

Memorandum 82-85

Subject: Study F-601 - Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage (Comments on Tentative Recommendation)

The Commission distributed for comment a tentative recommendation to permit the division of joint tenancy and tenancy in common property along with the community property at dissolution of marriage. A copy of the tentative recommendation is attached to this Memorandum. The comments received appear as Exhibits 1-7 and as Exhibit 3 to Memorandum 82-82.

General Reaction

The general reaction to the tentative recommendation was favorable. Bruce A. Lyon approves the concept (Exhibit 1), the State Bar Family Law Section Standing Committee on Property Division (South) favors the proposal (Exhibit 2), Terry A. Green agrees wholeheartedly with the intent (Exhibit 4), Ronald P. Denitz believes it will make a valuable addition to the law (Exhibit 6), Dennis A. Cornell applauds the concept (Exhibit 7), and Justice Robert Kingsley thinks it's an excellent idea (Exhibit 3 to Memorandum 82-82).

Apart from the general favorable reaction, there were a number of specific comments or suggestions, which are discussed below.

Jurisdiction of Court

The tentative recommendation subjects joint tenancy and tenancy in common property to the jurisdiction of the court if submitted by one of the parties. Terry A. Green (Exhibit 4) writes to suggest that the law should automatically give the court jurisdiction to deal with the property. The staff does not believe this is a good suggestion--it seems to imply that the court on its own motion may throw into the pot for division property that neither spouse wishes included.

Terry A. Green also suggests that the jurisdiction of the court should be limited to community property in joint tenancy form and should not include true community property. This suggestion would defeat the whole purpose of the tentative recommendation, which is to increase the flexibility of the court by increasing the property subject to its jurisdiction and avoiding disputes over the characterization of joint tenancy property. As Justice Kingsley points out, "it permits a rational

division of marital assets, without being restrained by what, often, is an uninformed mode of taking title." (Exhibit 3 to Memorandum 82-82).

Kenneth James Arnold (Exhibit 5) is troubled by the possibility that attorneys would be misled as to the power of the court to affect title to non-California property. He notes that the Comment discusses this point but suggests that the statute include some references to limitations on the authority of the court. The staff plans to add general language that: "The division shall be made in the same manner and to the same extent , and subject to the same limitations, as division of community property and quasi-community property."

Manner of Division

As drafted, the tentative recommendation requires joint tenancy property to be divided equally between the spouses and tenancy in common property to be divided between the spouses in proportion to their ownership. Several commentators point out that this can yield inequitable results between the spouses where they have contributed different amounts of their separate property to the acquisition of the property. Jan C. Gabrielson (Exhibit 2) states that, "If the parties can prove that their respective interests in tenancy in common and joint tenancy property are not equal, they should be allowed to do so." Paul Gordon Hoffman (Exhibit 3) notes the tentative recommendation requires that joint tenancy property be equally divided between the parties and comments, "It should be clarified that separate property interests of the parties are to be protected in any such division."

The staff believes this is a good point. There should be a presumption of equal ownership, rebuttable by proof of unequal contributions to the cost of acquisition or by proof of an agreement as to ownership. This is the effect of the Commission's recommendations on joint bank accounts and also the effect of the Commission's tentative decisions in the area of spousal joint tenancy property generally. The staff would revise the tentative recommendation as follows:

The division shall be made in the same manner and to the same extent as community property and quasi-community property ~~except that division shall be made of the joint interests of the parties equally and of the common interests of the parties in proportion to their ownership~~ . For the purpose of this section the interests of the spouses in the property are presumed to be equal. This presumption is a presumption affecting the burden of proof and is rebuttable by proof of the proportionate contributions of the spouses to the acquisition of the property or by proof of an agreement of the spouses as to their interests in the property.

Comment. Unlike division of community and quasi-community property, division of joint tenancy and tenancy in common property may be unequal if the proportionate contributions of the spouses to the acquisition of the property are unequal. This supersedes the rule of former Section 5110 and *In re Marriage of Lucas*, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980), which required equal division of joint tenancy property as community notwithstanding its acquisition out of the separate property of one of the spouses.

Contrary language in Civil Code Section 5110 should also be repealed:

~~When a single/family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single/family residence is the community property of the husband and wife.~~

Comment. Section 5110 is amended to delete the provision relating to classification for the purpose of dissolution of a joint tenancy single-family residence acquired during marriage. This provision is superseded by Section 4800.1 (division of joint tenancy and tenancy in common property).

Severance of Joint Tenancy

If the spouses dissolve the marriage without dividing joint tenancy property, should the dissolution operate as a severance so as to cut off the right of survivorship between the former spouses? The tentative recommendation provides that dissolution severs the joint tenancy.

Bruce A. Lyon (Exhibit 1) and Ronald P. Denitz (Exhibit 6) believe that dissolution should not sever the joint tenancy. They point out that severance may well defeat the intention or a contractual agreement of the parties. In addition, severance without a court decree or other recorded document can create title problems when one of the parties dies. This is pointed out by Paul Gordon Hoffman (Exhibit 3). Mr. Hoffman also believes that even where there is a court decree, the decree should be recorded if it is to affect the rights of third persons. This is a general rule of the law of recordation and bona fide purchasers; special provisions are unnecessary.

The staff believes these criticisms of the provision that dissolution severs a joint tenancy are sound. We plan to delete the provision from the recommendation.

Transitional Provisions

Kenneth James Arnold (Exhibit 5) suggests that the transitional provisions (currently drafted as an uncodified section) be incorporated

in the draft of the codified section. Although the staff is generally reluctant to clutter the codes with transitory provisions, it appears to be useful in this case. We will incorporate the transitional provision as subdivision (c) of Section 4800.1.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

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 JERRY M. KUPERSTEIN
 DAVID E. SMITH

August 5, 1982

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

Re: Tenantive Recommendation relating to Division
 of Joint Tenancy and Tenancy in Common Property
 at Dissolution of Marriage

Gentlemen:

I approve of the concept and Subdivision A of the
 Proposed Amendment to Section 4800.1.

I do not believe, however, that it is wise or appropriate
 to automatically sever the interests of joint tenants in a
 dissolution of marriage. The parties may wish to maintain owner-
 ship of property in joint tenancy.

Very truly yours,



BRUCE A. LYON

BAL/jll

EXHIBIT 2

STUART B. WALZER

STUART B. WALZER*
MICHAEL A. GOLD
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JAN C. GABRIELSON
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August 9, 1982

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

Re: Tentative Recommendation #F-601
re Division of Joint Tenancy and Tenancy
in Common Property at Dissolution of
Marriage

Dear Nat:

I have received and reviewed Tentative Recommendation #F-601. The general principle involved was discussed briefly by the State Bar Family Law Section Standing Committee on Property Division (South) and the members are all in favor of giving jurisdiction to the family law courts to divide joint tenancy and tenancy in common property. Some members felt that the recommendation will simply codify existing practice.

Although most couples will be inclined to submit such property to division by the dissolution court, the potential for abuse exists under existing law. If one party had reason to delay property division, that party could insist that a separate partition action be brought and delay its coming to trial for some time.

The last two lines of Paragraph (a) of proposed Section 4800.1 are not entirely clear to me. It seems to be the thrust of those two lines that tenancy in common and joint tenancy property which has its source in community property should be divided equally under the same principles as other community and quasi-community property. If the parties can prove that their respective interests in tenancy in common and joint tenancy property are not equal, they should be allowed to do so. Incidentally, maybe you can sneak something in here which will undermine the Lucas case.

Subdivision (b) is clear enough when read with the rest of the tentative recommendation. It may be a bit ambiguous to say that the interests of the parties in property held as joint

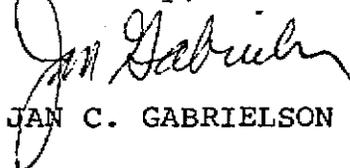
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August 9, 1982
Nathaniel Sterling

tenancs are severed by the judgment. It might be clearer to say that the survivorship aspect of the joint tenancy is terminated. Or, it could be stated that the joint tenancy becomes a tenancy in common.

A simpler approach to the whole thing might simply be to add a new subdivision to Civil Code §4800 stating that community property as used in this section shall be deemed to include joint tenancy and tenancy in common property held by the parties unless someone proves otherwise. I think I prefer your approach.

I continue to admire and appreciate your excellent work in this area.

Sincerely,

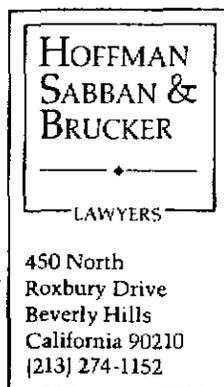
A handwritten signature in cursive script, appearing to read "Jan Gabrielson".

JAN C. GABRIELSON

JCG/nm

cc: Diana Richmond (w/encl.)

EXHIBIT 3



August 10, 1982

OUR FILE:

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

Re: Tentative Recommendation Relating
to Division of Joint Tenancy and
Tenancy-In-Common Property at
Dissolution of Marriage

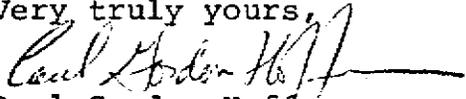
Gentlemen:

I have two comments regarding the tentative recommendation.

First, the statute seems to require that joint tenancy property be equally divided between the parties. It should be clarified that separate property interests of the parties are to be protected in any such division. An effort should be made to conform the division of joint tenancy property in this case with the rights in joint tenancy property provided for in the Tentative Recommendation Relating to Non-Probate Transfers.

Second, there should be a requirement that an interlocutory judgment of dissolution of the marriage or a judgment decreeing the legal separation of the parties will serve to sever the joint tenancy only if the judgment contains the legal description of the property, and is recorded with the County Recorder for the county in which the property is located. In this fashion, a clear chain of title will be preserved. Alternatively, the proposed statute should cause a severance only with respect to the interests of the parties as between themselves. I am concerned that an interlocutory judgment of dissolution might be entered, and thereafter one of the spouses might die and the surviving spouse might file an affidavit, death of joint tenant, so as to cause record title to the property to be transferred into the sole name of the surviving joint tenant. In such a case, third parties dealing with the surviving joint tenant should be fully protected, and the heirs of the deceased joint tenant should have only a right to proceed against the surviving joint tenant.

Very truly yours,


Paul Gordon Hoffman

PGH:sk

EXHIBIT 4

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RAYMOND F. DREYER
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TELEPHONE 298-5217

August 13, 1982

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

Re: Proposed revision of Civil
Code 4800.1 (joint tenancy and
tenancy in common property)

Gentlemen and Gentlewomen:

I am a practicing attorney in California and a certified specialist in family law.

I have read the proposed addition to the Civil Code concerning the court's ability to deal with the joint tenancy and tenancy in common property of married persons.

I agree wholeheartedly with the intent of the law. However, may I suggest that instead of at the request of one of the parties, the law automatically gives the court the power to deal with property held by the married parties in joint tenancy or tenancy in common. However, the law should also be careful to deal with only the property that would truly be community property in nature under all other tests and standards. Further, the law should recognize existing case and statutory law concerning methods of division and exceptions thereto as well as standards for determining the property is in fact community property; i.e., acquired during marriage with community property funds, how Lucas applies, how Aufmuth, applies, etc.

Thank you for your attention.

Sincerely,


TERRY A. GREEN

TAG:sw

EXHIBIT 5

KENNETH JAMES ARNOLD
ATTORNEY AT LAW
369 Harvard Street
San Francisco, California 94134

August 21, 1982

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

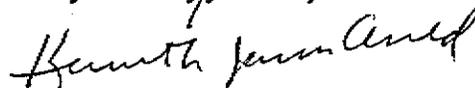
Dear Mr. DeMouilly:

I have reviewed ~~##~~ F-401 (Emancipated Minors), F-601 (Division of Joint Tenancy and Tenancy in Common Property on Dissolution of Marriage); L-626 (Missing Persons), L-627 (Proposed Limited Conservatee), and L-703 (Appointment of HealthCare Representative), which, I assume, supersedes or duplicates L-627.

F-401 in my opinion is well drafted and fills a legislative need. I find F-601 somewhat troublesome. I think your proposed CC § 4800.1 would mislead attorneys as to the power of the court to affect title to non-California property, particularly if the respondent does not appear in the proceeding or is a non-California resident. I would suggest at the least that the references in your comment be made express in the section. That is, that 4800.1 should include an express reference to CC §§ 4800.5 and 4813, e.g., Subject to the provisions of Sections 4800.5 and 4813, Too, the final two sentences of your comment might be included as subdivision (c) to your proposed 4800.1.

L-626 seems fine to me. With respect to L-627, could the 10-day period be extended to 15 days? Compare CCP §§ 1005, 1013(a). L-703 also seems okay to me, other than the typo in § 53.130.

Very truly yours,



Kenneth James Arnold

EXHIBIT 6

RONALD P. DENITZ

ATTORNEY AT LAW

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August 26, 1982

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

Re: Study F-601: Division of Joint Tenancy at
Dissolution of Marriage

Dear Nat:

In answer to the Tentative Recommendation dated July 22, 1982 in the captioned matter it is my opinion that proposed Section 4800.1(a) will make a valuable addition to the law of real property in California. However, I view Subdivision "(b)" of that Section as potentially destructive for the following reasons:

- a. Severance of husband and wife joint tenancies by operation of law may well defeat the desires or some prior contractual agreement of the parties;
- b. The Subdivision fails to state whether severance by operation of law would result in equal division or, better, division proportionate to the respective contributions of each of the parties; and
- c. Division by operation of law might, in the absence of notice and opportunity for a hearing, be an unconstitutional deprivation of property with respect to joint tenancies created prior to the effective date of the statute.

The jurisdiction of the Divorce Court over joint tenancy property should be limited to those situations where the Court does in fact actually act and, where the Court fails to act through intent of the parties or through ignorance of the parties or of the Court, joint tenancy properties should be left alone as joint tenancy properties subject to such further litigation or such other action as the parties may themselves later choose to take.

With many thanks for giving me the opportunity to comment upon the Tentative Recommendation, I am,

Cordially,

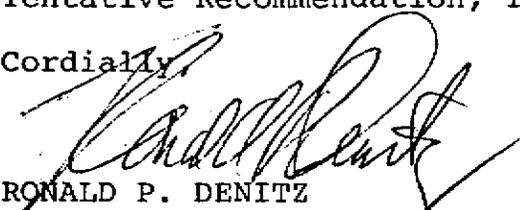

RONALD P. DENITZ

EXHIBIT 7

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REPLY TO: Merced

August 30, 1982

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

Gentlemen:

I am writing to comment on the Tentative Recommendation relating to the Division of Joint Tenant and Tenancy In Common Property at Dissolution of Marriage which was forwarded to me.

Generally, I applaud the concept and the efforts that you are making in this area to eliminate what has been a procedural shortcoming. As a practical matter, for some time the courts have been dividing these types of properties in dissolution actions as though your proposed changes were already in effect. The courts have been treating these properties like any other real property held by the parties as community property. The courts have been applying the provisions of Civil Code §5110.

In that regard, my one criticism of your proposed legislation can be found in the second sentence of paragraph (a). I do not think that there should be any different rules applied to these properties than to the other property before a court in a dissolution action. The sentence in question will limit the ability of the courts to divide these particular properties, and will be a De Facto change in the way the courts have been dealing with these properties up until this time. I do not think that is what you intend to do.

I suggest that the exception contained in that last sentence be omitted all together and the first part of that sentence be retained. In this fashion, the property will be treated the same as a family residence is under the current

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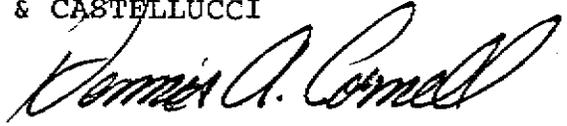
language of §5110.

Thank you for the opportunity to comment.

Very truly yours,

ALLEN, IVEY, CORNELL, MASON
& CASTELLUCCI

by

A handwritten signature in cursive script, appearing to read "Dennis A. Cornell".

DENNIS A. CORNELL

DAC/kt