Realism and Formalism in the Severance of Joint Tenancies

Richard H. Helmholz

University of Chicago Law School, dick_helmholz@law.uchicago.edu

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TABLE OF CONTENTS

I. Introduction ........................................... 1
II. Definitions ............................................ 4
III. Continuing Citation of the Four Unities ............... 6
IV. Rejection of the Four Unities Requirement ............. 9
   A. Cases of Unilateral Self-conveyance ................ 9
   B. Contracts to Sell and Equitable Conversion .......... 15
   C. Divorce and Severance ................................ 20
   D. Summary ........................................... 24
V. The Consequences ..................................... 24
   A. Added Difficulties in Determining Severance
      Questions .......................................... 25
   B. Increased Possibility of Fraud ...................... 25
   C. Greater Incongruity with the Remaining Formal
      Rules .............................................. 27
      1. Void Deeds ..................................... 27
      2. Mortgages ..................................... 28
      3. Wills .......................................... 29
      4. Partition ...................................... 30
      5. Bankruptcy .................................... 31
      6. Leases ........................................ 31
VI. Conclusion ........................................... 32

I. INTRODUCTION

During the 1950s, a series of articles, comments, and case notes appeared in American law reviews dealing with the then-current law relating to severance of joint tenancies.¹ It is not too much to say that

¹ See Paul Basye, Joint Tenancy: A Reappraisal, 30 Calif. St. B.J. 504, 507 (1955)(describing the four unities of joint tenancy as "an outstanding example of
they echoed a single theme: The inherited law of severance was based upon a needless and outmoded formalism. The commentators concluded that the law of severance of joint tenancies had become "thoroughly burdened with concepts which might be described as archaic."2

In their eyes, the "troublesome doctrine of the four unities"3 stood out as the worst offender. These four unities—time, title, possession, and interest—were traditionally used to decide whether there had been a severance. Unless they were broken, there could be none. That requirement seemed a particularly egregious example of the harm done by taking a purely formal approach to legal questions. It served to frustrate the legitimate expectations of too many joint tenants, and for no discernible purpose. To the commentators, the time seemed ripe for American courts to take a more realistic stance and to abandon the four unities outright. They advocated that courts look instead to the intent of the parties for the operative test of whether a joint tenancy had been severed and a tenancy in common created in its place.

In the years since the 1950s, the intent-based approach advocated by the law review commentators has been noted, mostly with approval, in treatises,4 law reviews,5 hornbooks,6 and casebooks.7 What

persisting medieval formalism"); Londo H. Brown, Some Aspects of Joint Ownership of Real Property in West Virginia, 63 W. VA. L. REV. 207, 227 (1961)(stating that the four unities requirement is "outmoded and has no place in modern law"); John Mann, Joint Tenancies Today, 1956 ILL. L. FORUM 48, 75 (describing the joint tenancy as "a technical common law estate, full of pitfalls for the unwary and uninformed"); Elmer M. Million et al., Real and Personal Property, 36 N.Y.U. L. REV. 357, 381 (1961)(noting with approval the development of an intent-based test according to discussions "during the past seven years"); Frank Reichelderfer, Severance of Joint Interests, 1959 ILL. L. FORUM 932, 934-35 (showing need for the use of a straw man to sever); Robert W. Swenson & Ronan E. Degnan, Severance of Joint Tenancies, 38 Minn. L. REV. 466, 503 (1954)(arguing that the unities may have had a purpose historically "but are useless concepts today"); Leland Stuart Beck, Note, 41 CORNELL L.Q. 154, 159 (1955)("The intention of the parties should be controlling, and the function of the court is to seek out that intention."); Note, Effect of Contract to Sell, 42 IOWA L. REV. 646, 648-49 (1957)(criticizing recent decision as contrary to the better rule that would "hold intention to be the primary test for severance," as was true for creation); Edward H. Hoenicke, Comment, Elimination of the Straw Man in the Creation of Joint Estates in Michigan, 54 MICH. L. REV. 118, 120 (1955); George W. Marti, Note, 55 MICH. L. REV. 1194, 1195 (1957); Harold J. Romig, Jr. & John M. Shelton, Comment, Severance of a Joint Tenancy in California, 8 HASTINGS L.J. 290, 298 (1957).

2. Swenson & Degnan, supra note 1, at 466.
3. Hoenicke, supra note 1, at 120.
has not been undertaken is any investigation of whether the case law itself has responded to the position taken in the articles. Academics issued a strong call for a more realistic approach to be used in deciding severance cases. But has any court answered their call?

At first sight, it appears that they have not. Judges and commentators today continue to speak of the four unities and the formalist approach they embody as stating the law applied in the majority of American jurisdictions. The arguments advanced in the law reviews during the 1950s seem to have fallen upon deaf ears. The task of the present Article is to discover whether that conclusion is correct.

The Article also contributes to the discussion of the place of formalism in the law. The relevance of the questions raised is not limited to the subject of joint tenancies. Underlying the approach advocated in most of the early law review commentary is the conviction that purely formal norms that are out of step with current realities should be eliminated from the law wherever they can be. Taking that approach seriously has real, and continuing, implications in many areas of the law, and it is a subject on which many writers have strong views. The commentary from the 1950s was an eloquent statement of one possible consequence of taking the anti-formalist view. Within this particular area of law, and in a forceful way, it raised a large subject which was of significant interest to legal scholars and, indeed, to all thoughtful lawyers.

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7. See e.g., JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 341 (3d ed. 1992); GRANT NELSON ET AL., CONTEMPORARY PROPERTY 314 (1996).
8. See JOHN CRIEBET ET AL., PROPERTY 319 (7th ed. 1990)(criticizing the result as "hardly comprehensible to a layman," but describing the four unities as "widely current" and noting that the alternative of doing without them "has not been widely adopted"); see also RALPH BOYER ET AL., THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY 101-02 (4th ed. 1991); ROBERT KRATOVIL & RAYMOND WERNER, REAL ESTATE LAW § 14.02(b)(1) (8th ed. 1983).
II. DEFINITIONS

Joint tenancies and tenancies in common exist where estates in land or rights to chattels are held as a unit by two or more persons. The former are distinguished from the latter by the characteristic, traditionally called the *ius accrescendi*, which makes the joint tenant who survives the death of the other(s) the outright owner of all the property. Property held in common, by contrast, passes to each tenant's heirs or legatees. It is quite possible to move from a joint tenancy to a tenancy in common while retaining the other features of co-ownership. In fact, either tenant has the right to sever the joint tenancy, even without the consent or knowledge of the other tenant, and such a severance ends the *ius accrescendi*. However, it does not upset the undivided ownership in the tenancy in common that is created when severance occurs. Only a partition, accomplished by sale or physical division of the property, results in the parties holding separate interests in the property.

Although by no means legally so confined, joint tenancies are typically used by husbands and wives, or at least by members of the same family. Ties of kinship often create an interest in property that is joint in more than a technical sense, and this form of ownership accords well with those ties. It also permits the survivor to take by virtue of the original conveyance, rather than by inheritance at the death of the other tenant(s); very often this result is exactly what members of the same family desire. Among other advantages, joint tenancy avoids the expense and trouble of probate. Consequently, it would not be inaccurate to say that the joint tenancy is most widely used today as an alternative to a will.

The common law joint tenancy is very old, going back at least to the thirteenth century. In its main features, it has exhibited a remarkable durability. As the preferred form of common ownership in earlier English law, the joint tenancy's existence was presumed over a tenancy in common in cases where there was doubt about which had been created. Despite widespread reversal of that presumption in modern American law, joint tenancies remain in frequent use. Indeed, there is some evidence to suggest that their popularity is actually growing.

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The traditional test for the creation and continuation of a joint tenancy depended upon the presence of the four unities. Unless the unities of time, title, interest, and possession existed at the tenancy's inception, or if they were broken at any subsequent point, the joint tenancy was automatically severed, and the owners became tenants in common. This requirement meant, for example, that the owner of property could not create a joint tenancy in himself and others without first making use of a straw man. Because all joint tenants had to receive their interest in the property at the same time and by the same title, the owner had first to convey to a third party, who would in turn convey the property back to the grantor and the other tenants. They would then take in joint tenancy. Without this purely formal step, however, they would be only tenants in common.

Today (as was already largely true in the 1950s), the necessity for using a straw man to create a joint tenancy has been largely eliminated from American law, sometimes by judicial decision but more often by statutory enactment. However, the situation as to termination of a joint tenancy has not been identical. In order to sever, the traditional rule has always required either that all the tenants make an express agreement to hold as tenants in common or that one of the tenants convey to a third person in order to destroy the unities. This

recorded in the state's populous counties convey to both husband and wife and that 90% of these deeds create joint tenancies); Robert R. Moodie, Some of the Dangers of Joint Tenancy, 29 Neb. L. Rev. 235, 235 (1950)(estimating that more than 50% of recorded conveyances of that time in Nebraska were in joint tenancy); cf. John H. Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 Harv. L. Rev. 1108, 1114-15 (1984)(discussing the common use of joint tenancies as imperfect will substitutes).

Moreover, some states that once forbade the creation of joint tenancies have now come to permit them. The common law joint tenancy, abolished by the Georgia Constitution of 1777, was revived by statute in 1976. Ga. Code Ann. § 44-6-190 (1976). In Washington state, the joint tenancy was abolished by statute in 1885 but reinstated by popular initiative in 1961. See Wash. Rev. Code § 64.28.010 (1989). The similar history of the law of North Carolina is traced in John V. Orth, The Joint Tenancy Makes a Comeback in North Carolina, 69 N.C. L. Rev. 491 (1991). A survey of current state law on this subject is found in 4 Thompson, supra note 4, at § 31.06(d).

12. See e.g., Irvine v. Helvering, 99 F.2d 265, 268 (8th Cir. 1938) noted in Recent Case, 23 Minn. L. Rev. 385, 385-86 (1939); see also Ratinska v. Estate of Densuk, 447 So. 2d 241, 243 (Fla. Dist. Ct. App. 1983) (stating that no purpose is served by "requiring that property be conveyed twice when a single conveyance is just as effective and has the virtues of economy and efficiency"); Switzer v. Pratt, 23 N.W.2d 837, 839 (Iowa 1946) (agreeing with the rule that "the intention of the parties should prevail over the technical common law rules"); Lipps v. Crowe, 100 A.2d 361, 364 (N.J. Super. Ct. Ch. Div. 1953) (stating that "if a joint tenancy can be created between or among persons by means of a conveyance through third persons, it can be created by direct conveyance").

13. A useful summary of the relevant statutes appears in 4 Thompson, supra note 4, at § 31.06(c).
means that, although any joint tenant has the unqualified right to sever the tenancy, thereby creating a tenancy in common in which the ius accrescendi disappears, if the joint tenant wishes to do so and continue to hold in common, he must first make use of the straw man. Otherwise, the four unities will not have been destroyed. The law review commentators found that requirement as incongruous as it was archaic. Indeed, its purely formalist approach seemed to have infected the law of severance at several points. They advocated its abolition. Calling for replacement of this formalist approach, commentators argued that the intent of the parties should control.

III. CONTINUING CITATION OF THE FOUR UNITIES

An initial examination of the cases decided in the intervening years tempts one to believe that nothing has changed in the interim. The four unities appear to occupy a central place in many judicial decisions. What judges have written often gives no hint that they have paid the slightest heed to the argument that the requirement has outlasted any utility it may once have had. The four unities continue to be described as necessary parts of a joint tenancy. A Missouri case from the 1950s saw fit to stress that a joint tenancy's "essential elements are the four unities of interest, title, time and possession."¹⁴ A Pennsylvania case of 1991 used almost exactly the same language—"the four unities of a joint tenancy"—to distinguish it from a tenancy by the entirety.¹⁵ In a 1983 case from West Virginia, the court spoke approvingly of "the four unities that are essential to the creation and maintenance of a joint tenancy."¹⁶ And in a decision from the District of Columbia in 1996, the judge held that "joint tenancy cannot exist unless there be present unity of interest, title, time and possession. . . ."¹⁷ Such statements recognizing the vitality of the unities are common. Although repudiated in a few jurisdictions, the rule that continued existence of the four unities is the necessary feature of the joint tenancy appears to be alive and well in many others.

A more thorough examination of these cases gives good reason for not drawing far-reaching conclusions based upon the various courts' mention of the four unities. Each of the four cases just cited arose under circumstances where there were substantive reasons, not simple formalism, for reaching a result in line with the four unities test. In none of the cases would a strict application of the four unities have required disregarding the intent of the joint tenants. The Missouri case involved a dispute over state inheritance taxation, and the four

¹⁴. G.H. Suelthaus v. State (In re Gerling), 303 S.W.2d 915, 917 (Mo. 1957).
unities were invoked to stress that the survivor took by the original conveyance, not by way of inheritance from the first to die.\textsuperscript{18} The Pennsylvania case used language approving the four unities simply to make the obvious point that marriage by one joint tenant did not necessarily sever a tenancy between him and another person.\textsuperscript{19} In the West Virginia case, one party had argued that the unities "must be deemed to be legislatively abolished,"\textsuperscript{20} and that, consequently, neither tenant had a right to sever the tenancy and create a tenancy in common. The court used the four unities to hold that this proposition was not the law; either tenant retained the power to sever by destroying one or more of the unities. Similarly, in the case from the District of Columbia, one party sought to sever by conveying her interest to a third person. The court upheld her intention by noting that her act had "destroyed the unities of title and time."\textsuperscript{21}

These four cases represent the pattern of the American decisions in the intervening years. The four unities continue to be invoked, but not where they would make a difference in the outcome.\textsuperscript{22} Sometimes, the four unities have been mentioned in dicta, where the reference was superfluous to the court's decision.\textsuperscript{23} Other times, they have been mentioned in dissent, to protest against a majority opinion dispensing

\textsuperscript{18} See G.H. Suelthaus v. State (\textit{In re Gerling}), 303 S.W.2d at 915, 918 (Mo. 1957). For an analogous though unusual case, holding that the survivor took by virtue of the original grant, which involved the proceeds to property intentionally burned by one joint tenant, who also committed suicide, see Felder v. North River Ins. Co., 435 N.W.2d 263, 265 (Wis. Ct. App. 1988).


\textsuperscript{20} Herring v. Carroll, 300 S.E.2d 629, 633 (W. Va. 1983).

\textsuperscript{21} In re Estate of Gulledge, 673 A.2d 1278, 1280 (D.C. 1996).

\textsuperscript{22} One possible exception to this generalization is the involuntary levy on one joint tenant's interests by a creditor. In these cases, the four unities sometimes have been used as a way to uphold the rights of the surviving joint tenant where the debtor-joint tenant dies before the property can be sold. See, e.g., Knibb v. Security Ins. Co., 399 A.2d 1214, 1216-17 (R.I. 1979)(observing that the levy of execution did not destroy the four unities and, therefore, did not sever the joint tenancy). However, similar cases have been decided in the same way without reference to the four unities. See, e.g., Jamestown Terminal Elevator, Inc. v. Knopp, 246 N.W.2d, 612, 613-14 (N.D. 1976)(holding that a judgment lien against a joint tenant's interest in real property is not by itself sufficient to sever the joint tenancy since the surviving joint tenant does not take the deceased tenant's interest but rather has a vested interest in the whole by virtue of the original conveyance). In such cases, the intent of the joint tenant cannot, of course, be dispositive, because his consent is irrelevant to the nature of the action taken against him. See John Fisher, \textit{Creditors of a Joint Tenant: Is There a Lien After Death?}, 99 W. Va. L. Rev. 637 (1997).

with the traditional unities. Occasionally, the four unities have rated a passing word as a largely historical curiosity. Rarely, however, has the requirement furnished the operative rule of decision in litigation. There are exceptions to this generalization which will be discussed below, but, in the main, the four unities have been used in these cases simply to reach an outcome that would also have been reached by enforcing the intent of the parties or applying some other legal rule.

Significantly, references to the four unities in cases where one of the tenants had conveyed his interest to a stranger to the title and thereby severed the joint tenancy have been a particularly frequent feature of the judicial opinions of recent years. In virtually all such instances, it made no difference to the outcome whether an intent-based or the traditional test was adopted, since the joint tenant who conveyed away his interest clearly wished to terminate the survivorship feature of the tenancy. Courts have quite sensibly cited both tests where no inconsistency between them existed. Such an approach is far from the archaic formalism that was the target of the original commentary.

The relative harmlessness of this formal requirement’s continued use is further illustrated by cases in which courts have held that some action short of outright conveyance by one of the tenants did not sever the joint tenancy. Some of these decisions supported this result by mentioning the continued existence of the four unities. However, they did so only in order to uphold the intent of the joint tenant not to destroy the survivorship rights. Thus, where one tenant pledged his interest in the property to a stranger or otherwise made a temporary grant of the property without intending that the interest serve as anything but a security interest, courts have occasionally taken note of the continued existence of the four unities. Doing so provides an easy way to uphold that tenant’s intent to continue the joint tenancy despite the pledge or grant. These judges were not using the four uni-

ties to upset the wishes of the parties. In fact, the reverse is closer to the truth. More often than not, judges have invoked the four unities to protect those wishes.

IV. REJECTION OF THE FOUR UNITIES REQUIREMENT

Besides the cases just described in which the formalist approach produced the same result as an intent-based approach, appreciable numbers of cases have arisen in which it did make a real difference which approach was adopted. In the great majority of these cases, and in virtually all those dealing with the specific problems taken up in the commentary of the 1950s, the courts have rejected the four unities requirement. They have instead adopted a more realistic approach to the question. They have followed the view expressed in the law review commentary that intent should control.28

Of course, it would be a mistake to exaggerate the absolute preponderance of the intent-based approach. The judicial response has not been unanimous. There have indeed been cases holding that the question of severance must be determined by looking solely at the four unities. But, although the existence of such cases is worth noting, surely it is more significant that they have been few in number. A trend does not cease to be a trend simply because there have been exceptions to it. Moreover, many jurisdictions have not decided one way or the other. Nonetheless, we would probably do well to hesitate before describing the traditional approach as "the majority rule" in view of the paucity of recent case law to support that conclusion. A survey of the decisions on the subject during the past forty years (of which there have been many) leaves one with the distinct sense of the traditional approach's substantive irrelevance. The evidence on the point falls roughly into one of three distinct classes.

A. Cases of Unilateral Self-conveyance

The starkest clash between the formalist and the intent-based approaches has come in cases in which one joint tenant has conveyed to him or herself as a tenant in common. Without joining or informing the other joint tenant(s), one of them seeks unilaterally to eliminate the *ius accrescendi* by converting the title into a tenancy in common. It has never been doubted that one tenant can sever a joint tenancy by conveying to a third person. But can one tenant achieve the same result simply by conveying, as a joint tenant, to him or herself as a ten-

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28. *See generally* Beck, supra note 1, at 159 (stating that "[t]he intention of the parties should be controlling, and the function of the court is to seek out that intention").

ant in common? Or can the tenant sever simply by making a formal declaration of intent to do so? Under traditional law, neither the unilateral self-conveyance nor the formal declaration disturbed the four unities. Both were therefore ineffective in severing the joint tenancy. It is doubtful, however, that this remains the law today.

The first outright rejection of the traditional approach to severance appeared in a Minnesota case. One joint tenant executed a "Declaration of Election to Sever Survivorship of Joint Tenancy" without the knowledge of the other tenant. Then he died. When this "Declaration" was challenged by the surviving joint tenant, who claimed title to the whole, it was held that the "Declaration" had in fact served as an effective severance. A tenancy in common had resulted. The case was complicated slightly by the fact that the property held in joint tenancy was a homestead, but the court's holding was not limited to such property. The opinion stated clearly that thereafter one tenant could "terminate the joint tenancy by declaration without being required to go through the ceremony of a conveyance to a straw man and a reconveyance back again."

In the years that followed, several other courts have taken the same step. The most dramatic occurred in California in 1980. Only twelve years previously, the same court had held unambiguously that any transfer of property required two different people, a grantor and grantee. Hence no severance could be effected by one joint tenant's conveying to herself. The 1980 case rejected this then-recent precedent, deciding instead to "discard the archaic rule that one cannot en-

29. Robert Natelson, Modern Law of Deeds to Real Property § 2.8 at 34-35 (1992)(said to be the rule "in most states").
31. Id. at 691.
32. Under Minnesota law, homestead property could not be alienated or mortgaged without the consent of both spouses. The traditional method of severance by conveyance and reconveyance was therefore not open to the joint tenant desiring to sever, so he chose to execute the Declaration described in the case. In recognizing an effective severance, the Minnesota Supreme Court pointed out that, had it rejected this method of severance in the instant case, a tenancy by the entirety would have been created, an estate which was not recognized in Minnesota. However, the court did limit the severance to the remainder interest in the wife's life estate so that she could continue in possession and enjoyment of the property during her life, thereby serving the public policy of protecting the wife's occupancy in the joint home. See id. at 691. Contrast, however, a Colorado court's refusal to allow severance of homestead property in Knoche v. Morgan, 664 P.2d 258, 259 (Colo. Ct. App. 1983)(holding that the attempt to sever was void because of the policy behind the homestead law).
feoff oneself which, if applied, would defeat the clear intention of the grantor." 36 The opinion, a model for a reasoned overthrow of a traditional rule of property, made the following points:

(1) There was no need to use a straw man in order to create a joint tenancy under existing California law. It seemed anomalous to require such use in order to terminate one. The inception and termination should be brought into harmony. 37

(2) One joint tenant could undoubtedly sever unilaterally and was not required to give the other tenant notice. No new powers were therefore being accorded to anyone by eliminating this purely formal requirement. Indeed, the traditional rule had really served only to increase the expense and trouble required on the part of the severing joint tenant. 38

(3) The four unities requirement was of a piece with other rules of the ancient common law—the requirement of livery of seisin for example. Almost all such "ancient vestiges" had been discarded already. This particular holdover could therefore more appropriately join that number. 39

(4) Little reliance had been placed upon this rule of property law by practitioners and land owners. The security of land titles in no way depended upon it, and the oft-advanced argument against change from reliance upon precedent therefore did not apply in this situation. 40

(5) Commentators had advocated the same step, and other courts had taken it without apparent ill results. The California court cited the 1968 Minnesota case in support of its decision. If others had not hesitated to change, why should California? 41

In recent years, the same dilemma has been faced squarely in at least four other jurisdictions. All but one have followed the pattern set by Minnesota and California. In 1982, an Illinois court held that a deed by one joint tenant "conveying [a] parcel of property from herself

37. See Riddle v. Harmon, 162 Cal. Rptr. 530, 532.
38. See id. at 534.
39. See id. at 533.
40. See id.
41. See id. at 534.
as a joint tenant to herself as a tenant in common" was an effective severance. The judge noted that "courts have been inclined to allow severance in any variety of ways once the intent to sever has been demonstrated," and he rejected the argument that statutory repeal of the requirement of the four unities in the creation of joint tenancies should not be extended to their termination because of the maxim that statutes in derogation of the common law should be construed strictly. In 1991, Florida took the same step in a bizarre case in which one joint tenant forged the other's signature in a purportedly joint conveyance to himself; he did so in order to secure a mortgage loan on the premises. The court held that his action, which it treated as equivalent to a conveyance to himself as a tenant in common, in fact severed the joint tenancy. Utah's Supreme Court followed suit in 1996. Following the reasoning of the Minnesota and California courts and also expressly overruling a prior Utah decision, the Utah Supreme Court stated that "a joint tenant may effectively sever a joint tenancy by executing and recording a unilateral self-conveyance."

The exception is Nebraska. In 1979, the state supreme court rejected the argument that was to prevail elsewhere. It held that "[a] person cannot convey or deliver to himself that which he already possesses," and that the regime of the four unities persisted except where it had been expressly modified by statute. The facts of the case admittedly made an appealing argument for reaching that result. The plaintiff, to whom the property had earlier been devised, created the joint tenancy with an old man who had been a long-time family friend on January 30th. Just twenty days later, this man, acting in


44. See id. at 389-90.

45. See Countrywide Funding Corp. v. Palmer, 589 So. 2d 994, 996 (Fla. Dist. Ct. App. 1991); see also Wittock v. Ramponi, 446 So. 2d 271, 271 (Fla. Dist Ct. App. 1984)(holding that joint tenancy was terminated when joint tenant conveyed her interest to herself and to a stranger to the title).

46. See Knickerbocker v. Cannon (In re Estate of Knickerbocker), 912 P.2d 969, 974-76 (Utah 1996).

47. Id. at 976. The severing tenant recorded the unilateral self-conveyance, and the opinion appears to require recordation in order to guard against the possibility of fraud. Indeed, this requirement figured in the court's reasons for allowing a unilateral self-conveyance to effect a severance.


49. Id. at 812, 277 N.W.2d 242, 246 (1979).

50. See id. at 811, 277 N.W.2d 242, 245 (1979).
the company of the defendant, caused a unilateral self-conveyance to be drawn up in favor of himself as grantee. At the same time, the old man executed a will under which the defendant took a large share. If effective, this would have deprived the plaintiff to whom the property had originally belonged of the chance even to change the old man's mind about the wisdom of severing. Although the court rejected the allegation of undue influence by the defendant, the suggestion is strong that the plaintiff had been treated unfairly and that the defendant was to blame. The four unities allowed the plaintiff (and the fairer result) to prevail.

What will happen in other American jurisdictions when this question has to be faced? Predictions are risky, and lawyers in jurisdictions where the matter remains uncertain will doubtless continue to use the conveyance to a strawman as a matter of prudence. However, it does seem more likely than not that the strength of the reasoning found in the recent opinions will carry the day when the question does arise. That is the way the tide is running. The Nebraska legislature itself acted quickly to reverse the 1979 decision. In 1980, it added a "curative" provision to its statute law:

The conveyance of all of the interest of one joint tenant to himself or herself as grantee, in which the intention to effect a severance of the joint tenancy expressly appears in the instrument, severs the joint tenancy.

A similar development has occurred elsewhere in property law. In the law of servitudes, the traditional "touch and concern" requirement, used to determine whether a servitude was enforceable against successors in interest in the land, has been attacked as "encrusted with archaic terminology," and has yielded in some measure at

51. Cf. Natelson, supra note 29, at 34-35 (stating that the unilateral self-conveyance creates an effective severance "in a very few states").

52. See, e.g., Kratovil & Werner, supra note 8, §14.02(c) at 239 (describing the Minnesota case that permitted unilateral self-severance as "a pretty liberal decision" and recommending that "the party deed out to a dummy and have the dummy deed back").


least, to a test tied to public policy and intent.\textsuperscript{56} There has also been a movement of opinion, though somewhat less successful so far, in favor of abandoning the traditional test for distinguishing assignments from subleases—by asking whether the grantor retained a reversion in favor of an intent-based test.\textsuperscript{57}

Moreover, some movement in this same direction is evident elsewhere in the law regulating severance of joint tenancies. Decisions arising in analogous situations have accepted the basic reasoning found in the law reviews.\textsuperscript{58} In some other situations where the unities have been technically breached, as happens for instance when one joint tenant is adjudged an incompetent and the legal title to the incompetent's property is assigned to a guardian, courts have regularly held that no severance occurred.\textsuperscript{59} Many decisions also speak critically of the antiquated character of the requirement of the four unities. They stress that the intention of the parties should control in deciding questions of severance.\textsuperscript{60} A few states have abandoned the

\textsuperscript{56} See Restatement (Third) of Property: Servitudes §§ 3.2-3.7 (Tentative Draft No. 2, 1991); see also Gerald Korngold, Private Land Use Arrangements § 9.10 at 311 (1990) (criticizing the rule as "an unwieldy and highly confused doctrine, where technical application, rather than policy-based analysis, determines results").


\textsuperscript{58} See e.g., Cope v. Western Sur. Co. (In re Matter of Robinson), 791 S.W.2d 844, 850 (Mo. Ct. App. 1990) (holding that joint tenant severed tenancy by his "acts, statements, conduct and testimony"); Rotert v. Faulkner, 660 S.W.2d 463, 470 (Mo. Ct. App. 1983) (surrendering of note held by joint tenancy by one tenant found to be an effective severance); Brown v. Bowery Sav. Bank, 415 N.E.2d 906, 907-08 (N.Y. 1980) (removing the name of the other joint tenant and substituting a third person on the bank's signature card effected a severance); Stop 35, Inc. v. Haines, 543 A.2d 1133, 1136 (Pa. Super. 1988) (holding that the parties' declaration of intent to sever their tenancy by the entirety would not be effective, but stating that the recording of a deed to the same effect would be).


\textsuperscript{60} See e.g., Brant v. Hargrove, 632 P.2d 978, 982 (Ariz. Ct. App. 1981) (contrasting four unities approach to mortgages with "the more modern approach"); MacGregor v. MacGregor, 323 So.2d 35, 38 (Fla. Dist. Ct. App. 1975) (disparaging "all the neo-Platonic references in the cases to the four 'unities' which form [the basis] for tenancies by the entirety"); Hyland v. Standiford, 111 N.W.2d 260, 264 (Iowa 1959) ("advocating a shift away from the four unities of the common law and to the intention theory"); Cornell v. Heirs of Walik, 235 N.W.2d 828, 829 n.1 (Minn. 1975) ("There should be no regrets over this departure from the concept of the four 'unities."); Cleaver v. Long, 126 N.E.2d 479, 482 (Ohio 1955) (stating
four unities approach across the board.\textsuperscript{61} And dicta in other decisions in this area support the proposition that exit from a joint tenancy should be no harder than entry into one.\textsuperscript{62} There is a counter argument, to be discussed below, to the effect that unilateral self-severance may become a tool for fraud if allowed without safeguard. However, to the extent this counter argument comes to prevail, it seems unlikely that it will do so because of a reverence for the formalist approach of the four unities requirement.

\section*{B. Contracts to Sell and Equitable Conversion}

Among the most formal of rules applied to joint tenancies is that which applies the doctrine of equitable conversion to severance questions involving contracts for the sale of land. It was among the targets of one of the comments that appeared in the law reviews and it offers a second opportunity for assessing current developments in the law of severance.\textsuperscript{63} The situation arises when all joint tenants execute a contract to convey the land held in joint tenancy, and then one of them dies while the contract is still executory. Under the doctrine of equitable conversion, a contract to convey land converts the seller's interest into an interest in personalty, normally the money proceeds from the

\begin{quote}
that there is no way to escape "wondering why the courts have dwelt at great pains 'on the four unities' of the old common law joint tenancy".
\end{quote}

\textsuperscript{61} See e.g., Bates v. Bates (\textit{In re} Estate of Bates), 492 N.W.2d 704, 706 (Iowa Ct. App. 1992) ("Iowa does not follow the 'four unities' common law rule, which required a unity of time, title, possession, and interest in order to create (and continue) a joint tenancy."). The Bates opinion relied in part on \textit{Baker v. Cobb} (\textit{In re Baker's Estate}), 78 N.W.2d 863 (Iowa 1956). The court in \textit{Baker} had noted that prior cases had "definitely held the 'four unities' common law rule was not applicable in Iowa and the intention of the parties should prevail." \textit{Id.} at 865 (citing \textit{Switzer v. Pratt}, 23 N.W.2d 837, 839 (Iowa 1946)). \textit{In re Baker's Estate} became a well known case because of its use in an annotation on the subject: W.W. Allen, \textit{Annotation, What Acts by One or More Joint Tenants Will Sever or Terminate the Tenancy}, 64 A.L.R.2d 918 (1959). \textit{See also Mann v. Bradley}, 535 P.2d 213, 214 (Colo. 1975) ("The modern tendency is to not require that the act of the co-tenant be destructive of one of the essential four unities . . . ."); \textit{Renz v. Renz}, 256 N.W.2d 883, 885 (N.D. 1977) ("[A]lthough we have recited the Blackstonian doctrine of the four unities as a matter of history . . . we have never held that the four unities were required in order to establish a joint tenancy under our law.") (citations omitted).

\textsuperscript{62} See e.g., Mamalis v. Bornovas, 297 A.2d 660, 662 (N.H. 1972) ("We can see no reason in policy or logic to adopt a different standard for the termination of a joint tenancy than obtains for its creation.").

\textsuperscript{63} There is an annotation on this subject in Sara L. Johnston, \textit{Annotation, Contract of Sale or Granting of Option, to Third Party, by Both or All of Joint Tenants or Tenants by the Entirety as Severing or Terminating Tenancy}, 39 A.L.R.4th 1068 (1985), but it divides cases into those which have found severance and those which have not, without looking at the question of whether a formal test or the intention of the parties was determinative in the outcome.
sale. In equity, title to the land is in the buyer from the moment the contract is signed.

When this doctrine is applied to property held by joint tenancy, it follows (or has seemed to follow) that the contract of sale itself will also sever the four unities and create a tenancy in common. The presumption in cases of doubt, in favor of tenancy in common over joint tenancies, a presumption that is broadly accepted in modern American law, has been used to buttress this conclusion. As a Nebraska court put it bluntly, "[c]onveyance of joint property by all the joint tenants destroys the joint tenancy." In practical terms, the result is that those who inherit from the first to die among the (former) joint tenants share in the proceeds of the sale.

That this result proceeds from a purely mechanical application of the doctrine of equitable conversion, and that it is not even absolutely required by the doctrine of the four unities, has been pointed out by many commentators and judges. They have noted that the admission that the joint tenancy is severed as to the land being conveyed does not require that it be severed as to the proceeds. The more appropriate approach would be to look to the intent of the joint tenants. Was it their intention that the contract to convey would also sever their interest in relation to the proceeds? American courts have had to respond to that question many times in recent years.

Reviewing the case law shows that overall the courts have not followed Nebraska's lead in applying a mechanical rule—whether based on equitable conversion or on the four unities. Both doctrines have been discussed in cases and sometimes are taken seriously, but neither has provided the rule of decision. An intent-based test has controlled instead. This is true even though decisions have gone both ways in deciding whether or not a severance in the proceeds had been effected by the contract to convey. Indeed outcomes are bound to vary where intention provides the rule of decision. The intent of the joint tenants varies.

64. Buford v. Dahlke, 152 Neb. 39, 45, 62 N.W.2d 252, 256 (1954) (stating also that, "the courts of other jurisdictions, and leading text writers, are unanimously of the opinion that a contract to convey operates, in equity, as a severance of the joint tenancy"). The case is noted in Lawrence L. Wilson, Note, The Effect of a Land Sale Contract Involving Property Held in Joint Tenancy, 34 Neb. L. Rev. 501 (1955).


66. It has even been possible to invoke the doctrine of equitable conversion in order to effect the intent of the parties. See, e.g., Timberlake v. Heflin, 379 S.E.2d 149 (W. Va. 1989).
A Maryland decision from 1966 is fairly typical of the cases that have found a severance. Two joint tenants agreed to sell a tract of land to the State and in fact delivered a deed to the lawyer acting for the State. However, before the deed could be recorded or the purchase price paid, one of the joint tenants died. The State contended that the joint tenancy had been severed and sought to recover from the estate of the deceased the inheritance tax due from the proceeds. The trial court disagreed, holding that the joint tenancy remained intact until the purchase price had been paid, and that the proceeds were owed entirely to the surviving joint tenant. The court of appeals reversed, holding that there had been a severance. Four points were made in the course of the decision:

(1) Admitting that there had been a severance in the land itself, the court concluded that this was by no means determinative as to the proceeds of the sale. A different question was raised, and the court was obliged to attempt to determine what the parties had actually intended. It stated that in such cases, “the paramount factor most often is the intention of the parties.”

(2) Examining the language of the contract, the judge found no indication of any intent by the parties to take the proceeds as joint tenants. The contracting parties had simply signed their names on the instrument, without indicating any desire to preserve their joint ownership in the proceeds.

(3) Noting that Maryland had a policy favoring tenancies in common, and that state statutes required the intent to take as joint tenants to be stated unambiguously, the judge held that it made sense to apply this policy under the facts of the case.

(4) No other “facts and circumstances” surrounding the joint ownership of the land suggested that the parties intended to extend the arrangement to the proceeds of the sale. Neither conduct nor external circumstances stood in favor of continuation of the joint tenancy.

Notable for its absence from the Maryland court’s reasoning was any application of the doctrine of equitable conversion or the four unities. The opinion did mention the latter, in noting that decisions in other jurisdictions were divided on the question of whether the four unities were affected by a contract to convey. It also took brief note of the former, in order to show that the state held the right to the legal

68. Id. at 249.
69. Id.
70. Id. at 250.
71. Id. at 249.
72. Id. at 247 ("The authorities have divided on whether a conveyance by all joint tenants destroys the joint tenancy and causes the proceeds of sale to be held in
But the opinion did not apply either doctrine in settling the question of entitlement to the proceeds. Of course neither did the decision speak at length about the ultimate question in the case—whether the state would collect the inheritance tax. The court's analysis meant that the tax had to be paid. However, at least so far as the words of the decision reveal, that result was not reached by application of a purely formal test. It was reached by looking to the parties' intent.

Many courts have recently reached the opposite conclusion about the factual question of whether there had been a severance by joint tenants. However, these courts have not relied upon a purely formal test. The cases have split in deciding what the intent of the contracting parties actually was, but rarely on the doctrinal question of whether equitable conversion or the four unities controlled the outcome. An Indiana case from 1976 illustrates the way most of the decisions finding that no severance had occurred have been framed. Two sisters and a brother owned 152 acres of land as joint tenants. In October 1972, they entered into an installment contract to sell it. When the brother died, his widow sought to secure her share of the remaining proceeds, alleging that the sale had automatically severed the joint tenancy. She persuaded the trial court, but the court of appeals reversed. It held there had been no severance. The contract had described the sellers "as joint tenants with right of survivorship and not as tenants in common," and the court found this indication enough to show that the sellers "did not intend the contract to alter their existing joint tenancy relationship." The court expressly held, moreover, that "the trial court improperly used the doctrine of equitable conversion to frustrate the intent of [the decedent] and his sisters."

Among all the cases decided on this subject, it is true that there have been decisions in the past forty-five years which held that a contract to convey on the part of all joint tenants severed the tenancy automatically, because of the doctrine of equitable conversion, or because the contract necessarily destroyed one of the four unities. However, they have been rarities. Few of the appellate decisions have

73. See id. at 248.
74. Virtually the only asset in the decedent's estate was the land involved.
75. See also In re Matter of Robinson, 791 S.W.2d 844 (Mo. Ct. App. 1990)(rejecting doctrine of equitable conversion where it would have been inconsistent with joint tenant's conduct and responsibility to his mother).
77. Id. at 230.
78. Id. at 231.
79. See In re Baker's Estate, 78 N.W.2d 863, 868-69.
80. See e.g., Yannopoulos v. Sophos, 365 A.2d 1312, 1315 ("The passage of equitable title by the execution of an agreement of sale by either or both parties destroyed
applied one of these purely formal tests. Instead, most courts have focused on the intent of the parties. It cannot be doubted, as leading commentators have remarked, that a "split of authority" exists on the question of whether a contract to convey automatically severs a joint tenancy. However, the existence of this split should not obscure how lop-sided in favor of an intent-based test that split actually is.

This result has not been without problems of its own. It has created at least three difficulties. First, the intent of the parties in such cases may be very difficult to determine. Thinking about severance requires thinking about dying. Joint tenants are understandably reluctant to do this, and some cases have had to discover the parties’ intent from very slim evidence pointing one way or the other. To require this inquiry is an invitation to litigation in a way a mechanical test is not. Second, the security of land titles in some measure has come to depend on a presumption of non-severance. Where one joint tenant has died, it has often happened that the other has gone ahead to complete the contract to sell without joining the personal represen-

the unity of title required by joint tenancy.”); see also In re Clay Estate, 264 A.2d 632, 634 (1970)(semble).


82. See ROGER A. CUNNINGHAM, ET AL., THE LAW OF PROPERTY § 5.4 at 201 (2d ed. 1993). For case law authority to the same effect, see, e.g., Smith v. Tang, 412 P.2d 697 (Ariz. 1966). The decision contains a long discussion of the doctrine of equitable conversion, but concludes that “the determining factor in this problem as to whether there has been severance of a joint tenancy by conveyance of all joint tenants is the intent manifested by the parties.” Id. at 703.
tative of the decedent.83 If the question of severance can later be re-
opened, many otherwise secure titles may be brought into dispute. 
That is not desirable. Third, the question of how far a joint tenancy in 
the proceeds can be carried lurks in the case law.84 If the joint ten-
ancy continues in the proceeds of a contract to sell land, does it con-
tinue still if the proceeds are invested in another asset, say a bank 
account or shares of stock? At some point the parties must express an 
intention to create a new joint tenancy if they mean to preserve the ius 
accrescendi, but an intent-based test renders that point more uncer-
tain than it would otherwise be.85 It can bring problems in its wake.

C. Divorce and Severance

Like cases involving contracts to convey property held in joint ten-
ancy, cases in which the marriage of joint tenants has ended in divorce 
pose continuing problems for the courts. Where no explicit decision 
about the fate of the property held in joint tenancy is made during 
divorce proceedings and one party to the divorce dies before the prop-
erty is sold, the dilemma is squarely presented. It turns out that vir-
tually all jurisdictions dealing with this dilemma after the 1950s have 
come to rely on the approach championed in that generation’s law 
reviews.

Husbands and wives very often own property as joint tenants, and 
the rising tide of divorce has led to an increasing number of disputes 
about the question of the tenancy’s survival afterwards. The tradi-
tional rule is that divorce does not sever a joint tenancy.86 This rule 
by itself is, of course, consistent with the four unities doctrine, since it 
is hornbook law that a divorce decree does not necessarily affect title 
to land held by the divorcing couple. Some states have passed stat-
utes creating a presumption of severance upon divorce,87 surely a sen-

83. See, e.g., Buford v. Dahlke, 152 Neb. 39, 62 N.W.2d 252 (1954), discussed supra 
note 64, but the danger exists equally with an intent-based test.
84. It is particularly problematic with joint bank accounts where either party can 
easily transfer account funds. See, e.g., In re Estate of Eyer, 317 A.2d 203 (Pa. 
1974).
problems of tracing could arise. And when would a joint tenancy, once created, 
en?”); see also Prather v. Hill, 250 A.2d 690, 693 (D.C. 1969) (questioning 
whether joint tenancy existed in automobile purchased with proceeds of joint 
bank account); In re Estate of Martinek, 488 N.E.2d 1332 (Ill. App. Ct. 1986) (ask-
ing whether assignees of rights under contract to purchase land in joint tenancy 
also took in joint tenancy).
86. 4 THOMPSON, supra note 4, at § 31.08(c). For case law in one jurisdiction, see, 
e.g., Shepherd v. Shepherd, 336 So. 2d 497 (Miss. 1976), holding that severance of 
tenancy by the entireties created joint tenancy between former husband and wife 
in the absence of contrary intent, and also Miller v. Miller, 298 So. 2d 704 (Miss. 
1974).
87. See e.g., OHIO REV. CODE ANN. § 5302.20(c)(5) (Anderson 1996).
sible way of avoiding the problem. The courts in some states, Minnesota for example, hold that in the absence of special circumstances, courts are required to settle the question of severance as part of the divorce decree. Most states, however, have left the courts to deal with the cases as best they might. Predictably, the results as to whether a severance has occurred go in both directions.

Where courts hold that the tenancy is not severed, one might expect them to have used the continued existence of the four unities as a basis for their conclusion. A few do. But most do not, even though there is a perfect congruence between the unities test and the result reached. In one Wisconsin dispute from 1985, for example, the opinion discussed at great length whether the intent of the parties to the divorce or the intent of the trial judge who granted the divorce controlled the question of severance. The opinion said nothing, however, about the effect of the four unities. Such focus on the intent of the actors, real or presumed, at the time of their divorce, rather than on problems raised by the continued existence of the four unities, is a salient feature of most of the cases where the joint tenancy has survived.

Cases in which an appellate court has held that the divorce decree had the effect of severing a joint tenancy turn out to be more numerous than those that hold it survived. In them, one expects that the four unities would be treated as an obstacle to severance—a problem to be mentioned, discussed and perhaps purposefully set to one side. Such cases exist. An Arizona decision of 1979 held that an agreement to sell the property at a future time, made at the time of the divorce, was itself sufficient to cause the destruction of the four unities “by

88. See Johnson v. Johnson, 169 N.W.2d 595 (Minn. 1969); see also Snyder v. Snyder, 212 N.W.2d 869 (Minn. 1973); Wos v. Wos, 191 N.W.2d 829 (Minn. 1971).
90. Lutzke v. Lutzke, 361 N.W.2d 640 (Wis. 1985).
91. See, e.g., In re Estate of Layton, 52 Cal. Rptr. 2d 251, 256 (Cal. Ct. App. 1996)(“The current state of the law does not permit automatic severance of a joint tenancy, but requires, at the very least, specific words or conduct that can be construed as being inconsistent with holding title in joint tenancy. A status-only dissolution judgment does not manifest sufficient words or conduct to sever a joint tenancy.”); In re Estate of Sander, 806 P.2d 545, 547 (Mont. 1991)(“The rigid requirement of the common law doctrine of the four unities are not part of Montana's statutory law on property.”); see also U.S. v. Gibbons, 71 F.3d 1496, 1499 (10th Cir. 1995); Watford v. Hale, 410 So. 2d 885 (Ala. 1982); Compton v. Compton, 624 P.2d 345 (Ariz. Ct. App. 1981); Mangus v. Miller, 532 P.2d 368, (Colo. Ct. App. 1974); Sondin v. Bernstein, 467 N.E.2d 926, 929 (Ill. App. Ct. 1984)(mentioning four unities but seemingly not relying upon them in the holding); In re Estate of Woodshank, 325 N.E.2d 666 (Ill. App. Ct. 1975); In re Estate of Bates, 492 N.W.2d 704 (Iowa Ct. App. 1992); In re Estate of Viol, 492 N.Y.S.2d 550 (1985); Witzel v. Witzel, 386 P.2d 103 (Wyo. 1963).
implication." One Kansas judge adopted a position in accord with common sense, if not with traditional doctrine—that a divorce decree by itself destroyed the unity of possession and thereby caused a severance. Occasionally, a judge has faced the four unities obstacle squarely, but has rejected its continued applicability. In a New Hampshire decision of 1972, for example, the court discarded the rule, in holding that “a proper expression of intention by the parties ought to replace the historical unity rule.” It went on to decide that allowing the joint tenancy to continue would “ordinarily be in direct contravention of the intent of the deceased [joint tenant].”

Most of the cases involving severance upon divorce, however, have not alluded to this theoretical problem at all. They have simply focused upon the intent of the parties to the divorce. A Colorado decision of 1982 is typical. The divorce decree contained a provision that the land held in joint tenancy was to be used in certain ways and ultimately sold under certain conditions. Where one of the tenants died prematurely, the court held that the provision had effectively severed the joint tenancy because it showed that the parties ultimately intended to divide the proceeds. The four unities presented no apparent obstacle. They were not mentioned. It was intent that mattered.

Some of the cases have gone to great lengths in order to discover an intention to sever in the acts or the conduct of the parties to a divorce. In one, inclusion of the phrase “to settle” in a property settlement was found sufficient to suggest an intent to sever, because of the air of finality it imported. In others, judges have indulged in the supposition that it was “illogical” or “hard to see” or “difficult to
envision" that the parties to a divorce would wish to preserve a form of property ownership which resulted in a "windfall" to the second to die. But in virtually all the cases, it is an intent-based test that is said to control.

It should of course be remembered that the law has long since dispensed with the strictest understanding of the requirement of the four unities. Severance of a joint tenancy can be accomplished by an agreement of the parties to it, even if the unities themselves are not broken. The parties to the agreement will then hold as tenants in common. As long as such an express agreement is sufficient, it is open to joint tenants to end the ius accrescendi by the kinds of agreements commonly made in divorce cases. What is surprising today is how far that process has gone. American courts have been willing to find that such agreements to sever joint tenancies in divorce cases from language that is ambiguous at best, and sometimes even from the conduct of the parties. They have not required an express agreement to sever. Any action on the couple's part that is inconsistent with an intent to continue the joint tenancy sometimes can serve as a substitute for an actual agreement. American courts have come a long way from the world of the four unities.

California adopted legislation which deals with the subject by creating a presumption that property would be held as community property upon divorce. CAL. CIV. CODE § 4800.1 (West 1992)(repealed 1994). The results, however seem not wholly to have fulfilled the drafters' expectations. See, e.g., In re Estate of Layton, 52 Cal. Rptr. 2d 251 (Cal. Ct. App. 1996); In re Marriage of Hilke, 841 P.2d 891 (Cal. 1992); Allen v. Graham (In re Marriage of Allen), 10 Cal. Rptr. 2d 916 (Cal. Ct. App. 1992), review granted & opinion superseded by 839 P.2d 983 (Cal. 1992). See generally Channick, supra note 36.


101. See, e.g., Robertson v. U. S., 281 F. Supp. 955, 961 (N.D. Ala. 1968) (holding that joint tenancy in securities held by brothers "severed, terminated or abandoned . . . either by the agreement of the brother or by their conduct in devoting such securities to the partnership business"); Guilbeault v. St. Amand, No. 93569, 1993 WL 392943 at *5 (Conn. Super. Sept. 28, 1993) (concluding that severance found when "the conduct of the parties voluntarily evidenced their intention to sever the joint tenancy with the right of survivorship and hold their property as tenants in common"); In re Marriage of Dowty, 496 N.E.2d 1252, 1254 (Ill. App. Ct. 1986) (finding that trial testimony at divorce evidenced intent to sever because parties desired to sell and divide proceeds "as soon as reasonably possible"); Brodzinsky v. Pulek, 182 A.2d 149, 156 (N.J. Super. 1962) (finding severance where joint tenants "by their conduct and course of dealing, mutually treated the subject mortgages as held by them as tenants in common"). Compare In re Estate of Layton, 52 Cal. Rptr. 2d 251, 255-56 (Cal. Ct. App. 1996) (holding intent not to sever inferred from long delay and having filed a motion to sell property but not having proceeded with motion).
D. Summary

The severance cases involving divorce, as in the other two situations surveyed, stand as clear evidence that a purely formal approach linked to the four unities, the subject of analysis and criticism in 1950s law reviews, has largely ceased to control the outcome of American cases, at least where it would produce a result inconsistent with the intention of the parties. The preponderance of cases decided since then points strongly in that direction. At the same time, it is plainly not true that the four unities have entirely ceased to appear in the case law. They have been mentioned in a variety of contexts and are likely to continue to be cited where they prove convenient.

Perhaps the overall development is best summed up in the cautious approach to the subject found in a 1975 case involving the creation of joint tenancies. After expressly rejecting the common law doctrine that the four unities were required by law, and after describing the traditional doctrine a “fiction” and “useless”, the court nonetheless added a cautionary note. It would be “premature to do away with the ‘unities’ doctrine,” the judge wrote, “as its usefulness may better be determined on a case-by-case basis.” That is about where things stand with relation to severance as well.

V. THE CONSEQUENCES

If, as seems to have happened, the approach to the law of severance advocated by the commentators of the 1950s has very largely succeeded in persuading courts to abandon a purely formal approach based upon the four unities, what have been the results? That is a fair question to put to any successful argument. At least it is fair when enough years have passed to provide a sufficient test, and enough time has certainly gone by in this instance.

The most obvious conclusion must be that the intent of joint tenants is being carried out more fully and more often than it was under a regime that strictly observed the rule requiring destruction of one of the four unities or an unequivocal agreement among the tenants in order to effect a severance. This conclusion is mostly guesswork of course. Although it has certainly worked that way in several decided cases, the conclusion is not subject to statistical verification. We have no index of “joint tenant satisfaction” with severance cases, and there is unlikely to be one anytime soon. But it does seem the more plausible consequence of the development in the case law.

There are, however, at least three less attractive consequences of the approach that do appear in the reports. They are unintended con-

103. Id. at 829 n.1.
sequences of the shift. In any fair assessment of the merit of the realistic approach advocated in the law reviews, these consequences require recognition and consideration. They also raise in pointed ways the more general question of the place of formalism in our law, the question that was raised at the outset of this assessment and that has also been close to the surface in the discussion within it.

A. Added Difficulties in Determining Severance Questions

One of the obvious advantages of a purely formal intent is that it provides direct answers. An intent-based test does not. Both the divorce cases and the contract for sale cases illustrate the problem.104 Most of these disputes arose where the parties were not thinking at all about what would happen if one of them died. Why would they? They assumed that the divorce would be completed or that the contract for sale would be fulfilled. In most situations that is exactly what did happen. But not all. Where the unexpected does happen and one party dies, litigation all too easily ensues. In it, the courts have been left with the task of discovering the intent of the parties from what are very often the slenderest of indications. I make no criticism of judicial efforts here. They have done the best they could. But it requires both ingenuity and perspicacity to discover an intent about severance from documents generated by parties who were not thinking about severance at all. Happy are the courts of states where the legislature has created a statutory presumption for determining severance questions, or at least set some exact requirements for severing a joint tenancy.105 They at least have a standard from which to start. The parties can always choose something other than that statutory standard if they desire, and the statutory presumptions probably coincide with what their actual intent would have been had they been required to think the problem through.

B. Increased Possibility of Fraud

Since one joint tenant has always been able to sever the tenancy without the concurrence or even the knowledge of the other, the possi-

104. For an instructive case wrestling with the problem in the context of a contract to convey, see Estate of Calligaro v. Owen, 768 P.2d 660 (Ariz. Ct. App. 1989), remanding case for determination of intent, expressly permitting the introduction of extrinsic evidence.

105. See e.g., Neb. Rev. St. § 76-2,109 (establishing no severance where all joint tenants join in the execution of contract, "unless the intention to effect a severance expressly appears in the instrument"). The statute was enforced, apparently to the letter, in Satellite Development Co. v. Bernt, 229 Neb. 778, 429 N.W.2d 334 (1988).
bility of a severance that is unfair to the other has long existed. It can take several forms, as where the joint tenant who has contributed nothing to the purchase of the assets then severs unilaterally, thereby upsetting the normal expectations of the other joint tenant. Its most extreme form is the secret severance. If the tenant who severs secretly is the first to die, the heirs or successors produce the severing document and take half of the property. It accrues to them under the tenancy in common that was the result of the severance. If the severing tenant survives, however, the severing document is suppressed and the survivor takes the whole. The heirs or successors of the first to die get nothing. It is what the economists call "strategic behavior."

Although elimination of the four unities does not make this kind of fraudulent severance possible for the first time, there can be little doubt that it does make it easier. If the unilateral self-severance is valid in law, there is less protection for the other joint tenant than there would be if compliance with the four unities were strictly required. It was for this reason that the Minnesota court that first approved these unilateral acts stated that there might be reliance or other action on the part of the "passive joint tenant" that might call for a different result. It was also for this reason that the Minnesota legislature subsequently amended the statute to require that such an instrument of severance be filed in the appropriate record office. The Minnesota courts have struggled with these two limitations; the results are not easy to digest. But both are surely signs of unease.


107. See, e.g., Crowther v. Mower, 876 P.2d 876, 877-78 (Utah Ct. App. 1994) (suggesting that letter instructing grantee to record promptly if severing tenant died first, but "suggest[ing] you contact me" if it was the other joint tenant who died first).


112. See Wendt v. Hane, 401 N.W.2d 457, 460 (Minn. Ct. App. 1987). One joint tenant petitioned to partition, the other answered by asking that the property be partitioned by sale. The first party then died, and the survivor moved to dismiss the action so that she could take the whole under the original tenancy. This motion
with the results that may follow from the decision to allow unilateral self-severance. That decision may better fulfill the legitimate expectations of the joint tenants than did the four unities test. But it is not without costs of its own.

C. Greater Incongruity with the Remaining Formal Rules

Rejection of the four unities requirement has not altogether rid the law of severance of the effects of formalism. It has limited them, no doubt, but rejection has also had one other unintended consequence. It has brought into more prominent focus those situations, not directly involving the four unities, in which formalism still controls the outcome of cases. It makes them look more conspicuous. Perhaps deep reasons of policy underlie some of them. But judicial opinions commonly approach these cases in just as formal a fashion as they once did unilateral severances. This opens the result to an attack that would not have been possible under the regime that adhered more strictly to the four unities requirement. Incongruity appears in several situations:

1. Void Deeds

Where one joint tenant conveys his interest to a third party, is there a severance if it turns out that the deed is void? The law has long been, and still is, that there is no severance.\textsuperscript{113} Under the four unities test, that result follows as a matter of course. The unities could not have been disturbed by an action that was itself a nullity. Under an intent-based test, however, the same result becomes a good deal harder to justify. Any joint tenant could have created a tenancy in common simply by making a unilateral self-severance, and the void deed is hard to distinguish in substance from such a unilateral act. In this situation, courts have been driven to make conclusory statements like, "[w]e conclude that the void deed may not be deemed evidence of any intent," if they are to preserve the right of survivorship.\textsuperscript{114} The

\textsuperscript{113} See Chrystyan v. Feinberg, 510 N.E.2d 33, 36 (Ill. Ct. App. 1987) ("[A]lthough an intent to sever was shown, the conveyance was void because it did not adhere to the terms of the trust instrument and thus, was unable in law to effect a severance (sic)."); see also McBee v. Crosby, 632 P.2d 1059 (Colo. Ct. App. 1981); Ianotti v. Ciccio, 591 A.2d 797 (Conn. 1991); Hayes v. Lewis, 338 N.E.2d 102 (Ill. App. Ct. 1975); Nelson v. Albrechtson, 287 N.W. 2d 811 (Wis. 1980).

result seems right, but it is not derived from “realism” in discerning what the party’s intent actually was. It is a formal rule.

2. Mortgages

Where one joint tenant mortgages his interest in the property to a lender, traditional law has dealt with the question of whether this action amounts to a severance by applying a formal test: does a mortgage convey title or is it merely a lien under local law? If the former, then there is severance; if the latter, then there is not. Most recently decided cases have continued to use that test, and the result is that if the mortgaging joint tenant dies first in a state where a mortgage is only a lien, the mortgagee’s interest vanishes.116 Where a mortgage constitutes a conveyance of the title, by contrast, the mortgagee prevails. This may well be the correct approach, despite the potential for hardship of the first theory on unsuspecting lenders.116 But the distinction between the “title theory” and the “lien theory” is very largely a formal one,117 and it becomes increasingly hard to defend it

115. See e.g., American Nat’l Bank and Trust Co. v. McGinnis, 571 P.2d 1198, 1200 (Okla. 1977) (“Since a mortgage is a mere lien or charge upon the mortgagor’s interest which does not transfer any legal title . . . it does not destroy any unity and, therefore, estate in joint tenancy is not severed and converted to tenancy in common.”); see also Harms v. Sprague, 473 N.E.2d 930 (Ill. 1985)(discussing the two theories and citing authority from other states). Compare Stewart v. AmSouth Mortgage Co., 679 So. 2d 247, 249 ( Ala. Civ. App. 1995)(holding, in a case of first impression, that execution of a mortgage by one tenant severs, because “Alabama classifies itself as a ‘title’ state with regard to mortgages”), rev’d sub nom. Ex parte AmSouth Mortgage Co., 679 So. 2d 251 ( Ala. 1996). See also Downing v. Downing, 606 A.2d 208, 213 (Md. 1992)(no automatic severance although Maryland is a “title” state); First Westside Nat’l Bank v. Llera, 580 P.2d 100 (Mont. 1978), overruled by In re Estate of Shaw, 855 P.2d 106 (Mont. 1993); Tracy-Collins Trust Co. v. Goeltz, 301 P.2d 1086, 1090 (Utah 1956). Of course, under a lien theory, if the mortgaging joint tenant is the survivor, then to some extent the opposite result is obtained. The mortgagee will stress the limited nature of the interest conveyed and the representatives of the first joint tenant to die will argue that a severance has occurred. See, e.g., Brant v. Hargrove, 632 P.2d 978 (Ariz. Ct. App. 1981).

A “hybrid” solution is offered in Schaefer v. Peoples Heritage Savs. Bank, 669 A.2d 185, 187 (Me. 1996)(allowing severance under title theory, but describing it as “subject only to the right of redemption”). See generally CUNNINGHAM ET AL., supra note 6, at 201-02, and 4 THOMPSON, supra note 4, at 49-50, for discussion and further citations. A fuller treatment is found in Taylor Mattis, Severance of Joint Tenancies by Mortgages: A Contextual Approach, 1977 S. ILL. U. L.J. 27.


117. It was the subject of a memorable article of the Realist movement in American jurisprudence, Wesley A. Sturges and Samuel O. Clark, Legal Theory and Real Property Mortgages, 37 YALE L.J. 691, 709 (1928), arguing that judges use one theory or the other “depending upon [their] sense of convenience and the matters
REALISM AND FORMALISM

in an era when the intention of the parties provides the touchstone for deciding most severance cases. One Florida judge, acknowledging "the logic and the fairness" of the mortgagee's argument in favor of severance, retreated to the most formal of justifications in reaching the opposite result. The mortgagee's position was, he wrote, "at variance with the essence of a joint tenancy in real property."118

3. Wills

The rule that an attempt to sever by the last will and testament of one joint tenant is ineffective has been stated by many cases decided since the 1950s,119 and it seems almost self-evidently correct.120 The most common justification given for the rule, however, is a decidedly formal one: a will is ambulatory and has no effect until the testator's death. By the time the will can take effect, the property held in joint tenancy has already passed automatically to the survivor. The attempt to sever therefore has nothing upon which it can operate.121 There is bound to be some tension between this statement of the rule and reliance upon an intent-based test in other circumstances, particularly since a number of cases have allowed severance in cases of joint wills, on the theory that the severance occurs by virtue of the agreement to make the wills rather than by virtue of the wills themselves.122 That exception obviously cannot apply where only one

which stimulate them in the particular case." Although the result today is not normally announced in connection with the four unities, it can be. See, e.g., Texas Amer. Bank/Levelland v. Morgan, 733 P.2d 864, 865 (N.M. 1987)("In New Mexico, a mortgage is merely a lien ... hence, title and joint tenant unities are unaffected by the execution of a mortgage."). aff'd, 793 P.2d 1337 (N.M. 1990). See generally Ann M. Burkhart, Freeing Mortgages of Merger, 40 Vand. L. Rev. 283, 324-29 (1987)(arguing in favor of the results reached by the lien theory in the context of merger).


120. If one could sever by will, this would create an advantage no matter the outcome, since one would inherit the whole if one survived the other joint tenant(s), but also be free to devise half to one's own successors if one did not.

121. See e.g., Hyland v. Standiford, 111 N.W.2d 260, 266 (Iowa 1961)("A will speaks only from the death of the testator. The death of a joint tenant terminates his interest and leaves no part of the joint tenancy property subject to his will.").

tenant's will is at issue. The incongruity in such cases seems particularly poignant. Nothing could have been stated more definitely than the one tenant's intent to sever. It is a reason imported from the law of wills and stated in a formal rule about the inherent nature of wills, not fulfillment of the joint tenant's expectations, that is said to prevent this from happening.

4. Partition

Where joint tenants petition for partition of the property (or take any equivalent step towards severance for that matter), but one of them dies before the petition can be acted upon, does the survivor take the whole? The cases are virtually unanimous that there is no severance in this circumstance. The survivor does take the whole. Only if the partition is carried through to its conclusion does a severance occur. Although it may be said in favor of this rule that the parties might always have changed their mind before the final decree, that seems a poor justification in the face of their clearly expressed intent to sever and the untimely death of one of them. The true reason for the rule must be a formal one: the rule is necessary in order to safeguard the integrity of the underlying action for partition. Partition cannot be effective before it is obtained. One cannot secure the results of a judicial action simply by asking for it. Put that way, the result seems right, even inevitable. But to an enthusiast for the intent-

The Nebraska case contains a revealing, if slightly mysterious, judicial comment on the subject. See Powell v. American Charter Fed. Savs. and Loan Ass'n., 245 Neb. 551, 559, 514 N.W.2d 326, 333 (1994)("After a review of our own cases, we recognize that we have contributed to the confusion between property which is subject to the terms of a will and property which is devised pursuant to the will, [citing cases]. To the extent that these cases imply that a testator may change the method of transferring property held in joint tenancy by the language in his will, these cases are incorrect."); see also Wilcoxen v. U. S., 310 F. Supp. 1006, 1010 (D. Kan. 1969)(distinguishing wills by one tenant from wills by one tenant to which the other had given her consent, and treating only the latter as severed). Apparently contra are Coffey v. Price, 380 P.2d 537 (Okla. 1963) and Anderson v. Anderson, 450 F.2d 254 (10th Cir. 1971)(decided under Oklahoma law). There is a brave effort to reconcile the cases in Estate of Stewart v. Commissioner, 79 T.C. 1046, 1049-51 (1982).

based approach to questions of severance, the rationale must ring a little hollow. 124

5. **Bankruptcy**

These cases arise when one party to a joint tenancy files a bankruptcy petition and then dies before administration of the bankrupt's estate can be taken up or a discharge secured. The question is whether the petition itself severs or whether, instead, the other joint tenant succeeds to the whole free from the bankruptcy process. The bankruptcy courts are split on the outcome. Some have found a severance. 125 Some have not. 126 What unites them is their entire disregard of all questions of intent. One can see why. Bankrupts rarely have any intent at all as to severance, at least any intent that can be discerned after their death. Discharge and a fresh start are on their minds, not the possibility of dying. The words and policy of the Bankruptcy Act and the classification of joint tenancies under state law, such as they are, 127 have therefore provided the only tools available for judicial analysis. They are undeniably formal in character. If one looked honestly at the filer's probable intent, had he given it any thought, the severance would occur at the moment of filing. But this has not happened.

6. **Leases**

"Like a comet in our law," the existence of this problem has long been recognized, although it comes into view only from time to time. 128 The question is whether a lease by one joint tenant works a severance. The answer is said to have been disputed since the fifteenth century, 129 and there seems to be little hope of its resolution.

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124. See Allison v. Powell, 481 A.2d 1215, 1218 (Pa. Super. Ct. 1984)(Cavanaugh, J., concurring) ("It is only the event of his death prior to the final decree, and not that the petitioner has changed his mind, that prevents the severance."). Compare the statements commonly made in divorce cases to the effect that "[a]n agreement to sever itself operates to effect a severance, and the intervening death of one of the joint tenants will not defeat the severance even though the agreement is not performed." Thomas v. Johnson, 297 N.E.2d. 712, 714-15 (Ill. App. Ct. 1973).


today. The recent decisions are as inconsistent as the early English cases. On the one hand, a short term lease is likely to end before the death of the leasing tenant, and there is therefore no inherent necessity of finding a severance. On the other hand, it is possible that the lease will last longer, and if it does the lessee will be ousted if no severance is found, since the non-leasing tenant will take the whole by right of survivorship. Courts have to make a choice, and the intention of the parties or other "realities of the situation" can be of little help to them.

It was not by accident that the California decision which faced the problem ended its refusal to uphold the rights of the lessee, despite the admitted hardship to him and the apparent violation of the leasing tenant's intent, by saying, "we cannot allow extraneous factors to erode the functioning of joint tenancy. The estate of joint tenancy is firmly embedded in centuries of real property law and in the California statute books." Identical words could once have been written about the four unities.

VI. CONCLUSION

At the end of the day, examining the case law dealing with the law of severing joint tenancies decided since the 1950s leads to a mixed conclusion. On the one hand, most of the immediate goals of the commentators seem to have been achieved. The four unities have ceased to control the outcome of virtually all the recent cases involving the specific problems they addressed, even though the unities continue to be mentioned in decisions when they coincide with a result that would be reached on other grounds. The unities have retained a staying power in the intervening years, but they have not been harmful in any real sense. To this extent, the aims of the law review commentators have been accomplished, and this can be counted a real victory over a purely formalist approach.

On the other hand, formalism has not disappeared from the law of joint tenancies. To the extent that this was the goal of the law review


131. A third possibility is to find a "partial severance" in which the joint tenancy would revive if the lease ended before the death of the leasing joint tenant. See generally Charles H. Matthews, Jr., Joint Tenancy in California Revisited: A Doctrine of Partial Severance, 61 Cal. L. Rev. 231 (1973).

132. See, e.g., Swenson & Degnan, supra note 1, at 474 (taking the position that finding a complete severance would be the best result since it would be in line with the more likely intent of the lessor). But see Kratovil & Werner, supra note 8, §14.02(c), at 240 (arguing that "court decisions holding that a lease severs a joint tenancy are absurd"). All authors have acknowledged that what authority there was on the point did not unambiguously support either conclusion.

articles, they have enjoyed much more limited success. Indeed the law of joint tenancies seems to have been unable to get along without formalism. It is even difficult to see how the law could dispense with formalism. There must be a way to decide whether a void deed, a mortgage, a will, a pledge, a petition in bankruptcy, an action for partition, or a lease operates to sever a joint tenancy, and it is very hard to conceive of any test but a formal test that will provide an answer. At least no other has been discovered so far. Looking to the intent of the parties, or relying on “realism” to deal with the situation, simply will not answer the question being posed. Occasional judicial attempts to break the bonds of formalism in these areas seem only to make matters worse.\textsuperscript{134}

The law review commentary of the 1950s may thus have been successful in clipping the wings of the four unities and the purely formal approach they embody, but their efforts have not removed the hand of formalism from the law of severance of joint tenancies. At least in this corner of American jurisprudence, formality has continued to be a “fundamental characteristic of law.”\textsuperscript{135} “Realism” itself suggests that this characteristic is unlikely to disappear any time soon.

\textsuperscript{134} See, e.g., Harris v. Crowder, 322 S.E.2d 854, 855 (W. Va. 1984)(Neely, J.) (attempting to balance “the ineluctable logic of received property law” with “common humanity and sound public policy”). This opinion and associated problems are discussed in John W. Fisher, Joint Tenancy in West Virginia: A Progressive Court Looks at Traditional Property Rights, 91 W. Va. L. Rev. 267 (1988).

\textsuperscript{135} The phrase is taken from The Formal Character of Law, Summers, supra note 9, at 260.