of the exclusions would be required nonetheless.

interest costs. In addition, upon death of one joint tenant, all of the asset is included in the estate of the decedent for death taxes except to the extent that the survivor can prove that his assets are the source.⁵⁰ The writers indicate that avoiding total inclusion in the estate of the decedent is frequently impossible because of lack of sufficient evidence to justify exclusion of part or all of the value of the joint tenancy property.⁵¹ The practical problem also exists that a donor joint tenant might think of the asset as still his and expect to continue to exercise dominion over it. If this continued control is acceptable to the donee joint tenant, he may find himself subject to income tax liability for part of the income the asset produces even though he does not "feel" himself yet to be owner of anything!⁵²

A death tax complication that should not be overlooked arises from the inflexibility of survivorship. In estates reaching into tax brackets, passage of half the assets from the husband, H, would put total ownership in the surviving widow, W, to be fully included in the estate of the survivor; or put another way, would mean inclusion of 50 per cent when H died and 100 per cent when W died for death tax purposes. If H's half were made available to W for her lifetime and then went to children (for example), the inclusions in the respective estates would be H's 50 per cent in his estate and W's 50 per cent in hers but nothing of H's half in W's estate. This example is, of course, oversimplified. The possible tax reduction by avoiding joint tenancy survivorship can be substantial.

If community property is changed into joint tenancy ownership there apparently is no gift tax liability, assuming that the source can be adequately proved, and only a half interest would be taxed on the decedent's death. And similarly as to community property when one spouse dies only half of the community property is included for death tax purposes.

As the footnotes indicate, death taxation, as distinct from the problem of establishing no tax liability, probably would not affect the claim-

⁵⁰ RCW 83.04.020; 26 U.S.C. (I.R.C. 1954) § 2040, Reg. § 20.2040-1. Here, too, the "small" estate probably will not present problems. As to the state inheritance tax \$40,000 of life insurance proceeds may be exempt and the Class A exemption of \$5,000 plus \$5,000 for a spouse, and for each child, stepchild, or adopted child living (or if dead, per stirpes) can very well eliminate inheritance tax complications. Similarly, the \$60,000 exemption for federal estate tax purposes can remove this area from concern as to the small estate. However, the proof problem in the joint tenancy situation could put some estates into the taxable brackets, though as between husband and wife the marital deduction might eliminate or reduce the tax.

⁵¹ With the expense of attorney's fees involved, too! See references, note 15 *supra*.

⁵² And if the donee dies first, the donor may find himself paying death taxes on the survivorship to himself unless he can *prove* he was the contributing source.

ant to a small accumulation, but an extra income tax cost for the survivor, even of the small accumulation, might be expectable. The usual pattern apparently is that an asset owned by survivorship, a home for example, is sold, resulting in a capital gain subject to income taxation. The complication stems from the calculation of the basis to be deducted from the proceeds to determine the capital gain. To the extent that the asset was includible in the decedent's estate for estate tax purposes the basis will be the value at death, but to the extent that it was not includible the basis will be the original cost, not the increased value at death.⁵³ To illustrate, assume that community property was used to buy joint tenancy property at \$10,000, and when one spouse died in 1959 the property was worth \$20,000. In this instance half of the property would be includible in the estate of the decedent at \$10,000 and would acquire that new basis; the other half would retain its old \$5,000 basis. Upon sale in 1959 or 1960 at \$20,000 there would be capital gain of \$5,000 to the survivor taxable at a maximum rate of 25 per cent or \$1,250. If on the same financial facts, the property had remained community property and had been devised to the surviving spouse there would be no difference in death taxes and *no* capital gains tax at all for the asset would acquire the new basis totally, not merely as to one-half.⁵⁴

Taxwise as between husband and wife, then, joint tenancy would give no advantage over community property ownership and might result in major disadvantages. As between unmarried persons, splitting the income during the continuance of the joint tenancy might result in some tax advantage; there would be no advantage as to death taxes.⁵⁵ It seems to the writer doubtful whether the possible advantage to unmarried joint tenants warrants adoption of a device which would most likely be used principally by married persons as a substitute for community property ownership to their probable substantial disadvantage.

It seems likely that in many situations the adoption of joint tenancy will not "Stop Probate with 208" as the slogan for the initiative proclaims, and even in instances where it would, that the purpose of the sponsoring "Citizens Committee to Save Probate Costs" would not be

⁵³ 26 U.S.C. (I.R.C. 1954) § 1014 (b) (9). P. H. Federal Taxes Par. 10449. In *Bordenave v. United States*, 150 F. Supp. 820 (1957) change from community property to joint tenancy prevented use by the survivor of the new basis at death of her husband (totally under the then law) for purposes of calculating depreciation.

⁵⁴ 26 U.S.C. (I.R.C. 1954) § 1014 (b) (6). P. H. Federal Taxes Par. 10450; Rev. Rul. 59-20, I.R.B. 1959-25.

⁵⁵ Unless, conceivably, the possibility of concealing the taxable event (survivorship) from the tax authorities, but though more difficulty might be encountered it can be assumed some method to exact the taxes would be evolved.

realized except of course in the most technical, but not practical, sense. There is widespread misunderstanding of the purpose and effect of probate and administration of decedents' estates, and misinformation on both the calculation and reasonableness of the attorney's fee attendant thereon, though attorneys who keep their clients fully informed of the steps taken and work done in the administration usually have clients who are not dissatisfied. It is also true that many laymen do not appreciate the advantages of disposing of their property by will and are convinced of many "truths" that are not so.

There remains the more serious question whether, granting or assuming the reasonableness of the attorney's fees, there should not be some simplification of probate procedures so that death costs (other, obviously, than death taxes) can be reduced, particularly in small estates. A source of recurring irritation to surviving spouses is the discovery that community property has now changed into a co-ownership with descendants of the intestate decedent. A simple change in the inheritance statute so that all community property would be owned by the surviving spouse would cure this. On the other hand there may be situations in which the decedent for sufficient reasons would not desire this result, and therefore the testamentary power which each spouse has over half the community property should be preserved.

In addition, the usefulness of the statutory community property agreement can be increased, and the willingness of attorneys to suggest its use nourished, by legislation delineating its flexibility and providing a simple procedure to establish that creditor's rights are promptly asserted or barred.⁵⁶

Unless the lawyers furnish leadership in solving the problems which prompt such proposals as Initiative 208 they can expect continuing efforts by others even if the present proposal fails. It is the writer's further belief that the purposes of the sponsors of the initiative probably would not be achieved but rather a sizeable net disadvantage to the residents of Washington would result, and that any expansion of joint tenancy would merely add undesirable complexities to the law.

⁵⁶ Or perhaps both for "probate" and "community property agreement" succession the successor could have an election confirmed by the court to assume outstanding obligations and get essentially immediate distribution or to follow some non-claim procedure to bar non-appearing creditors—particularly if the estate went to the surviving spouse or perhaps to the surviving spouse and children.