

## Memorandum 82-68

Subject: Study F-600 - Community Property (Dividing Joint Tenancy and Tenancy in Common at Dissolution)

At the May meeting the Commission decided to distribute for comment, as a matter separate from the general joint tenancy study, a tentative recommendation to give the court jurisdiction at dissolution to divide joint tenancy and tenancy in common property of the spouses and to make clear that dissolution severs a joint tenancy between the spouses. Attached is a staff draft of the tentative recommendation, to be distributed for comment after approval by the Commission.

The Commission at the May meeting also suggested that partnership property of the spouses might be treated in the same manner as joint tenancy and tenancy in common property. After further work on this matter, the staff has concluded that the draft should omit partnership property because rights of third parties will frequently be involved and because the Uniform Partnership Act is a preferable forum for resolving partnership property problems.

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

DIVISION OF JOINT TENANCY AND TENANCY IN COMMON PROPERTY  
AT DISSOLUTION OF MARRIAGE

A husband and wife may hold property as joint tenants, tenants in common, or as community property.<sup>1</sup> Although the court in a dissolution or legal separation proceeding has jurisdiction to settle the property rights of the parties,<sup>2</sup> this jurisdiction is construed to extend only to the community property and not to include joint tenancy or tenancy in common property.<sup>3</sup> Joint tenancy and tenancy in common property must be divided in a separate partition action.<sup>4</sup>

The most significant consequence of this scheme is that the court in a dissolution proceeding is hindered from making the most sensible disposition of property because not all the marital property is at its disposal. For example, it may be desirable to award a working spouse the spouse's community property pension and to offset the value of the pension by awarding real property to the other spouse. But because real property is frequently held in joint tenancy the court may be unable to accomplish this disposition, with the result that the pension must be divided at dissolution and the real property divided in a subsequent partition proceeding. As a further example, it may be desirable to award temporary occupancy of the family home to the spouse awarded

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1. Civil Code § 5104.

2. Civil Code § 4351.

3. Civil Code § 4800; *Schindler v. Schindler*, 126 Cal. App.2d 597, 272 P.2d 566 (1954); *Walker v. Walker*, 108 Cal. App.2d 605, 239 P.2d 106 (1952). See discussion in *Porter v. Superior Court*, 73 Cal. App.3d 793, 141 Cal. Rptr. 59 (1977) and *Lichtig, Valuation and Division of Property*, 1 California Marital Dissolution Practice §§ 8.3, 8.6-8.7 (Cal. Cont. Ed. Bar 1981).

4. Title 10.5 (commencing with Section 872.010) of the Code of Civil Procedure. See Code Civ. Proc. § 872.210 (partition permitted as to property other than community property).

custody of the minor children; this can be done if the property is held as community<sup>5</sup> but not if it is joint tenancy.<sup>6</sup>

To overcome these difficulties, courts when faced with property held by the spouses in joint tenancy title form have strained to find that the property is actually community and subject to the court's jurisdiction. The result has been an extensive and continually growing body of confusing and inconsistent law that offers no useful guidance as to when property held by the spouses in joint tenancy form will be found to be community and when it will be found to be true joint tenancy.<sup>7</sup> This problem is particularly troublesome because a substantial amount of the marital wealth in California is held in joint tenancy title form.

To cure these problems the Law Revision Commission recommends that the court at dissolution or separation be given jurisdiction to include joint tenancy and tenancy in common property in the property division,<sup>8</sup> upon motion of either party. Other community property jurisdictions require disposition of the joint tenancy and tenancy in common property along with the community property.<sup>9</sup> California family law courts now dispose of such property as part of the dissolution where both parties submit the property to the court<sup>10</sup> or where the court reserves jurisdiction to divide community property that becomes tenancy in common by

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5. See, e.g., In re Marriage of Duke, 101 Cal. App.3d 152, 161 Cal. Rptr. 444 (1980); In re Marriage of Herrmann, 84 Cal. App.3d 361, 148 Cal. Rptr. 555 (1978); In re Marriage of Boseman, 31 Cal. App.3d 372, 107 Cal. Rptr. 232 (1973).
  6. See, e.g., Carter v. Carter, 148 Cal. App.2d 845, 307 P.2d 630 (1957). This situation is mitigated somewhat by a statute creating a rebuttable presumption that a single-family residence acquired during marriage as joint tenancy is in fact community for purposes of dissolution. Civil Code § 5110.
  7. For an excellent discussion and analysis of the law in this area, see Sterling, Joint Tenancy and Community Property in California (March 1982).
  8. This has also been suggested in Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity 103-104 (1981).
  9. Ariz. Rev. Stat. § 25-318 (West Supp. 1981); Nev. Rev. Stat. § 125.150 (1981).
  10. See, e.g., Allen v. Allen, 159 Cal. 197, 113 P. 160 (1911); Womack v. Womack, 242 Cal. App.2d 572, 51 Cal. Rptr. 668 (1966); Spahn v. Spahn, 70 Cal. App.2d 791, 162 P.2d 53 (1945).

operation of law.<sup>11</sup> Express authority for the court to divide joint tenancy and tenancy in common property will eliminate litigation over the community or separate character of the property, add flexibility to the formulation of a just property disposition, and avoid the need for a separate partition proceeding for the property.

As a related matter, joint tenancy property that is not divided at dissolution should be deemed severed by the dissolution.<sup>12</sup> Dissolution of marriage ordinarily terminates the property relations between the spouses. Community property that is not divided becomes tenancy in common by operation of law;<sup>13</sup> the same rule should apply to joint tenancy property, which in California is a common community property substitute.

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The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Section 4800.1 to the Civil Code, relating to division of marital property.

The people of the State of California do enact as follows:

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11. See, e.g., *Marriage of Borges*, 83 Cal. App.3d 771, 148 Cal. Rptr. 118 (1978); Comment, *Post-Dissolution Suits to Divide Community Property: A Proposal for Legislative Action*, 10 Pac. L.J. (1979). Where the court fails to reserve jurisdiction to divide omitted or after-discovered community property a separate partition proceeding is necessary since the property has become tenancy in common by operation of law, thereby causing the court to lose jurisdiction. See, e.g., *Henn v. Henn*, 26 Cal.3d 323, 161 Cal. Rptr 502, 605 P.2d 10 (1980).
  12. Under existing law joint tenancy is not severed by dissolution, with the result that a person must act affirmatively to sever the joint tenancy or upon the death of one of the former spouses the property will pass by survivorship to the other former spouse. *Brunschger v. Reagh*, 164 Cal. App.2d 174, 330 P.2d 396 (1958); *Cole v. Cole*, 139 Cal. App.2d 691, 294 P.2d 494 (1956).
  13. See e.g., *DeGodey v. DeGodey*, 39 Cal. 157 (1870).

§ 4800.1 (added). Division of joint tenancy and tenancy in common property

SECTION 1. Section 4800.1 is added to the Civil Code, to read:

4800.1. (a) Notwithstanding any other provision of this title, in a proceeding for division of the community property and the quasi-community property, upon motion of either party the court shall have jurisdiction to divide real and personal property, wherever situated and whenever acquired, held by the parties as joint tenants or tenants in common. The division shall be made in the same manner and to the same extent as community property and quasi-community property except that division shall be made of the joint interests of the parties equally and of the common interests of the parties in proportion to their ownership.

(b) The interests of the parties in property held as joint tenants, whether or not divided pursuant to this section, are severed by the interlocutory judgment of dissolution of the marriage or the judgment decreeing the legal separation of the parties.

Comment. Section 4800.1 reverses the rule that the court in a dissolution or separation proceeding has no jurisdiction over property of the parties other than community or quasi-community. *Schindler v. Schindler*, 126 Cal. App.2d 597, 272 P.2d 566 (1954); *Walker v. Walker*, 108 Cal. App.2d 605, 239 P.2d 106 (1952); cf. *Porter v. Superior Court*, 73 Cal. App.3d 793, 141 Cal. Rptr. 59 (1977) (general discussion). It is consistent with the general rule that the court has jurisdiction to settle the property rights of the parties and with the principle that the court has jurisdiction to settle matters submitted to it by the parties. Section 4351 (jurisdiction of court); see, e.g., *Allen v. Allen*, 159 Cal. 197, 113 P.160 (1911). It is also consistent with the rule that the court may reserve jurisdiction to divide community property that has become tenancy in common by operation of law upon dissolution or separation. See, e.g., *Marriage of Borges*, 83 Cal. App.3d 771, 148 Cal. Rptr. 118 (1978); Comment, *Post-Dissolution Suits to Divide Community Property: A Proposal for Legislative Action*, 10 Pac. L.J. 825 (1979).

Subdivision (a) supplements Section 4800 by giving the court express jurisdiction over any joint tenancy or tenancy in common property submitted to it by a party in a property division proceeding under the Family Law Act only. Property subject to division includes property acquired by the parties either before or during marriage. It also includes property acquired or situated either in this state or elsewhere. For a special rule governing treatment of real property situated in another state, see Section 4800.5 (community and quasi-community property). See also Section 4813 (jurisdiction where service is by publication). The jurisdiction of the court extends only to the interests of the spouses, whether equal or unequal, and the court may not affect interests of third parties in the property. The interests of third parties may be subject to partition pursuant to Title 10.5 (commencing with Section 872.010) of the Code of Civil Procedure. Otherwise, joint tenancy and

tenancy in common property is subject to all rules applicable to division of community property and quasi-community property.

Subdivision (b) makes clear the time of severance of a joint tenancy where the property is divided pursuant to subdivision (a). Subdivision (b) also provides that dissolution or separation severs a joint tenancy even though the property is not divided. This reverses existing law. *Brunschger v. Reagh*, 164 Cal. App.2d 174, 330 P.2d 396 (1958); *Cole v. Cole*, 139 Cal. App.2d 691, 294 P.2d 494 (1956). It is consistent with the rule that dissolution or separation severs the interest of the spouses in community property, thereby converting it to tenancy in common property. See, e.g., *DeGodey v. DeGodey*, 39 Cal. 157 (1870). Joint tenancy property may be severed before the time prescribed in subdivision (b) by any other act that operates to sever a joint tenancy, including unilateral action of a party. See, e.g., *Riddle v. Harmon*, 102 Cal. App.3d 524, 162 Cal. Rptr. 530 (1980).

The rule of subdivision (a) that joint tenancy and tenancy in common property may be divided in a community and quasi-community property division proceeding applies only to proceedings commenced after January 1, 1984. The rule of subdivision (b) that dissolution or separation severs a joint tenancy applies only to proceedings commenced after January 1, 1984.

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SEC. 2. This act applies to proceedings commenced on or after January 1, 1984, regardless whether the property was acquired before, on, or after January 1, 1984.