First Supplement to Memorandum 93-10

Subject: Study F-521.1/L-521.1 - Effect of Joint Tenancy Title on Community Property (Comments on Memorandum)

Professor Kasner has written to say that he fully supports the staff position on Memorandum 93-10 concerning the effect of joint tenancy title on community property--"It is time to resolve this issue." He states:

> It seems to me there are at least two solutions to this problem, and probably more. The solution you picked was not my first choice, but I believe it wooks. I also believe it resolves the "Property vs. Title" issue. Since it requires an express transmutation to convert the community to so called "true" joint tenancy.

Attached as Exhibit pp. 1-2 is a letter from Jeff Strathmeyer also commenting on the memorandum. He makes several points about the memorandum.

Is There a Problem?

Mr. Strathmeyer questions the "assumption" that there is frequent litigation over the community property/joint tenancy issue, noting that the draft tentative recommendation cites only a few odd-ball cases over a 60-year period and that he has never heard of a problem even though he interacts with many practitioners in his position with CEB.

Of course, the Commission would not want to waste its resources on a study of something that isn't a problem. But this matter was brought to the Commission's attention by active state bar practitioners who have had problems, particularly with respect to tax issues. We haven't cited all the appellate cases grappling with the issues because we didn't think it necessary to belabor the point, but the actual number is quite substantial.

As it happens, the day after we received Mr. Strathmeyer's letter I gave a talk about the Commission's current projects to the estate planning and probate section of the Santa Clara County Bar

Association. I asked the approximately 80 attendees if they had experienced any problems in recent years with the effect of joint tenancy title on community property. About a third of them indicated they had.

Do People Know What They're Doing?

Mr. Strathmeyer questions the "assumption" that people don't really understand what they are doing when they take joint tenancy title. He thinks most people understand that they are getting a right of survivorship when they do this.

Our proposals have always recognized that if people understand anything about joint tenancy, it's that it involves a right of survivorship. But we have been told by practitioners that people think this means the property passes to the surviving spouse without probate if they do nothing else with it. Many do not understand that the right of survivorship precludes them from willing their interest in the property if they so desire, or from including it in a trust.

Revise Transmutation Statute?

Mr. Strathmeyer recognizes there is a tax problem with imposition of joint tenancy title on community property and suggests it could be cured by loosening the transmutation statute, thereby returning the law to its previous state of fluidity where oral agreements and understandings hold sway. He suggests this could be done without affecting dissolution proceedings by relaxing the standards of proof of transmutation only in post-death contexts.

Different standards of proof apply right now for determining the character of property at dissolution and at death, and people aren't very happy with the situation. The movement and pressure in the law are all the other way, towards unification.

One of the reasons for applying a statute of frauds is to minimize the importance of self-serving declarations. The risk of fraud is even greater after death than at dissolution of marriage, since only one of the parties is able to testify. But who cares, besides IRS? If the spouses have children of former marriages, the children may be more

than casually interested in the true title to the property and intent of their parents. Loosening the transmutation statute does not necessarily promote justice.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

EXHIBIT

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Re: Study F-521.1/L-521.1 - Effect of Joint Tenancy Title on Community Property; "Basic Principles Revisited" memo of January 4, 1993

Dear Nat:

I think this study in general and the staff recommendation in particular are flawed by two questionable assumptions:

A. **The "frequent litigation" assumption.** The introduction of the study suggests that there is "frequent" litigation in which persons contend that joint tenancy property is in fact community property. [New Tentative Recommendation, pp. 2-3.] This statement is supposedly supported by Footnote 5, which cites nine court cases decided over a 60 year period, virtually all of which present either unusual facts (death in mid-divorce) or involve dissolution of marriage issues under prior law.

Contrary to the assumption, it strikes me that the issue is remarkably litigation free. It seems a fair speculation that millions of parcels of California real estate are owned by married couples in joint tenancy. An equally fair assumption is that these parcels include a high percentage of the most valuable assets in the society. To that extent we would expect title to these assets to be a frequent subject of litigation. Yet I have rarely heard of anyone attacking the validity of a husband and wife joint tenancy title to real property in a case which involved:

A. A bona fide dispute as to ownership (as opposed to a tax motivated contention); and
B. A primary contention that the decedent did not understand the survivorship feature of the title. [There are many other theories for attacking these titles (e.g. form of title chosen as a result of undue influence; and form of title chosen with intent that survivor hold title as a nominee/trustee), but these do not provide evidence that the decedent did not understand the survivorship feature.]

I would be the first to admit that my own impression of the amount of litigation on this point has limited probative value--even taking into account my 19 years of practice, including 10 working for CEB in a position that provides me a fairly good level of interaction with other practitioners. But it is enough to make me extremely suspicious. I hear about will contests constantly. Why do I never here about the type of case I just described?

B. The "people do not know what they intend" assumption: The referenced memorandum states at page 18:

> The staff believes the guiding principle in the formulation of the rules should be the intent of the parties. But, what do they intend? We have previously assumed that they intend to pass the property to the surviving spouse without probate, for the most part. However, we have been informed that in fact most people do not intend anything in particular--they're just doing what some broker told them to do.

I think, in this respect, that the staff has been incorrectly informed. I do not dispute the suggestion that people often choose title based on the suggestion of a real estate broker. It is also clear that many brokers do not understand all of the consequences of the decision (particularly with respect to tax consequences). But I strongly dispute the implication of the quoted language, which is that brokers do not understand the survivorship feature of joint tenancy and do advise their clients about it.

I think if you take an informal survey and ask married homeowners the question, "Is it your understanding that if a Husband and Wife take title to their home as joint tenants that the property will pass to the survivor of them without probate when one of them dies?", that you find that almost everyone who owns a house with a joint tenancy title will correctly answer the question.

[This is to be distinguished from the question, "*Why* did you take title in joint tenancy?"--a question which generates all kinds of defensiveness and confusion about what is really being asked--particularly when asked by a lawyer.]

Conclusion: On balance, I think the present system is creating far fewer practical problems than the study suggests. At the very least, there is enough of a question about this point that the Commission should document the challenged assumptions before recommending legislation.

There is, of course, the related capital gain tax problem. If the transmutation statute is aggravating the situation, it should be amended. Former standards of proof of transmutation can be applied in post-death contexts without relaxing the standards applicable in dissolution of marriage proceedings.

Very truly yours,

Jeffrey A. Dennis-Strathmeyer