#F-521.1/L-521.1

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Memorandum 93-32

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

BACKGROUND

The Commission circulated for comment its tentative recommendation on the effect of joint tenancy title on community property during the months of February, March, and April. A copy of the tentative recommendation is attached to this memorandum.

The tentative recommendation was sent to persons on the Commission's regular mailing list interested in family law, probate law, real property law, and business law. In addition, the tentative recommendation or a summary of it was printed and publicized in the California Family Law Report, CEB Estate Planning Reporter, and State Bar Estate Planning News. We also solicited input from special interest groups, including relevant State Bar and specialized bar sections, the real estate industry, the title insurance industry, the banking and trust industry, and the securities transfer industry.

We have received comments from 25 persons and organizations. The comments are attached to this memorandum as an Exhibit. This memorandum analyzes the responses.

SUMMARY OF TENTATIVE RECOMMENDATION

The tentative recommendation seeks to ensure that married persons who take title to property as joint tenants do so knowingly and intentionally. In order to convert their community property to separate property held as joint tenants, the spouses would have to transmute the property by an express written declaration; otherwise it would remain community property. The recommendation requires persons who assist spouses in titling their property to inform them of the

advantages and disadvantages of community property and joint tenancy. A "safe harbor" statutory form is provided with sufficient information and a proper declaration to enable spouses to transmute community property to separate property held as joint tenants, if desired. The statutory presumption that community property remains community unless transmuted to joint tenancy would apply retroactively to property acquired before the operative date of the statute.

GENERAL REACTION

The general reaction to the tentative recommendation is mixed. Four commentators support it without qualification, and eight others support the basic approach but suggest some changes. Four commentators oppose the tentative recommendation, and three offer their own cure for the community property/joint tenancy problem. The remaining six comment on specific aspects of the recommendation without indicating general support or opposition.

General Support

Unqualified supporters of the tentative recommendation include the Executive Committee of the State Bar Family Law Section (Exhibit p. 47), which "unanimously agrees with the recommendation and reasoning therein; Scott D. Richmond of Orange (Exhibit p. 38), a certified specialist in estate planning, who thinks "it's wonderful and it's about time"; Professor Paul Goda of Santa Clara University School of Law (Exhibit p. 20) ("an excellent recommendation"); and Robert Clark of South Pasadena (Exhibit p. 29), a paralegal who states that the recommendations "rectify the present confusion that exists in this area. The proposed changes to the code are well organized and well thought out."

Other supporters of the recommendation make such remarks as:

"It is certainly time to clarify the law in this area. The recommendation seems to do that in a straightforward way." John D. Miller of Long Beach (Exhibit p. 5).

"My initial reaction to this legislation is that it is high time. ... The misinformation and lack of information in the real estate and title communities are of gargantuan proportions." Maralee Nelder-Adams of Grass Valley (Exhibit p. 17).

"I applaud your review and tentative recommendations ... and highly approve of the intended purpose of this legislation. It is long overdue. I support the recommendations and feel that the clarity of the proposed legislation is good." Paul W. Smith of Vista (Exhibit p. 26).

General Opposition

The following persons oppose the entire concept of the legislation:

Alvin G. Buchignani of San Francisco (Exhibit p. 10) believes the debtor protection aspects of joint tenancy should be fostered and he does not believe the legislation should be retroactive. However, he has no objection to the requirement that persons involved in title preparation must inform married persons about the consequences of the form of title. These matters are discussed in greater detail below.

Peter R. Palermo of Pasadena (Exhibit p. 19) believes the law as it stands is adequate, "i.e., 1) the presumption that if husband and wife take title as joint tenants they hold as community property, and 2) in order to transmute joint tenancy into community property there should be a writing." He does not believe that it is realistic to think people will become informed about the consequences of the form of tenure they select. Interestingly enough, his version of current law is consistent with the tentative recommendation. However, there is no consensus in the legal community about what existing law is. This is amply illustrated by the fact that one of the greatest concerns commentators have with the tentative recommendation is its retroactivity, on the basis that it will change current law, whatever it is.

The Legislative Committee of the Stanislaus County Bar Association Family Law Section (Exhibit p. 32) strongly opposes the proposal. "The reason that we oppose this legislation is that it does not specifically coordinate itself to the language in the Family Law Act which talks about community property versus joint tenancy property. If this law

went into effect, then all property owned by parties in joint tenancy would be presumed separate rather than presumed to be community. That is dichotomous." The staff does not understand these remarks. The subcommittee appears to attribute to the tentative recommendation the opposite of what it would do.

Thomas N. Stewart, Jr., of Walnut Creek (Exhibit p. 42) believes the proposal is ill considered. He deplores legislation intended to protect the public from itself and believes new legislation only adds confusion. He doubts that the Commission has considered "the adverse Federal Estate Tax effect making joint tenancy property part of the property 'subject to claims'". The staff is not sufficiently expert in estate tax matters to respond fully to this last point. We do understand that expenses incurred in transferring title to joint tenancy property are deductible for estate tax purposes if paid before the return is filed. However, expenses of probate administration for community property are also deductible. Whether there is any significant advantage one way or the other is not clear to us. We also suspect that any estate tax advantage that might be found for joint tenancy is far overshadowed by the potential income tax disadvantage.

It is not clear whether Robert J. Fulton of San Jose (Exhibit p. 16) supports or opposes the tentative recommendation. His letter begins, "My compliments to the person or persons that put the time and effort into this work." But his letter concludes with a "Counterpoint: I thing it is time to stop trying to legislate away every possibility of error in our social order." He does not think the proposed legislation can achieve its goal to provide certainty and minimize litigation.

Different Solution

Three commentators offer their own approaches to the community property/joint tenancy problem.

Abolish joint tenancy. Rawlins Coffman of Red Bluff (Exhibit p. 22) states "I abhor the joint tenancy vesting." He would eliminate all future joint tenancy vesting in California, require existing joint tenancies to be converted to another form of tenure, allow either spouse full disposition rights over the spouse's one-half interest in

community property, and treat quasi-community property the same as community property for all purposes. The staff does not believe it is politically feasible to abolish joint tenancy. A recommendation to do this would not cure any problems in the law because it would not be enacted.

Community property with right of survivorship. The law firm of Rosenthal and Smith of Encino (Exhibit p. 37) believes that the tentative recommendation is "a step in the right direction", but should go one step further and allow a new hybrid title form to be used in the future--community property with right of survivorship. Property held in this form would be treated as community property for all purposes except at death it would pass to the survivor. However, they also propose that the property would be subject to testamentary disposition. This sounds a lot like unadorned community property--we don't need a new title form for that.

The Legislative Committee of the Beverly Hills Bar Association Probate and Trust Section (Exhibit p. 39) also thinks the tentative recommendation is "excellent" but that community property with right of survivorship would be better. Their version of CPWROS is more in line with what we have considered in the past--the property is treated as community for all purposes, but at death it would not be subject to testamentary disposition. Their proposal would be a way to treat existing community property held in joint tenancy form.

The Beverly Hills group makes a strong argument for their proposal, noting that many persons have taken joint tenancy title knowingly and intentionally, that survivorship enables certainty and simplicity in passing title at death, and that title will mean what it says. They pose the situation of a second marriage where each spouse has children of a former marriage. They knowingly take joint title, each intending to pass their own property to their own children, but the jointly titled family home is intended to go to the survivor. Under the tentative recommendation the children of the decedent could challenge the joint tenancy deed and take a share of the decedent's interest in the family home as community property.

The Commission has taken all these factors into account in the past when it has seriously considered the concept of community property with right of survivorship. The problem is that no matter what rule we adopt, it is easy to come up with cases that would come out wrong under it. The solution is to figure out what the ordinary situation is and cover it by statute, while still allowing persons who don't fit the mold to do what they want to do.

Our investigation of this subject over many years reveals that very few people understand the full consequences, or even any of the consequences, of taking title as joint tenants. That theme is repeated throughout the current responses to our latest proposal on this subject. Second, even if people know or think they know what they are doing by taking joint title, they often end up later wanting to pass the property elsewhere, either through a will or a trust, not knowing that the joint tenancy form of title precludes this.

Considerations such as these, plus the uncertainty over whether this sort of treatment would qualify the property as community for federal income tax purposes, has led the Commission to reject the concept of community property with right of survivorship on several occasions.

Other General Considerations

Mr. Buchignani believes the law should favor joint tenancy because of its creditor avoidance aspects. Exhibit pp. 10-11. By preferring community property to joint tenancy, the tentative recommendation is going the wrong way. Most creditors are knowledgeable and can take care of themselves, whereas an innocent spouse should be able to take the decedent's property free of the decedent's debts. "When weighing the interests of these two groups, I must conclude that the interests of the spouse deserve greater protection."

On the other hand, Mr. Smith would seek to eliminate the debt-avoiding features of joint tenancy. Exhibit p. 28. The staff agrees with Mr. Smith's argument that "There is no reason in our modern society to perpetuate this inequitable rule of common law." However, that is beyond the scope of the current recommendation, and the staff believes we should not get sidetracked by it.

One commentator, Luther J. Avery of San Francisco (Exhibit p. 7), thinks the tentative recommendation should go beyond its limited scope and address other situations where joint tenancy title between spouses creates peculiar issues. Among the ones he has frequently encountered in law practice are:

Tracing from and through bank accounts. The California Multiple Party Account Law deals with community property in joint accounts. This was enacted on Commission recommendation. It appears to be working adequately.

Property located in another state. Mr. Avery is correct that we do not delve into choice of law rules. No one has demonstrated that a problem exists in this respect.

Community property invested in an asset held with a third person in joint tenancy. This deals with a totally different problem from that addressed in the tentative recommendation. If people really use joint tenancy as a form of investment tenure with third persons, that fact illustrates the danger of joint tenancy tenure and supports efforts to ensure that it is only used knowingly.

Unmarried cohabitors. If unmarried cohabitors acquire property as joint tenants, their interests are separate property (community property is limited to married persons). This recommendation seeks only to cure the limited problem of community property held in joint form.

SPECIFIC POINTS ON TENTATIVE RECOMMENDATION

Preliminary Part

A number of remarks are addressed to the preliminary part of the tentative recommendation that explains the proposals and the reasons for them.

Summary of Tentative Recommendation (preface). IRS refuses to recognize community property. Alvin G. Buchignani of San Francisco (Exhibit p. 10) would be more precise in referring to the position of the Internal Revenue Service, e.g., "the Internal Revenue Service

refuses to recognize community property claims for property titled as joint tenancy unless evidenced by a written agreement." The staff has no problem with this clarification.

Pages 2-3. Comparison of community property and joint tenancy. The Debtor/Creditor Relations and Bankruptcy Committee of the State Bar Business Law Section (Exhibit p. 33) believes the discussion of the incidents of community property and joint tenancy is unbalanced in favor of community property and may be inaccurate in some respects, particularly with respect to protections against creditors. The staff will review the matters identified in their letter and propose any changes that appear appropriate in the next draft of the recommendation.

Page 4 (footnotes 23 and 25). Retroactivity and existing law. The discussion in the text and footnotes indicates the intent to apply the proposed legislation retroactively and that the proposed legislation probably codifies existing law. Professor Goda of Santa Clara University School of Law (Exhibit p. 20) suggests that this discussion should be expanded, since it is a major issue. The staff agrees, and will augment this portion of the preliminary part in the next draft of the recommendation.

Pages 4-5. Title to community property can pass simply by affidavit. J. Richard Johnston of Oakland (Exhibit p. 1) questions the accuracy of the comment on pages 4 and 5 (and also on page 3) that community property title can pass quickly by affidavit of death in the same manner as joint tenancy. Apparently he has encountered difficulty in using the affidavit procedure for community property, even though Probate Code Section 13540 gives the surviving spouse the right to dispose of real property 40 days after the death of the decedent, absent a claim of interest. The Commission considered adding statutory language to strengthen this procedure but did not include it because it appeared that title companies now are honoring the 40-day rule. Mr. Johnston's comments indicate this may not be the case. The staff recommends that the Commission propose language that augments or clarifies the availability of the affidavit procedure. We are not sure what form this would take, but will propose language for the final recommendation on this matter.

§ 860. Scope of chapter

Mr. Avery notes that the tentative recommendation fails to deal with separate property held in joint title. Exhibit p. 1. He is correct that the tentative recommendation deals only with imposition of joint title on community property, not on separate property. We agree that the separate property/gift/transmutation issues are much more complex. We're having enough trouble forging a consensus in a relatively narrow area of law, without bringing in a whole new set of problems.

Margaret T. Collins of Torrance (Exhibit p. 44) agrees with the approach of the tentative recommendation on this point. "I cannot think of an effective way of clarifying the consequences when both separate and community property funds have been used. I think most of the problems will be cleared up by the proposed language."

Bart J. Schenone of Hayward (Exhibit pp. 30-31) suggests a potential problem with retroactivity of the proposed legislation and its impact on the in-law inheritance statute. However, Mr. Schenone's problem relates only to joint tenancy that has a separate property source rather than joint tenancy that has a community property source, and is therefore unaffected by the current proposal. His problem illustrates two interesting points, however: (1) Joint tenancy form of title may cause quirky unintended consequences. (2) The in-law inheritance statute can operate inequitably. Both these principles we know well. Besides attacking uninformed use of joint tenancy in this tentative recommendation, the Commission has recommended repeal of the in-law inheritance statute.

§ 862. Transmutation of community property to joint tenancy

Section 862 requires a written transmutation in order to create joint tenancy from community property. Ms. Collins agrees. Exhibit p. 44.

Mr. Smith questions the provision of this section that allows the written transmutation to be executed with the document of title "or at another time". Exhibit p. 26. His concern is that the purpose of advising and requiring a knowing acceptance of the joint tenancy would be substantially defeated if this can be done after the fact. The

draft allows the transmutation to be done at another time so that if the spouses fail to sign the transmutation at the time title is taken, they can cure the defect later without having to reconvey, etc. We do not see how the intent of the statute would be hurt by this.

The most serious problem raised in connection with the written transmutation relates to the fact that the statutory declaration found in Section 864, or some nonstatutory equivalent, may be used routinely in every transaction. It will become just another piece of paper to sign without conveying to the signer any useful information about what is occurring. The firm of Rosenthal and Smith observes that "the Declaration will become just one more form in a multitude of documents which must be signed in complex transactions, such as the purchase of real property, or even in simply establishing a bank account. As such, people will wind up signing this document without the full knowledge and 'informed consent' necessary to make such a decision." Exhibit p. 37.

The harm here could be serious, since by signing the declaration the person ensures the property is joint tenancy. At least under existing law there may be the possibility of making an argument that the joint tenancy was unintended and inadvertent. Could the Commission's recommendation actually put people in a worse, rather than better, position to avoid an unwanted joint tenancy?

First, it is our hope that when a person glances at the declaration while signing papers, the declaration may catch the person's eye and give the person pause to think and perhaps question. Second, the form may give the form provider (broker, escrow agent, etc.) pause to think and perhaps be weaned from joint tenancy. Third, it is not clear that a person who signs the declaration will be in a worse position than under existing law, which is moving away from allowing a person to argue the nature of property based on understandings and oral agreements of intent. Finally, common law and equitable excuses such as fraud, duress, mistake, etc. are always available.

§ 863. Information concerning form of title

Section 863 requires any person who provides a form or advises the use of joint tenancy to inform the joint tenants of the advantages and disadvantages of joint tenancy and community property. This duty could be satisfied by use of the statutory form.

A number of commentators object to requiring or permitting lay persons such as real estate agents, bank clerks, securities salespersons, stationery store clerks, and the like, to give legal advice. See, e.g., Robert M. Allen of San Jose (Exhibit p. 2), Mr. Miller (Exhibit p. 5), Robert M. Jones of Atascadero (Exhibit p. 23), the firm of Rosenthal and Smith (Exhibit p. 37), Mr. Stewart (Exhibit p. 42), Ms. Collins (Exhibit p. 44). Typical concerns expressed are that it is unreasonable to impose a burden to give legal advice on these lay persons, that the advice given is not likely to be much good, that this is a trap for the unwary and will cause substantial litigation over liability issues.

On the other hand, several commentators feel less charitable towards laypersons who stick married persons with joint tenancy. See, e.g., Mr. Buchignani (Exhibit p. 11--no objection to requiring persons involved in titling to explain consequences) and William L. Dok of San Jose (Exhibit p. 25--wholehearted support, too many years of title company and real estate sales person ignorance, they "should either be prohibited from giving legal advice as to the form of title someone should take property in, or in the alternative, they should be properly educated to give legal advice because that is exactly what they are doing and have been doing for far too long").

The most common alternate solution suggested by the commentators is simply to require that the statutory form be used in order to obtain joint tenancy. We did not impose such a requirement in the tentative recommendation because we did not want to invalidate titles just because some lay person failed to provide the form. We believed that the form would come into common use, but were unwilling to mandate it.

The State Bar Debtor/Creditor Committee has a different perspective. It believes that an attorney should not be able to discharge the duty to counsel its client simply by providing a

statutory form. Exhibit pp. 35-36. This is particularly so because of defects the group sees in the statutory form. See discussion below in connection with Section 864.

The staff must agree with critics of the advice requirement. We included it so people involved in titling property would sit up and take notice, but we do not think the requirement is practical, and it would generate a formidable obstacle to enactment of any reform in the Legislature. However, we also think that a broker or escrow agent who advises married persons to put their property into joint tenancy is flirting with common law liability regardless of any statutory mandate.

The staff suggests that the statute should require only that a person involved in titling property as joint tenancy should provide the statutory declaration, which includes information. The statute also should make clear that there is no liability for failure to do so, and the failure does not affect the validity of any joint tenancy title that is otherwise valid. This will encourage the giving of proper advice without creating liability problems that don't already exist.

§ 864. Statutory form

Section 864 provides a form of advice and transmutation for creating joint tenancy. Use of the form satisfies the statutory advice and transmutation requirements.

The form states that "You may wish to seek expert advice before signing this declaration." Several commentators felt the signer should be referred to an attorney rather than an "expert". See comments of Mr. Avery (Exhibit p. 8), Ms. Nelder-Adams (Exhibit p. 17), Mr. Smith (Exhibit p. 26). The Commission considered this concept before, and decided that requiring consultation with a lawyer is self-serving, and that non-lawyer estate planning professionals are competent to advise on these matters. Mr. Smith remarks, however, that "I feel strongly that there are few attorneys, let alone accountants, brokers and other 'experts' that understand more than what is summarized in this form. Maybe that is self-serving, but I know of no other 'expert' that I would refer a client to for advice in this regard."

The State Bar Debtor/Creditor Committee is concerned that the declaration is biased against joint tenancy, and is inaccurate and incomplete in places. Exhibit pp. 34-35. The group is particularly concerned that the description of rights of creditors should be more fully explained and in a more even-handed manner. The staff will review the declaration to try to eliminate any bias, but we note two concerns: (1) It is not possible in a short summary such as this to write a treatise on the law, and if it were possible, we would defeat the purpose of this short statement, which is simply to hope people read it and get a rough idea of what they are doing and to send them to an expert if they are concerned. (2) One of the reasons the declaration may seem slanted is that in fact, as most experts will tell you, community property is more appropriate for the situation of most married people than joint tenancy.

In this respect, it is also worth noting that we received a comment on creditor rights tending in a direction opposite to that of the State Bar Committee. Whereas the Bar Committee wants to point out protections against creditors in some detail, Mr. Smith wants the reverse. Exhibit pp. 26-27. He points out that the social policy of joint tenancy creditor avoidance is unsound and should not be encouraged, and that there are fraudulent transfer and other limitations on the ability of a person to dodge creditors by putting property into joint tenancy. "The purpose of all of the above is to demonstrate that major exceptions exist to nullify the general rule. Thus, I believe the wording should be eliminated or at least changed to state 'that your spouse may take their interest free of debts, but that is dependent upon the circumstances and the nature of the obligation.'"

Mr. Avery suggests that this form be prepared in the most common foreign languages as well as English. Since this document will be recorded, the staff believes it is appropriate that it be in English.

Other useful editorial suggestions, which the staff will incorporate in the next draft of the recommendation, are made in the letters of Ms. Nelder-Adams (Exhibit p. 18), Mr. Smith (Exhibit pp. 26-28), and Ms. Collins (Exhibit p. 46).

§ 865. Effect of transmutation to joint tenancy

Once joint tenancy is created under this chapter, it is a true separate property joint tenancy. Therefore, a severance of the survivorship right results in a separate property tenancy in common rather than a reversion to community property.

Mr. Fulton asks whether this conflicts with the community property presumption for tenancy in common property under Section 2581(a). Exhibit p. 16. It does not, since subdivision (b) of Section 2581 is added to make clear that the character of the property is governed by the provisions of this chapter rather than by Section 2581(a).

§ 866. Effect on special statutes

Mr. Avery wonders why the tentative recommendation does not make conforming revisions in other statutes that currently prescribe rules for joint ownership of bank accounts, stocks, automobiles, and other jointly-held personal property. Exhibit pp. 8-9. He then answers his own question by noting the existence of Section 866, which provides that "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." It is not our intent in this statute to override any special statute tailored to deal expressly with joint ownership of a particular type of asset.

§ 867. Transitional provision

The new law would apply to existing joint tenancy titles imposed on community property--the property is presumed community but the presumption is rebuttable by evidence of a transmutation to joint tenancy. A number of commentators object to retroactive application. See comments of Lee A. Garry of Encino (Exhibit p. 3), Terry A. Green of San Jose (Exhibit p. 4), Mr. Buchignani (Exhibit p. 11), the State Bar Debtor/Creditor Committee (Exhibit p. 35), and Ms. Collins (Exhibit p. 44).

The reason most of these persons oppose application of the statute to existing joint tenancies is that persons may have relied on existing law and this would destroy their expectations or put a burden on them

to act to confirm their true joint tenancy intent. There are several problems with this argument. First, we know that most joint tenants end up in that form of tenure unknowingly, and in fact many end up in that form of tenure despite their best efforts to have the property titled as community property. Second, even where persons have relied on existing law, we wonder what law they have relied on. The law is very unclear and is constantly changing by case law and by statute. In fact, we defy anyone to tell us with any certainty what existing law is. Third, if we were pressed to give an opinion of what existing law is, we would guess that it is exactly what is provided in the tentative recommendation--an asset with a community property source remains community unless it is transmuted to joint tenancy by an express written declaration. The tentative recommendation probably imposes no greater impediment to creation of joint tenancy than already exists.

Professor Goda agrees with this analysis. Exhibit p. 21. "Actually, I make a stronger case than you do when I teach in asserting that 'the effect of existing statute and case law is the same as that proposed in this recommendation.'" He is thankful that the legislation is retroactive.

The staff has felt it is important to make the legislation apply to existing joint tenancies. The existing law is uncertain and is a continuing source of confusion and litigation. The proposed legislation would provide a clear rule, a rule that probably corresponds to what most persons would want, and a rule that probably captures existing law.

One commentator notes the possibility of a constitutional impediment to retroactive application under the Buol doctrine. In fact, the initial drafts of this legislation were prospective in light of Buol, until the Hilke case came down. Hilke makes clear that there is no vested right in joint tenancy survivorship, and therefore retroactive legislation to impose a community property presumption is constitutional. This opens the way to apply the legislation to existing joint tenancies, which is what we have done in the proposal.

Professor Goda raises the issue of how far back retroactivity should extend--to property acquired at any time, or only to property acquired after January 1, 1985 (the operative date of the transmutation

statute). He points out that the statute as drafted requires a writing that satisfies the transmutation statute, but since the transmutation statute did not exist until 1985 we cannot require compliance with it for properties acquired before 1985. Unless of course the transmutation documents are executed separately later, which draft Section 862 expressly permits (see discussion above).

Our intent in the tentative recommendation is to apply the statute to all existing joint tenancy titles. We think we can do this under the Hilke case. But for pre-1985 titles, the law probably was that a transmutation document was not necessary--the property was presumed joint tenancy, subject to a showing of intent of the parties not to transmute it or an oral agreement to tranmute it back. One option is to push the new statute back only to 1985, leaving the pre-1985 properties to the vagaries of whatever the law was. Another option is to make clear that the new statute goes all the way back; a transmutation paper would be necessary to confirm joint tenancy title, but a period of time, e.g., a year or two grace period, would be provided before the new law applies. There could be some difficulty for a person no longer competent to execute such a document.

The staff in principal prefers universal application of the new law, with a grace period. As we indicated above, this will come closer to what most persons really want, and will yield a fair result in most cases. Exceptions will be found, of course, but they will be exceptions rather than the rule. The new statute should be treated as curative legislation for titling abuses that have occurred over many years.

However, as a practical matter, every time we enact curative legislation in the family law and estate planning areas, we see practitioners panic without good cause. The reaction to the tentative recommendation suggests the current legislation will be no different in this respect. We foresee that practitioners will rush out and cause their clients to execute documents transmuting their community property joint tenancies to true joint tenancies, or worse, will agitate to repeal the new legislation in its entirety, regardless of whether the proposal is completely retroactive or retroactive only to 1985. For this reason, the staff ultimately and reluctantly recommends that this proposal be made prospective only.

CONCLUSION

It is clear from the commentary on the tentative recommendation that we will never be able to forge a consensus in this area. Nonetheless, the staff believes the tentative recommendation holds up well to the scrutiny and criticism it has received. The staff suggests the Commission make the following revisions to the tentative recommendation in light of the comments received, and prepare a final recommendation on this basis.

(1) The preliminary part should be revised to expand discussion in the areas of debtor rights and transmutation issues, and should incorporate clarifications and corrections suggested in the comments on the tentative recommendation.

(2) The draft legislation should include a provision augmenting existing statutory provisions for clearing title to community property by affidavit procedure.

(3) The provision requiring brokers and others to advise married persons concerning joint tenancy and community property should be replaced by a provision requiring such persons to provide the statutory information form. The requirement should be precatory only, with no liability and no defect of title if the form is not provided.

(4) The statutory declaration form should be reviewed for accuracy, particularly in the area of debtor rights, and clarifications and suggestions from the commentators incorporated.

(5) The statute should be made prospective only.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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February 11, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
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Dear Commission:

I have read with interest the Commission's Tentative Recommendation on the Effect of Joint Tenancy Title on Community Property, and I intend to retain it for future reference. However, I do question the accuracy of the following statements at pages 3 and 4-5 of the Summary of Tentative Recommendations:

Page 3: "The ability to clear title quickly by an affidavit of death is characteristic of joint tenancy property that applies to community property as well."

Pages 4-5: "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 affidavit or by summary court proceeding."

Sections 210-221 of the Probate Code are cited as authority for the second statement. Section 210 provides that when title to real property is affected by the death of a person, the fact of death may be established by recording either an affidavit of death or a certified copy of a court order that determines the fact of death.

An affidavit is commonly used to clear the record title to joint tenancy property. I fail to understand, however, how recording either an affidavit of death or a court order establishing the fact of death will clear the title to community real property, since the right of survivorship that is characteristic of joint tenancy property has no application to community property.

If I am correct in my understanding of the law, I suggest that the Summary of Tentative Recommendation should be revised.

Very truly yours,

J. Richard Johnston

J. RICHARD JOHNSTON

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February 12, 1993

California Law Revision Commission
4000 Middlefield Road, #D-2
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Re: Tentative Recommendation on Effect of Joint Tenancy Title on Community Property

To Whom It May Concern:

It is my understanding that the Tentative Recommendation would require a person who assists spouses in titling their property to inform them of the advantages and disadvantages of community property and joint tenancy forms of ownership. Most of these assisting persons will not be attorneys. I do not think that they will be competent to give legal advise on the advantages or disadvantages of community property and joint tenancy. Therefore, I would suggest that the law include a quoted provision which all assisting persons who are not attorneys must provide to the spouses prior to preparing documents which would title their property.

Very truly yours,

Robert M. Allen

Robert M. Allen

RMA:ca

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February 12, 1993

California Law Revision Commission
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Re: **News Release of February 8, 1993**

Gentlemen:

I read with interest your news release of February 8, 1993. In substance, I have no serious objection to the proposed legislation other than I believe it would be a serious mistake to make the rule retroactive to property acquired before the operative date of the statute. There must be a great number of people who have placed property in title in reliance upon the state of the law at the time it was done. If the statute is made retroactive it would place a severe burden on all of those persons to immediately record documents to effectuate their true intention. Obviously, in some cases the parties may no longer even agree, and it would be impossible to effectuate the intention of the parties as of the earlier date when the recording first occurred.

In addition to the above, there may be tax or other reasons why parties have elected to hold property as community or joint tenancy. To apply an unrelated presumption to defeat their intention seems to be inappropriate.

In summary, I have no objection to the proposed legislation other than I seriously object to it being made retroactive.

Thank you for considering my comments.

Very truly yours,

LEE A. GARRY

LAG/paw

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TERRY A. GREEN, A.P.C.
ROBERT W. EVANS

February 16, 1993

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Rd., Ste. D-2
Palo Alto, CA 94303-4739

Re: **Joint Tenancy On Community Property**

Dear Mr. Sterling:

Thank you for informing me of pending legislation re real property held as joint tenants by married parties.

Comments:

1. In the past, community property has often been held as joint tenants by married parties even though they considered it to be community property. Because of realtors and escrow companies, the title was held erroneously as joint tenants.

2. However, it is also true that many people deliberately and knowingly held property as joint tenancy rather than community property.

3. There is current law which presumes property held in joint tenancy by married people is community property. See Civil Code section 4800.1.

4. I support legislation that will deem jointly held real property to be community property unless there is specific evidence to the contrary.

5. There may be serious problems with retroactivity along the lines dealt with in Buol.

I have been a certified specialist in family law since 1980 and practice family law exclusively.

Thank you for your attention.

Sincerely,

TERRY A. GREEN

TAG/ed

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February 17, 1993

Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendation "Effect of Joint Tenancy Title on Community Property"

Dear Nat:

I have read the above recommendation, and a good deal of the earlier material on the subject. It is certainly time to clarify the law in this area. The recommendation seems to do that in a straightforward way.

There is one area of the recommendation, however, that gives me some concern. I wonder if anyone else will raise it? The concern is with the provisions in section 863.(a) that require the person who provides an instrument (presumably a joint tenancy document though the section does not say so) to a married person must inform that person of the LEGAL incidents of the two forms of holding tenure. The statutory form will satisfy the persons duty to inform, but the failure to inform does not effect the validity of a transmutation that "...is otherwise valid" - whatever that means.

My problem is that the section requires a person furnishing a joint tenancy instrument to give "legal" advice. Does the statute intend to require real estate salespersons, brokers, store clerks, and other "persons" to give such advice? Should it do that? Is it fair to require them to do that? What constitutes "legal advice?" And does this set a precedent for authorizing non-lawyers to give legal advice not only here in what is concededly a complex area, but in others as well. If so, is this a door the Commission wishes to suggest be opened? One reason for the recommendation, and a major one, is that brokers and salespersons have consistently failed to give appropriate advice of the tax and other legal attributes of the two forms of holding title. There is not much realistic hope, at least to me, that they will do much better with a year, or ever, even if they receive some training in evening classes, seminars or whatever; and what about those clerks selling old forms in stationary stores? When will they be trained? This

kind of problem was dealt with when new forms of durable powers of attorney with prescribed warnings were adopted. I'm not sure the "solution" there was very good, but the problem appears at least to be somewhat related. Maybe the statute should require the mandated information be printed on the back or as a part of the joint-tenancy instrument.

Related questions arise: what is the consequence to the person that furnishes the joint tenancy instrument but not the statutory explanation? Will such person be liable for such failure that results in damage or loss to the uninitiated user of the instrument? Shouldn't this be dealt with? What about the poor stationery clerk who sells an old joint tenancy form and fails to also furnish the statutorily required explanation?

Why not just mandate the use of the statutory form and leave it at that (perhaps with a provision specifying the consequence to the person furnishing the joint tenancy document without the statutorily required informational form also being furnished).

Another thing bothers me some. In both sections 863(1) and (2), the word "transfer" is used. The dual use appears redundant and is, for that reason, confusing. Am I missing something?

I hope all is going well for you, Nat, and the Commission. Best wishes and keep the faith!

Very truly yours,

JOHN D. MILLER PROFESSIONAL
CORPORATION

BY: John D. Miller
JOHN D. MILLER

JDM:lhl

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February 20, 1993 9911.81-35

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA. 94303-4739

Re: Effect of Joint Tenancy Title on Community Property

Gentlemen:

This letter is a comment on the tentative recommendation January 1993. In my recent experience in law practice, I have encountered situations where joint tenancy title between spouses creates peculiar issues that I do not believe are addressed by the tentative recommendations. The problems I describe below are ones I have frequently encountered in law practice.

1. Problem One. The parties intend that joint tenancy property will pass to the surviving spouse in event of death but intend that the property goes to one of the spouses in event of divorce. This intent is not embodied in a written agreement although the parties assume that with joint tenancy there will be a tracing and each will be entitled to his or her contribution to the joint acquisition (and they usually have not thought about the effect of gain or loss unless one party has contributed all funds, in which case that party benefits or loses). For example, one spouse is wealthy and provides the funds to pay the down payment for obtaining the family residence or provides the entire purchase price. Is it intended that Fam.C.§860 proposed refers the parties back to the law prior to enactment? Civil Code §§ 4800 et.seq.(Family Code Division 7) deals with such a situation as does Probate Code §§140-147 yet the tentative recommendation seems to deal with proposed changes in the statutes without dealing with the fact the Family Code is not effective until 1994 and seems to ignore Prob.C. §§ 140-147 and also seems to ignore Prob.C.6560

2. Problem Two. The parties acquire a residence in another state in joint tenancy while domiciled in California or while domiciled in the other state and they later move to California. What law applies?. Neither your tentative recommendations nor the legislative history deals with this

common problem. For example, it is common for California residents to acquire vacation residences in Hawaii or Oregon or Nevada.

3. Problem Three. The parties acquire real estate in joint tenancy form and sell the property and receive the proceeds of sale by joint check. Is the proceeds of sale subject to the proposed new rules? What if the joint check is deposited in the account of one of the spouses? Again, I do not see any consideration in the tentative recommendation of what actually happens in spousal situations.

4. Problem Four. A spouse acquires joint tenancy property with a married person using community property but the other joint tenant is not that person's spouse. For example, two couples invest community property in a real estate investment where the two couples take title to the investment in joint tenancy with each couple using the name of each husband of the spouses. Actually, it is intended by the parties that the joint investment is a partnership owned 50-50 by the two families. This often happens with vacation residences.

5. Problem Five. Unmarried cohabitors frequently acquire property in joint tenancy with the same expectations as married couples. The statutory protection for married persons is not available to unmarried cohabitors. If you are requiring in Fam.Code §863 proposed to advise married persons about the legal attributes of property ownership why don't you also require advice to unmarried cohabitors?

6. Problem Six. Presumably the advice required by Fam.Code §863 proposed will be put into the hands of real estate brokers and agents to advise the public concerning the legal incidents of ownership. Why doesn't the recommended form of Notice in the second capitalized paragraph say "...you may wish to consult an attorney before signing ..." instead of "seek expert advice"?. A party who cannot understand the Notice probably needs an attorney.

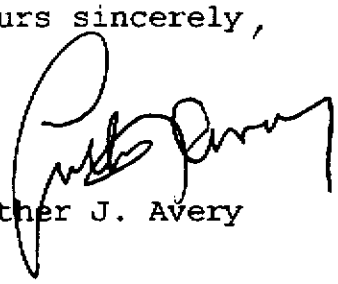
7. Problem Seven. Probably a substantial number of the persons who will be married and acquiring real estate in joint tenancy will be resident aliens or other persons who are not fluent in English. Shouldn't the Notice also contain a warning in the most common foreign languages?

8. Problem Eight. Fam.Code §860 proposed speaks of these new rules applying to real and personal property held between married persons in joint tenancy form.. Presumably that means joint tenancy bank accounts, jointly owned stocks , jointly owned automobiles, and other forms of joint ownership with right of survivorship yet I do not see in the draft

tentative recommendation amendments of the Financial Code, the Vehicle Code or the Commercial Code. See Veh.C§5600.5, Fin.C.§852 and Com.C.§3116. However, Fam.C.§866 proposed seems to say that special statues do not apply and presumably this means that Fam.C.§860 is not as broad as it at first seems to be.

9. I am not sure I understand how proposed Civ.C.§683(d) affects a joint bank account. Is it intended that a joint bank account cannot be community property? If so, that is contrary to the expectations of most married persons.

Yours sincerely,



Luther J. Avery

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February 22, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Effect of Joint Tenancy Title on Community Property

Ladies & Gentlemen,

I have read the tentative recommendation on the above subject, and I have reviewed some prior correspondence on the subject that goes back to 1984.

In 1984, a tentative recommendation was issued under the subject heading "Community Property in Joint Tenancy Form."

For reference, I am enclosing copies of letters that I wrote to the Commission on March 2, 1984 and again on July 27, 1984, together with copy of a letter from the Assistant Executive Secretary on October 5, 1984, which concludes with the sentence "The Commission has decided not to pursue this matter further."

The very same issues that were considered in 1984 are again being discussed at this time. I believe that the comments made in 1984 are still relevant, and I again submit them for consideration.

I take issue with the statement in the summary that "the Internal Revenue Service refuses to recognize community property claims for property titled as joint tenancy." That statement would only be true if it referred to the fact that the Service refuses to recognize community property claims based upon oral agreements for property titled as joint tenancy. I find no difficulty whatever in having the Internal Revenue Service recognize a simple written agreement that joint tenancy property is in fact community.

I still consider it most important to protect the rights of surviving spouses from creditors. Creditors are well able to protect themselves by obtaining the signatures of both spouses on agreements, or by obtaining spousal guarantees whenever credit is being extended to a married person. The proposal would subject joint tenancy property to the debts of either spouse, regardless of the acquiescence of both spouses in the underlying transaction. California law has long protected the interests of the surviving spouse, and knowledgeable creditors are well aware of that rule. The

proposal would simply protect the "ignorant" or "unsophisticated" creditor at the expense of the "innocent" spouse who had nothing to do with the event giving rise to the debt. When weighing the interests of these two groups, I must conclude that the interests of the spouse deserve greater protection.

I do not have any objection to a rule that requires persons who assist in the preparation of deeds or other documents of title to inform the parties of the consequences of the manner in which they take title. However, the emphasis should be on explaining the benefits and burdens of each form of title, and then letting the spouses make their own decision. Whatever form of title is actually used should carry the presumption that it was intended.

The retroactive nature of the legislation is particularly troublesome. There are undoubtedly a huge number of joint tenancy titles between spouses that would be automatically affected. The legislation reverses the normal expectations of the parties as to the effect of those titles.

For the above reasons, and others, I urge that the recommendation be rejected, with the exception noted.

Very sincerely,

Alvin G. Buchignani

AGB/pzg
Enclosures

March 2, 1984

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Re: Community Property in Joint Tenancy Form

I have read the tentative recommendation on the above subject with some interest.

I believe the tax advantages of community property should be compared with the considerable disadvantage to the surviving spouse, when the deceased spouse has left a substantial indebtedness, which is in no way due to the fault of the surviving spouse. Present law enables the surviving spouse in such situations to take the property free and clear of the debt. This can be a very salutary benefit, especially for persons of modest means.

Under present law, it is possible to obtain the tax benefits of community property, although held in joint tenancy, merely by having a written agreement that joint tenancy property is in fact intended as community property, whenever that is the case. Thus, present law provides tax benefits to those who will take the trouble to confirm their actual intent, and also provides protection to those who need it, as the result of the activities of the predeceased spouse. The proposal would reverse the priorities, and provide tax benefits automatically, while requiring those who need protection from creditors to obtain it by a written agreement, which is most unlikely, especially in the case of those who need it most.

As a final note, the proposed legislation would greatly increase the burdens of terminating a joint tenancy on the death of the first joint tenant to die. It would seem to

abolish the convenient procedure of a declaration of death, and substitute in its place the more cumbersome procedure of a formal court petition, court approval of the petition, court approval of the attorney's fees charged, and the attendant administration which accompanies any court proceeding.

For the foregoing reasons, I believe the disadvantages of the proposed legislation outweigh its advantages.

Very sincerely

Alvin G. Buchignani

AGB/dg
D77-55

July 27, 1984

Nathanial Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Re: Commission Study of Joint Tenancy and Community Property

Dear Mr. Sterling,

I have reviewed the recommendation relating to community property in joint tenancy form dated June, 1984. I have previously commented on earlier drafts of the commission proposal, in opposition to the automatic treatment of joint tenancy property as community property.

The persons whose interests will be adversely effected by the proposal are spouses who need protection from the creditors of the other spouse. The proposal will make all joint tenancy property automatically subject to the liabilities of either spouse. The persons most likely to suffer are those who need the protection most. They are not likely to have legal counsel and will lose the opportunity to save their property from the improvidence of a deceased spouse.

Very sincerely

Alvin G. Buchignani

AGB/cc
D84/115

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CALIFORNIA 94306
(415) 494-1335

October 5, 1984

Alvin G. Buchignani
100 Pine Street, Ste. 3300
San Francisco, CA 94111

Re: Community Property in Joint Tenancy Form

Dear Mr. Buchignani:

Thank you for your comments on the Commission's recommendation on community property in joint tenancy form. After again reviewing your comments and those of other interested persons, the Commission has concluded that the problems the recommendation could create outweigh the problems the recommendation would cure. The Commission has decided not to pursue this matter further.

Sincerely,

Nathaniel Sterling
Assistant Executive Secretary

100884

NS/vvm

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March 2, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Effect of Joint Tenancy Title on Community Property
(#F-521.1/L-521.1)

My compliments to the person or persons that put the time and effort into this work.

Question: Is there a conflict between the last sentence of Family Code section 865 and the presumption of Family Code section 2581(a)? By analogous reasoning to that applied to a "during marriage refinance" in In re Marriage of Neal (1979) 92 Cal.App.3d 834, 155 Cal.Rptr. 157, it seems a during marriage transmutation of joint tenancy property would be presumed to create community property.

Counterpoint: I think it is time to stop trying to legislate away every possibility of error in our social order. Decisional responsibility must be placed whenever possible on individuals. The idea that a proposed law "... will provide certainty and minimize litigation...." over any but a few areas of potential dispute is simply not true. Consistent application of the law creates order and certainty. Treating adults as responsible mature adults creates responsible mature adults. That it took all this work and words to "protect" us from ourselves is indeed a sad commentary on the level of our societal maturation. Fortunately, given CD ROM technology, the process which has caused our law office and law library shelves to steadily require larger and larger areas for job instruction like paternalistic code laws will be slowed for a time. But, given the driving force behind the process, I am sure the capacity of even our largest hard disks will be exceeded in time.

Very truly yours,

Robert J. Fulton

RJF:023revcom.ltr

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March 2, 1993

California Law Revision Commission
4000 Middlefield Road, Ste D-2
Palo Alto, CA 94303-4739

Re: *Tentative Recommendation on Effect of Joint Tenancy Title on Community Property*

Gentlemen and Ladies:

My initial reaction to this legislation is that it is high time. For many years, I have been explaining the adverse capital gains tax effects to clients who were told that joint tenancy was the only way for married people to hold property and that this would save substantial probate fees.

The misinformation and lack of information in the real estate and title communities are of gargantuan proportions. When I purchased my residence, I had to send the deed back to the title company three times in order to get them to put the property into community property, rather than the joint tenancy upon which they were insisting. At one point, one of my colleagues was actually told that he could not own property in joint tenancy with anyone other than a spouse, and that he should just marry the woman with whom he was taking the property. This purchase being part of his grandmother's estate plan, that solution was impractical.

I have a few other comments, however. In Section 864(a) [the statutory form], YOU MAY WISH TO SEEK EXPERT ADVICE should be modified to YOU MAY WISH TO SEEK THE ADVICE OF AN ATTORNEY. I believe that attorneys are still the only category of persons permitted to give advice upon legal matters, and the form as written does not make

this clear. In the paragraph regarding Passage to Surviving Spouse, I believe that you should insert the word "surviving" before spouse in the penultimate line and add "of place it in a trust" at the end of the paragraph. In the paragraph on Income Taxes, I think it would be clearer to most people to use the word "decreased" rather than "declined" in the penultimate line.

Very truly yours,

MARALEE NELDER-ADAMS

MN-A:hs

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PHILIP BARBARO, JR.
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RALPH T. MERRIAM
1892-1968
RONALD D. KINCAID
1941-1980

March 3, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Attention: Nathaniel Sterling,
Executive Secretary

Re: Effect of Joint Tenancy Title on
Community Property

Gentlemen:

I am a firm believer that we do not need additional laws but **better** laws and **fewer** laws. Although a study with regard to joint tenancy title on community property may be commendable, I do not believe that there should be a change in the law, but that the law as it stands is adequate, i.e., 1) the presumption that if husband and wife take title as joint tenants they hold as community property, and 2) in order to transmute joint tenancy into community property there should be a writing.

I do not believe that it is practical to assume that all prople will be informed of the advantages and disadvantages of community property and joint tenancy in taking title. Hence, for this reason, and for those as indicated above, I believe that the commission should file its report and not change the law.

Sincerely,

PETER R. PALERMO

PRP/dml

SANTA CLARA UNIVERSITY

SCHOOL OF LAW

March 8, 1993

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Rd., Suite D-2
Palo Alto, CA 94303-4739

Dear Nat:

I write briefly, with an enclosure, to comment on the Tentative Recommendation, "Effect of Joint Tenancy Title on Community Property." I wrote to you last year with a comment, which I enclose, upon Prof. Jerry Kasner's paper, and at the hearing in Sacramento, I yelled, "Help." You have answered that cry with an excellent recommendation.

Let me make just a few comments, which are not necessarily suggestions:

1. In footnote 23, you thankfully indicate that the legislation is not retroactive, based on prior law. Why not mention FC 852 and MacDonald in that footnote?

2. Why don't you mention the problem of "express declaration" in the body of the original discussion? Although you obviously make it a centerpiece of the statutes and you do mention MacDonald on p. 8 in the discussion of FC 862, an introductory discussion on "express declaration" might help more casual readers to understand what the fuss is about in transmutation.

3. Although my own suggestion on p. 4 of my letter last year is elegantly shorter, it is not simpler. I heartily concur in the clarity of what you have done. As I reread the tentative draft, I kept seeing more and more links clarifying the issues.

Thanks again. You have solved what someone in an industry I shall not mention told me he would deny if I ever mentioned it, that those in the industry who handled deeds did not know what they were doing with regard to joint tenancy deeds and needed some guidance. You have given it.

With best wishes,

Sincerely,

Paul L. Godar, S.J.

SANTA CLARA, CALIFORNIA 95053

SANTA CLARA UNIVERSITY

SCHOOL OF LAW

March 20, 1993

Mr. Nathaniel Sterling
Executive Secretary
California Law Review Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Nat:

This is an oops, whoops, letter, written in order to correct a mistake in my letter of March 8 to you on joint tenancy and community property. In that letter, I stated:

> 1. In footnote 23, you thankfully indicate that the legislation is not retroactive, based on prior law....

Scratch the not. Actually, I make a stronger case than you do when I teach in asserting that "the effect of existing statute and case law is the same as that proposed in this recommendation..."

While I am at it, let me make another comment. Jerry Kasner told me that he had a conversation with you about the implication that your footnote 23 intimates that the retroactivity would be total and complete, going back before 1985. I did not take that to be the case. Although in the transitional provision [FC 867(b)], you indicate that the statute applies to an instrument taken before the operative date of the statute, I would argue that your proposal is only a special subset of the transmutation provisions of the Code. You seem to intimate precisely that in the comment to proposed FC 862.

So in FC 852(e), it states, as it does in the present Civil Code 5110.730(e) "This section does not apply to or affect a transmutation of property made before January 1, 1985, and the law that would otherwise be applicable to such a transmutation shall continue to apply."

I would argue that your proposal can be retroactive only to Jan. 1, 1985. It may be that some clarification is needed on that point if Jerry and I got confused on it. Or then again...

Again, my best wishes...

Sincerely,

Paul J. Goda, S.J.

cc: Prof. Jerry Kasner

SANTA CLARA, CALIFORNIA 95053

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March 9, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Ladies and Gentlemen:

I have had occasion to read your tentative recommendation entitled "Effect of Joint Tenancy Title on Community Property".

First, permit me to state: I abhor the joint tenancy vesting. My suggestions would be as follows:

(a) Eliminate all future joint tenancy vesting in California;

(b) Give the husband and wife, who are currently joint tenants, authorization to transmute their title to community property, separate property, or co-tenancy vesting by written memorandum, deed, trust or will;

(c) Authorize a spouse to convey, transfer, sell, assign, or encumber his or her one-half interest in the community to a third party, a financial institution or trust;

(d) Finally, place all quasi-community property on an equal footing with community property.

Respectfully submitted,

Rawlins Coffman

RAWLINS COFFMAN

RC:mb

P. S. I can find neither in the history of Civil Code §683 or any literature material which lends credence to the premise that joint tenancy became popular in California during the 1920's as a will substitute!

THOMAS M. MORLAN
ROBERT M. JONES

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March 10, 1993

California Law Revision Commission
4000 Middlefield Road Suite D-2
Palo Alto, Ca., 94303-4739

Re: Tentative recommendation on the "Effect of Joint Tenancy Title on Community Property."

To whom it may concern:

In reviewing the tentative language of proposed Section 863 et. seq. of the Civil Code, including "Statutory Form" of the Declaration of Joint Tenancy, as is printed in the CEB Estate Planning & California Probate Reporter, I have the following concerns:

1. The language of Civil Code Section 863, as proposed, requiring "any person who provides a form or other instrument for use by a married person, or who advises a married person to hold property in joint tenancy, shall inform the married person concerning the advantages and disadvantages of community and separate property held as joint tenants ...", while presumably designed to protect the unwary and unsophisticated married couple, actually creates a whole new area of legal practice based on the creation of statutory liability to everyone and everything that provides services in the realm of holding title, from the lowliest escrow clerk in a title office, to the new accounts clerk at a community credit union, to the housewife who sells real estate in her spare time.

At a time when the courts are already crowded with an overwhelming number of cases, the ramifications of the failure to give the "Declaration of Joint Tenancy" document, to be required by Section 864, to a party taking title to a bank account, stock account, purchase of a parcel of real property, or the like, are overwhelming. The imagination runs wild with the thoughts of law suits occurring years and even generations after a bank account was opened, or a stock or first home purchased, where, due to this proposed new duty, the one required to provide the form "forgot to record the notice" evidencing compliance with the statutory authority.

Certainly the Law Revision Commission, in attempting to clarify the law and assist those in need of the protections occasioned by the conflicts of the tax law effects on Joint tenancy property, management and control problems, and survivorship questions, could avoid opening a can of worms that would create duty problems far beyond the scope that this new law intended.

2. As a follow-up, and yet somewhat different than the above concern, is the requirement that even without the proposed form, the Law Revision Committee is entertaining a statute that sets forth specific areas that must be discussed by those advising a married person as to which form of title should be used to hold property that is being purchased, transferred or acquired. Is this to suggest that every real estate company, Title Company or Bank or Savings and Loan, or Credit Union must increase their liability insurance out of concern for what problems may be caused by their employees in failing to abide by the statutory dictates? Certainly the lobbying efforts against passage of the proposed statute by these entities will ensure the death knell of this ill-advised law.

Without some protection to all those who provide common place advice in this commonplace world, this proposed statute is doomed. It would be far better to just leave this issue alone than to create the socio-legal problems that this proposed law would face.

Very truly yours,

ROBERT M. JONES
Attorney at Law

RMJ\kjd
misc0001\35

DOK
LEVY
& PERRIN
ATTORNEYS

March 11, 1993

California Law Review Commission
4000 Middlefield Road
Room D-2
Palo Alto, CA 94303-4739

To Whom It May Concern:

I wholeheartedly support a law that would require anyone advising people taking title to real estate to explain the pros and cons of the form of title that they're taking.

For too many years title companies only knew joint tenancy and either they and/or real estate sales people had blinders and ignorance as to any other form of title.

It seems to me that these entities; i.e., title companies and real estate sales people should either be prohibited from giving legal advice as to the form of title someone should take property in, or in the alternative, they should be properly educated to give legal advice because that is exactly what they are doing and have been doing for far too long.

Very truly yours,

WILLIAM L. DOK

WLD:ej

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March 12, 1993

California Law Review Commission
400 Middlefield Road, Suite D-2
Palo Alto, California 94307-4739

Re: Tentative Recommendation - Effect of Joint Tenancy Title on Community Property

Dear Commissioners:

I applaud your review and tentative recommendations as published in the Estate Planning & California Probate Reporter, February, 1993, and highly approve of the intended purpose of this legislation. It is long overdue. I support the recommendations and feel that the clarity of the proposed legislation is good, but suggest certain revisions and one major addition.

My first concern is with the second sentence in proposed Family Code § 862(a). The transmutation agreement should be signed either before or contemporaneously with the document of title. The purpose of advising and requiring that the parties understand what they are doing would be substantially defeated if the transmutation agreement can be executed after the fact. Furthermore, it leaves open a possibility of fraud and second-guessing long after the document of title is executed. Who benefits when the transmutation agreement is signed after the document of title?

In regard to the statutory form set forth in § 864, I have a couple of comments. I would propose replacing the last two sentences of the notice with the following:

> "This general summary is not a complete statement of the law. The instrument may substantially affect or be affected by prior agreements and your estate plan. To best understand the effect of this declaration, you may wish to consult an attorney before signing this declaration."

The reason I suggest an attorney rather than "expert" is that I feel strongly that there are few attorneys, let alone accountants, brokers and other "experts" that understand more than what is summarized in this form. Maybe that is self-serving, but I know of no other "expert" that I would refer a client to for advice in this regard.

The provision in the notice regarding *Rights of Creditors* leads to a major concern not addressed by this legislation, and that is the ability of a debtor to unilaterally affect a creditor's rights by simply transferring the debtor's property into joint tenancy with a third person. I do not believe it should be the

public policy of this state to promote such conduct and oppose any advice, express or implied, that does. Thus, I object to the second sentence in the notice which suggests that when a party dies, the spouse takes the property free of the debt.

That is my philosophical reason for opposing the provision. Additionally, I do not feel that it is a correct statement of law. If the debt is community, the surviving spouse will be liable for the debt regardless of the form of title. Civil Code § 5120.010, et seq. The community spouse may also be liable under some benefit conferred quasi-contractual theory for receiving the benefit of the creditor's payment and, most importantly, joint tenancy transfers have been treated and set aside as fraudulent conveyances, Rupp v. Kahn (1966) 246 Cal.App.2d 188, applying Civil Code §§ 3439.05, et seq. Fraudulent conveyances are specifically recognized in family law transmutations. See Civil Code § 5110.720. There are similar laws, such as a bulk sales law, Commercial Code § 6100, that may require such a transfer if it is a "bulk sale" to be set aside for failure to comply with the bulk sales law, and please do not forget the bankruptcy laws that could set aside such a conveyance as a preferential transfer or fraudulent conveyance under 11 U.S.C. § 547 or 11 U.S.C. § 548 if those elements were contained in the transfer. In fact, there is at least one California bankruptcy case, In re Bonart (Bkrtcy. CD Cal. 79), 1 B.R. 335, which holds that the filing of a bankruptcy severs a joint tenancy and should there be a simultaneous death, Probate Code § 223, divides the property as if the parties were tenants-in-common, and thus a creditor would have access to the transferors' interest. This statement also does not take into account the fact that the property is part of the decedent's estate for computing estate and gift taxes, and the property would be liable for those taxes, nor does it address liens in existence before the transfer. For instance, a deed of trust executed by the transferring spouse on real property would not be extinguished by the death of that spouse if the joint tenancy was created after the deed of trust.

The purpose of all of the above is to demonstrate that major exceptions exist to nullify the general rule. Thus, I believe the wording should be eliminated or at least changed to state "that your spouse may take their interest free of debts, but that is dependent upon the circumstances and the nature of the obligation." This leads to an addition I propose.

Your proposed legislation does not address the issue of protecting creditor's rights in joint tenancy property. Although I think a strong argument could be made for elimination of the general rule, my main concern is the subsequent transfer of

assets that intentionally or by happenstance defeat creditor's rights.

There is no reason in our modern society to perpetuate this inequitable rule of common law. Courts in dissolutions have long dealt with the issue of partial interests in property and the IRS has had no problem in formulating contribution rules in order to determine tax basis and percentage of ownership interests in joint tenancy, and there is no reason our civil laws should not be so changed. My proposal is that joint tenancy be treated like all other forms of non-probate transfers, i.e., that the recipient, surviving tenant be liable to the creditor up to the amount of the value of the property received from the deceased joint tenant similar to Probate Code § 13112(b). In the community situation, it would be easy to perpetuate the presumption of one-half ownership and, in all other situations, a contribution rule could be easily established. This would then protect the creditors and give the survivor no more than any other recipient of a decedent's property.

Getting off my soapbox, there are two other small matters I wish to address. First, is the summary re *Income Taxes*. It is my suggestion that the language simply be changed so that the word "will" be changed to "may" in both sentences as there are certain exceptions to these general rules and, furthermore, we cannot predict what the federal government will do in the future regarding community property and, keeping with the general nature of the provision, I believe the word "will" is too strong.

Finally, I suggest that the first sentence of the "Declaration" should also direct the parties' attention to the nature of what they are doing by being in capital letters, bold or larger type.

I hope that the tone of this letter does not give you the impression that I do not approve and support the work that has gone into this well considered recommendation. I only make these points to be sure that these issues have been considered and, of course, to promote my own desire that joint tenancy no longer be an avenue of debt avoidance.

Thank you for considering my suggestions and good luck with the legislation.

Very truly yours,

SCHAEFER & SMITH
A Professional Law Corporation

By: PAUL W. SMITH

PWS:mc

Law Revision Commission
RECEIVED

MAR 1 1993

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Key:

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March 13, 1993

CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CALIFORNIA 94303-4739

RE: TENTATIVE RECOMMENDATION JOINT TENANCY

Dear Commission:

Thank you for sending me the tentative recommendation Effect of Joint Tenancy Title on Community Property. *I found your recommendations to be solidly based upon legal precedent. Your recommendations rectify the present confusion that exists in this area. The proposed changes to the code are well organized and well thought out. I think, that the changes that you purpose will directly solve the problems we now face with joint tenancy title for community property.*

I do not see any reason why the recommendation should not be submitted in its present form.

Please keep me informed of any further developments regarding this issue.

Sincerely,

Robert Clark, Paralegal

Robert Clark, Paralegal

BART J. SCHENONE
RONALD G. PECK

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March 17, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: Comments - Effect of Joint Tenancy Title on Community Property

Dear Members of the Commission,

I have reviewed the tentative recommendations and I should like to comment concerning the proposed retroactivity because the retroactivity will affect the rights of beneficiaries in intestate estates.

When a decedent dies intestate, Probate Code sections 6401 and 6402 governs distribution of property between the surviving spouse and the surviving issue. If there are no surviving spouse or surviving issue, under Probate Code Section 6402.5, if the decedent had a predeceased spouse who died not more than 15 years before the decedent, then the portion of the estate "attributable to the decedent's predeceased spouse" would be distributed to the heirs of the predeceased spouse.

The general rule is that if the decedent's property had an origin in community property, even if held in joint tenancy, then one-half (1/2) of the decedent's property would be distributed to the decedent's predeceased spouse.

However, if the decedent's source was the separate property <u>of the decedent</u>, transferred to a joint tenancy where the decedent and the predeceased spouse were the joint tenants, and the decedent survived the predeceased spouse, then the decedent's heirs would receive <u>all</u> of the property. The <u>Estate of Abdale</u> (1946) 28 C.2d 587 establishes the foregoing rule which continues to be the prevailing law on the issue.

The proposed retroactivity would nullify the <u>Estate of Abdale</u>.

While one can debate the relative merits of nullifying the Estate of Abdale and the rule of going to the source of the property in decedent's estate, it is my suggestion that the Commission should be aware of the fact that retroactivity will affect what now are substantive rights.

By proposing retroactivity, it would seem the Commission is trying to modify all existing joint tenancy title on the assumption that this is what married couples intended. In certain instances, this would be a faulty assumption.

As in the case of the Estate of Abdale, one can imagine a spouse titling his or her separate property in joint tenancy for purposes of effecting a transfer of title upon death without probate, but not titling it with the idea, that if he or she survived the spouse, one-half of the property would go to the predeceased spouse's heirs and not to his or her own heirs.

Consequently, unequivocal retroactivity has the effect of modifying rights.

It is my anticipation, therefore, that the Commission will consider the effect on distribution of property on intestacy in connection with its recommendations.

Thank you for this opportunity to comment.

Respectfully,

SCHENONE & PECK,

by _____
BART J. SCHENONE

E.F. Cash-Dudley
A Professional Law Corporation

E.F. Cash-Dudley
Certified Specialist in Family Law
California Board of Legal Specialization

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April 5, 1993

California Law Revision Commission
4000 Middlefield Road
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Palo Alto, California 94303-4739

RE: Tentative Recommendation of the Effect of Joint Tenancy Title on Community Property

Gentleman or Madam:

The Legislative Sub-Committee of the Family Law Section of the Stanislaus County Bar Association has had an opportunity to review the tentative recommendation regarding the effect of joint tenancy title on community property.

We strongly oppose this legislation.

The reason that we oppose this legislation is that it does not specifically coordinate itself to the language in the Family Law Act which talks about community property versus joint tenancy property. If this law went into effect, then all property owned by parties in joint tenancy would be presumed to be separate rather than presumed to be community. That is dichotomous.

If there are going to be any public hearings on further opportunities to comment on this issue, will you please let me know so that I can advise members of this group who may want to attend.

If you have any questions regarding this matter, please feel free to contact me.

Sincerely,

E. F. CASH-DUDLEY

ECD/djr

cc: Legislative Sub-Committee: Suzanne Whitlock, Michael Goss, Richard Palmer, and Michael Tozzi
cc: Judge Edward Lacey and Judge A Girolami

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April 8, 1993

Re: Tentative Recommendation of the California Law Revision Commission on the Effect of Joint Tenancy Title on Community Property

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Sterling:

My partner Forrest Plant asked me to have the Debtor/Creditor Relations and Bankruptcy Committee (the "Committee") of the Business Law Section of the State Bar consider and respond to the Commission's Tentative Recommendation on the Effect of Joint Tenancy Title on Community Property.

The Committee has reviewed the Commission's Tentative Recommendation and the Committee has noted several areas of concern. It is the view of the Committee that the Commission should make revisions to the Tentative Recommendation as detailed below.

The Committee was concerned that both the recommended legislation and the report accompanying the recommended legislation are not a balanced and impartial review of the law. In particular, it seemed to several members of the Committee that the materials were not an even-handed exposition of the relevant law, but instead were biased against joint tenancy and slanted in favor of the community property election. For example, the materials did not discuss the debtor protection aspects of joint tenancy in any great detail. Similarly, the Declaration of Joint Tenancy included at section 864 (the "Declaration") appeared to the Committee to be a subtle attempt to pressure consumers into not signing the Declaration.

Several members of the Committee also believed that the summary of the law contained in the Declaration was incomplete and possibly inaccurate in several respects. For example, the section in the Declaration regarding the rights of creditors seemed to several members of the Committee to be inaccurate or incomplete insofar as one spouse's liability for the debts of the other spouse is concerned. The statement about the joint tenancy election impairing the ability to obtain credit also seemed to be incomplete or inaccurate to at least two members of our Committee whose residences are held in joint tenancy and who have not experienced any credit problems. The section of the Declaration concerning probate also seemed to be slanted against signing the Declaration.

The declarant seems to be "warned" that it must take the property without probate if the Declaration is signed. The language suggests adverse consequences if property is taken without probate, but there is no explanation of what those consequences might be.

The Committee was also very concerned about the retroactive nature of the proposed legislation. Section 862 seems to create an irrebuttable presumption of community property, notwithstanding the form of existing instruments, for persons who do not in the future affirmatively execute an instrument similar to the Declaration. In the view of the Committee, this places an unfair burden on persons who held property in joint tenancy prior to the date of the legislation to take some remedial step or otherwise be swept within the scope of the legislation.

Finally, the Committee was concerned about the aspect of the legislation that permits lawyers to comply with the statute by simply providing a form (i.e., the Declaration) to the client. As indicated above, because of the many problems with the Declaration, simply providing an incomplete or misleading form to satisfy the statutory disclosure requirements does not seem to be in the best interests of the people of the State of California. Conversely, notwithstanding the intent of section 863(b) of the proposed legislation to permit compliance with the disclosure requirements of section 863(a) through use of the Declaration, blind reliance upon the Declaration in its current form may create malpractice

issues for practitioners who are not familiar with tax, estate, and debtor-creditor issues. These practitioners are, nonetheless, bound to counsel the client and comply with the disclosure requirements of section 863(a) of the proposed legislation. Perhaps counseling clients on the ramifications of the joint tenancy election is not suited to mere presentation of a form.

In sum, it is the view of the Committee that a more complete discussion of the pros and cons of joint tenancy versus community property, with particular emphasis upon the debtor/creditor effects of the election, should be included within the Commission's materials with the proposed legislation, and the proposed legislation itself should be rewritten to address the retroactivity and disclosure problems. To the extent the proposed legislation will rely upon forms and other disclosures, a more complete and accurate disclosure form should be developed.

We would be happy to respond to any questions you may have about the Committee's comments.

Thank you.

Very truly yours,

Jane McKeag

Jane Dickson McKeag, Chair
Debtor/Creditor Relations and
Bankruptcy Committee of the
Business Law Section

cc: Mr. Forrest A. Plant

JDM30012

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April 14, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Effects of Joint Tenancy on Community Property

To the Members of the California Law Revisions Commission:

The tentative recommendation regarding the above topic was circulated among the members of this firm for purposes of preparing our comments to you. We generally believe that the proposed presumption in favor of community property is a step in the right direction. However, we are concerned that the statutory requirement for the Declaration of Joint Tenancy will remain an area that can be subject to much confusion, if not abuse. We feel that it is improper to put the obligation to "advise" a married couple on the banks, brokerage houses and other parties who would have the direct contact with these individuals; the Declaration will become just one more form in a multitude of documents which must be signed in complex transactions, such as the purchase of real property, or even in simply establishing a bank account, As such, people will wind up signing this document without the full knowledge and "informed consent" necessary to make such a decision.

In light of the above, we strongly belief is that the change should go one step further, allowing for the creation of a new form of title as "community property with right of survivorship." This hybrid form of title would provide the best situation for a married couple, with a right of survivorship in favor of the spouse which could be defeated by a testamentary transfer to another by will or trust. Absent a contrary provision to transfer the property, the right of survivorship would be effective.

This form of title would be a conclusive, without the confusion inherent in dealing with a presumption, and ensures that title held as joint tenancy will clearly and unequivocally be the separate property of each of the joint tenants.

Thank you for the opportunity to provide our comments to your recommendation, and we would welcome the opportunity to further discuss this matter with you.

Sincerely,

ROSENTHAL AND SMITH

MICHAEL A. ABRAHAM

MAA:sn

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*Certified by the California State Board of Legal Specialization
KAREN OWENS
JOAN VIRGINIA ALLEN

FROM Orange
OFFICE

April 15, 1993

Mr. Nathaniel Sterling
Calif. Law Revision Commission
4000 Middlefield Rd., Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative recommendation: Effect of Joint Tenancy Title on Community Property

Dear Mr. Sterling,

I am a Certified Specialist in Estate Planning and wanted to register my comments regarding your tentative recommendations referred to above. I think it's wonderful and it's about time. Keep up the good work!

Yours truly,

SCOTT D. RICHMOND

SDR:tli

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DAVID E. LICH
KENNETH G. PETRULIS
JEANNETTE HAHM

April 15, 1993

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite d-2
Palo Alto, CA 94303-4739

Via FAX (415) 494-1827
and U.S. Mail

Re: Effect of Joint Tenancy Title on Community Property; Tentative Recommendation

Dear Mr. Sterling:

I am writing on behalf of the Legislative Committee of the Beverly Hills Bar Association Probate and Trust Section. We wish to commend the Commission for what we think is an excellent proposal to reform the law on joint tenancies.

We do feel, however, that, for a variety of reasons, the new law should provide for community property held in joint tenancy form to pass to the surviving joint tenant spouse, unaffected by a conflicting testamentary disposition. We make no comment on what the rule should be, where the surviving joint tenant is not the spouse.

Initially, we look to Probate Code § 5000, which provides that a provision for a nonprobate transfer on death, in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employment benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is not invalid because the instrument does not comply with the requirements for execution of a will, and the Probate Code does not invalidate the instrument.

As a conveyance, a joint tenancy deed is but one means of transferring community property which is not affected or invalidated by a contrary provision in a will. Of all of these types of conveyances, this proposed law would single out joint

tenancy transfers to be invalidated and become subject to intestate succession or testamentary disposition. Other forms of nonprobate transfer of community property, such as the transfer of life insurance, will remain unaffected. We think the same reasons apply and mitigate against subjecting community property, whether held in joint tenancy or any other form, to intestate or testamentary disposition.

First, and most importantly, there are many existing plans and conveyances where property has been taken in joint tenancy form, based on sound and correct legal advice. Current law allows property in joint tenancy form to pass to the surviving joint tenant, unaffected by a contrary provision in a will. By changing the law, the intent of most persons, who have sought good legal advice and followed that advice, will be upset. The only persons who can be helped are those whose plans are presently flawed.

Second, the present law supports the integrity of our title system. Now, anyone examining title and finding it in joint tenancy form, can be reasonably assured that title will pass to the surviving joint tenant, and that, once an Affidavit - Death of Joint Tenant has been filed, title has passed. We imagine it will be quite upsetting to the title companies trying to insure title to have this presumed validity of title upset by a law that states that a contrary provision in a will, or proof that the property was indeed community property, will instead vest the property in those persons designated in a will which may be discovered years afterward.

Third, if community property is not allowed to pass as community property to the surviving joint tenant spouse, it will impose the requirement of filing a Spousal Property Petition in every case where community property has been held in joint tenancy form and a step up in basis is desired on both halves of the community property. These unnecessary petitions could be removed from our court system, if the new law merely recognizes that community property in joint tenancy form, just as community property, in the form of a life insurance policy or many other types of contract rights, can pass to the surviving spouse based merely on form of title or contract agreement, without passing through probate and without being affected by contrary testamentary disposition.

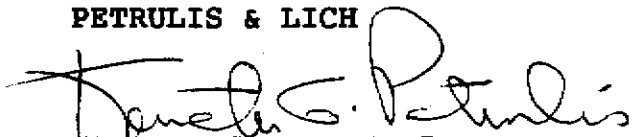
Fourth, there is a certain propriety and simplicity in allowing property to pass to the surviving joint tenant just the way the title reads. Not only title companies, but also plain ordinary people who were told that they were taking property as joint tenants with the right of survivorship, will be comforted to know that that right of survivorship really does exist. We think it is more important to protect those people who rely on a plain language meaning of the title, rather than those who surreptitiously try to avoid that plain meaning by making a contrary provision in their will and attempting from the grave to upset the plan made when the joint tenancy property was acquired.

Perhaps a simple example can show the harsh inequities that can result from this change in the law. Consider the couple, each of whom is married for the second time, who hold but a single piece of community property, their home, in joint tenancy form. Knowing that the surviving spouse will have the community property home, each spouse then makes a will leaving all of their other property to their own children. In this not unusual situation, under the new law the children would be free to challenge the joint tenancy deed and leave the surviving spouse with only half of the property he or she was supposed to receive. Under current law, the surviving joint tenant spouse would receive the house as intended.

We thank you for your consideration.

Very truly yours,

PETRULIS & LICH



KENNETH G. PETRULIS
for the Beverly Hills
Bar Association, Probate,
Trust and Estate Planning
Legislative Committee

KGP:ar

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April 21, 1993

California Law Revision Commission
4000 Middlefield Road, Suite #2D
Palo Alto, CA 94303

Gentlemen:

This is my response to the invitation to comment on the proposed legislation to "clarify" joint tenancy property vis a vis community property. I believe the proposed legislation to be ill considered.

As a general proposition, I deplore legislation intended to protect the public against itself, but which results in compounding the layman's existing befuddlement. If your committee, the legislature and our pitiful State Bar want to help the public, encourage the later to get their legal advice from lawyers instead of real estate brokers, security peddlers and bank employees.

If you have a compulsion to legislate, at least follow the principal of K.I.S.S. Simply make a declaration in the form presented in your article a prerequisite to recording a deed or deed of trust where the grantees or beneficiaries are a married couple and execution of such a declaration a condition to the opening of a bank account and the transfer of securities. Giving the bank or broker one more piece of paper to have signed would not be much of a burden and the county recorder already collects a preliminary change of ownership form with every deed for the benefit of the county assessor, so another "prerequisite" to recording shouldn't pose a problem.

The courts in MacDonald and the Bar/legislature in Probate Code §5000 et seq have already made a significant contribution to California's muddled property laws. Don't exacerbate the problem by proposing more rules.

Finally, have you considered the adverse Federal Estate Tax effect making joint tenancy property part of the property "subject to claims"? I doubt it.

Very truly yours,

THOMAS N. STEWART, JR.
TNS:k
CC: Robert E. Temmerman, Jr., Esq.

COLLINS, ROBILLARD & KATZ
ATTORNEYS AT LAW

Margaret T. Collins
Gail M. Robillard
Neil Barry Katz

Robert A. Hacker
Carol A. Glover

Our File No. 999.2

April 26, 1993

California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, California 94303-4739

Re: Joint Tenancy Title

Gentlemen:

I just received my copy of the Estate Planning, Trust & Probate News containing the information about the tentative recommendation on April 22, 1993. Therefore, I am sending this response despite the stated deadline date of April 15th. For your information, my practice consists solely of real estate transactions and estate planning.

1. I do not think we should allow oral transmutation.

2. I think we should support this legislation.

3. I think it is a desirable goal to conform treatment of title at dissolution and at death. It is too confusing for most lay people to have different treatment.

4. I think it should be prospective only.

5. I have included my changes in the wording of Section 864.

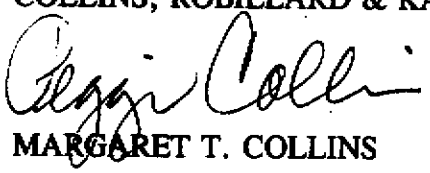
6. I think it is unreasonable to charge escrow, real estate brokers and title company personnel with "all adverse consequences that result" by their failure to advise. I am not as concerned about attorneys. At some point people have to take responsibility for themselves and should be charged with their own failure to seek proper advice.

2377 Crenshaw Boulevard, Suite 310, Torrance, California 90501 Telephone: 310.328.4327 Facsimile: 310.618.1634

7. I cannot think of an effective way of clarifying the consequences when both separate and community property funds have been used. I think most of the problems will be cleared up by the proposed language.

Very truly yours,

COLLINS, ROBILLARD & KATZ



MARGARET T. COLLINS

MTC:spd

Encl.

cc: Robert E. Temmerman, Jr., Esq.

Comment. Section 863 requires that a person who offers married persons the option of holding property in joint tenancy form must provide information comparing community property and separate property held as joint tenants. A person who fails properly to inform the married persons may be liable for any adverse consequences that result from the joint tenancy form of title. The information requirement of this section may be satisfied by use of the statutory form provided in Section 864. This section applies only to a form or instrument provided or advice given on or after January 1, 1996. Section 867 (transitional provision).

§ 864. Statutory form

864. (a) An instrument transmuting community property to separate property held as joint tenants satisfies Sections 862 and 863 if the instrument is made in writing by an express declaration substantially in the following form and signed by each spouse:

DECLARATION OF JOINT TENANCY
NOTICE

IF YOU SIGN THIS DECLARATION, YOU WILL LOSE IMPORTANT COMMUNITY PROPERTY RIGHTS. DO NOT SIGN THIS DECLARATION UNLESS YOU ARE WILLING TO GIVE UP YOUR COMMUNITY PROPERTY RIGHTS.

SOME OF YOUR COMMUNITY PROPERTY RIGHTS ARE SUMMARIZED BELOW. THIS SUMMARY IS NOT A COMPLETE STATEMENT OF THE LAW. YOU MAY WISH TO SEEK EXPERT ADVICE BEFORE SIGNING THIS DECLARATION.

- **Management and Control.** You and your spouse must act together to transfer any interest in community real property. If you sign this declaration, your spouse acting alone may transfer a one-half interest in the property.
- **Rights of Creditors.** All of your community property is liable for your debts. If you sign this declaration, only your one-half interest in the property is liable for your debts, and when you die your spouse takes your interest free of debts. By signing this declaration you may impair your ability to get credit.
- **Passage to Surviving Spouse.** When you die, your one-half interest in community property passes to the beneficiaries named in your will, for example a child or a trust; if you have no will, it passes to your spouse. If you sign this declaration your one-half interest in the property passes to your spouse; you cannot will your interest in the property to anyone else.
- **Probate.** If you leave your interest in community property to your spouse, your spouse may choose whether or not to probate it; if your spouse elects not to probate it, your spouse may establish title within 40 days after your death by recording an affidavit of your death. If you sign this declaration your spouse may take the property without probate; title may be established immediately by recorded affidavit.
- **Income Taxes.** When your spouse dies you will receive an income tax benefit for community property that has increased in value. If you sign this declaration, you may not receive an income tax benefit for the property unless it has declined in value.

DESCRIPTION OF PROPERTY

The property that is the subject of this declaration is:

Description of Property or Document of Title or Other Instrument Creating Joint Tenancy Title

DECLARATION

We have read the Notice in this instrument and understand that we lose important community property rights by signing this instrument. We declare that we intend to convert any community property interest we may have in the property that is the subject of this declaration to joint interests in separate property, and to hold the property for all purposes as joint tenants and not as community property.

Signature of Spouse _____ Date _____

Signature of Spouse _____ Date _____

ACKNOWLEDGMENT

State of California)
)
County of _____)

On _____ before me, (here insert name and title of officer), personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), 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 instrument not substantially in the form provided in this section if the instrument otherwise satisfies Section 862.

(2) The sufficiency of information concerning the advantages and disadvantages of community property and separate property held as joint tenants if the information otherwise satisfies Section 863.

Comment. Section 864 provides a "safe harbor" for the requirements of Sections 862 (transmutation of community property to joint tenancy) and 863 (information concerning form of title). This section does not provide the exclusive means by which those sections may be satisfied; any instrument or information that meets the standards in those sections will satisfy them. However, use of the statutory form provided in Section 864 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 interest) and in Family Code Section 852 ("express declaration" required for transmutation).

Continued on page 18

FAMILY LAW SECTION
THE STATE BAR OF CALIFORNIA

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California Law Revision Commission
4000 Middlefield Road, #D-2
Palo Alto, CA 94303-4739

April 26, 1993

Re: Effect of Joint Tenancy Title on Community Property,
F-521.1/L-521.1

Dear Commissioners:

The Family Law Section's Executive Committee has reviewed the Tentative Recommendation as above captioned dated January 1993 and unanimously agrees with the recommendation and reasoning therein.

Sincerely,

Mark I. Starr

Mark I. Starr

MIS/s
cc: Stephen J. Wagner, Section Chair
cc: Donald W. Breer, Section Adminstrator