#H-510 1/7/83

First Supplement to Memorandum 82-102

Subject: Study H-510 - Joint Tenancy (Comments of Professor Bernhardt)

We have received the letter attached as Exhibit 1 from Professor Roger Bernhardt commenting on the staff draft of the joint tenancy tentative recommendation. The comments are analyzed below.

§ 745.210. Manner of creation

Section 745.210 requires an express written declaration for creation of joint tenancy; this continues existing law. See Civil Code § 683. Professor Bernhardt asks whether the statute should include a recitation of the required language, e.g., "In joint tenancy with right of survivorship and not as tenancy in common or community property." Section 5110.420 of the proposed statute invites the sort of recitation that Professor Bernhardt suggests. The statute presumes property acquired during marriage in joint tenancy form to be community property with right of survivorship unless there is "a clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property." A statutory formula has the potential to create problems where the deed fails precisely to conform to the statutory formula. We could add to Section 5110.420(b)(2) a provision such as, "A statement that the property is acquired 'in joint tenancy as separate property and not as community property' or a statement substantially to that effect is sufficient to rebut the presumption established by this section." The Comment would have to point out that these words are sufficient but not necessary and that other words may also suffice. The staff does not believe this would add much to the statute.

Existing Section 683 permits a joint tenancy in personal property to be created by written agreement; proposed Section 745.310 extends this manner of creation to any type of property. Professor Bernhardt believes that in the case of real property the agreement should be recorded. "We have too many problems already due to the fact that the title can appear other than as records show." The staff does not believe recording should be a condition for creation of a valid joint tenancy. The result of failure to record should be only that the joint tenancy

does not bind third parties without notice who rely on the record; that is the effect of the recording laws. However, the unrecorded joint tenancy should continue affect the rights of the parties to the agreement as between each other.

§ 745.310. Severance of joint tenancy

Professor Bernhardt proposes that where a joint tenant severs a joint tenancy unilaterally, notice should be given to the other joint tenant; at the very least the severing document should be recorded. The Commission considered this concept at some length in its initial discussions of joint tenancy law. The Commission decided not to impose a notice or recording requirement for a number of reasons, including that it would add more complexity and potential litigation to the law and that it could interfere with a person's privacy and freedom to alter an estate plan. The Commission observed that notice is not ordinarily required for any other aspect of estate planning, including devising community property to a person other than the surviving spouse and terminating a mutual estate plan (unless there is a contract obligation that requires it).

The staff believes the Commission should reconsider the possibility of a recording requirement. A recording requirement would help prevent title problems that will undoubtedly arise under a unilateral severance. It would also preclude a party from executing a secret severance and then producing it, or not, to greatest advantage.

§ 745.320. Effect of survivorship

One reform in the law made by the tentative recommendation is that a lien on the interest of a deceased joint tenant, instead of being extinguished by operation of survivorship, survives the death of the decedent and continues to burden the share taken by the survivor. Professor Bernhardt recommends that if the lien is to survive, the lienholder should give actual notice to the other joint tenant--"I am concerned that your proposal worsens the situation of a recently bereaved spousal joint tenant."

Whether the proposal worsens the position of a spousal joint tenant is debatable. Under existing law the joint tenancy is frequently held to be community property, which passes subject to liens. The staff does

not see what a notice requirement would accomplish, other than to make things more difficuld for creditors. The staff is opposed to a notice requirement.

§ 5110.420. Community property in joint tenancy form

Section 5110.420 provides that property acquired during marriage in joint tenancy form is presumed to be community property with right of survivorship. This presumption is rebuttable by proof of a contrary agreement of the parties or by proof of tracing to a separate property source. Professor Bernhardt points out a defect in this scheme--if the presumption is rebutted by tracing to a separate property source, the separate property portion is deemed to be held in joint tenancy, and therefore is owned equally by the parties. This frustrates our purpose of allowing the contributor of the separate property to regain the property on dissolution.

Professor Bernhardt makes a good point. The tracing provision is misplaced. It should be deleted from Section 5110.420 and the statute should make clear instead that upon division of community property with right of survivorship the separate property contributions can be traced and reclaimed.

§ 5110.440. Legal incidents of community property with right of survivorship

One unresolved question relating to "community property with right of survivorship" is: What is the effect of severance on the property rights of the parties? The staff draft provides that severance terminates the survivorship right but does not otherwise affect the community character of the property. Professor Bernhardt would like to see a scheme whereby the survivorship right is not severable unless both parties join in the severance. "Then spouses could choose whether they want a destructable form or coownership (joint tenancy) or an indestructible one (community property with survivorship) which would be something like the old common law tenancy by the entirety."

The problem with Professor Bernhard's suggestion is that it assumes the spouses make a conscious choice as to the manner of their property tenure and with awareness of the legal consequences. In fact, it is likely that they do not, and the major thrust of the joint tenancy recommendation is to recognize the hybrid character of property acquired

by married persons with community funds but in joint tenancy form. Joint tenancy survivorship characteristics combined with basic community property ownership, including the ability to alter the survivorship right and make a disposition by will, we think is a fairly close approximation to what most married people intend.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

November 17, 1982

Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
Stanford, California

Re: Study H-510

Dear Nat:

I have the following comments regarding the proposals in your memorandum H2-102.

745.210: If an express declaration is to be required for the creation of the joint tenancy, don't you want to recite what should be said? Must the deed say "In joint tenancy with the right of survivorship and not as tenancy in common or community property", or will something less do?

Furthermore, if existing owners can make an agreement to convert title into joint tenancy (as suggested by subsection (b), you should require that the agreement be recorded. We have too many problems already due to the fact that title can appear other than as records show.

745.310: I appreciate the reasons for your wanting to eliminate the strawman requirement for severing joint tenancies. My concern, however, is that far too frequently, spouses secretly sever joint tenancies, with the result that survivors discover only after death that the survivorship arrangement has been destroyed. Your proposal makes it all easier to do that. I do not suggest that the other joint tenant must consent to the severance, but I think there should be a requirement of notice. At the very least, the document severing the joint tenancy should have to be recorded, so as to at least give the other joint tenant an opportunity to discover and act accordingly.

745.320: Again, I am concerned that your proposal worsens the situation of a recently bereaved spousal joint tenant. I recommend that any creditor seeking a lien on joint tenancy property, which is intended to survive the death, be required then to give actual notice to the other joint tenant.

5110.420: I do not think that you will accomplish your purpose by permitting the presumption of community property to be rebutted by tracing. If the presumption is rebutted, the statute seems to suggest that title would then go back to joint tenancy. But I think that if parties make unequal contributions to a down payment for a joint tenancy property, the inequality is disregarded anyway - since joint tenants are required to have equal interest in in the property, and a voluntary down payment is not a necessary expenditure, such as would justify treating it as a loan. If you want to repeal Marriage of Lucas, the statute should say that a spouse who makes a separate property excess contribution towards the acquisition of property is presumed to be investing or lending her funds rather than donating them regardless of how title is taken.

5110.440: As you may surmise, I would like to see an indestructible form of coownership. I see little advantage in creating community property with right of survivorship, if it is as easily severed as joint tenancy. I recommend that you strike the final sentence of this section and replace it with provisions consistent with Civil Code Section 5127, to the effect that neither spouse may convey community property without the other's signiture. By insulating community property from unilateral conveyance, it would also become indestructible. Then spouses could choose whether they want a destructible form of coownership (joint tenancy) or an indestructible one (community property with survivorship) which would be something like the old common law tenancy by the entirety. This would leave only the inconsistent feature that community property is liable for the debts of either spouse, without the assent of the other, as the risk a surviving spouse must confront.

I write this letter to you in my individual capacity and not on behalf of any organization.

Yours truly,

Roger Bernhardt
Professor of Law

RB/gm