#H-510 4/30/82

First Supplement to Memorandum 82-32

Subject: Study H-510 - Joint Tenancy

We have received letters from Professors Bird (Exhibit 1), Goda (Exhibit 2), and French (Exhibit 3) addressed to problems discussed in Memorandum 82-32 (Joint Tenancy). Their views are summarized below.

Severance of Joint Tenancy

The memorandum raises the question whether a joint tenant should be required to give notice to the other joint tenants when severing the joint tenancy. Professor Bird believes there should be such a notice requirement. "I think that the possibilities of increased litigation noted by the staff are outweighed by the fraud dangers posited by Professor Bruch."

Professor French is of the opposite opinion. "I cannot see any reason to treat joint tenancies any differently from other forms of testamentary dispositions or other will substitutes, which require no notice of change of disposition." She points out that notice of termination of mutual estate plans generally is required only when there is a contract obligation to that effect. A statutory notice requirement would add another technicality into the law that would result in estate plans being more expensive and would create a risk that a plan will fail because notice was not given or that litigation will be necessary to establish its validity. She also suggests that a notice requirement could deter a non-dominant spouse from making changes in an estate plan the spouse may have been coerced to accept and may in fact disagree with.

Joint Tenancy and Community Property

The memorandum recommends reversal of the current presumption that property held by married persons in joint tenancy form is in fact joint tenancy. Under this recommendation property held by married persons in joint tenancy form would be presumed to be community property, except that at death it would be treated as joint tenancy and pass by survivorship.

Professor Bird is concerned that if the property is treated as joint tenancy at death, adverse tax consequences will result; we must make clear that it is "community property with right of survivorship" and not joint tenancy property at death. Professor Bird is correct; the language used in the memorandum to describe the proposal is loose and the statute should be clear on this point. However, as Professor Reppy points out, it does not necessarily follow that IRS will treat "community property with right of survivorship" the same as community property for income tax purposes.

Professor French suggests a variation on the idea of "community property with right of survivorship," based on Washington law. Her proposal is that community property be held in joint tenancy, just as separate property is held in joint tenancy. If married persons hold property in joint tenancy, their individual interests will be separate or community based on the source of the property. Where their interests are community, the only difference in treatment between the joint tenancy property and community property generally would be that at death the decedent's interest (1) passes by survivorship and not by intestacy and (2) is not subject to testamentary disposition.

This proposal is essentially the same in all significant respects as that outlined in the memorandum for treatment of "community property with right of survivorship." It reaches the same results from a slightly different perspective. It may be that this perspective will be useful in drafting a statute to deal with the community property/joint tenancy interrelation. The staff will adopt whatever perspective appears in drafting to impart greatest simplicity and clarity to the concepts.

Professor Goda would go a step further in terms of simplicity and clarity of concept and eliminate joint tenancy altogether as a means of tenure between married persons. This is certainly the direction both the law and the proposals in the memorandum are heading. As he points out, "Current community property law solves the problems that joint tenancy solved." However, the staff is opposed to taking this final step <u>at this time.</u> Joint tenancy appears to serve a deep-rooted emotional need and any overt attempt to eliminate the survivorship right is certain to fail, taking down with it any other reforms we seek to make. The staff believes the only practical approach is to make the needed reforms,

with the likelihood that they will lay the groundwork ultimately to make joint tenancy unnecessary as a means of tenure between married persons.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW
198 McALLISTER STREET
SAN FRANCISCO, CALIFORNIA 94102

April 9, 1982

Mr. John DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear Mr. DeMoully:

Unfortunately, I will be unable to attend the April meeting of the Commission. I do plan to attend the next meeting, which I understand will be held in June.

I would like to offer some comments concerning a few aspects of the joint tenancy study on the April 16 agenda. I am in general agreement with the staff recommendations regarding severance of a joint tenancy and the testamentary disposition of joint tenancy property, although I would prefer a notice requirement in the inter-vivos severance situation. I think that the possibilities of increased litigation noted by the staff are outweighed by the fraud dangers posited by Professor Bruch.

My other major concern involves the treatment of community property held in joint tenancy. The staff memorandum seems to indicate that at the death of one of the spouses, the presumption should be that the parties intended joint tenancy. The rationale offered is that by taking title in joint tenancy, the parties intended a right of survivorship, and presumably wanted to avoid probate administration by using the simple procedure for joint tenancy termination.

What the spouses probably did not intend, however, is the disfavorable tax treatment afforded joint tenancy property. As Mr. Sterling's article notes, community property passing to a surviving spouse at the death of the other spouse receives a stepped up basis as to both halves, while joint tenancy property receives a stepped up basis only as to the deceased spouse's one-half interest. What is needed is some mechanism whereby the spouses could have the convenience of the joint tenancy termination procedure and yet retain the benefits of the more favorable tax treatment afforded community property. The hybrid "community property with right of survivorship" form of ownership outlined by Mr. Sterling seems to be a workable solution worth exploring (see Sterling, Joint Tenancy and Community Property in California, pp. 38-39, 51-52), and I would be in favor of such a statutory presumption.

I am sorry that I will miss this meeting, but look forward to seeing you at the next.

Very truly yours,

Gail Boreman Bird

Gail Boreman Bird
Assistant Professor of Law

GBB:ac

EXHIBIT 2

THE UNIVERSITY OF SANTA CLARA • CALIFORNIA • 95053

SCHOOL OF LAW

April 12, 1982

Mr. John DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear John:

Thank you for the Memorandum 82-32 for Study #H-510 on Joint Tenancy. I am going to send you a quick reply since my time has run out. I have to write up some exams and then start correcting them.

It seems to me that you must cut the Gordian knot. If you keep joint tenancy title as between spouses, you will get rid of the existing complexities and raise up other complexities. For example, on pp.3-4 of your memo, in discussing the testamentary disposition of joint tenancy property, you quite properly recognize the present problems but on p. 4 raise up the other problems which I think you gloss over.

The irony of Marriage of Lucas is that it took the CC 5110 presumption of joint tenancy, single family residence at time of divorce, as community property and added what is the presumption of gift to it thus mandating the need to show intent otherwise to trace back to separate property. Marriage of Bjornestad I think had the right answer but Lucas overruled it.

It seems to me that the best way to avoid the problem is to end the possibility of joint tenancy having any effect as between married persons. Thus the change of title would not raise the presumption of gift, the Siberell rule of inconsistency between civil law and common law titles would be inoperative and all community property rules would be in effect.

This is the one suggestion you have not put into the list on pp. 49-57. I am surprised that I have come to this conclusion

myself since I know the current complexities. But I think that any intermediate solution will simply raise up other problems. Current community property law solves the problems that joint tenancy solved. As one Pope once said of the religious order to which I belong before it was suppressed a couple of centuries ago, "Aut sint ut sint aut non sint." "Either let them be as they are or let them not be."

With best wishes,

Sincerely,

Paul J. Goda, S.J.

PJG:md

EXHIBIT 3

Comments of Professor Susan F. French, April 9, 1982

Marital Property Study

1. Title Proposals: Joint Tenancy Property

The study suggests that "true joint tenancy title" should be restored and a new form of ownership created which would permit holding property as community property with a right of survivorship. (Pages 90-93). The suggestion appears based on an assumption that community property ownership and joint tenancy ownership are mutually exclusive, an assumption that reflects California law, but one which should not be accepted as immutable. Rather than create an additional category of ownership, the desired results could be obtained with less complexity by recognizing that community property can be held in joint tenancy with right of survivorship. Separate property can be held in joint tenancy and there is no compelling reason that I can see to prevent holding community property in that form as well. I practiced law in the State of Washington for a number of years where both separate and community property could be held in joint tenancy. Whether property held in joint tenancy was separate or community was determined by the same rules as were applied to determine whether property held in other forms was separate or community.

Where community property is held in joint tenancy, it retains all the characteristics it has as community property, except that on death, it passes to the survivor by virtue of the right of survivorship, rather than by intestacy, and it is not subject to testamentary disposition. The principal characteristics that it retains are:

1. Taxation. The property is taxed as community property so that both halves receive the step-up in basis.

2. Dissolution. The property is subject to division as community property.

3. Intervivos Disposition. Neither party can make a unilateral disposition of his or her half by intervivos disposition except as permitted for community property.

Joint tenancy property and community property are treated differently at death in their liability to creditors of the decedent. I agree with Prof. Bruch that the rights of creditors to reach community property should not depend on whether it passes to the surviving spouse by virtue of a survivorship right, by a will or by intestacy.

Joint tenants are free to destroy the joint tenancy by unilateral act of severance whether the asset held in joint tenancy is individual property, separate property or community property. On severance of a joint tenancy of community property, the spouses are left with community property which will pass by intestacy or under their wills, and is otherwise the same as any other community property. Professor Bruch suggests at p. 92 that notice ought to be required for severance of a "true" joint tenancy--which she would restrict to separate property--but does not specify whether this same requirement would apply to the proposed new form of ownership which would provide a right of survivorship for community proeprty, although this is suggested in note 256. The reason for requiring notice is that the other joint tenant may be "misled into believing that a mutual estate plan remains in effect." (p. 92).

However, spouses are not required to give notice to terminate other "mutual" estate plans except where the estate plan is executed pursuant to a contract which obligates them not to revoke the plan. Creation of a survivorship right should not be held to create an obligation not to revoke unless the parties have made such an agreement. Such an agreement relating to a will is subject to the statute of frauds (Civ. Code §1624(6)). The Uniform Probate Code requires that contracts to make wills or not to revoke wills be set forth in the will, or referred to in the will, or be in a writing signed by the decedent. UPC §2-701. I cannot see any reason to treat joint tenancies any differently from other forms of testamentary dispositions or other will substitutes, which require no notice of change of disposition.

It might be argued that notice should be required to one's spouse before any change in an estate plan can become effective, but I would strongly oppose such a suggestion. It adds one more technicality back into the law,

making implementation of estate plans more expensive and creating the risk that plans will fail because a notice was not given, or that litigation will be necessary to establish the validity of a plan. If we are concerned that spouses be adequately provided for after death of the first spouse, that problem should be tackled directly, not by placing procedural obstacles in the way of making dispositions effective at death.

I would also suggest that non-dominant spouses are more likely to be coerced into executing estate plans than dominant spouses and that requiring them to give notice of any such change will deter them from making such changes even if the plan does not really represent what they would like to do with the property.

If my suggestion that community property should be permitted to be held in joint tenancy is adopted, there would be no need to adopt Prof. Bruch's suggestions on page 91 that additional technicalities be required for creation of joint tenancies between spouses. If placing the property into joint tenancy does not change the separate or community character of the asset, there is no need for those provisions. Again, I would urge that we not add technicalities to the conveyancing process. Wherever a particular statement is required, litigation will result because someone will use a different statement. The history of statutory requirements that particular statements be used to create joint tenancies should persuade us that this is to be avoided if at all possible.