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Estate Planning and the Severance of Joint Tenancies in Nebraska

Richard C. Schmoker

University of Nebraska College of Law, r.schmoker@att.net

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ESTATE PLANNING AND THE SEVERANCE OF JOINT TENANCIES IN NEBRASKA

For many years, attorneys and estate planners have been cautious of joint tenancies where substantial wealth is involved. A jointly owned estate poses a number of tax problems and ownership difficulties which often frustrate the intentions of the creator.

The primary advantage of holding property in joint tenancy is that the cost and publicity of probate are avoided. To secure this benefit, the owner loses many rights to the property and may suffer disastrous tax consequences. Basically, the use of joint tenancies prevents the contributing tenant from efficiently planning the disposition of his property. If he should die first, the surviving tenant has uncontrolled power over the property. Thus, the property may be diverted from the contributing tenant's intended beneficiaries. The second major objection to the creation of joint tenancies is the adverse estate tax consequences which may result. If the contributing tenant dies first, the entire value of the joint tenancy will be included in his estate and probably taxed again in the estate of the surviving joint tenant.

Because many potential tax and nontax disadvantages of joint ownership may be alleviated through a proper severance of the joint tenancy, this article discusses the voluntary and involuntary acts which will constitute a severance of real and personal property in Nebraska.

I. FEDERAL ESTATE AND GIFT TAX PROVISIONS

A. ESTATE TAX

(1) Section 2040

The full value of all property held in joint tenancy is included in the estate of each co-owner except to the extent that it can be proved that the survivor contributed to the purchase price of the property from money or property which did not originate with the decedent. This means that the joint property is includable in

1 Possibly, there is an exception for (1) modest bank accounts, (2) family automobile, and (3) personal residence. Moodie, Some Of The Dangers of Joint Tenancy, 29 Neb. L. Rev. 235, 237 (1950).

2 Any personal property which can be held in severalty can be held in joint tenancy. In re Estate of Johnson, 116 Neb. 686, 218 N.W. 739 (1928).

3 INT. REV. CODE of 1954, § 2040. This same provision applies to tenancies by the entirety, but this form of co-ownership does not exist in Nebraska. Kerner v. McDonald, 60 Neb. 663, 84 N.W. 92 (1900).
full in the estate of the contributing tenant for the purpose of federal estate taxes, but is not included in the estate of a noncontributing tenant whose executor can demonstrate factually that no consideration flowed from the deceased tenant. The uncertainty of being able to prove contribution by the living tenant can only work to the disadvantage of the decedent's estate. If the property was acquired by gift, devise or inheritance from some other person, only the decedent's fractional interest in the property (as is the case of property held in common) will be included in his estate for estate tax purposes.

(2) Section 2035

Section 2035 of the Internal Revenue Code provides that property which is transferred within three years of death is presumed to be made in contemplation of death and includable in decedent's gross estate unless his estate can show that the transfer was not made in contemplation of death or was made for a good and valuable consideration. Under the language of this section, there is considerable uncertainty whether the severance of joint property involves a "transfer," "bona fide sale," or "adequate and full consideration in money or money's worth" and the extent to which local property law is relevant in making these determinations.

In Harris v. United States, a 1961 Nebraska case, a husband and wife held property in joint tenancy for which the husband had paid the entire consideration. Two years prior to the husband's death, the husband and wife transferred the property into a tenancy in common with the admitted intention of avoiding estate taxes. The United States District Court included the full value of the total property in the decedent's gross estate, reasoning that the transfer was made in contemplation of death.

4 "The entire value of jointly held property is included in a decedent's gross estate unless the executor submits facts sufficient to show that property was not acquired entirely with consideration furnished by the decedent, and the other joint owner or owners by gift, bequest, devise, or inheritance." 26 C.F.R. § 20.2040-1(a) (2). See also Neb. Rev. Stat. §§ 77-2002(1) (D) (Reissue 1958).


8 The opinion was modified at 739 to delete a reference to § 2040. Int. Rev. Code of 1954, § 2035. Under § 2033, it is arguable that once the joint tenancy is severed, the decedent's interest is only that of a tenancy in common; thus, only one-half of the total value of the property is taxable. For a proposed solution to the Harris case, see text, section II
The Ninth Circuit reached a contrary result. In *Estate of Sullivan*, a husband and wife held property as joint tenants for which the husband had given the entire consideration. In contemplation of death, they transferred the property to their son. After the death of the husband, the Tax Court held that the entire property was taxable to his estate as a transfer in contemplation of death. The Tax Court reasoned that a transfer in contemplation of death should be treated as though no transfer occurred. Upon appeal, the Ninth Circuit reversed the Tax Court. It looked to the local law and found that the husband could convey only one-half of the property. The one-half interest is all that he could transfer in contemplation of death, and all that could be included in his estate nonincome producing property.

The Sullivans owned other property as joint tenants for which the husband had paid. In contemplation of the husband's death, both spouses entered into a contract in which they converted the joint tenancy into a tenancy in common. As to this property, the Tax Court again ignored the "transfer" for tax purposes and taxed the entire property to the husband's estate under Section 2035. The Ninth Circuit reversed on this point holding again that only the half of the property which the husband owned as a tenant in common at his death was taxable to the estate. The court left open the question whether the contract to sever amounted to a

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(D). By regulation, only property held in joint tenancy at death is taxed under § 2040. 26 C.F.R. § 20.2040-1(a). This regulation would appear to preclude a fusion of § 2035 and § 2040 in the manner which the Commissioner of Internal Revenue has attempted to fuse § 2035 with § 2036. United States v. Allen, 293 F.2d 916 (10th Cir. 1961), cert. denied, 368 U.S. 944 (1961).

10 T.C. 961 (1948), rev'd, 175 F.2d 657 (9th Cir. 1949).

10 T.C. 961 (1948).

11 175 F.2d 657 (9th Cir. 1949).


12 Estate of Sullivan, 175 F.2d 657 (9th Cir. 1949).
"transfer" in contemplation of death.\textsuperscript{14} The court stated that even if there were a transfer, it was not taxable as a transfer under Section 2035 because the interest which the husband transferred to the wife was in consideration of the transfer by the wife of her interest to him, which interests were equal in value.\textsuperscript{15}

Although \textit{Sullivan} has been criticized,\textsuperscript{16} to the extent it has been followed in other decisions,\textsuperscript{17} a substantial tax advantage would occur from a successful severance of the joint tenancy. If such a severance is accomplished, only one-half of the total value of the property held in joint tenancy is taxed in the contributing tenant's estate (if he is the first to die); whereas, if no severance occurs, the entire value of the joint tenancy would be taxed in his estate and probably taxed again in the estate of the surviving joint tenant.

(3) \textit{Section 2036}

Section 2036 reaches transfers with retained life interests. It includes within the estate tax gross estate property over which the decedent has retained at the date of his death "the possession or enjoyment of, or the right to the income from, the property, or the right, either alone or in conjunction with any person to designate the persons who shall possess or enjoy the property or the income therefrom."\textsuperscript{18} The application of this section to joint property which has been severed into a tenancy in common prior to death is wholly unclear at present. Arguably, any joint tenancy severed into a tenancy in common is subject to the literal language of this section with respect to the contributing tenant's federal estate tax. Either tenant in common has a right of possession in the whole property and enjoys income from the entire property. Following the reasoning \textit{Harris} and similar cases have applied to the same

\textsuperscript{14} \textit{Lowndes \& Kramer, Federal Estate and Gift Taxes} § 11.10 (2d ed. 1962); \textit{Wright, Transfers of Joint Property in Contemplation of Death, 55 Mich. L. Rev.} 1, 18 (1956).


\textsuperscript{17} Cases cited in note 12 \textit{supra}.

\textsuperscript{18} \textit{Int. Rev. Code} of 1954, § 2036.
language of 2035 concerning "sale," and "adequate consideration," and reading "transfer" in a sense of meaning "transfer for tax purposes, and not just local property law," Section 2036 might have some application to severed joint tenancies. At least, this argument would seem to have considerable force with respect to nonincome producing property.

B. GIFT TAX

The federal gift tax must also be taken into consideration by an estate planner who is confronted with the decision of creating or severing a joint tenancy. Substantial estate tax savings may be possible from a severance of the joint tenancy. On the other hand, the severance of a joint tenancy to avoid estate taxes may amount to a substantial gift which is taxable to the contributing tenant. Different tax results occur under the gift tax provisions of the 1939 Code and those of the 1954 Code.

(1) 1939 Code

Prior to the 1954 Code, there were no explicit provisions handling the result of a gift which was created by a joint tenancy. Prior to 1955 (the effective date of the 1954 Code for gift tax purposes), the creation of a joint tenancy resulted in a taxable gift to the extent that one of the tenants made a gratuitous transfer of an interest in the property (and such transfer was beyond his sole power to recall). The amount of the gift was the difference between the fair market value of the donor's contribution and the value of the rights he retained. In determining the value

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19 See United States v. Allen, 293 F.2d 916 (10th Cir. 1961), cert. denied, 368 U.S. 944 (1961). After the Allen decision, the Commissioner withdrew his previous acquiescence and substituted nonacquiescence in three cases whose holdings were based on Sullivan. 1962-1 Cum. Bull. 4, withdrawing acquiescence and substituting nonacquiescence in A. Carl Borner, 25 T.C. 584 (1955); Edward Carnall, 25 T.C. 654 (1955); Estate of Brockway, 18 T.C. 488 (1952), aff'd on other grounds, 219 F.2d 400 (9th Cir. 1954).


21 One way of avoiding ambiguity in this section is to read "possession and enjoyment" to relate, in this sense, to nonincome producing property only; however, historical usage of this phrase is unclear.

22 26 C.F.R. § 25.2515-1(b).

23 LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES § 30.3 (2d ed. 1962); Commissioner v. Hart, 106 F.2d 289 (3d Cir. 1939); J. C. Gutnam, 41 B.T.A. 816 (1940).
retained, the courts looked to local property law. Thus, if the donor created a joint tenancy with a right of severance with two other tenants, the value of his retained rights would be one-third of the fair market value of the property regardless of their life expectancies.

Under the 1939 Code, the gift tax attached upon the creation of the joint tenancy; thus, there was no further gift when the tenancy terminated if the proceeds of the property were distributed to the joint tenants according to their respective interests.

(2) 1954 Code

Under the 1954 Code, the creation of a joint tenancy in real property between spouses will not be treated as a taxable gift unless the donor spouse chooses to return it as a gift. This exception is limited to the creation of joint tenancies between spouses (and tenancies by the entirety) in real estate after 1954.

When the donor spouse does not elect to treat the creation of a joint tenancy in real estate as a gift under Section 2515(a), the tax is deferred until the termination of the tenancy. Upon termination, the taxable gift is the difference between the part of the proceeds of the joint property proportionate to a spouse's contribution to the property and the amount of the proceeds which this spouse receives; any amount under his proportionate share is a gift to his spouse.

If the joint tenancy between spouses is terminated (assuming no gift tax is paid at creation) by the death of either, no gift tax results because such a transfer is a testamentary transfer which is taxed under the estate tax provisions. When such a tenancy ends in any other way, however, the gift tax applies unless the joint

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24 The courts did not look to the estate tax provisions where "contribution" was the key factor. See LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES § 30.3 (2d ed. 1962).

25 26 C.F.R. §§ 25.2515-2(b)(1), 25.2511-1(h)(5). Thus, if the land was held under a tenancy by the entirety with no right of survivorship, the value of the donor's retained value had to be determined by a comparison of life expectancies. See LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES § 30.3 (2d ed. 1962); 26 C.F.R. §§ 25.2515-2(b)(2) and (c).

26 INT. REV. CODE OF 1954, § 2515.

27 If the joint tenancy is not between spouses or involves personal property, the results are the same as those that existed under the 1939 Code. Section 2515 is not clear as to what real estate constitutes; see LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES § 30.4 (2d ed. 1962).

28 26 C.F.R. § 25.2515-1(b).
tenancy is converted into other real property held under an identical tenancy. In most situations, a severance of a joint tenancy before the death of either spouse may result in a substantial tax savings to the contributing spouse (his estate) if viewed as an inter vivos transfer. Even if the transfer is taxed under the gift tax as an inter vivos transfer, and again as a transfer in contemplation of death under the estate tax if death occurs within three years, the transferor may be in a better position than if he had not made the transfer. The amount of gift tax will be removed from his estate, and a credit (up to 100 per cent) may be allowed against the estate tax for the gift tax paid in connection with the inter vivos transfer.

II. SEVERANCE IN NEBRASKA

In Nebraska, as in the vast majority of jurisdictions, a joint tenancy can only be created and continue in existence so long as the four unities—time, title, interest and possession—remain intact. In other words, to create a joint tenancy, the joint tenants must take at the same time, by the same instrument, have the same type of interests, and both have possession of the total property held in joint tenancy. Under section 76-118 of the Nebraska Statutes, however, a person owning property can convey to himself and another with a right of survivorship and thereby create a joint tenancy. Thus, the statute does not require unity of time for the creation of a joint tenancy if such a conveyance is used, as the two tenants will have actually acquired title to the property at different times. Other than this situation, however, the Nebraska

29 26 C.F.R. § 25.2515-1(d) (2).
31 2 TIFFANY, REAL PROPERTY § 425 (3d ed. 1939).
32 Buford v. Dahlke, 158 Neb. 39, 62 N.W.2d 252 (1954); cases in accord are collected in 4 THOMPSON, REAL PROPERTY § 1780 (1961) and Annot., 129 A.L.R. 816 (1940). At common law, unity of “interest” meant that the joint tenants took equal shares and had the same type of estates. 4 THOMPSON, REAL PROPERTY § 1780 (1961).
33 “(1) Any person or persons owning property which he or they have power to convey, may effectively convey such property by a conveyance naming himself or themselves and another person or persons, as grantees, and the conveyance has the same effect as to whether it creates a joint tenancy, or tenancy in common, or tenancy in partnership, as if it were a conveyance from a stranger who owned the property to the persons named as grantees in the conveyance.” NEB. REV. STAT. § 76-118 (Reissue 1958).
Supreme Court applies the four unities rule. In the subsequent sections this article discusses the various acts of joint tenants which constitute a severance of the joint tenancy in Nebraska and in Section II (D) proposes a solution for the severance problem in regard to federal estate taxes.

A. CONTRACTS TO SELL

A contract to sell to a third party by one joint tenant would, under the four unities test, sever the tenancy. The contracting tenant no longer has the same interest in the property as does his co-owner. There is a Nebraska case directly on point holding that a severance results. The Supreme Court followed its reasoning in Buford v. Dahlke where the court stated, "A contract by one joint tenant to convey his interest to a stranger severs a joint tenancy since equity regards that as done what in good conscience ought to be done."

Such a result is in harmony with both the four unities rule and public policy. If the contracting joint tenant and the third party contract for the sale of the former's interest in the land, their intentions should not be thwarted because the contracting tenant dies before the deed is passed. If the contract did not operate as a severance in such a situation, the surviving joint tenant would take the entire interest free from the contract.

A contract to sell to a third party executed by both joint tenants presents a slightly different problem. Under such a contract, it is arguable that the joint tenancy remains as to the proceeds from the contract. No unity has been destroyed; the real estate (or personalty) has merely been converted into cash. In Buford, however, the Nebraska Supreme Court held that a contract to sell real estate owned by a husband and wife as joint tenants in which both executed the contract destroys not only the joint tenancy in the real estate but in the proceeds as well. The husband had died and the wife had, since his death, received all the payments under the contract of sale. The husband's administrator brought action

37 Id. at 44, 62 N.W.2d at 255. Accord, Kozacik v. Kozacik, 157 Fla. 597, 26 So.2d 659 (1946); 4 THOMPSON, REAL PROPERTY § 1780 (1961); Annot., 129 A.L.R. 816 (1940).
38 Buford v. Dahlke, 158 Neb. 39, 45, 62 N.W.2d 252, 256 (1954); contra (as to the proceeds), Simon v. Chartier, 250 Wis. 642, 27 N.W.2d 752 (1947); 4 THOMPSON, REAL PROPERTY § 1780 (1961, Supp. 1962).
COMMENTS

against the wife for one-half of the proceeds of the contract which she had received since her husband's death. The court stated that the executory contract effects an equitable conversion of the real estate into personalty, consisting of a contract of sale in which husband and wife each own an undivided one-half interest even though they retain legal title to the real estate as security for a part of the purchase price. The court reasoned that the husband and wife merely held the title as "trustees," and that the vendors did not have title, interest, or possession after the contract.

From the court's opinion, it appears that the proceeds from the contract were held in a tenancy in common. This portion of the court's opinion has been criticized. Since the joint tenancy is severed and the title remains with the vendors, in case one dies, both the surviving joint tenant and the decedent's heirs are needed to convey clear title.

It would appear that no policy is being served by such a result. Even if the four unities rule is applied to the case, it could be argued that no unity has been destroyed; the subject matter of the joint tenancy has merely changed from real estate to cash.

If all joint tenants enter into a contract of sale of part of the jointly held property, the joint tenancy is only severed as to the part sold, if the four unities rule is observed. As to the part not sold, the four unities remain intact. Similarly, if one joint tenant conveys a life estate (for the life of the grantor), it has been held that no severance occurs. It could be argued, however, that such a conveyance severs the joint tenancy because the unities of interest and possession are destroyed.

B. PARTITION

Partition can be enforced by one joint tenant, and such ac-

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41 Id. at 478, "[W]here both contract to convey, their mutual rights are unchanged . . . . If the traditional test of destruction of a unity is applied, we find that no unity has been affected." The article discusses the problems which will arise if we require conveyances from the heirs if one joint tenant dies before the entire purchase price is paid.
tion constitutes a severance of the joint tenancy. Partition is a court proceeding which contemplates an absolute severance between the joint tenants. After partition (assuming the land is not sold), each co-owner has the right to enjoy his estate free from any interference of the other co-owner. The unities of title, interest, and possession are completely destroyed. The commencement of the action, however, is not a severance because the action may be discontinued. It is generally agreed that the severance occurs when a completed partition has been made by court decree or by voluntary action of the co-owners.

C. Mutual Agreement Between the Co-owners

The joint tenants may, by means of a contract between themselves, cause a severance of the joint tenancy. Such an act is similar to a voluntary partition and has, in addition, a contract to enforce it.

Similarly, joint or mutual wills, executed by both tenants and disposing of the land on their death according to a plan not consistent with the survivorship right, will sever the tenancy. Such wills are executed jointly by both (or all) joint tenants and contain reciprocal provisions whereby the promise of each joint tenant is consideration for the other joint tenant’s provision. Thus, a contractual agreement is formed; and it is this contract or agreement involved, not the will, that operates as the severance.

D. Conveyance by One Joint Tenant to Himself

Under section 76-118 of the Nebraska statutes, it is arguable

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44 2 American Law of Property § 6.21 (Casner ed. 1952); 4 Thompson, Real Property § 1779 (1961).
47 2 American Law of Property § 6.19 (Casner ed. 1952); 4 Thompson, Real Property § 1780 (1961); Parks v. Snyder, 126 Kan. 446, 268 Pac. 814 (1928).
49 Lewis v. Lewis, 104 Kan. 269, 178 Pac. 421 (1919). The Nebraska Attorney General has issued a report which states that the bare execution of
that a deed by one joint tenant of his one-half alienable interest to himself will sever the joint tenancy. The statute provides that: 50

Any person or persons owning property which he or they have power to convey, may effectively convey such property by a conveyance naming himself or themselves and another person or persons, as grantees and the conveyance has the same effect as to whether it creates a joint tenancy, or tenancy in common, or tenancy in partnership, as if it were a conveyance from a stranger who owned the property to the persons named as grantees in the conveyance.

The statute presumes a situation where a person who is holding property by himself wishes to create an estate of co-ownership, between himself and another. From the language of the statute, however, one joint tenant may be able to convey his interest to himself and effect a severance. One problem with this theory is that a joint tenant only has a right to convey his one-half alienable interest. Thus, if he conveyed this interest only to himself, the statute may not give such a conveyance effect because the conveyance required under the statute may have to be to himself and "another person." If such a strict interpretation of the statute is followed, the joint tenant could only operate a severance under the statute by conveying his one-half interest to himself and another, creating a tenancy in common (or joint tenancy) in one-half of the original joint tenancy. The unities of time, title and interest are destroyed as far as the two original joint tenants are concerned, but such a conveyance is awkward and brings a third party into the picture.

If the statute has no application, it appears that no severance occurs when one joint tenant conveys his interest to himself. No equitable conversion results because there is no sale. In addition,

50 NEB. REV. STAT. § 76-118 (Reissue 1958).
none of the four unities are affected; it seems clear that he still holds under the prior title which created the joint tenancy.

Nevertheless, it seems anomalous that one joint tenant can convey to a strawman (who then reconveys to that tenant) and sever the joint tenancy, but cannot operate a severance of the joint tenancy by deeding one-half of the property to himself. Such a distinction stresses form over substance.

If such a deed does operate as a severance, it may have favorable tax consequences. For example, if a husband and wife hold property by joint tenancy for which the husband has given all the consideration, a deed by himself and the other joint tenant to themselves as tenants in common or to a third party would be viewed, under *Harris*, as a “transfer” in contemplation of death (assuming death follows within three years of the deed). Thus, the entire property would be taxed to his estate. If the wife, however, deeds her one-half alienable interest in the property to herself thereby effecting a severance, it is arguable that the husband has not made a “transfer” within Sections 2035 or 2036 of one-half of the property to his wife.\(^5\)

For purposes of property law, such a wife (or noncontributing joint tenant) might be well advised out of an abundance of caution to transfer through a strawman. Even though there is an overriding (and expanding) rule that for federal tax purposes, substance controls over mere form, still for purposes of federal estate and gift taxation, husbands and wives having substantial adverse interests in property (which each spouse has in the other’s proportionate share) have been regarded as completely independent parties. Thus, it is possible that a choice of the severing party can affect the federal estate tax result. At least, where severance is contemplated, there would be everything to gain by having the noncontributing tenant sever alone—although perhaps through a strawman.

E. Leases

The overwhelming weight of American authority upholds the joint tenancy in cases where either one or all of the joint tenants lease the property.\(^5\) One authority criticizes part of this view

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52 A Thompson, *Real Property* § 1780 (1961); 2 Tiffany, *Real Property* § 425 (3d ed. 1939). *Swartzbaugh v. Sampson*, 11 Cal. App. 2d 451, 54 P.2d 73 (4th Dist. 1936) stated that the lease was binding on the survivor but he received all the rents.
and contends that the better view is that a lease by one joint tenant of his interest results in a complete severance.\textsuperscript{53} Under such a lease, it appears that the unity of interest (and possibly possession) has been destroyed. An English case has held that a lease by one joint tenant operates a severance of the joint tenancy so long as the lease endures.\textsuperscript{54}

\textbf{F. Mortgages}

Most courts dealing with the question of whether a mortgage will sever a joint tenancy conclude that a mortgage given by one joint tenant operates as a severance.\textsuperscript{55} At common law, under the title theory of mortgages, a mortgage of one joint tenant's interest severed the joint tenancy.\textsuperscript{56} Such a result is consonant with the four unities rule. Under the title theory, the mortgaging tenant actually conveyed title to the mortgagee; thus, the unities of interest and title are destroyed. The transfer is similar to where one joint tenant executes a contract to sell his interest.

A contrary result has been reached in one jurisdiction following the lien theory of mortgages; a California case directly on point held that the real estate passed free of any mortgage or lien against the deceased joint tenant.\textsuperscript{57} Under the lien theory, no title passes to the mortgagee from the tenant; and even though it is arguable\textsuperscript{58} that the unity of interest is lacking, title remains in the mortgaging tenant and the unity is complete.

One Nebraska decision, while not directly dealing with the issue, assumed that a mortgage given by one joint tenant did not operate as a severance.\textsuperscript{59} It is generally agreed that a joint tenancy

\textsuperscript{53} 2 \textit{American Law of Property} § 6.2 (Casner ed. 1952).
\textsuperscript{55} Cases collected in 2 \textit{Tiffany, Real Property} § 425 (3d ed. 1939) and Annot., 64 A.L.R.2d 934 (1959).
\textsuperscript{56} 2 \textit{American Law of Property} § 6.2 (Casner ed. 1952); Simpson v. Ammons, 1 Binn. 175, 2 Am. Dec. 425 (Pa. 1806).
\textsuperscript{58} 2 \textit{American Law of Property} § 6.2 (Casner ed. 1952).
\textsuperscript{59} Olander v. City of Omaha, 142 Neb. 340, 6 N.W.2d 62 (1942). In the case, however, all joint tenants signed the mortgage even though the agreement was to the effect that it was only on one joint tenant's interest.
is not severed in a lien jurisdiction if all the joint tenants join in the mortgage since all four unities remain intact.\(^6\)

Assuming no unity is destroyed in the lien mortgage situation where one joint tenant mortgages, a strong argument could be made for effecting a severance on other grounds. The rights of a third party are involved (the mortgagee), and even if he took the mortgage with notice of the joint tenancy, his claim should not be destroyed because the mortgaging tenant predeceased the other tenant.

On the other hand, the four unities rule, though difficult to apply, does provide the court with a concrete test to decide if a severance has occurred. Presumably, the concept does add stability to the law as everyone will know what does or does not constitute a severance. Nevertheless, this rule should not be allowed to defeat the rights of creditors or the intentions of one or both joint tenants. The public policy to give effect to these rights and intentions overrides the need for upholding an ancient rule of severance.

G. JUDGMENT LIENS

Courts have generally held that the attachment of a judgment lien does not sever the joint tenancy since no unity is affected.\(^6\) The Nebraska Supreme Court has held by implication that the attachment of a lien after judgment does not sever the joint tenancy.\(^6\) Under the four unities test, it would seem that the sale

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\(^6\) Cases collected in Annot., 64 A.L.R.2d 935 (1959); Simmons, Effect of Owners Execution of Land Contract or Mortgage Upon Joint Tenancy, 34 Neb. L. Rev. 285, 293 (1954). Some courts have taken the view that a mortgage by one or both of the joint tenants severs the tenancy until it is paid or redeemed (dictum). 4 THOMPSON, REAL PROPERTY § 1780 (1961).


\(^6\) Hein v. W. T. Rawleigh Co., 187 Neb. 176, 92 N.W.2d 185 (1958); cf., Barry v. Barry, 147 Neb. 1067, 26 N.W.2d 1 (1946) (mechanic's lien could not be enforced against surviving joint tenant). In Nebraska, whenever a joint tenant receives old age assistance and a lien for such is properly recorded, the joint tenancy is severed into a tenancy in common "giving the county and the state of Nebraska an enforceable ... lien against an undivided interest equal to the undivided interest owned by the other joint tenant." Neb. Rev. Stat. § 68-215.09 (Supp. 1961).

A 1962 Attorney General's Report (No. 168) came to the conclusion that real estate encumbered by a lien against the deceased joint tenant does not sever the joint tenancy. The lien involved was attached under Neb. Rev. Stat. § 68-105 (Supp. 1961) which involves relief given by
would effect a severance. There is, however, little authority on
the subject.63 One Illinois case has even held that a sale of the
property did not sever the joint tenancy.64 All jurisdictions, how-
ever, agree that there is a severance when the certificate of sale
is issued.65

As in the case of mortgages, there seems to be little policy
for continuing the joint tenancy if a third person attaches a lien
against one joint tenant's interest. The third party's claim should
not be destroyed if the debtor joint tenant happens to die first.
Even if the four unities rule does not sever in such a situation, the
joint tenancy should be severed to the extent of the lien to protect
the creditor.

H. INCURRENCE OF DEBTS

In Nebraska, the incurrence of debts has been held not to con-
stitute a severance.66 Although section 30-62467 has no effect upon
the continuance of the joint tenancy, it does provide that upon the
death of either joint tenant (or any joint tenant if more than two
are involved), the survivor "shall be liable for the debts and obliga-
tions of the deceased joint owner or owners . . . ."68 Under the
statute, the survivor is only liable for an amount "equal to the value
of the amount contributed to the jointly owned property by the

county boards to the poor. The report, in addition, reaches the con-
clusion that the real estate passes to the survivor clear of the lien. Under
Neb. Rev. Stat. § 30-624 (Reissue 1956), which provides that the sur-
viving joint tenant is liable for any debts of the deceased tenant up to
the amount contributed by the deceased, the surviving joint tenant
would be liable for at least part of the debt. Of course, since the
liability created under § 30-624 is personal (not on the property), the
real estate does pass clear of the lien.

64 Jackson v. Lacey, 408 Ill. 530, 97 N.E.2d 839 (1951). This case involved a
judgment lien, and the court held that no severance occurred until a
period of redemption had expired.
65 E.g., Johnson v. Muntz, 364 Ill. 482, 4 N.E.2d 826 (1936); Thornburg v.
Wiggins, 135 Ind. 178, 34 N.E. 999 (1893); cases collected in 4 Thompson,
(Reissue 1956).
66 DeForge v. Patrick, 162 Neb. 568, 76 N.W.2d 733 (1956).
68 Chief Justice Paul W. White, when on the bench of the Lancaster District
Court, held the statute to be "a direct and very catastrophic interfe-
rence with the necessarily exclusive jurisdiction of the county court." Mem-
(1959).
deceased joint owner." This statute arguably assumes that the acquisition of a debt will not sever a joint tenancy. Since the passage of this statute, however, it is clear that the joint tenancy in Nebraska today lacks one survivorship quality of a common law joint tenancy (where the land passed to the survivor free from any debts of the deceased joint tenant)—the land vests in the surviving joint tenant free of the debts of the deceased joint tenant, but the survivor is personally liable for such debts.

As in the preceding two sections, a strong argument could be made for severing the joint tenancy to protect the interests of the creditor. Section 30-624, however, appears to give him adequate protection.

I. BANKRUPTCY

It is generally thought that bankruptcy will sever a joint tenancy. As one authority states, "If one joint tenant becomes bankrupt, the involuntary transfer of his interest to the trustee, which then takes place, would presumably operate to effect a severance, and this result would no doubt follow upon the sale of his share under execution upon a judgment against him."70

J. RELEASE BY ONE JOINT TENANT OF HIS CONTROL OVER THE PROPERTY

If one joint tenant conveys to the other all of his interest in the property, the tenancy is terminated. The unities of title, interest and possession are destroyed. Two cases have held that the conveyance of one joint tenant's interest into a trust arrangement severs the joint tenancy. Nevertheless, courts have allowed joint tenants to contract with one another, concerning the management of the jointly held property, without effecting a termination of the tenancy.73

K. Divorce

Although there is authority to the contrary, it is generally conceded that a divorce alone does not sever the joint tenancy. Unlike a tenancy by the entirety, a joint tenancy does not depend on the continuation of the marriage. A Wisconsin case even held that the murder of one joint tenant by the other (her spouse) did not operate as a severance.

III. Tenancy in Common with Right of Survivorship

In Nebraska, there is one estate which has many qualities of the joint tenancy. It is the tenancy in common with right of survivorship. In this section, the article will discuss what acts will constitute a severance of this type of co-ownership and the qualities which parallel it closely with the joint tenancy. It is not within the scope of this comment to discuss the estate and gift tax consequences of this type of co-ownership.

In Anson v. Murphy, the Nebraska Supreme Court held that such a tenancy was created when A conveyed to A and B as joint tenants with a right of survivorship; a joint tenancy was not created since the unity of time was lacking. The court gave effect to the survivorship clause and held that such an estate could only be severed by the voluntary action of all the tenants in common. Such an estate has all the unities of a joint tenancy except the unity of title; however, its survivorship quality, unlike the joint tenancy, cannot be defeated by the act of one joint tenant.

The conveyance used in Anson would today create a joint

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77 In re King's Estate, 261 Wis. 266, 52 N.W.2d 885 (1952). However, all the property was included in the estate of the murdered spouse.
79 This defect was remedied by Neb. Rev. Stat. § 76-118 (Reissue 1950); see Neb. Rev. Stat. § 76-275.01 (Reissue 1950).
tenancy under section 76-118.\textsuperscript{80} Thus, it is not clear if such a tenancy could now be created in Nebraska. Nevertheless, it appears that nothing would prevent the creation of such an estate by express terms.

CONCLUSION

The Nebraska Supreme Court appears, at this time, to be committed to the four unities rule when deciding if a severance of a joint tenancy has occurred. Nevertheless, arguments based on the intentions of the joint tenants and the rights of third parties will probably temper the court's application of this rule.

The practitioner may deem a severance of his client's jointly owned property advantageous for either ownership or tax reasons. It is clear, however, that the method selected for severance is important; a deed by both joint tenants to themselves as tenants in common may reach the desired result if both want to control one-half of the land at death, but such a conveyance may not be at all suitable from the federal estate tax standpoint. In any event, it appears that there is everything to gain by having the noncontributing joint tenant sever the joint tenancy.\textsuperscript{81} Such action may result in substantial estate tax savings if the contributing tenant dies within three years of the severance.

Richard C. Schmoker '64


\textsuperscript{81} See text, Section II (D).