



## HOW DOES JOINT TENANCY INTEREST TRANSFER WHEN MULTIPLE OWNERS DIE SIMULTANEOUSLY?

By Jared R. Clemence

Joint tenancy includes the right of survivorship. But what happens when both joint tenants die at the same time?

Also, generally, California law dictates that a person who dies within 120 hours of another is presumed to predecease the first person to determine what happens with the first person's property. While this rule helps probate an intestate estate, does it apply to a joint tenancy interest?

### Creating a Joint Tenancy

California defines "joint tenancy" in Civil Code section 683. The most important part, which most do-it-yourself document preparers overlook, is that a joint tenancy requires an "express declaration" in the granting instrument. Taking title expressly as "joint tenants" in the granting instrument means that you cannot later say, "I meant to have a joint tenancy" if the deed does not say it.

But, when such a mistake occurs, California allows a person to transfer "from tenants in common . . . to themselves." So, if you did recognize an error in how you hold title, you can transfer the item from yourself to yourself and specify that you wish it to be transferred in "joint tenancy" at that time.

### Right of Survivorship

"[T]he distinguishing incident is a right of survivorship." (*De Witt v. San Francisco* (1852) 2 Cal. 289, 297.) Corporations cannot hold title in joint tenancy because no corporation can "die"; therefore, the "right of survivorship" is meaningless. (*Ibid.*)

### Simultaneous Death

California dedicates a whole Part of the Probate Code to the subject of simultaneous death. Probate Code, Division 2, Part 5 is titled “Simultaneous Death” and sets forth the general and specific rules.

Generally speaking, California relies on a “clear and convincing evidence” standard:

Except as otherwise provided in this chapter, if the title to property or the devolution of property depends upon priority of death and it cannot be established by clear and convincing evidence that one of the persons survived the other, the property of each person shall be administered or distributed, or otherwise dealt with, as if that person had survived the other.

(Prob. Code, § 220.)

The rule for simultaneous death in joint tenancy is essentially the same: Probate Code section 223. Subdivisions (b) and (c) have practically the same rule, which is that the property shall be divided among the joint tenants equally unless it can be established “by clear and convincing evidence that one survived the other.”

### **The 120-Hour Rule does not apply**

When dealing with the issue of “simultaneous death,” we often are trying to determine who inherits from whom. The general rule states that “clear and convincing evidence” establishes an order of death, but intestate succession rules differ. For intestate succession, an heir must “survive the decedent by 120 hours.” (Prob. Code, § 6403.) Because joint tenants do not inherit their interest, the 120-hour rule does not apply.

### **Special Exceptions**

Not every simultaneous death resolves under Probate Code section 223. Consider a murder-suicide situation. It could be easy for a person to murder a joint tenant, establish clear and convincing evidence that the murderer survived the victim, and then commit suicide. Under Probate Code section 223, the clear and convincing evidence of survivorship would cause the murderer to take the victim’s interest. But the Court imposes other rules to prevent such a criminal situation.

In 1970, the California Courts had to determine the fairest division of property in a murder-suicide. A husband feloniously and intentionally killed his wife.

### **Slayer rule**

To avoid unjust enrichment, the Court noted that, in this instance, the law severs the joint tenancy interest and creates a tenancy in common. The husband takes only that interest that was already his before the murder. A prior referenced case provides the example where, before the murder, the husband was a joint tenant, but he had only contributed 37 percent of the purchase

price to the property, so the Court gave him 37 percent common interest. (*Johansen v. Pelton* (1970) 8 Cal.App.3d. 625 at 629, referencing *Abbey v. Lord* (1959) 168 Cal.App.2d 499.)

In the case of *Johansen v. Pelton*, the survival rule did apply, and the murderous husband should take ownership of the wife's interest. Still, the Court converted the husband's ownership of the wife's interest to a constructive trust to prevent unjust enrichment. He holds the title legally, but he holds it for the benefit of the victim's estate. (*Johansen v. Pelton, supra*, 8 Cal.App.3d at 630.)

Under the rules outlined in *Abbey*, Pelton should have a 67 percent interest because he contributed 67 percent of the purchase price. However, the Court made special findings to distinguish Pelton's case from *Abbey*. The couple in *Abbey* held the title in joint tenancy, but they had separate documentation establishing the 37 percent interest. Here, Pelton has no such documentation to show that he continued to recognize a superior claim. Because Pelton (the murderous husband) did not have separate documentation, the Court presumed that he intended the equality of ownership that comes with joint tenancy and that Pelton intended to gift any interest over 50 percent to his wife.

## **Conclusion**

So, having reviewed the codes and the cases, we determine the following. When multiple joint tenants die close in time, first, we look to see if any joint tenant is still alive. If any joint tenants survive, then they take the title by survivorship.

If no joint tenant survives, then we see if any joint tenant survived the others by clear and convincing evidence. Even if it is by a matter of minutes, clear and convincing evidence of survivorship gives the last surviving tenant all the rights of the other owners. (Prob. Code, §§ 220 & 223.)

If clear and convincing evidence does not indicate which owner survived the longest, all owners take an equal interest, and the law severs into tenancies in common. (Prob. Code, § 223, subs. (b) & (c).)

The only time where these rules do not apply is where an exceptional circumstance applies. The extraordinary event that we reviewed is the Slayer Rule, in which a survivor was forced to turn over the ownership to the victim's estate for distribution. (Actually, the Court held that the survivor's estate held the title as a constructive trust, but as the beneficiary of the constructive trust, the wife's estate gets to dictate how the estate is distributed.)

## **Contact:**

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