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### **Cover Page Footnote**

\* Professor of Law, Syracuse University. I wish to thank Lisa Gayle Bradley, Esq. for several helpful suggestions and for her able assistance in the preparation of this Article

# AN INVITATION TO COMMIT FRAUD: SECRET DESTRUCTION OF JOINT TENANT SURVIVORSHIP RIGHTS

SAMUEL M. FETTERS\*

## INTRODUCTION

**J**OINT tenancy is the most popular form of spousal residential property ownership in the United States.<sup>1</sup> Indeed, it is safe to say that

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\* Professor of Law, Syracuse University. I wish to thank Lisa Gayle Bradley, Esq. for several helpful suggestions and for her able assistance in the preparation of this Article.

1. See E. Clark, L. Lusky & A. Murphy, *Gratuitous Transfers* 921 (3d ed. 1985) [hereinafter Clark] ("One of the most popular ways of holding property within families is, undoubtedly, in joint tenancy. . . . [A]lthough there is little empirical basis . . . it seems probable that the chief reason for so holding property is that it will pass to the surviving tenant upon death without the need for probate."); Campfield, *Estate Planning for Joint Tenancies*, 1974 Duke L.J. 669, 670 (1974) [hereinafter Campfield] ("Joint ownership of real and personal property by husband and wife in a common law jurisdiction is so generally accepted that to hold property in the name of only one spouse is the exception rather than the rule."); Griffith, *Community Property in Joint Tenancy Form*, 14 Stan. L. Rev. 87, 88 (1961) ("Of the husband-and-wife deeds over 85 per cent are to them both as joint tenants, and the remaining 15 per cent are to one or the other or to both as tenants in common."); Hines, *Real Property Joint Tenancies: Law, Fact and Fancy*, 51 Iowa L. Rev. 582, 586-87 (1966) ("Starting from a base of less than 1 per cent in 1933, the incidence of joint tenancy in Iowa rose to . . . an average of 52 per cent of all Iowa land transfers [in 1964] . . ."); Sterling, *Joint Tenancy and Community Property in California*, 14 Pac. L.J. 927, 928 (1983) ("Approximately 85 percent of recorded real property deeds to husbands and wives are in joint tenancy form."); Stuart, *Joint Ownership Before and After the Tax Reform Act*, 21 Ariz. L. Rev. 659, 659 (1979) ("The majority of residences are owned by married couples who hold their property either as joint tenants or as tenants by the entirety.").

Some authorities would appear to undermine this proposition by reducing substantially the number of states in which spouses may hold property as joint tenants. Professor William E. Burby draws the erroneous conclusion that because a substantial number of courts have construed conveyances to husbands and wives "as joint tenants," as creating in them tenancies by the entirety, that "[t]his conclusion indicates that husband and wife cannot own property as joint tenants." See W. Burby, *Real Property* 223 (3d ed. 1965). Burby cites no authority to support his speculation. See *id.* From Burby's unsupported speculation, Professor Thomas L. Waterbury states, as fact, that "[t]here is substantial authority for the view that a husband and wife, in a jurisdiction recognizing tenancies by the entirety in real property, cannot acquire title to real property as joint tenants." See T. Waterbury, *Trusts and Estates* 369 (1986).

There is no support either in the statutes or in the cases for Burby's speculation or Waterbury's bold assertion of fact. My research has disclosed only 22 jurisdictions that still recognize tenancies by the entirety. *But see* R. Cunningham, W. Stoebuck & D. Whitman, *The Law of Property* 211-12 & n.8 (1984) [hereinafter Cunningham] (twenty states recognize tenancies by the entirety); 4A R. Powell, *Powell on Real Property* ¶ 620[4], at 52-13 (P. Rohan ed. 1986) (no fewer than 25 states and possibly as many as 37 states plus the District of Columbia recognize tenancies by the entirety). Of these 22 jurisdictions, nine provide by statute that spouses may hold title to real property either as joint tenants, tenants in common, or both. If spouses may hold title as tenants in common, there is no reason why they cannot hold title as joint tenants unless joint tenancies

millions of land titles representing billions of dollars of capital investment are held in joint tenancy in this country. Yet these titles are seriously flawed. Several rules of law relating to joint tenancy ownership of real property,<sup>2</sup> to conveyancing,<sup>3</sup> and to the recording of deeds,<sup>4</sup> all well-

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have been abolished in the jurisdiction. *See* Alaska Stat. § 34.15.110 (1986); D.C. Code Ann. § 45-216 (1981); Haw. Rev. Stat. §§ 509-1, 509-2 (1976); Ky. Rev. Stat. Ann. §§ 381.120, 381.130, 381.050 (Michie/Bobbs-Merrill 1986); Mass. Ann. Laws ch. 184, § 7 (Law. Co-op. 1977 & Supp. 1986); N.Y. Est. Powers & Trusts Law § 6-2.2(b) (McKinney 1986); N.C. Gen. Stat. § 39-13.6 (1984); Okla. Stat. Ann. tit. 60, § 74 (West 1971); R.I. Gen. Laws § 34-3-1 (1984).

In ten other states that recognize tenancies by the entirety, there are unequivocal judicial decisions recognizing the capacity of spouses to hold title to real property as joint tenants or as tenants in common. *See, e.g.,* *Jenkins v. Simmons*, 241 Ark. 242, 407 S.W.2d 105 (1966); *Pace v. Woods*, 177 So. 2d 779 (Fla. Dist. Ct. App. 1965); *Thornburg v. Wiggins*, 135 Ind. 178, 34 N.E. 999 (1893); *DeYoung v. Mesler*, 373 Mich. 499, 130 N.W.2d 38 (1964); *Davidson v. Eubanks*, 354 Mo. 301, 189 S.W.2d 295 (1945); *Dodd v. McGee*, 354 Mo. 644, 190 S.W.2d 231 (1945); *Fulper v. Fulper*, 54 N.J. Eq. 431, 34 A. 1063 (1896); *Gorger v. Gorger*, 276 Or. 267, 555 P.2d 1 (1976); *Robb v. Beaver*, 8 Watts & Serg. 107 (Pa. 1844); *Tindell v. Tindell*, 37 S.W. 1105 (Tenn. 1896) (strong dicta to the effect that husband and wife can hold title to real property as tenants in common); *Witzel v. Witzel*, 386 P.2d 103 (Wyo. 1963).

The remaining three states, Delaware, Vermont and Virginia, have statutes that could be construed as allowing spouses to hold real property as tenants in common. *See* Del. Code Ann. tit. 25, § 701 (1975); Vt. Stat. Ann. tit. 27, § 2 (1975); Va. Code Ann. §§ 55-20, 55-21 (1986). In none of these three states, however, have the courts directly passed on the issue. In any event, this is hardly a basis for the claim that a substantial number of jurisdictions that recognize tenancies by the entirety disallow spouses from holding title to property as joint tenants or as tenants in common. As an original question, there is no contemporary policy reason for not allowing spouses to hold title to real property by any arrangement of titles they might desire.

The most recent survey of the current status of tenancy by the entirety is found in 4A R. Powell, *supra*, ¶ 620, at 52-4 to -13, which is a complete revision of the subject by Professor David A. Thomas. Professor Thomas claims that tenancy by the entirety is recognized in no fewer than 25 states and possibly as many as 37 states plus the District of Columbia. *See id.* ¶ 620[4], at 52-13. All previous revisions of Powell claim only 22 states as recognizing tenancies by the entirety. *See* 4A R. Powell, *supra*, ¶ 621, at 685 n.7 (P. Rohan ed. 1982). Thomas also asserts that "in a few jurisdictions, a tenancy by the entirety may be the only concurrent estate a husband and wife can hold." 4A R. Powell, *supra*, ¶ 621[2], at 52-18 (P. Rohan ed. 1986). In support of the latter statement he cites one case each for the District of Columbia, Massachusetts, Michigan and North Carolina. *Id.* ¶ 621[2], at 52-18 n.13. None of the cases cited support his assertion. The case from Michigan supports the opposite position. *See DeYoung v. Mesler*, 373 Mich. 499, 130 N.W.2d 38 (1964) (holding that spouses may hold real property as joint tenants or as tenants in common). In addition, statutes in Massachusetts, North Carolina and the District of Columbia support the position that spouses in those jurisdictions can hold title to property as tenants by the entirety, joint tenants or as tenants in common. *See* D.C. Code Ann. § 45-216 (1981); Mass. Ann. Laws ch. 184, § 7 (Law. Co-op. 1977 & Supp. 1986); N.C. Gen. Stat. § 39-13.6 (1984).

Another unfortunate tidbit of misinformation is the statement of Cunningham, Stoebuck & Whitman that Illinois has abolished joint tenancies in land. *See* Cunningham, *supra*, at 204 n.16. The Authors are misinformed. *See* Ill. Rev. Stat. ch. 76, para. 1 (1965).

2. Joint tenancy survivorship rights are subject to unilateral destruction by either joint tenant without the consent or knowledge of the other. *See infra* notes 12, 20 and accompanying text.

3. The law has long recognized that the juristic act in the conveyancing transaction

established and salutary in their own right, can be used in combination by one joint tenant to assure his<sup>5</sup> own survivorship right while defeating the survivorship right of his spouse.<sup>6</sup> In other words, one joint tenant, while secure in his own survivorship right, can defraud his cotenant of his survivorship right with impunity.

Take the case of *H* and *W*, a husband and wife<sup>7</sup> who own their family residence property as joint tenants. *H* has a child, *C*, by a previous marriage. Without *W*'s consent or knowledge, *H* executes a severance deed<sup>8</sup> and deposits it in his safety deposit box along with his will in which he leaves all of his property to *C*. Sometime later, either weeks, months or years, *W* dies. *H* retrieves his severance deed and destroys it. Because only *H* knew about the severance deed and its destruction, *H* will have no difficulty in establishing clear title to the property as surviving joint tenant. If *H* dies before *W*, however, the severance deed will be discovered and recorded. *W* will be unsuccessful in her claim to the property as surviving joint tenant.<sup>9</sup> Rather, she and *C* will hold title in equal, undivided shares as tenants in common.<sup>10</sup>

Outrageous? Of course! But, I submit, such is the law. If I am right, either the law must change or the most common form of real property ownership of family residence property in this country must be abandoned. This Article demonstrates that the complete, or nearly complete, secrecy allowed in unilateral spousal severance transactions is a critical flaw in the law of joint tenancy. In Part I, this Article examines the right of unilateral severance in the context of secret spousal severance transactions. It concludes that such transactions confer an advantage upon the severing joint tenant never contemplated by the common law. Part II analyzes the effectiveness of delivery in these transactions. It concludes that the joint tenant's failure to record his severance deed raises serious doubts as to whether he intended his deed to operate presently or only upon his death. Part III proposes legislation that would eliminate the potential for fraudulent, secret severance transactions in a manner that preserves the flexibility of unilateral severance. Remedial legislation may

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is delivery of deed, *see infra* notes 12, 20 and accompanying text, and the legal meaning of delivery of deed relates to the intent of the grantor rather than the physical act of transferring the deed from the grantor to the grantee. *See infra* note 50 and accompanying text.

4. A deed or other title instrument is valid even if it is never recorded. *See infra* note 44 and accompanying text.

5. For the sake of convenience, the male pronoun will be used throughout the article to refer to the joint tenant who is defeating the survivorship right of the other joint tenant.

6. *See infra* notes 27-37 and accompanying text.

7. The principal parties involved in this and subsequent examples and cases are a husband and wife who hold their residential property as joint tenants. For the sake of convenience, husband and wife will often be referred to as, respectively, *H* and *W*.

8. *See infra* notes 33-34 and accompanying text.

9. *See infra* notes 21-23 and accompanying text.

10. *See infra* note 23 and accompanying text.

be the only way to end these abuses in view of the failure of generations of attorneys and judges to recognize a flaw so potentially dangerous to title stability as to render joint tenancy ownership of real property unacceptable to spouses, or, for that matter, anyone else.

## I. SECRET SPOUSAL SEVERANCE TRANSACTIONS

Spouses who take title to their property as joint tenants assure themselves not only of survivorship rights in their property<sup>11</sup> but also of the right of either spouse to destroy those rights unilaterally.<sup>12</sup> In other words, either spouse can terminate his own and his spouse's survivorship right without the other's consent or knowledge. If either spouse effects a secret severance without recording his severance instrument, he has, whether he realizes it or not, created a situation in which he can terminate the survivorship right of his spouse while retaining his own.<sup>13</sup>

### A. Joint Tenancy Survivorship and Severability

Most law review articles concerning joint tenancy ownership of real property contain extended discussions of its technical requirements that owe their allegiance to the accommodations of feudalism, not to contemporary society.<sup>14</sup> Repetition of that discussion is not required here. Regardless of the long history of joint tenancy law<sup>15</sup> and the gradual erosion of many of its fundamental requirements,<sup>16</sup> we should know that the only reason for its retention today is its attribute of survivorship.<sup>17</sup>

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11. See 2 American Law of Property § 6.1, at 3-6 (1952); 2 W. Blackstone, Commentaries \*183-84; R. Cunningham, *supra* note 1, at 207.

12. See 2 American Law of Property, *supra* note 11, § 6.2, at 7-11; 2 W. Blackstone, Commentaries \*184-87.

13. See *infra* notes 27-37 and accompanying text.

14. See, e.g., Spitzer, *Joint Tenancy with Right of Survivorship: A Legacy from Thirteenth Century England*, 16 Tex. Tech L. Rev. 629 (1985); Swenson & Degnan, *Severance of Joint Tenancies*, 38 Minn. L. Rev. 466 (1954).

15. See generally 2 American Law of Property, *supra* note 11, § 6.1, at 3-6 (joint tenancies have existed since the thirteenth century).

16. See 20 Am. Jur. 2d *Cotenancy and Joint Ownership* § 4 (1965 & Supp. 1986); 2 American Law of Property, *supra* note 11, § 6.2, at 9; 4A R. Powell, *supra* note 1, ¶¶ 615[1], at 51-3, 616[3], at 51-6 to -7, 617[1]-[2], at 51-9 to -10; 4 G. Thompson, *Real Property* § 1777 (Supp. 1974); see, e.g., Harris, *Will Substitutes*, 41 Ala. Law. 235, 240-43 (1980).

17. See Clark, *supra* note 1, at 921 ("One of the most popular ways of holding property within families is, undoubtedly, in joint tenancy. . . . [A]lthough there is little empirical basis . . . it seems probable that the chief reason for so holding property is that it will pass to the surviving tenant upon death without the need for probate."); Hines, *Personal Property Joint Tenancies: More Law, Fact and Fancy*, 54 Minn. L. Rev. 509, 550 (1970) ("The co-ownership of today almost always involves a married couple. Reliable indicators show that when a husband and wife own property together they intend a survivorship arrangement in the overwhelming majority of cases.").

"Survivorship" itself is a misnomer. Survivorship does not mean survivorship in the sense that there is a shift in ownership from the deceased joint tenant to the survivor. Joint tenants hold title *per my et per tout*, with the consequence that when one of two joint tenants dies, his interest ceases to exist, leaving the surviving joint tenant with an

How the general public comes to "learn" of joint tenancy ownership, I do not know. I suspect that most purchasers of family residence property receive their introductory law course on joint tenancy titles from their real estate agent who also assists them in executing a standard form purchase offer, a standard form contract of sale and even assists them in drafting the language of joint tenancy title to be included in their grantor's deed.<sup>18</sup> I also suspect that most attorneys involved in real estate closings rarely inform purchasers of the implications of holding title to property as joint tenants. The attorney's role is usually limited to preparing and inspecting the deed and seeing to its proper execution at the closing.

So what do the new joint tenants know about the law that pertains to their title? They probably believe, at least for the time being, that they are assured of absolute and inviolate survivorship rights so long as they own their property.<sup>19</sup> Their expectations could not be more wrong, their

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absolute title extended to the whole of the property. *See* 2 W. Blackstone, Commentaries \*183-85.

18. *See* Campfield, *supra* note 1, at 671 ("For generations married persons in common law jurisdictions have been counseled by bank personnel and real estate salespeople to take title to real and personal property as joint tenants with rights of survivorship.") (footnote omitted); Griffith, *supra* note 1, at 89 ("Generally real estate brokers and salesmen, whose legal training is to say the least quite limited, tell people how to take title when they take the escrow instructions to the buyers.").

This can also be supported by way of anecdote, with not the slightest claim to have engaged in any empirical research. In 1972, I purchased a house in New York. New York recognizes both joint tenancy and tenancy by the entirety. *See* N.Y. Est. Powers & Trusts Law § 6-2.2(b) (McKinney 1986). I told the real estate agent that I wanted the granting clause of my deed to provide: "To H and W, husband and wife, as joint tenants and not as tenants by the entirety." The agent advised me that this was not possible, that spouses were required to take title to real property in New York as tenants by the entirety. I told him to go ahead anyway and have the deed prepared as I had instructed, that I would take my chances and would assume the risk. Unfortunately, this was not an isolated incident. I have found real estate agents to possess almost limitless reservoirs of misinformation on property law.

19. In other words, they believe that nothing can affect their survivorship right without their consent. *See, e.g.,* Burke v. Stevens, 264 Cal. App. 2d 30, 34, 70 Cal. Rptr. 87, 90 (1968) (wife believed that there was nothing she could do to prevent her spouse from taking their property as survivor of the joint tenancy); Delanoy v. Delanoy, 216 Cal. 23, 13 P.2d 513 (1932) (wife alleged that husband's conveyance of his interest was invalid without her consent); Williamson v. Williamson, 90 R.I. 233, 236, 157 A.2d 110, 111, (1960) (wife testified that "it had always been her opinion that a joint tenant could not convey his interest without the signature of the other"); *id.* at 238, 157 A.2d at 112 (wife testified that "she had always thought that a joint tenant could not convey his interest without the other tenant participating in the conveyance").

Most couples who own their family residence property as joint tenants probably would describe their situation as follows: "We own our home as joint tenants so that if one of us, God forbid, should die tomorrow, the house would not be tied up in probate. The survivor would own it outright." My experience in teaching property law for over a quarter of a century is that it is difficult even for law students to grasp the concept that there are a variety of different kinds of interests or estates in property, that there can be concurrent and successive interests, and that these interests might be vested or contingent. By learning to focus on these interests rather than forever looking for *who* owns proverbial *Blackacre*, students discover that the process of analysis for solving property

ignorance more profound. Their seriously flawed perceptions of their property rights make them easy victims for loss or destruction of their survivorship rights through fraud.

The reality is that either joint tenant can, without the consent or even the knowledge of the other joint tenant, sever his interest from joint tenancy ownership<sup>20</sup> by any act that destroys one or more of the four "unities" required by the common law.<sup>21</sup> For our purposes, it is sufficient to recognize that a conveyance by either joint tenant destroys the unities of "time" and "title,"<sup>22</sup> converts each joint tenant's interest into that of a tenant in common and thereby destroys each tenant's survivorship right.<sup>23</sup> Thus, it is in the nature of the joint tenancy estate that survivorship rights are assured, but only so long as it continues as joint tenancy property.<sup>24</sup> Furthermore, it is neither wrong nor immoral for a joint tenant who desires to terminate survivorship rights to do so without first obtaining the consent of the other joint tenant.<sup>25</sup> Because the interest of

problems gradually emerges. Most law students resist understanding that, by severing the joint tenancy and turning it into a tenancy in common, the survivorship right is thereby destroyed. Once the meaning of "severance" is understood as a destruction of survivorship rights, and that either joint tenant may accomplish such destruction by his own unilateral act, students find the law as hard to swallow as chopped hay.

20. See *supra* note 12 and accompanying text.

21. See 2 American Law of Property, *supra* note 11, §§ 6.1-6.2, at 3-11; 2 W. Blackstone, Commentaries \*180-82 ("The *properties* of a joint estate are derived from its unity, which is fourfold; the unity of *interest*, the unity of *title*, the unity of *time*, and the unity of *possession* . . .") (emphasis in the original).

22. See 2 American Law of Property, *supra* note 11, § 6.2, at 7-11; 2 W. Blackstone, Commentaries \*184-85.

23. See 2 American Law of Property, *supra* note 11, § 6.2, at 7-11; 2 W. Blackstone, Commentaries \*184-85.

24. Spouses who discover the right of unilateral severance may find the estate of joint tenancy more attractive. They may prefer the flexibility inherent in joint tenancy ownership of property to the rigidity of other types of estates, arrangements of property titles, or covenants, that assure indestructible rights of survivorship. For instance, in the "twenty states," see Cunningham, *supra* note 1, at 211-2 & n.8, or in the "no less than twenty-five and possibly as many as thirty-seven states and the District of Columbia," see 4A R. Powell, *supra* note 1, ¶ 620[4], at 52-13, that recognize tenancy by the entirety, spouses may elect this form of co-ownership to assure indestructible survivorship rights. In all jurisdictions, indestructible survivorship rights can be ensured by creating life estates in common with contingent remainder in fee simple in the survivor or survivors of the life tenants. See *Durant v. Hamrick*, 409 So. 2d 731, 737 (Ala. 1981) ("A tenancy in common for life with contingent remainder in fee in the survivor differs from a joint tenancy in that the right of survivorship in one tenant in common is not destructible by the act of the other."); Swenson & Degnan, *supra* note 14 at 469 ("If an indestructible right of survivorship is desired—that is, one which may not be destroyed by one tenant—that may be accomplished by creating a joint life estate with a contingent remainder in fee to the survivor; a tenancy in common in simple fee with an executory interest in the survivor; or a fee simple to take effect in possession in the future . . ."); L. Simes & A. Smith, *The Law of Future Interests* § 1141, at 31 (2d ed. 1956 and Supp. 1985) (a covenant not to partition may be upheld if reasonable and limited in duration to the period allowed by the rule against perpetuities); see also C. Moss and W. Siebert, *Classification and Creation of Joint Interests*, 1959 U. Ill. L. F. 883, 969 (1959) (regarding agreements not to partition).

25. See *Burke v. Stevens*, 264 Cal. App. 2d 30, 34, 70 Cal. Rptr. 87, 91 (1968). This



a joint tenant is a present interest in fee simple, it is not subject to a valid restraint on its alienation.<sup>26</sup> There is, therefore, no way to prevent a joint tenant from effecting a valid, unilateral, nonconsensual transfer of his interest that would sever his interest from joint tenancy ownership.

### B. *An Invitation to Commit Fraud*

In the context of this Article, a secret spousal severance transaction is one in which a joint tenant executes a severance instrument without the consent or knowledge of his spouse and without recording it.<sup>27</sup> Such a transaction is a legitimate exercise of the joint tenant's right of unilateral severance.<sup>28</sup> Further, the law does not require recordation of the instrument for the severance to be effective.<sup>29</sup> Nevertheless, the severing spouse's failure to record the severance instrument transforms an otherwise valid severance transaction into a vehicle for fraud.

The severing spouse's failure to record allows the spouse to "have his cake and eat it too." If the severing joint tenant survives his spouse, his failure to record allows him to destroy all evidence of the transaction and thereby retain his survivorship right. If he dies first, his secret severance instrument will be discovered and recorded. His spouse, instead of acquiring an absolute title in fee simple as surviving joint tenant, becomes a tenant in common with the successor of the deceased joint tenant's one-half interest in the property. In sum, the common law rules that ensure the right of the joint tenant to sever his interest from joint ownership<sup>30</sup> enable him to destroy the survivorship right of his spouse while retaining his own.

There are three typical secret spousal severance transactions. One involves a conveyance by one spouse of his interest in the joint tenancy property to another family member, often his child by a previous marriage.<sup>31</sup> Another involves one spouse's conveyance of his interest to a

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seems implicit in the joint tenant's right of unilateral severance. *See supra* notes 20-21 and accompanying text.

26. *See* 5A R. Powell, Real Property ¶¶ 841, 846 (P. Rohan ed. 1985) (in general, it can be safely asserted that under present law, there is no way in which an unqualified restraint on alienation can be effectively imposed on a legal estate in fee simple); L. Simes & A. Smith, *supra* note 24, § 1141, at 30-33 (dealing with restraints on partition); *id.* § 1150, at 50-54 (dealing with Kentucky and Nebraska where some cases indicated that reasonable restraints on alienation may be lawful, though the authors saw little significance in them).

27. *See infra* notes 31-32, 34 and accompanying text.

28. *See supra* note 12 and accompanying text.

29. *See infra* note 44 and accompanying text.

30. *See supra* notes 20-26 and accompanying text.

31. *See, e.g.,* Meyer v. Wall, 270 Cal. App. 2d 24, 28-30, 75 Cal. Rptr. 236, 239-40 (1969); Delanoy v. Delanoy, 216 Cal. 23, 24, 13 P.2d 513, 513 (1932); Carmack v. Place, 188 Colo. 303, 304, 535 P.2d 197, 198 (1975) (en banc); Williamson v. Williamson, 90 R.I. 233, 234, 157 A.2d 110, 110 (1960); Schimke v. Karlstad, 87 S.D. 349, 350, 208 N.W.2d 710, 711 (1973).

In *Schimke*, plaintiff's wife conveyed an undivided one-half interest in the property to her children by a former marriage without the knowledge and consent of plaintiff. Plain-

"strawman," usually his attorney's associate, secretary or other employee, who contemporaneously conveys the property back to the severing spouse.<sup>32</sup> The third involves the execution of only one instrument—a

tiff asserted that the execution of the deed without his consent or knowledge affected the validity of the transaction. The court found this to be "immaterial, for a joint tenant may convey his or her interest in the property without the knowledge or consent of the other joint tenant, and, thus, plaintiff's wife was exercising a right she had as joint tenant." *Id.* at 351, 208 N.W.2d at 711. In *Meyer v. Wall*, 270 Cal. App. 2d 24, 30, 75 Cal. Rptr. 236, 240 (1969), the court disposed of a similar protest that a joint tenant owes a legal duty to his cotenant to disclose his termination of the tenancy. "Each cotenant, whether he be a joint tenant or a tenant in common, may sell or encumber his interest in the property forming the subject of the tenancy at his pleasure, regardless of the knowledge, consent, or approval of the other cotenants." *Id.* (quoting *Thompson v. Thompson*, 218 Cal. App. 2d 804, 807, 32 Cal. Rptr. 808, 810 (1963)).

A frequently cited case is *Delanoy v. Delanoy*, 216 Cal. 23, 13 P.2d 513 (1932) in which *H*, a joint tenant with his wife, *W*, conveyed his interest by way of gift to his mother without *W*'s knowledge or consent. The court stated that:

[*H*] had the power to convey his separate estate by way of gift or otherwise without the approval or consent of his wife. It also follows that upon such conveyance the joint tenancy was terminated and the plaintiff and [*H*'s mother] became tenants in common, each the owner of an undivided one-half interest in the property.

*Id.* at 26, 13 P.2d at 514 (brackets not in original).

32. See, e.g., *Dean v. Auble*, 109 Cal. App. 3d 156, 167 Cal. Rptr. 138 (1980); *Burke v. Stevens*, 264 Cal. App. 2d 30, 70 Cal. Rptr. 87 (1968); *Johnson v. Johnson*, 11 Ill. App. 3d 681, 297 N.E.2d 285 (1973); see also *Riddle v. Harmon*, 102 Cal. App. 3d 524, 529, 162 Cal. Rptr. 530, 533 (1980) ("The most familiar technique for unilateral termination is use of an intermediary 'strawman' . . .").

In *Dean v. Auble*, 109 Cal. App. 3d 156, 167 Cal. Rptr. 138 (1980), *W* went through a strawman conveyance and reconveyance, three weeks before her death, for the sole purpose of destroying the joint tenancy. *Id.* at 158, 167 Cal. Rptr. at 139. *H* was unaware of the transaction. *Id.* After *W*'s death, *H* commenced a quiet title action, claiming to own the property in question as surviving joint tenant. *Id.* It would be difficult to discover a case more emphatic in its statement of the legal efficacy of the severance transaction. "Plaintiff's appeal from the judgment in the quiet title proceeding, viewed in the light of the common law and statutory history of joint tenancy, is frivolous." *Id.* at 159, 167 Cal. Rptr. at 140 (citation omitted). The court went on to state:

It is indisputable that each joint tenant, for whatever reason, has the power to convey his or her separate estate without the knowledge or consent of the other joint tenant, thereby destroying the joint tenancy. The tenancy may be destroyed unilaterally by conveyance to a "straw man" grantee and the conveyance back to the grantor. In such circumstances, the joint tenancy is not revived. The former joint tenants become tenants in common.

*Id.* at 159-60, 167 Cal. Rptr. at 140 (citations omitted).

In *Johnson v. Johnson*, 11 Ill. App. 3d 681, 297 N.E.2d 285 (1973), *H*, by quitclaim deed, conveyed his one-half interest in the joint tenancy property to his attorney who then reconveyed it by quitclaim deed to *H* and *D*, *H*'s daughter by a previous marriage. *Id.* at 682, 297 N.E.2d at 287. *W* learned of the straw party severance transaction after *H*'s death. *Id.* The court held that *W* and *D* held title to the property as tenants in common. *Id.* at 684, 297 N.E.2d at 288. The court stated:

The deprivation of [*W*'s] expectation by a deed or gift is not vulnerable to attack unless the transaction is a sham, colorable or illusory and tantamount to a fraud. . . . It was [*H*'s] privilege to make a gift to his daughter. There was no evidence that the conveyances by which he made [*D*] a joint tenant in an undivided one-half interest in the realty were illusory or shams.

*Id.* at 684, 297 N.E.2d at 288 (citation omitted).

“severance deed” or “Declaration of Election to Sever Survivorship of Joint Tenancy”<sup>33</sup>—that has the legal effect of terminating the joint tenancy.<sup>34</sup> The manner of severance chosen makes little difference in most

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33. A “severance deed,” which is executed by only one of the two joint tenants, has the legal effect of terminating the joint tenancy, destroying survivorship rights, but preserving spousal ownership as tenants in common. *See, e.g., Riddle v. Harmon*, 102 Cal. App. 3d 524, 530-31, 162 Cal. Rptr. 530, 534 (1980) (holding that severance without a “strawman” effectively severs the joint tenancy). This was impossible at common law and is still impossible today in most states. *See id.* at 527, 162 Cal. Rptr. at 532; *Nelson v. Davis*, 592 P.2d 594 (Utah 1979). A growing number of states, however, now recognize that what could not be accomplished by the use of one instrument at common law is acceptable today. *See, e.g., Carpenter v. Chandler*, 140 Cal. App. 3d 709, 712, 189 Cal. Rptr. 651, 653 (1983); *Riddle v. Harmon*, 102 Cal. App. 3d 524, 531, 162 Cal. Rptr. 530, 534 (1980); *Hendrickson v. Minneapolis Fed. Sav. & Loan Ass’n*, 281 Minn. 462, 161 N.W.2d 688 (1968). In *Riddle v. Harmon*, 102 Cal. App. 3d 524, 162 Cal. Rptr. 530 (1980), a California court allowed, for the first time, a single deed severance of a joint tenancy thus dispensing with the requirement of the strawman conveyance and reconveyance, observing that such practices were the product of obsolete vestiges of the English feoffment ceremony requiring both a feoffor and feoffee. *See id.* at 528-29, 162 Cal. Rptr. at 533. “Handing oneself a dirt clod is ungainly,” the court said. *Id.* at 529, 162 Cal. Rptr. at 533.

I think I might understand a formal ceremony on the land itself which required me to transfer a clod of dirt from my left to my right hand to effect a transfer of title more readily than signing a two-party deed where my name appears as both parties to the conveyance. I know I would better understand an instrument entitled “Declaration of Election to Sever Survivorship of Joint Tenancy,” which was approved by the Minnesota Supreme Court, to effect a unilateral termination of spousal joint tenancy ownership in that state. *See Hendrickson v. Minneapolis Fed. Sav. & Loan Ass’n*, 281 Minn. 462, 161 N.W.2d 688 (1968).

34. *See, e.g., Carpenter v. Chandler*, 140 Cal. App. 3d 709, 712, 189 Cal. Rptr. 651, 653 (1983); *Riddle v. Harmon*, 102 Cal. App. 3d 524, 162 Cal. Rptr. 530 (1980); *Hendrickson v. Minneapolis Fed. Sav. & Loan Ass’n*, 281 Minn. 462, 161 N.W.2d 688 (1968).

In *Riddle v. Harmon*, 102 Cal. App. 3d 524, 162 Cal. Rptr. 530 (1980), *W*’s “attorney prepared a grant deed whereby [*W*] granted to herself an undivided one-half interest in the [property owned by herself and *H* as joint tenants]”. *Id.* at 526, 162 Cal. Rptr. at 531. On the same date, *W* executed her will. She died twenty days later. *Id.* No mention was made of whether the deed was recorded or whether *H* knew of the deed prior to *W*’s death. That *H* did not know seems to have been the case because the Court stated that “[an] indisputable right of each joint tenant is the power to convey his or her separate estate by way of gift or otherwise without the knowledge or consent of the other joint tenant and to thereby terminate the joint tenancy.” *Id.* at 527, 162 Cal. Rptr. at 531.

Relying upon *Riddle* in a case where it was clear that the single severance deed was not recorded and that the surviving spouse did not learn of the deed prior to her husband’s death, the California Court of Appeal observed:

How [severance] was accomplished makes no practical difference to the survivor. She would be in no different position if the decedent had secretly used a strawman. That too would have been unknown to her. Nonetheless, it would have had the same result as accomplished by the unilateral act, i.e. a breaking of the joint tenancy.

*Carpenter v. Chandler*, 140 Cal. App. 3d 709, 712, 189 Cal. Rptr. 651, 653 (1983).

In *Hendrickson v. Minneapolis Fed. Sav. & Loan Ass’n*, 281 Minn. 462, 161 N.W.2d 688 (1968), *H* executed a “Declaration of Election to Sever Survivorship of Joint Tenancy.” *Id.* at 463, 161 N.W.2d at 689. On that same date, he executed his will leaving his interest in the property to his daughter by a previous marriage. *Id.* at 463, 161 N.W.2d at 690. He died two months later. *Id.* After *H*’s death, *W* made an application to register title in her name as fee owner. *Id.* Daughter then appeared and asserted her claim as a

situations, since, in each type of severance, the transaction is likely to remain secret. But the elimination of potential witnesses to the severance transaction afforded by the single-party severance instrument strengthens the hand of the person whose interests are better served by secrecy. The single-party severance deed might also help the severing spouse's attorney sanitize and insulate himself from his client's acts.

Given the apparent ignorance of most joint tenants of their right of unilateral severance,<sup>35</sup> it would seem that the attorney directs the entire severance transaction in most instances.<sup>36</sup> The joint tenant already is surprised to learn from his attorney that joint tenancy survivorship rights are not absolute and inviolate, but can be destroyed unilaterally and without his spouse's knowledge. He is now introduced to another layer of complexity, the inscrutable severance instruments themselves. The single deed he signs with his name typed in as both grantor and grantee is, no doubt, just as confusing to him as the strawman exchange of deeds between himself and his attorney's legal secretary. In all of this confusion, the joint tenant might not be aware of the advantageous posture he now enjoys.

Nonetheless, once the severing joint tenant is faced with the death of his spouse, he cannot avoid being aware of his power to claim as surviving joint tenant simply by destroying the unrecorded severance instrument. His spouse's death presents him with an almost irresistible invitation to commit fraud by destroying the severance instrument.<sup>37</sup> It is only when the severing spouse dies first that his secret is revealed.

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tenant in common. *Id.* It seems that *W* was unaware of the "declaration" until after *H*'s death. The court held it to be a valid severance of the joint tenancy. *See id.* at 465, 161 N.W.2d at 690.

35. One can reasonably infer such ignorance from their surprise when they discover that the right of unilateral severance has been used to destroy their survivorship right. *See supra* note 19 and accompanying text. It can also be inferred from the way spouses learn about joint tenancy—through real estate agents. *See supra* note 18 and accompanying text. Finally, it seems evident from the fact that most spouses intend a survivorship arrangement when they own property as joint tenants. *See supra* note 17 and accompanying text.

36. This is well illustrated by the case of *Burke v. Stevens*, 264 Cal. App. 2d 30, 70 Cal. Rptr. 87 (1968). *See infra* notes 87-125 and accompanying text.

37. Perhaps the best illustration of the power of temptation in these circumstances is the case of a severing joint tenant who has already recorded the severing instrument. In *Minonk State Bank v. Grassman*, 95 Ill. 2d 392, 447 N.E.2d 822 (1983), one of two sisters holding property as joint tenants executed and recorded a single severance deed without the knowledge or consent of the other. *Id.* at 393, 447 N.E.2d at 823. The non-severing sister died five years later. *Minonk State Bank v. Grassman*, 103 Ill. App. 3d 1106, 1107, 432 N.E.2d 386, 387 (1982), *aff'd*, 95 Ill. 2d 392, 447 N.E.2d 822 (1983). In defense against a suit by the administrator of the non-severing sister's estate, the surviving sister argued that her single severance deed, which she herself had executed and recorded, did not constitute a valid severance of the joint tenancy. *See Minonk State Bank v. Grassman*, 95 Ill. 2d 392, 394, 447 N.E.2d 822, 823 (1983). The court dismissed her claim and held the severance to be valid. *See id.* at 396, 447 N.E.2d at 824. Given her desire to invalidate the deed despite recordation, it seems reasonable to assume that the deed would never have been discovered if she had not recorded the deed.

Even then, it can only inure to his benefit. It cannot harm him, at least in the sense that if his scheme fails, he has lost nothing he would not have lost anyway.

## II. DELIVERY AND RECORDATION

After completing the formal, legal requirements for secretly severing his interest from joint tenancy ownership,<sup>38</sup> the severing joint tenant is then in a position to maintain his own survivorship right and to defeat the survivorship right of his joint tenant.<sup>39</sup> Although this situation was never contemplated by the common law,<sup>40</sup> most courts have found nothing wrong with secret severance transactions.<sup>41</sup>

In upholding the validity of these transactions, the courts have applied traditional conveyancing and recording principles<sup>42</sup> that are sound and appropriate in the context of ordinary real estate transactions, but that are wholly inappropriate in the context of secret joint tenant severance transactions. An examination of these transactions reveals a relationship between the failure to record the severance deed and the requisite intent for an effective inter vivos conveyance.

### A. *A Question of Intent*

It is fundamental to the law of conveyancing that delivery of the deed is essential for an effective transfer of an interest in land<sup>43</sup> and that its recordation is not.<sup>44</sup> Delivery is *the* juristic act in the conveyancing transaction.

38. See *infra* notes 43-63 and accompanying text.

39. See *supra* notes 27-37 and accompanying text.

40. The common law rules ensured a joint tenant's unrestricted right of severance, see *supra* notes 20-26, 30 and accompanying text, not his right to defraud his spouse. See *infra* note 123 and accompanying text.

41. See *supra* notes 31-32, 34 and accompanying text and *infra* notes 68-78, 89-125 and accompanying text.

42. See *infra* notes 65-125 and accompanying text.

43. See 3 American Law of Property, § 12.64, at 311-12 (1952); R. Boyer, Survey of the Law of Property, ch. 19, at 415 (3d ed. 1981); W. Burby, *supra* note 1, § 121, at 293 (3d ed. 1965); Cunningham, *supra* note 1, § 11.3, at 732; 6A R. Powell, Real Property ¶891, at 81-95 (P. Rohan ed. 1984).

44. See Cunningham, *supra* note 1, § 11.9, at 776 ("In general, no one is obliged to record anything, and there is no direct penalty if a conveyance goes unrecorded. As between the original parties, an instrument is fully binding whether it is recorded or not.") (footnote omitted); 6A R. Powell, *supra* note 43, ¶ 904[3], at 82-14 ("[T]itle to real property may be transferred by delivery of a deed without recording."); Swenson & Degnan, *supra* note 14, at 482 ("Even if unrecorded, [a severance deed] is probably valid [against the surviving tenant] since the surviving tenant may not be a purchaser under the recording act."); see also Carmack v. Place, 188 Colo. 303, 305, 535 P.2d 197, 198 (1975) (en banc) ("Failure to record a deed until after the grantor's death has no effect upon an otherwise valid conveyance."). But see Md. Real Prop. Code Ann. § 3-101 (1981) ("No estate . . . or deed may pass or take effect unless the deed granting it is executed and recorded."); J. Cribbet & C. Johnson, Property 1380 (5th ed. 1984) ("Two or three states have an express statutory provision that instruments of conveyance are void until recorded, but it is not clear how such a provision would be interpreted by the courts.").

Delivery of deed is to inter vivos transfers of land as death is to testamentary devises. An undelivered deed is similar to a will. During the lifetime of the grantor of an undelivered deed<sup>45</sup> and during the lifetime of the testator,<sup>46</sup> no interests are transferred to the person or persons designated in their respective instruments of transfer. At their respective deaths, however, the difference between the undelivered deed and the will is dramatic. At the testator's death, his will becomes an instrument of transfer for the first time.<sup>47</sup> At the death of the grantor of an undelivered deed, his deed loses its ability to operate as an instrument of transfer.<sup>48</sup> Delivery of the deed is an inter vivos juristic act.<sup>49</sup> Hence, the deed is a nullity if not delivered during the lifetime of the grantor. Even if the deed finds its way into the hands of the grantee after the grantor's death, title still does not pass. Dead people cannot deliver deeds. Inter vivos transactions can be accomplished only during life.

For an effective delivery, the grantor must intend to effect a present transfer of his property interest; he must intend his deed to be presently operative as a deed.<sup>50</sup> Hence, even if the deed were manually delivered from the grantor to the grantee, there would be no delivery where the grantor intends for his instrument to be operative only upon his death.<sup>51</sup> Under such circumstances, the transaction fails as an inter vivos transfer, and probably will fail as a testamentary devise because deeds are seldom executed with the formalities required by the statute of wills.<sup>52</sup> In the case of joint tenants, such a deed will fail as an attempted testamentary disposition even if the deed's execution fulfills the requirements of the applicable wills act.<sup>53</sup> Failure of the deed to effect a severance of the joint

45. See *supra* note 43 and accompanying text.

46. See T. Atkinson, *Law of Wills* 1 (2d ed. 1953) (defining a will as being "operative for no purpose until . . . death"). Some states define wills by statute. See, e.g., N.Y. Est. Powers & Trusts Law § 1-2.18 (McKinney 1981).

47. See T. Atkinson, *supra* note 46, at 2.

48. See 3 American Law of Property, *supra* note 43, § 12.64, at 311-12. See *supra* note 43 and accompanying text.

49. See *infra* note 50 and accompanying text.

50. See 3 American Law of Property, *supra* note 43, § 12.64, at 312; Cunningham, *supra* note 1, § 11.3, at 732; 6A R. Powell, *supra* note 43, ¶ 891, at 81-95 to -96.

51. See 3 American Law of Property, *supra* note 43, § 12.66, at 317 (When deed is delivered to grantee, "the fact of the reservation shows a lack of intention to transfer . . . a present . . . estate and the deed is held to be inoperative for lack of delivery."); R. Boyer, *supra* note 43, at 416 (delivery not effective without requisite intent); W. Burby, *supra* note 1, at 297-98; Cunningham, *supra* note 1, at 732 (physical transfer of deed without requisite intent does not constitute delivery); 6A R. Powell, *supra* note 43, ¶ 891, at 81-97; 8 G. Thompson, *Real Property* § 4234, at 70 (1963); 4 H. Tiffany, *Real Property* § 1034, at 361 (3rd ed. 1975).

52. See T. Atkinson, *supra* note 46, at 188, 189 (how deeds commonly fail to measure up as wills); W. Burby, *supra* note 1, at 298 ("Ownership did not pass under the will because the deed formed no part of the will."); Cunningham, *supra* note 1, at 733 (wills require attestation though deeds do not). Compare T. Atkinson, *supra* note 46, at 291-348 (minimal formalities required of a will) with 6A R. Powell, *supra* note 43, ¶¶ 881-892 (minimal formalities required of a deed).

53. See Cunningham, *supra* note 1, at 733.

tenant's interest during his lifetime leaves him with no interest at his death.<sup>54</sup> The surviving joint tenant's survivorship right cannot be defeated by the deceased joint tenant's will.<sup>55</sup>

Although it would be a rare case indeed, the converse of manual delivery without the requisite intent is retention of the deed by the grantor but with the intent that his deed should operate immediately to vest title in the grantee.<sup>56</sup> It is clear that in such a case there is an effective delivery.<sup>57</sup> "[A]s a deed may be delivered to the partie without words," Lord Coke stated, "so may a deed be delivered by words without any act of deliverie."<sup>58</sup>

Such a transaction would, no doubt, be difficult to prove. Yet, intent in reference to delivery of deeds is no different from intent in other areas

54. In discussing the delivery problem encountered in gratuitous family transfers, the authors of the only new property hornbook published in several decades state:

The essential problem is that the grantor has attempted to use the deed as a will. An intent that the instrument take effect at the maker's death is perfectly appropriate to a will, but it will not do for a deed at all; what is required for delivery of a deed is intent that some interest be transferred *immediately*.

Cunningham, *supra* note 1, at 733 (emphasis in original).

While the above statements are correct, the following are not.

Much of the controversy would be swept away if the requisite formalities for deeds and wills were the same. It would then make little difference, in terms of ultimate validity, whether or not the grantor intended an immediate transfer, for the courts could enforce the deed as a will. But the formalities do differ rather drastically. In particular, deeds require no attestation by witnesses in most states, while wills require attestation of a particular rigorous kind. Hence an instrument which fails as a deed for lack of delivery can seldom be treated as a valid will even if the grantor's intent would be carried out by doing so.

*Id.* at 733 (footnotes omitted). The second sentence of their statement is not only misleading, it is wrong. A deed that was not intended for immediate transfer could not be enforced as a will even if the formalities for deeds and wills were the same. The deed cannot have any effect at all because the joint tenant has nothing to convey at the time of his death. Without delivery of deed there is no severance of the joint tenancy, see *supra* notes 12, 20-22 and accompanying text, and the joint tenant's interest ceases to exist upon his death. See 2 W. Blackstone, Commentaries \*183-85. See *supra* note 55 and accompanying text. Thus, a joint tenant's severance deed either operates as a deed or it operates not at all. The instrument's compliance with the formal requirements of the wills acts is wholly irrelevant. By treating a severance deed as a valid will, the grantor's intent would not be carried out by doing so. See *infra* note 92 and accompanying text.

55. See 4A R. Powell, *supra* note 1, § 617[3], at 51-11 ("A joint tenant may not devise his interest in the joint tenancy, because if another cotenant survives, there is no interest for the will to transmit.") (footnote omitted).

56. See R. Boyer, *supra* note 43, at 433; Cunningham, *supra* note 1, at 732; 6A R. Powell, *supra* note 43, § 891, at 81-97.

57. See *Doe v. Knight*, 5 B. & C. 671, 692, 108 Eng. Rep. 250, 257 (K.B. 1826) (When a party to an instrument seals it and declares in the presence of a witness that he delivers it as his deed, but keeps it in his possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping of the deed in his hands, it is a valid and effectual delivery.); 3 American Law of Property, *supra* note 43, § 12.64, at 313 ("Where intent that the deed shall operate at once is proven, physical delivery becomes unnecessary.") (footnote omitted).

58. Co. Litt. \*36a.

of the law.<sup>59</sup> We infer or deduce intent from behavior. Thus, retention of the deed by the grantor justifies a presumption or inference of non-delivery, which is seldom overcome.<sup>60</sup> Conversely, we are justified in presuming or inferring delivery from the grantee's possession of the deed.<sup>61</sup>

Recordation by either the grantor or grantee, though not necessary for a valid conveyance,<sup>62</sup> raises a presumption or inference that the deed was delivered.<sup>63</sup> A far more complex problem is presented by a joint tenant's secret severance deed that is not recorded until after his death.<sup>64</sup>

### B. *Intent and Failure to Record Inter Vivos*

Most courts that have considered the validity of secret severance transactions have ignored the delivery and recordation issue entirely.<sup>65</sup> Those courts that have considered the issue have failed to analyze the unexplained secrecy of the severance transaction and the failure to record the severance instruments in holding that there was an effective delivery.<sup>66</sup>

A relatively recent Colorado case presents a recurring fact pattern.<sup>67</sup>

59. Compare 3 American Law of Property, *supra* note 43, § 12.64, at 312 and W. Burby, *supra* note 1, at 294 (delivery "will suffice if the grantor evidences by word or conduct an intention that the deed be operative") and Boyer, *supra* note 43, at 415 (grantor's use of deed may be evidence of his intention) with 2 J. Wigmore, Evidence §§ 300-307, 371 (discussing general principles of evidence of knowledge, design, and intent in criminal and civil cases).

60. See 3 American Law of Property, *supra* note 43, § 12.64, at 314; W. Burby, *supra* note 1, at 295-96; Cunningham, *supra* note 1, at 732; 6A R. Powell, *supra* note 43, ¶ 891, at 81-106.

61. See 3 American Law of Property, *supra* note 43, § 12.64, at 314; W. Burby, *supra* note 1, at 295-96; Cunningham, *supra* note 1, at 732; 6A R. Powell, *supra* note 43, ¶ 891, at 81-106.

62. See *supra* note 44 and accompanying text.

63. See 3 American Law of Property, *supra* note 43, § 12.64, at 313; W. Burby, *supra* note 1, at 293, 296; Cunningham, *supra* note 1, at 733-34; 6A R. Powell, *supra* note 43, ¶ 891, at 81-104.

64. None of the authorities discuss this problem or raise a presumption of a lack of present intent to sever from failure to record the joint tenant's deed during his lifetime. See, e.g., 3 American Law of Property, *supra* note 43, § 12.64, at 313; R. Boyer, *supra* note 43, at 415-18; W. Burby, *supra* note 1, at 294; Cunningham, *supra* note 1, at 733-34.

65. See, e.g., *Carpenter v. Chandler*, 140 Cal. App. 3d 709, 189 Cal. Rptr. 651 (1983); *Dean v. Auble*, 109 Cal. App. 3d 156, 167 Cal. Rptr. 138 (1980); *Riddle v. Harmon*, 102 Cal. App. 3d 524, 162 Cal. Rptr. 530 (1980); *Delanoy v. Delanoy*, 216 Cal. 23, 13 P.2d 513 (1932); *Johnson v. Johnson*, 11 Ill. App. 3d 681, 297 N.E.2d 285 (1973); *Hendrickson v. Minneapolis Federal Sav. & Loan Ass'n*, 281 Minn. 462, 161 N.W.2d 688 (1968); *Williamson v. Williamson*, 90 R.I. 233, 157 A.2d 110, (1960); *Schimke v. Karlstad*, 87 S.D. 349, 208 N.W.2d 710 (1973).

66. See *Burke v. Stevens*, 264 Cal. App. 2d 30, 35, 70 Cal. Rptr. 87, 91 (1968) (secrecy and failure to record irrelevant in determination of effective delivery); *Carmack v. Place*, 188 Colo. 303, 305-06, 535 P.2d 197, 198-99 (1975) (en banc) (same).

67. See, e.g., *Meyer v. Wall*, 270 Cal. App. 2d 24, 75 Cal. Rptr. 236 (1969) (spouse secretly conveyed interest in joint tenancy property to child); *Delanoy v. Delanoy*, 216 Cal. 23, 13 P.2d 513 (1932) (spouse secretly conveyed interest in joint tenancy property to mother); *Carmack v. Place*, 188 Colo. 303, 535 P.2d 197 (1975) (en banc) (spouse secretly conveyed interest in joint tenancy property to child); *Williamson v. Williamson*, 90 R.I.



In *Carmack v. Place*,<sup>68</sup> the spouses acquired their family residence property in 1946 and occupied it as husband and wife until their deaths in 1971, *H* having predeceased his wife by three months.<sup>69</sup> Four years earlier, *H* had executed a deed conveying his undivided one-half interest in the property to his daughter, *D*.<sup>70</sup> *W* had no knowledge of the deed, which was not recorded until six days after *H*'s death.<sup>71</sup> Holding that the 1967 deed from *H* to *D* severed the joint tenancy, the court's entire discussion of the delivery and recordation issue was as follows:

[I]n Colorado the failure to record a deed until after the grantor's death has no effect upon an otherwise valid conveyance.

Although at the trial level, [*W*'s executor] denied delivery of the deed, he presented no evidence to rebut the presumption of delivery arising from recordation of the deed. Upon recording, this rebuttable presumption relates back to the date of the execution of the deed.<sup>72</sup>

It is true, as the court states, that the failure to record an otherwise valid deed prior to the death of the grantor does not affect its validity.<sup>73</sup> No state recording statute requires recordation prior to the grantor's death.<sup>74</sup> For that matter, there is no requirement that the deed be recorded at all.<sup>75</sup> It is also true that recordation of a deed results in a presumption of a present intent to pass title.<sup>76</sup> But to indulge a presumption of delivery related back to the date of the deed from a recordation *after* the grantor's death when we know that the deed was secretly executed, was kept secret for four years from the grantor's spouse of over twenty years, and was secretly deposited somewhere other than with the recorder of deeds, makes it impossible to raise an inference, or even a suggestion, of a lack of intent to pass title at the date of the deed.

Each of the court's statements of law can be supported by abundant case, text and treatise authority.<sup>77</sup> And each of these statements are sound propositions of law intended to support the integrity of the conveyancing process and the recording system. That is the reason, no doubt, why none of the commentators treat the failure to record as a basis for a presumption or inference against delivery.<sup>78</sup> The problem here is that the wooden application of these conveyancing and recording

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233, 157 A.2d 110 (1960) (same); *Schimke v. Karlstad*, 87 S.D. 349, 208 N.W.2d 710 (1973) (spouse secretly conveyed interest in joint tenancy property to children).

68. 188 Colo. 303, 535 P.2d 197 (1975) (en banc).

69. *Id.* at 304, 535 P.2d at 198.

70. *Id.*

71. *Id.*

72. *Id.* at 305, 535 P.2d at 198 (citations omitted) (brackets not in original).

73. See *supra* note 44 and accompanying text.

74. See *id.*

75. See *id.*

76. See *supra* note 63 and accompanying text.

77. See *supra* notes 44, 63 and accompanying text.

78. See *supra* note 64 and accompanying text.

principles is wholly inappropriate in the context of the secret joint tenancy severance transaction.

At least one court has seen a relationship between the failure to record until after the grantor's death and the requisite intent for an effective inter vivos conveyance. In *Blackburn v. Drake*,<sup>79</sup> the court stated that, though the failure to record until after the death of the grantor "in and of itself does not vitiate delivery or the intent to make a present transfer . . . [it] is a circumstance for the court to consider with the other circumstances surrounding the transaction in ascertaining whether the grantor intended the deed to be presently operative."<sup>80</sup>

Only in cases like *Blackburn v. Drake*, where the severance transaction involves a purported conveyance to a third person, has the lack of intent for the deed to operate presently been argued successfully to defeat the secret deed.<sup>81</sup> It has never been argued successfully in a strawman or single instrument severance transaction.<sup>82</sup> Yet, in both cases, the question of intent remains the same—whether the severing spouse intended to effect an immediate destruction of joint tenancy ownership<sup>83</sup> or whether he intended his instrument to be operative only upon his death.<sup>84</sup> Further, in both cases, the danger of fraud and the incentive to perpetrate fraud are the same.

Take the case of a secret conveyance by *H* to *D*, his daughter by a previous marriage. *W*, *H*'s wife, dies first. Will *D* resist her father's request that she return the deed so that he can claim the property absolutely as surviving joint tenant?<sup>85</sup> Or will she insist that her deed now be

79. 211 Cal. App. 2d 806, 27 Cal. Rptr. 651 (1963).

80. *Id.* at 814, 27 Cal. Rptr. at 656 (citations omitted). See also *Meyer v. Wall*, 270 Cal. App. 2d 24, 75 Cal. Rptr. 236 (1969) (court considers failure to record as one factor indicating non-delivery of deed); *Mecchi v. Picchi*, 245 Cal. App. 2d 470, 483, 54 Cal. Rptr. 1, 8 (1966) (failure to record a deed until after the death of a grantor supports, but does not compel, a finding of non-delivery).

81. See, e.g., *Meyer v. Wall*, 270 Cal. App. 2d 24, 75 Cal. Rptr. 236 (1969); *Blackburn v. Drake*, 211 Cal. App. 2d 806, 27 Cal. Rptr. 651 (1963); *Klajbor v. Klajbor*, 406 Ill. 513, 94 N.E.2d 502 (1950).

82. See, e.g., *Carpenter v. Chandler*, 140 Cal. App. 3d 709, 712, 189 Cal. Rptr. 651, 653 (1983); *Dean v. Auble*, 109 Cal. App. 3d 156, 167 Cal. Rptr. 138 (1980); *Riddle v. Harmon*, 102 Cal. App. 3d 524, 162 Cal. Rptr. 530 (1980); *Burke v. Stevens*, 264 Cal. App. 2d 30, 70 Cal. Rptr. 87 (1968); *Johnson v. Johnson*, 11 Ill. App. 3d 681, 297 N.E.2d 285 (1973); *Hendrickson v. Minneapolis Fed. Sav. & Loan Ass'n.*, 281 Minn. 462, 161 N.W.2d 688 (1968).

83. See *supra* note 50 and accompanying text.

84. See *supra* note 51 and accompanying text.

85. In *Klouda v. Pechousek*, 414 Ill. 75, 110 N.E.2d 258 (1953), *H* and *W* owned certain real property registered under the Torrens Act as joint tenants. *Id.* at 77, 110 N.E.2d at 260. *W* was *H*'s third wife. *Id.* at 78, 110 N.E.2d at 261. Two years before his death, *H* executed and delivered a quitclaim deed of his interest to *D*, one of his six children by a previous marriage. *Id.* The deed purported to grant *H*'s interest to all six children as joint tenants. *Id.* The deed contained the provision: "This deed not to be recorded and not take effect until my death." *Id.* The reason for this provision was that, because *W* had possession of the Torrens certificate, *H* could not keep the deed a secret from *W* if he attempted to register it. See *id.* at 87, 110 N.E.2d at 265. *D* testified "that she would have given the deeds back to the grantor if he had asked for them." *Id.* at 83.

recorded so that she or her stepmother's devisees can bring a partition action to have the house sold, receive her one-half share of the proceeds of the sale and have her father evicted from possession of his home? Since *D* participated in the secret conveyance and the lack of recordation, is it reasonable to expect her now to have a sudden attack of candor and honesty?<sup>86</sup>

The difference between these attempted testamentary dispositions is that in the single and straw party severance transactions, the severing joint tenant is more in control of his affairs, his secret is better kept and the temptation to destroy the severance instrument or instruments is almost irresistible. It would seem, therefore, that the failure to record the severance deed prior to the severing joint tenant's death is even more probative of a lack of present intent in the single party and straw party transactions than in third party transactions.

### C. *A Case in Point*

The case of *Burke v. Stevens*,<sup>87</sup> which has gone unnoticed or ignored for almost two decades,<sup>88</sup> best illustrates the typical circumstances in which secret severance transactions take place and the shocking failure of courts to perceive and to remedy a problem that is inimical to joint tenant title stability. In *Burke*, *H* and *W* purchased the property in dispute as joint tenants in 1941.<sup>89</sup> Sometime before or during the month of June, 1960, *H* informed *W* that, should she die first, he would dispose of the joint tenancy property as he wished.<sup>90</sup> It was this conversation that prompted *W* to write to her personal attorney, Mr. Natzke, in June, 1960

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110 N.E.2d at 263 (emphasis added). Because the initial delivery of deed was not so conditioned, her statement was considered irrelevant. The court held that there was a valid delivery of deed and that the effect of the provision against "recording" until after the grantor's death constituted a present transfer of the fee title to his children and a reservation of a life estate in the grantor. *See id.* at 88-89, 110 N.E.2d at 266.

86. Even if *H* and *D* had a serious falling out, she could insist that *H* convey to her a one-half interest in the property as a precondition to returning the deed. Thus, *D* could receive a one-half interest in the property either upon return of the deed to *H* or upon recordation of her deed. If she chose the former, she would preserve *H*'s one half-interest in the property without affecting her interest. If she chose the latter, however, she would extinguish *H*'s interest in the property while preserving her interest. Given the preservation of her interest in either case and in view of her prior cooperation with *H* in the transaction, she would appear to have little incentive to refuse *H*'s request to return the deed. *H* could then destroy the deed, claim as surviving joint tenant, and *D* would still take the interest she would have taken under the original severance deed.

87. 264 Cal. App. 2d 30, 70 Cal. Rptr. 87 (1968).

88. *See, e.g.*, 2 American Law of Property, *supra* note 11, § 6.2, at 160-61 n.19 (Supp. 1977); R. Boyer, *supra* note 43, 80-88; O. Browder, R. Cunningham & A. Smith, Basic Property Law, 301-04, 307-15 (4th ed. 1984); A. Casner & W. Leach, Cases and Text on Property 254 (3d ed. 1984); J. Cribbet & C. Johnson, *supra* note 44, at 338-42; Cunningham, *supra* note 1, §§ 5.3-5.4; C. Donahue, T. Kauper & P. Martin, Property 621-28 (2d ed. 1983); J. Dukeminier & J. Krier, Property 487-530 (1981); 4A R. Powell, *supra* note 1, ¶¶ 615-619[2], at 51-1 to -18.

89. *Burke v. Stevens*, 264 Cal. App. 2d 30, 33, 70 Cal. Rptr. 87, 90 (1968).

90. *Id.* at 32-33, 70 Cal. Rptr. at 90.

regarding certain testamentary dispositions she wished to make of her separate property in the event of her death.<sup>91</sup> Her letter stated her belief that, because the real property was held in joint tenancy, the survivor would take all and there was nothing she could do about it.<sup>92</sup>

There was no mention of any further communication between *W* and her attorney until approximately four months later when *W* wrote a letter to him, dated October 2, 1960, directing him to "prepare a power of attorney for her execution, naming him as her attorney in fact, and directing him to terminate the joint tenancy."<sup>93</sup> No mention was made of how *W* acquired the legal knowledge sufficient to give such directions.<sup>94</sup> On the same day, she executed and delivered the power of attorney pursuant to her letter<sup>95</sup> and executed her last will and testament, naming Mr. Natzke executor thereof.<sup>96</sup> The court did not explain how *W*'s letter, dated October 2, 1960, could have been dispatched by *W*, and received by Mr. Natzke, so as to allow him sufficient time to "hatch" the "secret plan to terminate the joint tenancy,"<sup>97</sup> prepare the power of attorney and have *W* execute the same, all on October 2, 1960. Unless the dates were confused, it appears that the letter, the power of attorney and *W*'s will all were prepared, executed and delivered contemporaneously.

To terminate the joint tenancy, Mr. Natzke executed and delivered a quitclaim deed on October 5, 1960, conveying *W*'s interest to Mr. Moran, his law office associate.<sup>98</sup> The next day, the associate conveyed his interest back to *W*.<sup>99</sup> Contrary to normal conveyancing practices,<sup>100</sup> the deeds were not recorded immediately.<sup>101</sup> Thus, the failure to record appeared to be deliberate. Yet, Mr. Natzke must have known that the transaction would have remained secret even if the deeds had been recorded immediately. The chance that *H* would cause a search to be made of the records of property he owned for twenty years and thereby discover the secret severance deeds was virtually nil.<sup>102</sup> Failure to rec-

91. *See id.* at 34, 70 Cal. Rptr. at 90.

92. *Id.*

93. *Id.* at 32, 70 Cal. Rptr. at 89.

94. *See id.* at 32-34, 70 Cal. Rptr. at 89-90.

95. *See id.* at 32, 70 Cal. Rptr. at 89.

96. *See id.* at 33, 70 Cal. Rptr. at 90.

97. *Id.* at 32, 70 Cal. Rptr. at 89 ("This secret plan to terminate the joint tenancy was hatched pursuant to a letter from Mrs. Burke to Mr. Natzke.")

98. *Id.* at 32, 35, 70 Cal. Rptr. at 89, 91.

99. *Id.* at 32, 70 Cal. Rptr. at 89.

100. *See* Cunningham, *supra* note 1, at 776.

101. *Burke v. Stevens*, 264 Cal. App. 2d 30, 34-35, 70 Cal. Rptr. 87, 91 (1968).

102. The following cases illustrate that an owner of property, either individually or as a co-owner, has no reason to examine his record title once he has recorded the deed conveying title to himself. Recordation of a severance deed is not intended to give the other joint tenant notice or constructive notice. He is not a subsequent purchaser.

In *Hockett v. Larson*, 742 F.2d 1123 (8th Cir. 1984), *H* conveyed property owned by himself and *W* as joint tenants, signing his own name and forging *W*'s signature to the deed. *Id.* at 1124. Although the deed was recorded immediately after conveyance by *H*, *W* did not know of the conveyance until after *H*'s death, three years later, in 1979. *Id.*

ord, however, would allow the deed to be discovered and given effect only upon the death of *W*.

Both of the deeds and *W*'s will were kept in *W*'s attorney's offices.<sup>103</sup> Her will devised her interest in the property to her two sons by a previous marriage, subject to a life estate that she left to *H*.<sup>104</sup> *H*, of course, learned of the secret conveyances only after *W*'s death almost two years

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The court held that the deed effectively transferred *H*'s interest in the property and severed the joint tenancy, leaving *W* as a tenant in common as to her undivided one-half interest. *Id.* at 1126.

In *Loneragan v. Strom*, 145 Ariz. 195, 700 P.2d 893 (1985), *H* and *W* were under a preliminary injunction in an annulment proceeding instituted by *H* not to "transfer, encumber, conceal, sell, or otherwise dispose of" joint tenancy property "without the written consent of both parties or the permission of the court." *Id.* at 197, 700 P.2d at 895. While the preliminary injunction was still in effect, *H*'s attorney effected a strawman exchange of deeds between *H* and the attorney's legal secretary for the sole purpose of severing the joint tenancy title to certain property owned by *H* and *W* as joint tenants. *Id.* at 197, 700 P.2d at 895. The deed was recorded, but *W* did not learn of the strawman severance deeds until after *H*'s death seven months later, which was three months after judgment was entered in *W*'s favor in the annulment proceeding. The court held that the severance was not the type of "transfer" against which the injunction was issued. *Id.* at 198-200, 700 P.2d at 896-98. Hence, "the legality of the straw party transaction by which the husband sought to terminate the joint tenancy between himself and his wife was not subject to question." *Id.* at 198, 700 P.2d at 896.

In *Clark v. Carter*, 265 Cal. App. 2d 291, 70 Cal. Rptr. 923 (1968), *W* executed a single party severance deed and an assignment the day before she died. *Id.* at 293, 70 Cal. Rptr. at 925. The deed was recorded three days after *W*'s death. *Id.* Three months later, *H*, unaware of the severance deed, its recordation, or even *W*'s death, filed an "affidavit terminating the joint tenancy which he believed existed." *Id.* at 293, 70 Cal. Rptr. at 925. It is significant that *H*, even at the time that he filed an instrument which he believed would sever the joint tenancy, did not cause a search of the title to discover whether *W* might have filed an earlier severance instrument. The court held that the single party severance deeds were invalid and did not terminate the joint tenancy. *See id.* at 296, 70 Cal. Rptr. at 927.

In *Register v. Coleman*, 130 Ariz. 9, 633 P.2d 418 (1981), a mother who had owned her residence property in fee simple caused the property to be transferred to herself and her son as joint tenants. *Id.* at 11, 633 P.2d at 420. In 1971, the mother transferred her interest by quitclaim deed to her daughters and had the deed immediately recorded. *Id.* The son claimed he did not know of the recorded deed from his mother to the daughters until after his mother's death in 1975. Despite the son's lack of knowledge, the court held that the joint tenancy was severed by the mother's quitclaim deed. *See id.* at 12, 633 P.2d at 421.

A similar case is *Minonk State Bank v. Grassman*, 95 Ill. 2d 392, 447 N.E.2d 822 (1983), *aff'g* 103 Ill. App. 3d 1106, 432 N.E.2d 386 (1982). Three sisters owned property conveyed to them by their father as joint tenants. *Id.* at 393, 447 N.E.2d at 823. After the death of one of the three sisters, a surviving sister executed and recorded her severance deed. *Id.* Five years later, the non-severing joint tenant died, apparently still unaware of the recorded severance deed. *Id.* The court held that the single party deed had effectively severed the joint tenancy. *See id.* at 395-96, 447 N.E.2d at 824.

It seems that a recorded severance deed kept secret from the non-severing joint tenant is just as secret as one that is not recorded at all. How frequently and at what expense is a joint tenant going to search his title? A search today is worthless as to a recordation tomorrow, and a search tomorrow is worthless as to a recordation the next day, *ad infinitum*.

103. *Burke v. Stevens*, 264 Cal. App. 2d 30, 35, 70 Cal. Rptr. 87, 91 (1968).

104. *Id.* at 35, 70 Cal. Rptr. at 91.

later in 1962.<sup>105</sup>

In *H*'s subsequent action to quiet title, the California Court of Appeals held that the secret strawman transaction was effective to sever the joint tenancy.<sup>106</sup> The court characterized the transaction as a "secret plan to terminate the joint tenancy,"<sup>107</sup> that was "devised and carried out"<sup>108</sup> by Mr. Natzke and Mr. Moran. Despite the attorneys' evident familiarity and *W*'s apparent lack of familiarity with the law, the court attributed to *W* clear directions that she had given to her "attorney that complete secrecy was to be maintained."<sup>109</sup> Further, the court stated that the wife's actions were "subject to ethical criticism" and that "her stealthy approach to the solution of the problems facing her [was] not to be acclaimed," especially in view of the generous trust reposed in her by her husband.<sup>110</sup>

The court sustained the trial court's finding of a valid and effective delivery,<sup>111</sup> stating that "[i]nasmuch as two attorneys, presumably familiar with the law relating to joint tenancy, devised and carried out this course of action, the intent to pass title to one-half of the joint tenancy property was present in connection with the delivery of the first deed."<sup>112</sup> This line of reasoning is circular. It leads irresistibly to the conclusion that in all strawman severance conveyances, the present intent to cause a severance of the joint tenancy exists. The only purpose for the transaction is to sever the joint tenancy. The transaction itself is proof of the requisite intent. The same logic necessarily applies to single party severance deeds and to "Declarations of Intent to Sever."<sup>113</sup> The only purpose for executing these instruments is to cause a severance and to destroy survivorship rights. Thus, they too are executed with the present intent to effect their only purpose. To hold otherwise, so this line of reasoning would argue, would be to attribute to the severing joint tenant the performance of a meaningless and useless act.

But by focusing only on the severance transaction, divorced from the surrounding circumstances, the court loses sight of the issue entirely—whether the severance transaction was intended to effect an immediate destruction of joint tenancy ownership between the spouses.<sup>114</sup> Whatever the form of the severance transaction and no matter how scrupulously each detail of the severance ceremony is attended and fulfilled, the sine qua non of the transaction still is intent. The form of a transaction has

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105. *Id.* at 33, 70 Cal. Rptr. at 90.

106. *See id.* at 34-35, 70 Cal. Rptr. at 91.

107. *Id.* at 32, 70 Cal. Rptr. at 89.

108. *Id.* at 35, 70 Cal. Rptr. at 91.

109. *Id.* at 34, 70 Cal. Rptr. at 90.

110. *Id.* at 34, 70 Cal. Rptr. at 91.

111. *See id.* at 35, 70 Cal. Rptr. at 91.

112. *Id.* at 35, 70 Cal. Rptr. at 91.

113. *See supra* note 33 and accompanying text.

114. *See supra* note 50 and accompanying text.

never prevented the courts from piercing the most formal of legalistic inventions to address the substance and fairness of human behavior.

*Burke v. Stevens*<sup>115</sup> is the only secret severance case in which counsel argued that the secret severance transaction is a fertile environment for the fraudulent destruction of survivorship rights. Emphasizing that the unrecorded severance deeds were kept in the office of *W*'s attorney, *H*'s counsel argued that "if [*H*] had died first nothing would have been said about the deeds passing between [*W*] through Mr. Natzke and Mr. Moran and that, in such circumstances, [*W*] would become apparent owner of the entire land."<sup>116</sup>

The court failed to appreciate the relationship between the issue of present intent to effect a severance and the intentional failure to record the severance deed and dismissed the argument out of hand.<sup>117</sup> "The mere fact that a wrong of this kind is imaginable," said the court, "cannot be used to counter the fact that the joint tenancy was legally terminated."<sup>118</sup> The court stated that fraud could not be contingently assumed.<sup>119</sup> Not a shred of evidence supported the suggestion that "two reputable attorneys and a citizen" would conspire to conceal the truth and commit a wrong.<sup>120</sup> Rather, the nefarious scenario suggested by counsel was "pure guess" and "contrary to the presumption of fair dealing."<sup>121</sup> Having rejected the notion that the behavior of *W* and her attorneys might merit further scrutiny, the court disposed of the case by reciting a litany of propositions of law with wooden, syllogistic logic.<sup>122</sup>

What the court failed to see, or refused to appreciate, was the stubborn reality that whether the secret severance transaction was pursuant to a fraudulent scheme or whether it was innocent, *W* and her attorney would have been faced with the same dilemma upon *H*'s death: "Should we now come forward and inform the executor or administrator of *H*'s estate [probably *W* herself] that *W* severed the joint tenancy two years ago? If we do, *H*'s estate assets will include a one-half interest in the property which *H* believed he owned as a joint tenant until the day he

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115. 264 Cal. App. 2d 30, 70 Cal. Rptr. 87 (1968).

116. *See id.* at 35-36, 70 Cal. Rptr. at 91.

117. *See id.*

118. *Id.* at 36, 70 Cal. Rptr. at 92.

119. *Id.*

120. *Id.* at 36, 70 Cal. Rptr. at 92.

121. *Id.* at 36, 70 Cal. Rptr. at 91-92.

122. The court explained that:

It was unnecessary in connection with the execution of such a deed that there should be notification to the other joint tenant and unnecessary that the deed be recorded; neither acknowledgement or recordation is necessary. It is not necessary that the consent to termination of joint tenancy be obtained from the other joint tenant. None of these things was done, but it was not essential that any of them should be effected. The deed passed immediate title to Mr. Moran, and when he in turn deeded the same interest in the land to [*W*], that deed was also effective.

*Id.* at 35, 70 Cal. Rptr. at 91 (brackets not in original).

died, subject to *W*'s survivorship right. Or, should we forget about all of those documents that *W* executed?"

If the 1960 secret severance transaction were intended to effect a severance at that time, and if the deliberate failure to record were solely for the purpose of maintaining the secrecy of the severance transaction, then destruction or concealment of the deeds would constitute a fraudulent taking of *H*'s one-half interest in the property.<sup>123</sup> If, on the other hand, the failure to record the severance deeds were pursuant to a plan to effect a severance only if *W* died first, then the destruction of the straw party severance deeds would not be fraudulent. Having failed to serve their intended purpose, there no longer would be any reason to retain them. If this were *W*'s intent, and if this were the reason for not recording the deeds, then the severance transaction would be an invalid attempted testamentary disposition.<sup>124</sup> *W* either intended her severance deed to operate immediately or she intended it to operate only upon her death, not both.

If, as the *Burke* court stated, "[o]ne cannot contingently assume fraud,"<sup>125</sup> are we not justified in assuming that unrecorded severance deeds are executed with the intent to effect a severance only if the severing joint tenant dies first? It is one thing to indulge the "presumption of fair dealing" in a secret severance transaction so as not to charge the parties with a present intent to perpetrate a future fraud, but it is altogether different to stubbornly adhere to that presumption when it is contrary to the facts and human behavior. A person, otherwise scrupulously honest, is likely to be less than honest if he is assured of a substantial financial gain without risk that his less than honest behavior will be revealed. It defies reason to assume that the straw-party deeds would ever have been produced if *H* had died first. The only way we can conform the presumption of fair dealing with reality is to assume that *W* and her attorney intended the severance deeds to operate only in the event that *W* dies first. If that was *W*'s intent, the secret severance transaction fails as an invalid attempted testamentary disposition.

### III. A STATUTORY SOLUTION

Although there is a perfectly sound argument for raising a presumption of a lack of present intent to sever from the failure to record the severing joint tenant's deed during his lifetime, no such presumption has

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123. As indicated by the court in *Burke*, such an act would be "a conspiracy to hide the truth and commit a wrong" that, if actually intended by the attorneys, would constitute "fraud." *Id.* at 36, 70 Cal. Rptr. at 92. *Cf.* 8 G. Thompson, *supra* note 51, § 4292 n.99 ("[T]he destruction of the deed before the recording of it, whether by accident or by wrongful act of a third person, does not annihilate title . . . between the parties.") (emphasis added).

124. *See supra* note 51 and accompanying text.

125. *Burke v. Stevens*, 264 Cal. App. 2d 30, 36, 70 Cal. Rptr. 87, 91 (1968).



been recognized by courts<sup>126</sup> or even suggested by commentators.<sup>127</sup> Complete obliviousness to the issue, so palpably manifest in *Burke v. Stevens*, characterizes too many other judicial opinions to anticipate acceptance of such a presumption by other courts, even if they might now be persuaded that such a presumption was justified. It is doubtful, therefore, that such a presumption might be recognized at this late date. In view of the court's analysis of the effectiveness of after-death recordation of severance deeds in *Carmack v. Place*,<sup>128</sup> Colorado courts might find it impossible to raise even the slightest suggestion of a lack of present intent to sever from the failure to record the severing joint tenant's deed prior to his death.

It seems, therefore, that the solution to the problem should be statutory. The statute should be one that fits comfortably into the whole fabric of the conveyancing process, one that is not disruptive of the law as applied to the delivery of deeds and to the recording statutes. It should also leave the law intact as it applies to joint tenancy ownership of real property. Three statutory formulations based, respectively, on recordation, notice and fraud, were considered before the wisdom of a fourth formulation became apparent.

#### A. Recordation

It is always tempting to adopt a direct, absolute rule that is certain to cure the perceived wrong in every possible variation of the wrongful theme. Such a cure would be a rule that severance deeds shall be void unless recorded during the severing joint tenant's lifetime. This cure, however, poses several problems.

Suppose that you and your spouse have been engaged in a bitter and protracted divorce proceeding. After learning that a polyp removed from your large intestine was malignant, you turn your attention to your financial affairs. Months ago you had prudently attended to your will. Now disability and death have an element of immediacy to you. Because you practice law in California, Illinois or some other state that recognizes single-party severance deeds, you execute such a deed and have it acknowledged by a secretary who has served you in that capacity hundreds of times before. You are headed out the door to record the deed when one of your associates rushes into the office and informs you that your spouse was just killed in an automobile accident. Your next move? If you are starting to feel less honest than you thought you were, let me suggest that you read or re-read Mark Twain's *The Man that Corrupted Hadleyburg*.<sup>129</sup>

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126. See *supra* notes 65-66 and accompanying text.

127. See *supra* note 64 and accompanying text.

128. 188 Colo. 303, 535 P.2d 197 (1975) (en banc). See *supra* notes 68-72 and accompanying text.

129. Mark Twain's classic short story is about a self-righteous town whose only claim to fame was in its cultivated reputation for honesty. A stranger's diabolic ruse corrupted

Is there any doubt that you intended your deed on execution to be immediately operative? Had you, rather than your estranged spouse, been killed in an automobile accident on the way to the Office of the Recorder of Deeds, your deed should still be valid. That you probably would have destroyed the deed upon your spouse's hypothetically unexpected death, does not erase the fact that you intended to sever the joint tenancy. Nothing in your behavior suggests the fraudulent scheme here addressed. Although the requirement of recordation during the lifetime of the severing joint tenant would slam the door on spousal fraud on survivorship rights, it would also defeat bona fide severance transactions and deathbed severance deeds.

Furthermore, such a statute would not fit into the fabric of the conveyancing process. No state has recording statutes under which the validity of a deed is dependant upon its recordation.<sup>130</sup> If validity of a severance deed were dependent upon its recordation during the lifetime of the grantor, it would stand alone in the law of conveyancing.

### B. Notice

Another possible solution is to require notification. Some commentators have concluded that secret severance unfairly deprives the other joint tenant of an awareness of his right to provide for the transmission of his interest by will. They recommend that the legal effectiveness of the severance transaction be conditioned on notice.<sup>131</sup> One commentator observed that "[t]his would ensure that the nonsevering spouse will not rely on survivorship rights but will be aware of the need to make proper disposition of the property."<sup>132</sup>

The same commentator cautioned, however, that "this would create timing and proof problems."<sup>133</sup> Further, where the spouses are separated it might be difficult to locate the unknowing spouse. Another commentator who recommends notification suggests that, under such circumstances "the only notice that may be possible could be constructive notice via recordation of the termination instrument."<sup>134</sup> Constructive notice is

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all nineteen of the town's leading citizens by the lure of a fortune in bogus gold coins and his promise that their false claims to the fortune would not be revealed. See M. Twain, *The Man That Corrupted Hadleyburg*, in *The Complete Short Stories of Mark Twain* 349 (C. Neider ed. 1957).

130. See *supra* note 44 and accompanying text.

131. See *infra* notes 132-34 and accompanying text.

132. Sterling, *Joint Tenancy and Community Property in California*, 14 Pac. L.J. 927, 966 (1983).

133. *Id.*

134. Reppy, *Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage*, 18 San Diego L. Rev. 143, 238 (1981).

By way of footnote, another commentator stated:

First Nat'l Bank v. Groussman, 29 Colo. App. 215, 483 P.2d 398, *aff'd*, 176 Colo. 566, 491 P.2d 1382 (1971) (octogenarian mother bought home with daughter in joint tenancy; mother provided down payment and daughter as-

unlikely to remedy the unfairness caused by the nonsevering party's lack of awareness. Constructive notice is a euphemism for treating a person who does not know something as if he does. Recordation under such circumstances essentially hides something where everyone can see it but where no one thinks to look.<sup>135</sup>

A more serious problem with this solution lies in the uncertainty it introduces into joint tenancy titles. Once title to property has been held in joint tenancy, the prospective purchaser of a severed interest in that property will be unable to determine from the record title whether the severance deed is valid. Rejecting the claim that severance is dependent upon notice, the court in *Carmack v. Place*<sup>136</sup> correctly observed that it "would render the record extremely questionable whenever a severed joint tenancy appears."<sup>137</sup> The court noted that, "[i]n cases where both of the former joint tenants are deceased . . . actual notice could be difficult, if not impossible, to prove."<sup>138</sup>

I have no problem with the law of joint tenancy in its maximization of flexibility in survivorship rights. It is a form of property co-ownership that assures survivorship rights and, at the same time, allows for severability. Severability is the "escape hatch" available to each joint tenant. Whether he does or does not avail himself of his survivorship right is a matter of choice. A formula for reform that in any way impairs or indirectly suppresses those rights should be avoided. Better that we abolish directly, rather than indirectly, this form of property ownership.

### C. Intent

When the problem addressed by this Article first crossed my mind, my immediate response was to propose a direct and obvious solution. The obvious solution was a statute that would discourage secret severance schemes by presuming fraudulent intent from the failure to record unless clear and convincing evidence existed proving otherwise.<sup>139</sup> But I have

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sumed mortgage payments, but mother secretly conveyed her interest to grandchildren seven years later, reserving life estate to herself). To prevent cases like *Groussman*, Professor Edward Rabin recommends that joint action be required to terminate the survivorship feature. Conversation with Professor Rabin, Davis, California (Summer, 1981). Because parties' needs and intentions may change over time, however, the recommendation of this study would instead permit unilateral action with notice, relying on estoppel and damages doctrines to protect one who would thereby be unfairly prejudiced.

C. Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 *Hastings L.J.* 769, 834 n.248 (1982). In another footnote, Professor Bruch observed in passing: "Finally, if one secretly deeds to himself or herself, then outlives the co-tenant, it would be a simple matter to destroy the unrecorded deed and fraudulently take the property as a surviving joint tenant. See *Burke v. Stevens* . . ." *Id.* at 833 n.244.

135. See *supra* note 103 and accompanying text.

136. 188 Colo. 303, 535 P.2d 197 (1975) (en banc).

137. *Id.* at 306, 535 P.2d at 199.

138. *Id.*

139. This statute could have taken the following form:

now rejected this solution, not only because there is a better one, but because it is too harsh and hence unworkable. Ironically, it was *Burke v. Stevens*<sup>140</sup> that, upon reflection, convinced me to abandon the fraudulent scheme analysis.

The problem with such a statute is that, as the *Burke* court stated, "[o]ne cannot contingently assume fraud."<sup>141</sup> It might very well be that, as counsel implied in *Burke*, a spouse who executes and "delivers" a severance deed, but does not record it, intends to defraud his spouse by destruction of the deed in the event that his spouse dies first.<sup>142</sup> On the other hand, at the time of execution of the severance deed, the thought of the other spouse's prior death might not have even occurred to the severing joint tenant. His dominant motive and intent at the date of severance might have been to assure himself that one-half the value of the joint tenancy property would pass at his death to favored objects of his bounty rather than to his spouse. His secrecy might very well be based upon a fear of his spouse's power to use other legal maneuvers to frustrate his plan and his fear of the law and lawyers generally. Here we have a person whose initial perceptions of his rights in joint tenancy property ownership are so flawed that each "new" right or power revealed to him by his own attorney might very well engender new fears as to what legal tricks might be available to his spouse. He knows that once his spouse learns that an attorney is helping him to arrange his affairs, his spouse will retain an attorney to arrange his spouse's affairs. And his fear is that his spouse's attorney may be even more clever than his attorney. Hence, secrecy is to be maintained at all costs.

Moreover, the attorney's position is impossible. Even though the failure to record might initially have been wholly innocent,<sup>143</sup> the severing spouse and his attorney cannot fail to grasp the implications of the other spouse's death and realize that they put themselves in this position from the start. This is especially true when the instrument or instruments of severance have been held for safe keeping by the attorney. The attorney's

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#### MODEL ACT

Section 2-101. *Severance of Joint Tenancy. Persons Claiming Under Deceased Joint Tenant's Unrecorded Deed or Other Instrument—Void Unless Failure to Record Severance Deed Proved Not Fraudulent.* An unrecorded deed or other instrument otherwise effective to sever a joint tenant's interest in real property shall be void as against the surviving joint tenant or tenants unless the person or persons claiming under, by, or through such deed or other instrument prove by clear and convincing evidence that the failure to record such deed or other instrument was not intended to defraud the surviving joint tenant or tenants of his or their survivorship rights by destruction or concealment of said deed or other instrument in the event that the surviving joint tenant or tenants died first.

140. 264 Cal. App. 2d 30, 70 Cal. Rptr 87 (1968).

141. *Id.* at 36, 70 Cal. Rptr. at 92.

142. *Id.* at 30, 70 Cal. Rptr. at 87.

143. When I say "wholly innocent," I merely mean that it might not be pursuant to a fraudulent scheme. I do not mean that the secret severance transaction might serve some legitimate, praiseworthy objective. Regardless of the motivation, he has deprived his spouse of her survivorship right knowing that his spouse is relying upon the right.

client, whose understanding of the whole transaction is probably still flawed, will ask him to destroy the deed. That the attorney might have failed to anticipate his now impossible position is sufficient to justify the *Burke* court's conclusion that there was no evidence indicating that "[W], Mr. Natzke and Mr. Moran would join in a conspiracy to hide the truth and commit a wrong."<sup>144</sup> The attorney's legal, ethical, moral and financial positions are complex, contradictory and compromised.<sup>145</sup> A statute that concludes fraudulent intent unless clear and convincing evidence to the contrary be proven would be a strong deterrent. It might, however, put attorneys in serious jeopardy of disciplinary proceedings that would be difficult to defend against and where their only transgressions might be in their failure to exercise good judgment and professional prudence.

Nevertheless, secret severance transactions pose a grave threat to joint tenancy title stability that must be eliminated. A joint tenant who has devised or accepted an arrangement to assure secrecy has gained an advantage never intended by the common law. The law permits a joint tenant to sever without the consent *or even the knowledge* of the other joint tenant to assure that his right and ability to sever is absolute and unfettered.<sup>146</sup> That is why he may sever without giving notice to the other joint tenant, not because the policy of the common law is to promote the secret severance as one of the rights and advantages of joint tenancy ownership.

In every secret severance transaction, the possibility exists that the nonsevering spouse will die first. Whether the failure to record is pursuant to a fraudulent scheme or whether it is innocent, once the severing joint tenant, either alone or with his attorney, is faced with the prior death of the nonsevering joint tenant, he cannot avoid being aware of his power to claim as surviving joint tenant simply by destroying the unrecorded severance deed. Further, the ability to gain a substantial financial advantage by behavior not likely ever to see the light of day inevitably invites such behavior and triggers every conceivable variety of rationalization to justify such behavior. Are we not justified, therefore, in concluding that an unrecorded severance instrument will be discovered *only* if the severing joint tenant dies first? In other words, it seems fair to presume that the severing joint tenant who fails to record intends for his severance deed to operate only if he dies first—an attempted testamentary disposition.

If we address the realities of secret, unrecorded severance transactions, the model statute here proposed should commend itself.

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144. *Burke v. Stevens*, 264 Cal. App. 2d 30, 70 Cal. Rptr. 87, 91 (1968).

145. See generally Model Code of Professional Responsibility Canon 4 (1980) ("A lawyer should preserve the confidences and secrets of a client"); *id.* Canon 7 ("A lawyer should represent a client zealously within the bounds of the law").

146. See *supra* notes 20-26 and accompanying text.

## MODEL ACT

Section 2-101. *Severance of Joint Tenancy. Persons Claiming under Deceased Joint Tenant's Unrecorded Deed or other Instrument—Void as Testamentary in Character Unless Proven Otherwise.*

An unrecorded deed or other instrument otherwise effective to sever a joint tenant's interest in real property shall be void<sup>147</sup> unless the person or persons claiming under, by or through such deed or other instrument prove by clear and convincing evidence that such unrecorded deed or other instrument was intended to take effect irrespective of which of the joint tenants dies first.

The proposed statute leaves intact the joint tenant's absolute right to sever his interest from joint tenancy ownership and thereby terminate both spouses' survivorship rights. His unilateral severance right is not dependant upon notice to his spouse. Whether or not he chooses to inform his spouse of the severance, for whatever reason or for no reason at all, is a matter between him and his spouse. Even if secrecy is desired, the joint tenant can record his severance instrument, thereby taking his transaction beyond the purview of the statute, and still maintain secrecy. Though recordation might disclose his secret, it is highly unlikely to do so.<sup>148</sup>

While retaining all the advantages of joint tenancy contemplated by the common law, the Model Act would remove all incentive for delay in recording an instrument intended to effect an immediate severance and destruction of survivorship rights. The spouse is forced to choose between exercising his right of unilateral severance and taking his chances "upon success in the ultimate gamble—survival—and then only if the unity of the estate has not theretofore been destroyed by . . . action which operates to sever the joint tenancy."<sup>149</sup>

The statute would encourage the attorney to attend to the recordation of the severance deeds with the same attention he gives to all other deeds in the ordinary course of his real estate practice. He is given a statutory reason to refuse a client's request to sever the client's interest from joint tenancy ownership without prompt recordation. Otherwise, the attorney can explain, he could be held liable for malpractice by the client's disappointed devisees or distributees should the client die first.<sup>150</sup>

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147. An alternative formulation would be to insert after "shall be void" the phrase "as an attempted testamentary disposition or as an attempted intestate distribution."

148. See *supra* note 103 and accompanying text.

149. *Riddle v. Harmon*, 102 Cal. App. 3d 524, 526-27, 162 Cal. Rptr. 530, 531 (1980) (quoting *Tenhet v. Boswell*, 18 Cal. 3d 150, 155-56, 554 P.2d 330, 334, 133 Cal. Rptr. 10, 14 (1976)).

150. Consider the situation of an attorney who has been in possession of his client's unrecorded severance deeds for several years, as was the case in *Burke v. Stevens*, 264 Cal. App. 2d 30, 70 Cal. Rptr. 87 (1968). What would happen under the Model Act if his client dies first? If the deeds were recorded after his client's death and the client's devisees claimed an interest in the property under the will, it would seem impossible for them to prevail. They would have to prove that the severance deeds were not invalid as an attempted testamentary disposition. It is likely that under such circumstances, the attor-

Fraudulent destruction of secret severance deeds can neither be prevented nor discovered. This Model Act, however, provides a potent disincentive for their existence in the first place and is, therefore, respectfully commended to the several state legislatures and to the National Conference of Commissioners on Uniform State Laws.

#### CONCLUSION

It is with some trepidation that I publish this Article. I know of two other instances where the authors of law review articles proposed solutions to a problem where there was no general awareness that such a problem even existed until the articles were published and read. Both might have exacerbated the problem rather than contributed to its solution.

In 1905, Albert Martin Kales, a brilliant young law professor at Northwestern University Law School, published an article in the *Law Quarterly Review*.<sup>151</sup> In that same year, the Article was reprinted as a chapter of his treatise on the Illinois law of estates and future interests.<sup>152</sup> In 1967, I published an article in the *Arkansas Law Review*.<sup>153</sup> The theses of both Articles argued against judicial acceptance of the common law rule of destructibility of contingent remainders.<sup>154</sup> Both Articles analyzed case authority,<sup>155</sup> and respectively concluded that in Illinois (Kales),<sup>156</sup> and in Arkansas (Fetters),<sup>157</sup> there were sufficient precedents for the supreme courts of the respective states to hold that destructibility was not a part of the jurisprudence of either state should the issue of destructibility ever be squarely raised on appeal.

Three years after the Kales publications, and two years after my Article, the Supreme Courts of Illinois<sup>158</sup> and Arkansas<sup>159</sup> respectively de-

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ney would be liable to the disappointed devisees for malpractice. Might the attorney in such a position be tempted to destroy the severance deeds rather than record them? If he did destroy them, then he would have to explain the meaningless devise in his deceased client's will. He may find himself not only liable for malpractice, but also defending himself against disbarment. What if the client had died intestate in the above case? Might the attorney be tempted to destroy the severance deeds? He might, but then he would have to worry about whether the severance transaction was really secret, not from the surviving spouse-joint-tenant, but from anyone else who might refer the matter to the character and fitness committee. Under the proposed statute, attorneys will attend to recordation as promptly as the circumstances of the severance transaction permit. Death-bed severance transactions will survive post-death recordations.

151. See Kales, *Contingent Future Interests After a Particular Estate of Freehold*, 21 L.Q.R. 118 (1905).

152. See A. Kales, *Conditional and Future Interest and Illegal Conditions and Restraints* (In Illinois) § 81-92(a), at 107-33 (1905).

153. See Fetters, *Destructibility of Contingent Remainders*, 21 Ark. L. Rev. 145 (1967).

154. See *id.* at 146-48, 163; Kales, *supra* note 150, at 119-20, 136-37.

155. See Fetters, *supra* note 152, at 150-59; Kales, *supra* note 148 at 129-36.

156. See Kales, *supra* note 150 at 137.

157. See Fetters, *supra* note 152 at 163.

158. See *Bond v. Moore*, 236 Ill. 576, 86 N.E. 386 (1908).

159. See *Tucker v. Walker*, 246 Ark. 177, 437 S.W.2d 788 (1969).

cided cases in which destructibility was raised on appeal. Here ends the similarity in the sagas of these two law review articles. In the famous case of *Bond v. Moore*,<sup>160</sup> the Illinois Supreme Court held that the rule of destructibility of contingent remainders was a part of the common law of that state. Who represented the victorious appellant? None other than Professor Kales. As a result, Illinois was saddled with a pernicious precedent that generated a flood of wasteful litigation<sup>161</sup> until it finally was abolished by statute in 1921.<sup>162</sup>

In the not at all famous case of *Tucker v. Walker*,<sup>163</sup> the Supreme Court of Arkansas rejected the appellant's argument that he should prevail by application of the destructibility rule.<sup>164</sup> I suspect that my Article might have stirred up this litigation as Kales' Article might have done in Illinois. And I was delighted that the destructibility rule was not applied to defeat the contingent remainder. But there my satisfaction ended for I could not understand the majority opinion. I found myself just as befuddled as the concurring justice who stated, "I cannot tell whether the majority is rejecting or approving the doctrine [of destructibility of contingent remainders]. The opinion does not relate the particular facts which make the doctrine inapplicable."<sup>165</sup>

The destructibility Articles might have done more damage than good. Had Kales and I "let sleeping dogs lie," the tens of cases that followed might not have arisen. The tens or possibly hundreds of titles that might have been adversely affected by the destructibility rule might have gone unnoticed. Yet the problem raised in this Article is potentially far more mischievous than were the destructibility articles. Millions, indeed, tens of millions of land titles throughout the country might be unsettled by arousing this sleeping dog.

My fear is that this Article might interest the wrong people. It, too, proposes a solution to a problem where, apparently, there is no general awareness that there is a problem. And it offers what some readers might regard as a sensible solution. But my fear is that it might serve as a "do-it-yourself" blueprint for wrongdoing—an invitation to commit fraud.

Nonetheless, I feel reasonably confident that the solution to this problem will commend itself to law revision commissions and to the legislatures. Otherwise, joint tenancy ownership of real property in this country, with its extreme vulnerability to destruction of survivorship rights by fraud, most assuredly will be avoided by sensible, prudent people advised by competent counsel.

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160. 236 Ill. 576, 86 N.E. 386 (1908).

161. The cases are collected in A. Kales, *Estates, Future Interests and Illegal Restraints in Illinois* § 310 n.58 (2d ed. 1920). See also Note, *Seisin and Disseisin (Concluded)*, 34 Harv. L. Rev. 717, 737 n.530 (1921).

162. See Ill. Ann. Stat. ch. 30, para. 40 (Smith-Hurd 1969).

163. 246 Ark. 177, 437 S.W.2d 788 (1969).

164. See *id.* at 180, 437 S.W.2d at 789.

165. *Id.* at 183, 437 S.W.2d at 791 (Fogelman, J., concurring).