

Memorandum 92-46

Subject: Study F-521.1/L-521.1 - Community Property in Joint Tenancy Form (Draft of Tentative Recommendation)

Attached to this memorandum is a draft of a tentative recommendation relating to community property in joint tenancy form, to implement decisions at the Commission's July meeting in San Diego.

The thrust of the draft is that community property in joint tenancy form remains community property for all purposes unless it has been actually transmuted to joint tenancy, in which case it becomes true joint tenancy for all purposes. There is no community property with right of survivorship hybrid concept. The draft also requires brokers, title officers, and other professionals who provide married persons with a form or instrument to advise them concerning the adverse consequences of joint tenancy tenure. The draft provides a statutory safe harbor transmutation and advice form. The statute would have a one-year deferred operative date.

The Commission worked extensively on the same subject nearly 10 years ago. At that time the Commission explored community property with right of survivorship hybrid possibilities, but interestingly enough ended up finally with a recommendation essentially the same as the present draft (less the duty on professionals and statutory form)! The former recommendation was never published or submitted to the legislature--the Commission took the unusual step of circulating it again for comment, and finally concluded not to rigidify the law since people seemed able to achieve the desired results informally.

The reason for resurrecting this study now is that the informal cure no longer works. The combination of a stricter transmutation statute and stricter interpretations by the courts and IRS have necessitated legislative action to ensure that married persons do not inadvertently lose their community property rights based on an uninformed acceptance of a joint tenancy title form.

If the tentative recommendation is approved at the September meeting to circulate for comment, we may be able to have legislation on the subject ready for the 1993 legislative session.

Respectfully submitted,

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Executive Secretary

STATE OF CALIFORNIA

California Law Revision Commission

Staff Draft

TENTATIVE RECOMMENDATION

COMMUNITY PROPERTY IN JOINT TENANCY FORM

September 1992

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN November 15, 1992.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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07/28/92

Summary of Tentative Recommendation

Historically in California married persons have titled their community property as joint tenancy unaware of the adverse consequences of that form of tenure, including the inability to will it or to obtain community property tax benefits. On the death of a spouse the survivor has had to make a showing that the joint tenancy form was for convenience only and there was no intent to convert the property to joint tenancy. In recent years this informal arrangement has broken down as courts give greater effect to the form of title and the Internal Revenue Service refuses to recognize community property claims for property titled as joint tenancy.

Because community property tenure is more advantageous for most spouses than joint tenancy, this recommendation provides that community property in joint tenancy form remains community property unless it has actually been transmuted to joint tenancy by the spouses. The tentative recommendation requires brokers and others who assist spouses in titling their property to inform them of the disadvantages of joint tenancy. A "safe harbor" statutory form is provided with sufficient information and a proper declaration to enable a person to transmute community property to joint tenancy, if desired. The proposed statute is prospective only.

Tentative Recommendation

COMMUNITY PROPERTY IN JOINT TENANCY FORM

A husband and wife in California may hold property in joint tenancy or as community property.¹ The two types of tenure, one common law and the other civil law, have different legal incidents--the spouses have different management and control rights and duties, creditors have different rights to reach the property, and the property is treated differently at dissolution of marriage and at death.²

In California it is common for husband and wife to take title to property in joint tenancy form even though the property is acquired with community funds. Frequently the joint tenancy title form is selected by the spouses on the advice of a broker or other person who is unaware of the differences in legal treatment between the two types of property tenure. The spouses themselves ordinarily do not know the differences between the two types of tenure, other than that joint tenancy involves a right of survivorship.³

As a consequence, a person who is adversely affected by the joint tenancy title form may litigate in an effort to prove that the spouses did not intend to transmute the community property into joint tenancy. Because joint tenancy is often disadvantageous to the spouses (it frequently frustrates the decedent's trust or other estate plan and results in adverse tax consequences) the courts in the past have been liberal in relaxing evidentiary rules to allow proof either that the

1. Fam. Code § 750. The spouses may also hold property as tenants in common, although this is relatively infrequent.

2. See, e.g., Sterling, Joint Tenancy and Community Property in California, 14 Pac. L. J. 927 (1983); 10 Comm. Prop. J. 157 (1983).

3. See, e.g., Bruch, The Definition and Division of Marital Property in California: Towards Parity and Simplicity, 33 Hast. L. J. 769, 828-38 (1982).

spouses did not intend to transmute community property to joint tenancy or, if they did, that they subsequently transmuted it back.⁴

The result has been general confusion and uncertainty in this area of the law, accompanied by frequent litigation⁵ and negative critical comment.⁶ It is apparent that the interrelation of joint tenancy and community property requires clarification.

Legislation enacted in 1965 directly addressed the problem of married persons taking title to property in joint tenancy form without being aware of the consequences and in fact believing the property is community.⁷ Former Civil Code Section 5110 was enacted to provide that a single-family residence acquired during marriage in joint tenancy form is presumed community property for purposes of dissolution of marriage. This presumption had a beneficial effect and was expanded

4. See, e.g., Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 159-68 (1981).

5. See, e.g., *Siberell v. Siberell*, 214 Cal. 767, 7 P. 2d 1003 (1932); *Delanoy v. Delanoy*, 216 Cal. 23, 13 P. 2d 513 (1932); *Tomaier v. Tomaier*, 23 Cal. 2d 754, 146 P. 2d 905 (1944). Cases struggling with the issue in the past few years include *In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P. 2d 285, 166 Cal. Rptr. 853 (1980); *Estate of Levine*, 125 Cal. App. 3d 701, 178 Cal. Rptr. 275 (1981); *In re Marriage of Stitt*, 147 Cal. App. 3d 579, 195 Cal. Rptr. 172 (1983); *Estate of Blair*, 199 Cal. App. 3d 161, 244 Cal. Rptr. 627 (1988); *In re Marriage of Hilke*, [2 Cal. App. 4th 433 (1992)] (rev. granted).

6. See, e.g., Marshall, Joint Tenancy Taxwise and Otherwise, 40 Calif. L. Rev. 501 (1952); Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87 (1961); Mills, Community Joint Tenancy--A Paradoxical Problem in Estate Administration, 49 Cal. St. B. J. 38 (1974); Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego, L. Rev. 143 (1981); Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity, 33 Hast. L. J. 771 (1982); Sterling, Joint Tenancy and Community Property in California, 14 Pac. L. J. 927 (1983), 10 Comm. Prop. J. 157 (1983); Kasner, Community Property in Joint Tenancy Form: Since We Have It, Lets Recognize It (1991).

7. Cal. Assem. Int. Comm. on Judic., Final Report relating to Domestic Relations, reprinted in 2 App. J. Assem., Cal. Leg. Reg. Sess. 123-24 (1965).

in 1983 to apply to all property acquired during marriage in joint tenancy form.⁸ The 1983 legislation also made clear that the community property presumption may be rebutted only by a clear writing by the spouses, but that separate property contributions are reimbursable at dissolution of marriage.⁹ This legislation is limited in effect and does not address treatment of the property at death of a spouse,¹⁰ or during marriage before dissolution or death.

Community property provides a married person important protections that joint tenancy does not. Community property protections include:

- (1) Fiduciary duties in management and control of the property.¹¹
- (2) Limitations on depletion of the community by gift.¹²
- (3) Limitations on disposition of the family home or other community real property.¹³
- (4) Prohibition on forced partition of the property during marriage.¹⁴
- (5) Right to will the decedent's community property interest.¹⁵
- (6) Passage of property to the surviving spouse absent a will.¹⁶

8. Civ. Code § 4800.1, enacted by 1983 Cal. Stats. ch. 342, § 1. See California Law Revision Commission--Report Concerning Assembly Bill 26, 1983 Sen. J. 4865 (1983).

9. Civ. Code § 4800.2, enacted by 1983 Cal. Stats. ch. 342, § 2.

10. Marriage of Hilke, [2 Cal. App. 4th 433 (1992)] (rev. granted).

11. Fam. Code §§ 721, 1100(e), 1101.

12. Fam. Code § 1100(b).

13. Fam. Code § 1102.

14. Code Civ. Proc. § 872.210(b).

15. Prob. Code § 6101.

16. Prob. Code § 6401.

(7) Passage of property to the surviving spouse without probate,¹⁷ and ability of the surviving spouse to elect probate if desired.¹⁸

(8) Stepped-up income tax basis for appreciated community property passing to the surviving spouse.¹⁹

Joint tenancy may provide some protection for a married person from liability for debts.²⁰ However, the common law protection is at the expense of a creditor who may be denied payment for a just debt. By comparison, the statute governing liability of community property for debts represents sound social policy based on a balanced consideration of all aspects of the debtor-creditor relationship, including the need for fairness to all parties and to encourage extension of credit to married persons.²¹ The California Law Revision Commission believes the debt liability consequences alone of joint tenancy compel the conclusion that community property is the preferable form of property tenure.

The statutory incidents of community property that have been enacted over the years for the protection of married persons correspond with what most married persons want and expect. They are generally advantageous to married persons. Joint tenancy ill-serves the needs of most married persons, despite its wide-spread but uninformed use. For these reasons, the Law Revision Commission believes that the law should favor community property over joint tenancy for married persons.

Community property that is titled as joint tenancy should remain community property unless there has been an express and knowing

17. Prob. Code § 13500.

18. Prob. Code § 13502.

19. Int. Rev. Code § 1014.

20. See discussion in Sterling, supra, at 14 Pac. L. J. at 945-951; 10 Comm. Prop. J. at 175-182.

21. California Law Revision Commission, Recommendation relating to Liability of Marital Property for Debts, 17 Cal. L. Revision Comm'n Reports 1 (1984).

transmutation of the property to joint tenancy by the spouses. Brokers and others who assist married persons in titling their property should be required to inform them of the disadvantages of joint tenancy. A "safe harbor" statutory form should be enacted with sufficient information and a proper declaration to enable a person to transmute community property to joint tenancy, if that is what is really desired. There should be a one-year deferred operative date for the proposed legislation, in order to give affected persons an opportunity to become informed about the new requirements. The new requirements should apply only to a property acquisition or titling that occurs after the operative date.

The proposed statutory scheme corresponds with the intention of most married persons not to lose basic community property protections merely by taking property in joint tenancy title form. It will provide certainty and minimize litigation over the issue.

Treating the property as community at death will enable passage at death to the surviving spouse without probate. Title to the property can be cleared quickly and simply either by affidavit²² or by summary court proceeding.²³ It will also avoid possible frustration of the decedent's estate plan since the community property may be passed by will (for example, to an exemption-equivalent testamentary bypass trust, with resultant tax savings for survivors).

In short, community property tenure is more advantageous to the parties than joint tenancy in the ordinary case, and corresponds to the ordinary expectations of the parties who take joint tenancy title form. Community property in joint tenancy form should receive community treatment for all purposes, unless the parties clearly indicate in writing their intent to treat their interests as separate property.

22. Prob. Code §§ 210-21; see also Prob. Code § 13540 (right of surviving spouse to dispose of real property).

23. Prob. Code §§ 13650-60.

The Commission's recommendation would be implemented by enactment of the following provisions.

Civ. Code § 683 (amended). Creation of joint tenancy

SECTION 1. Section 683 of the Civil Code is amended to read:

683. (a) A joint interest is one owned by two or more persons in equal shares, by a title created by a :

(1) A single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or by transfer from when granted or devised to executors or trustees as joint tenants.

(2) A transfer, when expressly declared in the transfer to be a joint tenancy:

(A) From a sole owner to himself or herself and others, or from .

(B) From tenants in common or joint tenants to themselves or some of them, or to themselves or any of them and others, or from .

(C) From a husband and wife, when holding title as community property or otherwise to themselves or to themselves and others or to one of them and to another or others, when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants , subject to Chapter 6 (commencing with Section 860) of Part 2 of Division 4 of the Family Code (community property in joint tenancy form) .

(b) Provisions of this section do not apply to a joint account in a financial institution if Part 2 (commencing with Section 5100) of Division 5 of the Probate Code applies to such account.

Comment. Section 683 is amended to recognize enactment of Family Code Sections 860-865, governing community property in joint tenancy form. Those provisions become operative January 1, 1995. The other changes in the section are technical, for organizational purposes.

Fam. Code §§ 860-865 (added). Community property in joint tenancy form

SEC. 2. Chapter 6 (commencing with Section 860) is added to Part 2 of Division 4 of the Family Code, to read:

CHAPTER 6. COMMUNITY PROPERTY IN JOINT TENANCY FORM

§ 860. Transmutation of community property to joint tenancy

860. Notwithstanding joint tenancy form of title, community property held in joint tenancy form is community property and not joint tenancy unless the community property is transmuted to joint tenancy by an agreement or transfer that satisfies the requirements of Chapter 5 (commencing with Section 850) (transmutation of property). The agreement or transfer may be a part of a document of title or may be a separate instrument, and may be executed together with a document of title or at another time.

Comment. Section 860 makes clear that the transmutation statute governs community property that is titled in joint tenancy. This section applies to personal property as well as real property. Section 760 (community property). A transmutation of real property is not effective as to third parties without notice of it unless recorded. Section 852(b).

A husband and wife may hold property as joint tenants (or tenants in common) or as community property. Section 750. Joint tenancy is a form of separate property ownership and is inconsistent with community property. See, e.g., *Siberell v. Siberell*, 214 Cal. 767, 7 P. 2d 1003 (1932). See, generally, discussion in *Sterling, Joint Tenancy and Community Property in California*, 14 Pac. L. J. 927 (1983), 10 Comm. Prop. J. 157 (1983).

The spouses may transmute community property to joint tenancy by agreement or transfer. Section 850. A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected. Section 852(a). An express declaration transmuting community property to joint tenancy should state that the property is held "in joint tenancy and not as community property", or words to that effect expressly stating that the characterization or ownership of the property is being changed. See *Estate of MacDonald*, 51 Cal. 3d 262, 272 Cal. Rptr. 153, 794 P. 2d 911 (1990). The express declaration requirement may be satisfied by use of the statutory form provided in Section 862 (form of transmutation).

Under this section, community property that is not properly transmuted to joint tenancy remains community property for all purposes and receives community property treatment at death, including tax and creditor treatment and passage without probate (unless probate is elected by the surviving spouse). Prob. Code § 13500. In the case of community real property that passes without probate, the surviving spouse has full power to deal with and dispose of the property after 40 days from the death of the spouse. Prob. Code § 13540.

§ 861. Advice concerning form of title

861. An attorney, real estate agent or broker, title insurance officer, stock broker, bank officer, legal forms publisher, or other person professionally involved in the transfer or titling of property who provides a form or other instrument to a married person, the use of which results in the person holding community property in joint tenancy form or a transmutation of community property to joint tenancy, shall advise the person concerning the advantages and disadvantages of community property and joint tenancy. The advice shall include information concerning the right of a deceased spouse to make a testamentary disposition of community property, passage of community property to the surviving spouse absent a testamentary disposition, the right of the surviving spouse to take community property with or without probate, the income tax advantages of appreciated community property, and the absence of these advantages for joint tenancy.

Comment. Section 861 requires a professional in the property title or transfer field who offers a joint tenancy option to a married person to give advice comparing community property and joint tenancy. A professional who fails properly to advise a person may be liable for any adverse consequences that result from the joint tenancy form of title. A professional required to advise a person under this section may satisfy the requirement by use of the statutory form provided in Section 862 (form of transmutation). This section applies only to transmutations involving the professional that occur on or after January 1, 1995. Section 865 (transitional provision).

§ 862. Form of transmutation

862. (a) An agreement or transfer transmuting community property to joint tenancy satisfies the requirements of Chapter 5 (commencing with Section 850) (transmutation) and Section 861 (advice concerning form of title) if the agreement or transfer is made in writing by an express declaration that is made, joined in, consented to, or accepted by each spouse substantially in the following form:

DECLARATION OF JOINT TENANCY

WARNING

IF YOU SIGN THIS DECLARATION, YOU MAY LOSE IMPORTANT COMMUNITY PROPERTY RIGHTS.

California law generally is more protective of rights of married persons in community property than in joint tenancy.

and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature _____ (Seal)

(b) Nothing in this section limits or affects either of the following:

(1) The validity of an agreement or transfer not substantially in the form provided in this section if the agreement or transfer otherwise satisfies the requirements of Chapter 5 (commencing with Section 850) (transmutation).

(2) The sufficiency of advice concerning the advantages and disadvantages of community property and joint tenancy if the advice otherwise satisfies the requirements of Section 861 (advice concerning form of title).

Comment. Section 862 provides a "safe harbor" for the requirements of Sections 860 (transmutation of community property to joint tenancy) and 861 (advice concerning form of title). This section does not provide the exclusive means by which the requirements of those sections may be satisfied; any instrument or advice that meets the standards in those sections will satisfy them. However, use of the statutory form provided in Section 862 satisfies those sections as a matter of law.

The express declaration provision of this section is consistent with requirements in Civil Code Section 683 ("express declaration" required for joint tenancy) and in Family Code Section 852 ("express declaration" required for transmutation).

§ 863. Effect of transmutation to joint tenancy

863. Transmutation of community property to joint tenancy changes the character of the property to separate property joint tenancy for all purposes. A severance of the joint tenancy results in a tenancy in common of separate property interests of the spouses and not in community property.

Comment. Section 863 makes clear that a transmutation of community property to joint tenancy results in a "true" separate property joint tenancy and not a hybrid form of tenure. Married persons may hold property as either community property, joint tenants, or tenants in common. Section 750 (methods of holding property); see also Comment to Section 860 (transmutation of community property to joint tenancy).

At dissolution of marriage the property is treated as separate property and not as community property. See Section 2580 (presumption concerning property held in joint form). However, the property is subject to the court's jurisdiction at dissolution. Section 2650 (jointly held separate property).

§ 864. Effect on special statutes

864. Nothing in this chapter affects any other statute that prescribes the manner or effect of a transfer, inter vivos or at death, of property registered, licensed, or otherwise documented or titled in joint tenancy form pursuant to that statute.

Comment. Section 864 saves existing schemes governing transfer of title, probate and nonprobate, applicable to specified types of property. See, e.g., Vehicle Code §§ 4150.5, 5600.5 (coownership vehicle registration); Health & Safety Code § 18080 (coownership manufactured home, mobilehome, commercial coach, truck camper, or floating home registration). Cf. Civ. Code § 683 (creation of joint tenancy); Fam. Code § 2580 (community property presumption for property held in joint form); Prob. Code § 5305 (presumption that funds on deposit are community property).

§ 865. Transitional provision

865. (a) Subject to subdivision (b):

(1) This chapter applies to community property held in joint tenancy form as the result of a transfer or titling that occurs on or after January 1, 1995.

(2) Community property held in joint tenancy form before January 1, 1995, is governed by law otherwise applicable and not by this chapter.

(b) Community property held in joint tenancy form before January 1, 1995, pursuant to an agreement, transfer, express declaration, or other instrument that satisfies the requirements of this chapter is governed by this chapter.

Comment. Section 865 provides a one-year deferred operative date to enable persons affected by this chapter to become familiar with its provisions and to allow for production of forms that will satisfy it.

Fam. Code § 2580 (amended). Community property presumption for property held in joint form

SEC. 3. Section 2580 of the Family Code is amended to read:

2580. (a) For the purpose of division of property upon dissolution of marriage or legal separation of the parties:

(1) Property acquired by the parties during marriage on or after January 1, 1984, and before January 1, 1987, in joint tenancy form is presumed to be community property.

(2) Property acquired by the parties during marriage on or after January 1, 1987, in joint form, including property held in tenancy in common, joint tenancy, tenancy by the entirety, or as community property is presumed to be community property.

(b) The presumptions under subdivision (a) are presumptions affecting the burden of proof and may be rebutted by either any of the following:

(1) 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.

(2) Proof that the parties have made a written agreement that the property is separate property.

(c) Nothing in this section affects the character of property acquired by married persons that is not described in subdivision (a).

(d) Notwithstanding any other provision of this section, property acquired by the parties during marriage on or after January 1, 1995, in joint tenancy form is governed by Chapter 6 (commencing with Section 860) of Part 2 of Division 4 (community property in joint tenancy form).

Comment. Section 2580 is amended to recognize enactment of Sections 860-865, governing community property in joint tenancy form. Those provisions become operative January 1, 1995. Under them, community property in joint tenancy form remains community property, absent an effective transmutation. Section 860 (transmutation of community property to joint tenancy). Once transmuted, the property is separate for all purposes, but is subject to jurisdiction of the court at dissolution, as are all other forms of jointly held marital property. Section 2650 (jointly held separate property).

Prob. Code § 5305 (amended). Presumption that funds on deposit are community property

SEC. 4. Section 5305 of the Probate Code is amended to read:

5305. (a) Notwithstanding Sections 5301 to 5303, inclusive, if parties to an account are married to each other, whether or not they are so described in the deposit agreement, their net contribution to the account is presumed to be and remain their community property.

(b) Notwithstanding Sections 2580 and 2640 of, and Chapter 6 (commencing with Section 860) of Part 2 of Division 4 (community property in joint tenancy form) of, the Family Code, the presumption established by this section is a presumption affecting the burden of proof and may be rebutted by proof of either of the following:

(1) The sums on deposit that are claimed to be separate property can be traced from separate property unless it is proved that the married persons made a written agreement that expressed their clear intent that such sums be their community property.

(2) The married persons made a written agreement, separate from the deposit agreement, that expressly provided that the sums on deposit, claimed not to be community property, were not to be community property.

(c) Except as provided in Section 5307, a right of survivorship arising from the express terms of the account or under Section 5302, a beneficiary designation in a Totten trust account, or a P.O.D. payee designation, may not be changed by will.

(d) Except as provided in subdivisions (b) and (c), a multiple-party account created with community property funds does not in any way alter community property rights.

Comment. Section 5305 is amended to make clear that the special transmutation provisions of Family Code Sections 860-865 for community property in joint tenancy form are not applicable to community property in a multiple-party account. Property rights in such an account are governed by the special provisions of the California Multiple-Party Accounts Law and not by the general Family Code transmutation rules.