#F-521 05/29/84

Memorandum 84-56

Subject: Study F-521 - Community Property in Joint Tenancy Form (Draft of Recommendation)

At the April 1984 meeting the Commission reviewed comments received on the tentative recommendation relating to community property in joint tenancy form and made a number of changes, which are incorporated in the attached staff draft of the recommendation. If the draft is satisfactory, we will distribute it once again to persons and organizations on our mailing list, as directed by the Commission.

Respectfully submitted,

Nathaniel Sterling
Asst. Executive Secretary

#F-521

5/23/84

STAFF DRAFT

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

RECOMMENDATION

relating to

COMMUNITY PROPERTY IN JOINT TENANCY FORM

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
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#F-521 5/23/84

Staff Draft

RECOMMENDATION

relating to

COMMUNITY PROPERTY IN JOINT TENANCY FORM

A husband and wife in California may hold property in joint tenancy or as community property.[1] The two types of tenure, one common law and the other civil law, have different legal incidents--the spouses have different management and control rights and duties, creditors have different rights to reach the property, and the property is treated differently at dissolution of marriage and at death.[2]

In California it is common for husband and wife to take title to property in joint tenancy form even though the property is acquired with community funds. Frequently the joint tenancy title form is selected by the spouses upon the advice of brokers and other persons who are ignorant of the differences in legal treatment between the two types of property tenure. The spouses themselves are ordinarily unaware of the differences between the two types of tenure, other than that joint tenancy involves a right of survivorship.[3]

As a consequence, a person who is adversely affected by the joint tenancy title form may litigate in an effort to prove that the spouses did not intend to transmute the community property into joint tenancy. Because joint tenancy is often disadvantageous to the spouses, particularly the tax consequences of joint tenancy, the courts have been liberal in relaxing evidentiary rules to allow proof either that the spouses did

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1. Civil Code § 5104. The spouses may also hold property as tenants in common, although this is relatively infrequent.

2. See, e.g., Sterling, Joint Tenancy and Community Property in California, 14 Pac. L.J. 927 (1983), reprinted in 10 Comm. Prop. J. 157 (1983).

3. See, e.g., Bruch, The Definition and Division of Marital Property in California: Towards Parity and Simplicity, 33 Hastings L.J. 769 828-38 (1982).

not intend to transmute community property to joint tenancy or, if they did, that they subsequently transmuted it back.[4]

The result has been general confusion and uncertainty in this area of the law, accompanied by frequent litigation[5] and negative critical comment.[6] It is apparent that the interrelation of joint tenancy and community property requires clarification.

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4. See, e.g., Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 159-68 (1981).

5. See, e.g., Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003 (1932); Delanoy v. Delanoy, 216 Cal. 23, 13 P.2d 513 (1932); Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905 (1944). Cases struggling with the issue in the past few years include In re Marriage of Lucas, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980); In re Marriage of Camire, 105 Cal. App.3d 859, 164 Cal. Rptr. 667 (1980); In re Marriage of Gonzales, 116 Cal. App.3d 556, 172 Cal. Rptr. 179 (1981); In re Marriage of Cademartori, 119 Cal. App.3d 970, 174 Cal. Rptr. 292 (1981); In re Marriage of Mahone, 123 Cal. App.3d 17, 176 Cal. Rptr. 274 (1981); Badillo v. Badillo, 123 Cal. App.3d 1009, 177 Cal. Rptr. 56 (1981); In re Marriage of Hayden, 124 Cal. App.3d 72, 177 Cal. Rptr. 183 (1981); Estate of Levine, 125 Cal. App.3d 701, 178 Cal. Rptr. 275 (1981); In re Marriage of Miller, 133 Cal. App.3d 988, 184 Cal. Rptr. 408 (1982); Kane v. Huntley Financial, 146 Cal. App.3d 1092, 194 Cal. Rptr. 880 (1983); In re Marriage of Stitt, 147 Cal. App.3d 579, 195 Cal. Rptr. 172 (1983).

6. See, e.g., Comment, 5. S. Cal. L. Rev. 144 (1931); Miller, Joint Tenancy as Related to Community Property, 19 Cal. St. B.J. 61 (1944); Note, 32 Calif. L. Rev. 182 (1944); Lyman, Oral Conversion of Property by Husband and Wife from Joint Tenancy to Community Property, 23 Cal. St. B.J. 146 (1948); Marshall, Joint Tenancy Taxwise and Otherwise, 40 Calif. L. Rev. 501 (1952); Brown & Sherman, Joint Tenancy or Community Property: Evidence, 28 Cal. St. B.J. 163 (1953); Joint Tenancy v. Community Property in California: Possible Effect Upon Federal Income Tax Basis, 3 UCLA L. Rev. 636 (1956); Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87 (1961); Ferrari, Conversion of Community Property into Joint Tenancy Property in California: The Taxpayer's Position, 2 Santa Clara Lawyer 54 (1962); Griffith, Joint Tenancy and Community Property, 37 Wash. L. Rev. 30 (1962); Backus, Supplying or Prescribing Community Property Forms, 39 Cal. St. B.J. 381 (1964); Tax, Legal, and Practical Problems Arising From the Way in Which Title to Property is Held by Husband and Wife, 1966 S. Cal. Tax'n Inst. 35 (1966); Knutson, California Community Property Laws: A Plea for Legislative Study and Reform, 39 S. Cal. L. Rev. 240 (1966); Mills, Community Joint Tenancy--A Paradoxical Problem in Estate Administration, 49 Cal. St. B.J. 38 (1974); Property Owned with Spouse: Joint Tenancy by the Entireties and Community Property, 11 Real Prop. Prob. & Tr. J. 405 (1976); Sims, Consequences of Depositing

Legislation enacted in 1965 directly addressed the problem of married persons taking title to property in joint tenancy form without being aware of the consequences and in fact believing the property is community.[7] Civil Code Section 5110 provided that a single-family residence acquired during marriage in joint tenancy form is presumed community property for purposes of dissolution of marriage. This presumption has had a beneficial effect and was expanded in 1983 to apply to all property acquired during marriage in joint tenancy form.[8] The 1983 legislation also made clear that the community property presumption may be rebutted only by a clear writing by the spouses, but that separate property contributions are reimbursable at dissolution of marriage.[9]

This expansion is sound and should be effective to eliminate much of the confusion in this area of the law. However, the presumption is limited to dissolution of marriage. In order to clarify the property rights of the spouses generally, property acquired during marriage in joint tenancy form should be community for all purposes, unless there is a contrary express written agreement. This will correspond to the intention of most married persons not to lose basic community property protections merely by taking property in joint tenancy title form, and will ensure certainty and eliminate litigation over the issue.

Separate Property in Joint Bank Accounts, 54 Cal. St. B.J. 452 (1979); Mills, Community/Joint Tenancy Avoid a Tax Doubleplay; Touch the Basis, 1979 S. Cal. Tax'n Inst. 951 (1979); Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143 (1981); Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity, (1981); Comment, 3 Whittier L. Rev. 617 (1981); Comment, 15 U.C.D. L. Rev. 95 (1981); Comment, 15 Loy. L.A. L. Rev. 157 (1981); Thomas, Marriage of Lucas and The Need for Legislative Change, Fam. L. News & Rev., Fall 1982, at 8; Sterling, Joint Tenancy and Community Property in California, 14 Pac. L.J. 927 (1983), reprinted in 10 Comm. Prop. J. 157 (1983); Mennell, Community Property with Right of Survivorship, 20 San Diego L. Rev. 779 (1983); Mennell, Survivorship Rights in Community Property, 11 Comm. Prop. J. 5 (1984).

7. Cal. Assem. Int. Comm. on Judic., Final Report relating to Domestic Relations, reprinted in 2 App. J. Assem., Cal. Leg. Reg. Sess. 123-24 (1965).

8. Civ. Code § 4800.1, enacted by 1983 Cal. Stats. ch. 342, § 1. See California Law Revision Commission--Report Concerning Assembly Bill 26, 1983 Senate Journal 4865 (1983).

9. Civ. Code § 4800.2, enacted by 1983 Cal. Stats. ch. 342, § 2.

If the spouses intend anything when they take title to property in joint tenancy form, it is that the property should pass at death to the surviving spouse without probate. Treating the property as community at death will not only enable passage at death to the surviving spouse without probate, it will also ensure favorable tax treatment. Community property passes automatically to the surviving spouse absent testamentary disposition by the decedent.[10] Probate administration is not required for community property that passes to the surviving spouse either by testate or intestate succession.[11] Title to such property can be cleared quickly and simply either by court order in a summary proceeding[12] or by affidavit in the same manner as joint tenancy.[13]

Community property has the added advantage for the survivor over joint tenancy property that the survivor is entitled to a step-up of the federal income tax basis of the property.[14] In addition, the decedent retains the right of testamentary disposition, thereby avoiding possible frustration of an estate plan and enabling the property to be passed to an exemption-equivalent testamentary bypass trust, with resultant estate tax savings for the survivors.

In short, community property tenure is more advantageous to the parties than joint tenancy tenure in the ordinary case, and it corresponds to the ordinary expectations of the parties who take joint tenancy title form. Community property in joint tenancy form should receive community treatment for all purposes, unless the parties clearly indicate in writing their intent to treat their interests as separate property.

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10. Prob. Code § 201, reenacted as Prob. Code §§ 6400-6401, operative January 1, 1985.

11. Prob. Code § 202, reenacted as Prob. Code § 649.1, operative January 1, 1985.

12. Prob. Code §§ 650-657.

13. Cf. Prob. Code § 203 (right of surviving spouse), reenacted as Prob. Code § 649.2, operative January 1, 1984.

14. See discussion in Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management and Invalid Marriage, 18 San Diego L. Rev. 143, 238-40 (1981); cf. Parks, Critique of Nevada's New Community Property With Right of Survivorship, 10 Comm. Prop. J. 5 (1983).

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Section 5110.5 to, and to repeal Section 4800.1 of, the Civil Code, relating to community property.

The people of the State of California do enact as follows:

968/676

Civil Code § 4800.1 (repealed). Community property presumption

SECTION 1. Section 4800.1 of the Civil Code is repealed.

~~4800.1. For the purpose of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint tenancy form is presumed to be community property. This presumption is a presumption affecting the burden of proof and may by rebutted by either of the following:~~

~~(a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.~~

~~(b) Proof that the parties have made a written agreement that the property is separate property.~~

Comment. The substance of former Section 4800.1 is continued in Section 5110.5 (community property in joint tenancy form).

31559

Civil Code § 5110.5 (added). Community property in joint tenancy form

SEC. 2. Section 5110.5 is added to the Civil Code, to read:

5110.5. (a) Property the title to which is taken in joint tenancy form between married persons during marriage is community property, unless one of the following conditions is satisfied:

(1) The deed or other documentary evidence of title contains a clear statement that the property is separate property and not community property.

(2) The married persons have made a written agreement that the property is separate property and not community property.

(b) The characterization of property as community pursuant to this section is not altered by tracing contributions to the acquisition of the property to a separate property source. Nothing in this subdivision

limits the right of a party to reimbursement for separate property contributions at dissolution of marriage pursuant to Section 4800.2.

(c) This section does not apply to a joint account in a financial institution if Part 1 (commencing with Section 5100) of Division 5 of the Probate Code applies to the account.

(d) This section becomes operative January 1, 1986, and applies to all property the title to which is taken in joint tenancy form before, on, or after the operative date, except that:

(1) This section does not apply to any transaction involving the property that occurred before the operative date, including but not limited to inter vivos or testamentary disposition of the property by a married person and division of the property at dissolution of marriage. Such a transaction is governed by the law applicable before the operative date.

(2) This section does not apply until two years after the operative date to property the title to which is taken in joint tenancy form before the operative date, regardless whether payments on or additions to the property are made on or after the operative date, and until then the property is governed by the law applicable before the operative date. During the two year period either spouse may elect to have the law applicable before the operative date continue to govern the property beyond the two year period by executing and recording a notice of intent to preserve existing law, and to this extent the law applicable before the operative date is continued in effect. A notice of intent to preserve existing law shall be in the same form and shall be executed, recorded, and indexed in the same manner, to the extent applicable, as a notice of intent to preserve an interest in real property pursuant to Article 3 (commencing with Section 880.310) of Chapter 1 of Title 5 of Part 2 of Division 2, except that as to personal property the notice may be recorded in either the county in which the property is located or the county in which the parties reside.

Comment. Subdivision (a) of Section 5110.5 creates an exception to the presumption of Section 683 that property held in joint tenancy form is joint tenancy. Instead, property taken in joint tenancy form during marriage is community property. This reverses case law that treated community property in joint tenancy form as either community property or joint tenancy, depending upon the intent of the parties. See, e.g., discussion in Sterling, Joint Tenancy and Community Property in California, 14 Pac. L.J. 927 (1983), reprinted in 10 Comm. Prop. J. 157 (1983). Subdivision (a) is consistent with former Section 4800.1 (for purposes

of division, property acquired in joint tenancy form during marriage presumed to be community property), and broadens the community property characterization for all purposes, not just for purposes of division at dissolution of marriage. Subdivision (a) does not distinguish between community property and quasi-community property, since both spouses have a present interest in property held in joint tenancy form.

The community property characterization is subject to a contrary express intention of the parties in the form of a written statement, in the deed or otherwise, negating the community character and affirming the separate character of the property. This will help ensure that any transmutation of community property to separate property by the spouses is in fact intentional.

Ownership of community property pursuant to this section is qualified by a reimbursement right at dissolution for separate property contributions to its acquisition. Section 4800.2. In the case of property initially acquired before marriage, the title to which is taken in joint tenancy form during marriage, the measure of the separate property contribution is the value of the property at the time of its conversion to joint tenancy form. See subdivision (b).

Community property in joint tenancy form is community for all purposes and receives community property treatment at death, including tax and creditor treatment and passage without probate (unless probate is elected by the surviving spouse). Prob. Code § 649.1. Because the names of both spouses appear on the property title in this form of tenure, title in the survivor may in the ordinary case be cleared by affidavit in the same manner as joint tenancy, without the need for court confirmation pursuant to Section 650 of the Probate Code.

Subdivision (c) makes clear that the Probate Code provisions governing joint accounts prevail over this chapter. See Prob. Code § 5305 (presumption that sums on deposit are community property).

Subdivision (d) states the legislative intent to make this article retroactive to the extent practical, consistent with protection of the security of transactions involving the spouses or third persons that occurred before the operative date. Retroactive application is supported by the importance of the state interest served by clarification and modernization of the law of joint tenancy and community property, the conformance of the change with the ordinary expectations of the average joint tenant, the generally procedural character of the changes in the law, and the lack of a vested right in joint tenancy property due to the severability of the tenure. In addition, subdivision (d) provides a two-year grace period after the operative date during which persons who acquired property before the operative date may make any necessary title changes or agreements or other arrangements concerning the property, or may simply preserve prior law if they are unable to agree.