#H-510 10/31/83

Memorandum 83-105

Subject: Study H-510 - Joint Tenancy and Community Property (Comments on Recommendation)

Although the Commission has approved the recommendation on joint tenancy and community property and the recommendation is set in type and ready to print, the staff has held it up because we continue to receive seriously concerned comments on it. The latest comment, from Clare H. Springs, is attached as Exhibit 1.

Ms. Springs is informed that the new title form, community property with right of survivorship, would be treated as joint tenancy rather than community property for income tax basis purposes (only the decedent's half of joint tenancy property gets a stepped up basis whereas both halves of community property receive a stepped up basis on the death of a spouse). Moreover, Ms. Springs is concerned that creation of a new form of title will further confuse people in an already confused area.

If Ms. Springs is correct, and the staff believes she may be in part, then we probably don't want to proceed with the "community property with right of survivorship" proposal, at least not in its present form. One way to address the tax problem raised by Ms. Springs and still accomplish the result we desire is to revise terminology and simply provide that where married persons hold property in joint tenancy form the property is community for all purposes but is not subject to testamentary disposition, with no reference being made to "survivorship", "severance", and other joint tenancy-type concepts. This is the thrust of the current Commission draft, with cosmetic changes.

This leaves unresolved whether to authorize a direct form of property tenure, such as community property with right of survivorship. If we were to not create a new form of tenure, spouses who wish to hold their community property subject to a survivorship right would have to either take title in joint tenancy form or write a property agreement. The staff is not convinced that the confusion caused by another form of property tenure would necessarily outweigh the confusion caused by married persons having to take title in joint tenancy form in order to get all the community property consequences except testamentary disposability. But Ms. Springs takes the position that married persons ordinar-

ily desire to have the flexibility to make a testamentary disposition of property and that the survivorship right defeats this common intent. If Ms. Springs is correct, this argues for simply leaving the two existing forms--joint tenancy and community property--and not adding a new survivorship form of tenure.

On an unrelated matter, Ms. Springs objects to the provision of the Commission's recommendation that enables a party unilaterally to sever a joint tenancy. The Commission's recommendation requires such a severance to be recorded if it is to be effective as to real property. Ms. Springs believes recordation is not enough, and that notice should be given to the other joint tenants. "I foresee very serious problems in the divorce area if one spouse may unilaterally transfer title into his or her own name without notice simply by recording another deed."

The staff believes Ms. Springs misunderstands the effect of the Commission's recommendation. Under the Commission's recommendation, community property in joint tenancy form would be treated as community property for all purposes (except testamentary disposition), so that unilateral severance would do nothing except restore the right to make a testamentary disposition; all other law governing the rights of spouses to dispose of community property would continue to apply. In the case of non-spouse joint tenancies, existing law in some appellate districts allows a person to make a unilateral severance by declaration and in all appellate districts allows a person to make a unilateral severance by means of a straw man conveyance; no notice or other formalities are required. The Commission's recommendation in this respect goes beyond existing law by permitting severance by declaration in all appellate districts; in addition, the Commission would impose a recording requirement for a real property severance. The staff believes we are already taking a significant step in the direction Ms. Springs believes the law should be.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

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CLARE H. SPRINGS

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Joint Tenancy and Community Property

Dear Mr. Sterling:

I am writing you regarding the Law Revision Commission's concept of "community property with the right of survivorship."

I have many reservations about the community property with right of survivorship, most particularly that it will cause the loss of a double step-up as joint tenancy does. This weekend in New York when I chatted about the concept with members of the Treasury, I was informed that community property with right of survivorship would be treated as regular joint tenancy for income tax purposes. Because most individuals do not understand that property held under right of survivorship will bypass a will, and will have adverse tax consequences, I am concerned that in establishing this new type of title, we will be doing more harm than good to individuals with small and medium-size estates. In those estates, the residence is frequently the most valuable asset and the unnecessary incurrence of capital gains tax can seriously deplete the resources available to the surviving spouse. Indeed, whether or not you agree with my opinion on the stepped-up basis for "community property with right of survivorship," the fact that the issue is not clear should be sufficient by itself to prevent the Law Review Commission from supporting a statutory change which may inadvertently increase taxes of the lower income individual.

I find in my practice that even those couples who have combined estates well below any taxable amount, say, $200,000, still prefer to hold title as community property once the adverse tax consequences of joint tenancy are explained to

them. I think the Commission ought to realize that joint tenancy is not a popular way of holding title among lay-persons who understand the consequences of it. People do not want to pay taxes if they can be avoided with a minimum amount of effort. To further this confusion over how to hold title by creating a second community property with right of survivorship does not appear to be in the best interests of the taxpayer or the attorney.

I would hope that the Commission would reconsider establishing yet another type of title with right of survivorship.

Finally, I disagree with the Commission's position with respect to notice of a unilateral serverance of the joint tenancy. As I understand it from your letter of October 3rd to Ken Klug, the Commission has decided that as long as the severance has been recorded, the other joint tenant will be protected. This simply does not comport with reality. Very few individuals ever check their title reports. In essence, by recording a unilateral severance, notice would be given to everyone, but notice would not be given to the joint tenant who suffers from the severance. I can certainly imagine some of the individuals whom I have represented who, if they thought they could clear title to property by recording a unilateral severance of a joint tenancy without notice to the other joint tenant, would not have hesitated to do so and then sell or further transfer the property.

I urge the Commission to reconsider this position. I foresee very serious problems in the divorce area if one spouse may unilaterally transfer title into his or her own name without notice simply by recording another deed.

Thank you for your consideration of this matter.

Sincerely yours,

Clare H. Springs

(Ms.) Clare H. Springs