

## Second Supplement to Memorandum 82-32

Subject: Study H-510 - Joint Tenancy

Attached as Exhibit 1 is a letter from Jean A. Kunkel with comments and proposals for the joint tenancy study. Ms. Kunkel is co-author of the CEB program materials, Joint Ownership of Marital and Nonmarital Property (January 1982). Her points are analyzed briefly below.

Attached as Exhibit 2 is a letter from Garrett H. Elmore respectfully disagreeing with the staff proposals set forth in Memorandum 82-32. Mr. Elmore's views are based on some 55 years of experience "at the law" in civil and probate fields (as well as banking law). In addition to the points raised below about particular proposals, Mr. Elmore is concerned about the form and placement of any revisions of the law the Commission may propose. The staff believes it is premature to decide such drafting matters until the Commission has made the basic policy decisions. Changes in the law relating to severance of joint tenancy undoubtedly belong in the tenure provisions of the Civil Code, changes relating to community property presumptions in the Family Law Act, changes relating to simultaneous death in the Probate Code, etc. The exact form and placement will depend on the substance of the Commission's decisions.

Severance of Joint Tenancy

The staff has recommended codification of the case law doctrine that permits a joint tenant unilaterally to sever the joint tenancy by declaration, without the intermediary of a strawman conveyance. Ms. Kunkel believes that because a writing is required to create a joint tenancy, a writing should also be required for a severance by declaration. "The potential for abuse and ambiguity of title is great and the possible benefits are minor in comparison."

Mr. Elmore thinks that undue emphasis has been placed on severance of joint tenancy. His experience and views are that severance is not common and should not result in change of the basic estate. The staff has dealt with severance at some length not because we think it is particularly common but because many of the problems in the law relating to joint tenancy are caused by operation of the survivorship doctrine and could be cured by severance.

### Testamentary Disposition of Joint Tenancy Property

The staff has recommended that a joint tenant be permitted to dispose of his or her interest in the joint tenancy property by will. Ms. Kunkel is strongly opposed to this concept. One of the main advantages of joint tenancy is the certainty of title passing at death of a joint tenant and to allow the decedent to circumvent this would "radically alter the dynamics of joint tenancy ownership." Mr. Elmore points out that this also would require a great deal of public education and lead to the need for will review by many persons who thought their affairs adequately provided for in case of death.

While the staff agrees that these are problems, as we pointed out in the memorandum these problems already arise in many cases as a result of the fact that apparent joint tenancy property may actually be community property and therefore subject to the decedent's will. Moreover, problems can and do arise in other situations because a joint tenant may unilaterally sever the joint tenancy at any moment up to death and thereafter will away his or her interest. True, these problems would be aggravated by the ability to will joint tenancy property. However, the problems should be attacked directly rather than by indirection. The staff believes title to joint tenancy property should conclusively pass to the surviving joint tenants if not claimed for the decedent's estate within a limited period of time, say 40 days, regardless of the decision on whether joint tenancy property should be subject to testamentary disposition.

### Effect of Survivorship on Unsecured Creditors

The staff has recommended that the security interest of a creditor in a decedent's interest in joint tenancy property not be extinguished by the mechanism of survivorship. Ms. Kunkel would go a step farther and also make the decedent's interest in joint tenancy property subject to claims of the decedent's unsecured creditors. Under Ms. Kunkel's proposal claims of unsecured creditors would first be satisfied out of the decedent's estate; any excess would then be allocated against the joint tenancy property based on a priority similar to that for abatement of specific bequests.

Ms. Kunkel points out several problems with such a scheme--it requires some mechanism by which creditors could learn of the existence of joint tenancy property and it could cause gift tax complications

where a gift tax is paid at the time of creation of the joint tenancy and the surviving joint tenant never receives the full value of the property for which the tax was assessed. Another problem that Ms. Kunkel does not mention is that the surviving joint tenant would be unable to effectively deal with the property for a long period of time--a much longer time, in fact, than the period of delay that would be caused by making the interest of a joint tenant subject to disposal by will.

Finally, there is the political problem that joint tenancy is viewed by some as a haven from creditors. A proposal introduced by the Commission in the Legislature last session to subject funds in a joint tenancy bank account to claims of the decedent's creditors was opposed by the State Bar and was unacceptable to the Assembly Judiciary Committee. The staff believes we can legitimately distinguish and make a case for rights of secured creditors in the share of the deceased joint tenant even though we are unable to accomplish this result for unsecured creditors.

#### Ownership of Joint Bank Accounts

The Commission has developed a recommendation governing the rights of parties in a joint bank account. Under the Commission's recommendation a joint account belongs to the parties during their lifetime in proportion to their net contributions. The staff has proposed that this recommendation be qualified by a presumption of equal ownership since there will be obvious proof problems.

Mr. Elmore wonders whether under this qualification the law is being simplified or complicated. "More importantly, is it desirable to impose limits that prevent getting to the truth?" Mr. Elmore states that the proposal does not clearly distinguish between marital joint tenancies and other joint tenancies.

Marital joint tenancies would be governed by the Commission's recommendation that there be a presumption the property in the account is community, rebuttable by tracing to a separate property source or by proof of a contrary agreement. The staff proposal of an equal ownership presumption would apply to nonmarital joint tenancies. The staff believes this proposal would simplify the law and would not prevent getting to the truth.

#### Joint Tenancy and Community Property

To help solve the legal problems surrounding the interrelation of joint tenancy and community property, Ms. Kunkel has three specific

recommendations that are the same as and made for the same reasons as three of the staff's recommendations:

(1) "[A]ll community property transposed into joint tenancy form should presumptively retain its status as community property."

(2) "I would also strongly support the creation of a new form of ownership--community property with right of survivorship."

(c) "I strongly favor a revision of the law to require greater formality in the transmutation of separate and community property."

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

EXHIBIT 1  
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PLEASE REFER TO  
OUR FILE NO.

00002-050 (82)  
6117B

April 30, 1982

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

Re: Joint Tenancy and Community Property

Dear Mr. Sterling:

I apologize for the delay of my response. Your letter of January 25, 1982 was addressed to my former law firm and it took some time to be forwarded to me.

The areas of the law covering forms of property ownership, in particular, that of joint tenancy and community property, is well-suited to the thoughtful analysis and reform proposals for which the California Law Revision Commission is known in the legal community. I am pleased to offer you my comments and proposals in this area.

Claims Charged to Surviving Joint Tenant(s).

In light of the dramatic increase in the use of living revocable trusts, and the historical reverence for joint tenancy held by many real estate brokers, bank personnel, and others who advise individuals regarding the form in which marital property is to be held, it seems clear that many individuals today are concerned with the avoidance of a court-supervised probate proceeding and the delays inherent in the process of estate administration. Another strong rationale in favor of joint tenancy has been the ability of the surviving joint tenant to take the interest of the decedent free of the claims of the decedent's creditors. Where the decedent has not made provision for payment of outstanding claims, the creditor loses his right to repayment, absent certain protective measures taken by the creditor during the decedent's lifetime.

Because of the trends mentioned above, I believe that the law should be changed to provide that joint tenancy property is taken subject to outstanding claims against the deceased joint tenant. Since there are numerous administrative problems in allocation of the claims against the various joint tenancy properties, a legislative solution seems most worthwhile.

One possibility is to first charge the probate estate, if any. The excess of unpaid claims would then be allocated against the joint tenancy property based on a priority similar to that for abatement of specific bequests. From a practical point of view, unless the contents of the IT-22 were made public or unless the Superior Court was granted jurisdiction and the IT-22 filed with the Court, the procedure for a creditor to learn of such property, much less apply to the surviving joint tenant for payment of such claims, would seem overly burdensome. I would recommend the latter approach.

However, if one of the Inheritance and Gift Tax Referenda on the June ballot passes, there might not be any requirement to file the IT-22 as we now know it. If the law then simply requires that the first page of the Federal Estate Tax return be submitted, there will be no comprehensive list of joint tenancy property available to the Court or to creditors. Perhaps the Commission should lobby in favor of a proposal to require submitting the entire Federal Estate Tax return to avoid this problem.

One complication to this approach of charging joint tenancy property with a decedent's claims is related to gift taxation. If an individual makes a taxable gift to another by the creation of certain joint tenancies, the gift is valued at that time. If the claims ultimately allocated to the joint tenancy property exceed the decedent's share of the property (calculated immediately after the original gift), then the gift tax valuations would have been incorrectly determined. The obvious solution would be compromise of the valuation of the gift. Again, if either of the Inheritance & Gift Tax Referenda on the June ballot passes, there will be no more gift tax and this problem will not exist.

#### Severance by Declaration.

For the same reasons that the creation of a joint tenancy requires the formalities of a writing, I believe that the severance of joint tenancy should also be subject to the same standards. The potential for abuse and ambiguity of title is great and the possible benefits are minor in comparison.

Nathaniel Sterling  
April 30, 1982  
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"Blockbuster" Wills.

I strongly oppose any movement of the law in favor of "blockbuster" wills which would allow testamentary disposition of a joint tenancy interest. One of the main advantages of joint tenancy today is the certainty of title passing to the survivor(s) upon the death of one joint tenant. To allow a joint tenant to circumvent this result would radically alter the dynamics of joint tenancy ownership at the expense of the remaining joint tenant(s).

Community Property Held in Joint Tenancy Form.

The case law in this area (particularly Marriage of Lucas) has developed a trend for the proposition that the act of taking title in joint tenancy form is inconsistent with an intention to preserve a separate property interest. In light of this trend, it seems even more well-reasoned to ensure by amendment of Civil Code §5110 that all community property transposed into joint tenancy form should presumptively retain its status as community property.

However, I would also strongly support the creation of a new form of ownership--community property with right of survivorship. The choice of taking title in joint tenancy or as community property with rights of survivorship would require parties to consider the legal effects of title at the time of the original acquisition of the property. All too often in my experience the parties never address the issue of ownership during their joint lifetimes, thereby leaving the surviving spouse-joint tenant in a position to argue an "oral agreement" supporting a finding of separate or community property which suits his or her subsequent tax considerations. This certainly does not seem to be in the best interests of a society interested in legal certainty. For these and other reasons, I strongly favor a revision of the law to require greater formality in the transmutation of separate and community property.

I would be greatly interested in the progress of your study and appreciate the opportunity to be of assistance.

Very truly yours,

  
JEAN A. KUNKEL

JAK:gs

EXHIBIT 2

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May 5, 1982

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Re: May Agenda Item 19-Study H-510-Joint tenancy- memo. 82-32 (sent March 25, 1982)

Dear Members and Staff:

The abovementioned Agenda item asks that if the Commission approves "the policy" of certain revisions of the law proposed by staff in general terms or outline or "other revisions," it authorize staff to prepare a draft that sets out language and gives reasons, for a future Commission meeting, This would be with a view to distributing the draft as a "tentative recommendation" for comment. (Memo. 1,2).

I respectfully urge that before staff becomes engaged in such time consuming work and the Commission approves the "policy" or the "policy" as revised (if only for purposes of a Tentative Recommendation), there should be "working memoranda;" feasibility, form and "placement" studies.

There is apt to be in this area, undue reliance upon, first, academic approaches, and, second, views expressed by practitioners in specialized fields such as Family Law (who see disputes and controversies, as opposed to business persons, families, relatives and others who use joint tenancies routinely without problem), Probate Law (where the emphasis is on Wills, Testamentary Trusts, and other dispositions, including joint tenancy) and Real Property). Tax practice cuts across all forms of title holding, joint tenancies, P.O. D. obligations, life insurance, pension designations, Totten trusts and so on.

I am second to no one in my admiration for the information Mr. Sterling has assembled in the law-review type Background Study and for clarity of writing.

Based on some 55 years of experience "at the law" in civil and probate fields (as well as banking law), I respectfully disagree with the staff proposals as set forth in Memo. 82-32.

First, there is a problem of form and placement. Is it proposed that one of the basic codes is to have another new "act" collating the law of "joint tenancy." As all are aware, the Civil Code has sections on forms of "estates" (community, joint and so on) and on property rights between spouses ( Family Law Act); the Probate Code has provis-

ions directly affecting joint tenancy on death (§§ 1170 ff.) and indirectly affecting them by exclusion from turnover of personal property of \$30,000 or less without affidavit (§ 630 § 632), set aside of net estates up to \$20,000 or less in certain cases (§ 640 § 642), the Financial Code has provisions as to bank deposits, savings and loan shares and so on). The Probate Code has provisions permitting certain dispositions by will that were or might be an invalid testamentary disposition in absence of legislation (§ 170- Testamentary Additions To Trusts, §§ 175 ff.-Life Insurance And Other Trusts. Additionally, a new division known as Non-probate transfers has been proposed by the Commission but not enacted to date (Memo. 82-32's Background Study indicates it will be pressed again. The Financial Code will however probably be amended in 1982 by A. B. 2643 (McAlister) to provide for certain P.O. D. accounts (understood to be a Commission bill).

It is submitted the proposal now in question should be made more explicit as to what staff intends specifically or the options staff would present for later "decision."

In this regard, due concern for the fact changes will affect many persons, not just law practitioners and courts, and thousands of items of property, real or personal, and existing wills requires unusual care in format, structure and wording.

Second, undue emphasis has been placed on "severance" of joint tenancy. See Memo. p. 2, 3, 6 (leases) See also staff proposal for severance of community property interest except family home for real property estate. The conclusion indicated that severance is common and so should result in change of the basic estate does not accord with the present observer's experience or views.

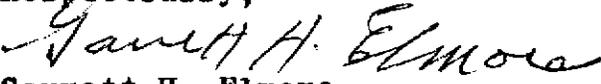
Third, the proposal to affect the present law and rights of persons who have joint tenancy bank accounts is based upon an undesirable provision as to ownership in proportion to contributions. Memo. 82-32 would change this by a presumption of "equal ownership" (Memo. p. 2). With due respect, the question is whether the law is being simplified or complicated. More importantly, is it desirable to impose limits that prevent getting to the truth. All types of joint tenancies are involved, whereas the present proposal does not clearly distinguish between marital joint tenancies and other joint tenancies. It may be that the staff proposal will be worked out to achieve substantial improvement; however, it is submitted more of a framework and more detail are needed before even a tentative recommendation should be put out.

Fourth, the proposal for making joint tenancies subject to disposition by will (as to the interest of the decedent) will require a great deal of public education and lead to the need for will review of many persons who thought their affairs adequately provided for in case of death. The need for this drastic change appears to rest upon (commentators) views of public misconception, except possibly for an Iowa survey.

It seems a more promising approach would be to provide for some form of contractual arrangement that parties could enter into, if they desired the dispose of joint tenancy property by will. However, my years of experience as a State Bar attorney covering lay advice, among other matters, leads me to believe that some safeguards will have to be imposed as to the formalities of such an agreement. The idea of an optional form of joint tenancy title (i. e., subject to disposition by will) encounters additional problems. How is it to be distinguished from a tenancy in common? Or under the other proposal on the May agenda from a community property real property title (other than family residence)?

The foregoing is written somewhat hastily. It does not represent views on other minor changes referred to, nor a complete "reply" to Memo. 82-32 in particular respects that strike the writer as important.

Respectfully,

  
Garrett H. Elmore