#F-521.1/L-521.1 ns88
06/23/92

Memorandum 92-34

Subject: Study F-521.1/L-521.1 - Community Property in Joint Tenancy Form (Comments on Policy Issues)

BACKGROUND

The Commission at its March 1992 meeting reviewed Professor Kasner's background study on community property in joint tenancy form. The Commission heard a number of different perspectives on the issues involved in dealing with property of this type, and finally concluded that the Commission needs more input on it. The Commission directed the staff to prepare and circulate for comment a memorandum indicating key policy issues and proposed solutions for further consideration.

A copy of the memorandum is attached as Exhibit 1. The staff distributed the memorandum in late March, with a request for comments by May 1. The memorandum was also published in the CEB Estate Planning and California Probate Reporter with a request for comments. Both the State Bar Estate Planning Section and the State Bar Family Law Section indicated they would be unable to comment by May 1, and we have delayed scheduling this matter to accommodate them. However, we must address the issues at the July meeting if we are to have a proposal for the 1993 Legislature.

We have now received the following comments on the memorandum:

Professor Kasner (Exhibit 2) forwarding information concerning the Arizona approach.

Luther J. Avery (Exhibit 3) of San Francisco.

Ken Petrulis (Exhibit 4) on behalf of the Legislative Committee of the Beverly Hills Bar Association's Probate, Trust & Estate Planning Section.

Professor Reppy (Exhibits 5 & 6) suggesting the Washington approach.

Professor Weisberger (Exhibit 7) suggesting the Wisconsin approach.

Valerie J. Merritt (Exhibit 8) on behalf of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section.

The State Bar Family Law Section has previously promised comments in June and now indicates July is likely.

SUMMARY OF ISSUES

Succinctly put, the problem is this: If community property funds are used to acquire property but title is taken in joint tenancy, is the property treated as community property or as joint tenancy? This is an important question because the situation arises frequently, and rights of interested persons can vary markedly depending on the character of the property. For example, rights of creditors against community property assets are much more substantial than against joint tenancy assets. A spouse may will one-half of the community property, but the spouse's interest in joint tenancy property passes to the surviving spouse by right of survivorship. And for income tax purposes on the death of a spouse, the surviving spouse receives a step-up in basis on both halves of community property but only on the decedent's half of joint tenancy property.

The California courts have treated this problem differently over the years. Historically, the surviving spouse has been able to claim that despite the joint tenancy title form, the spouses never intended that the property be transmuted and lose its community character. More recently the courts have held that the form of title should have greater presumptive effect. The court holdings have been cut back by legislation aimed at recognizing the source of the property and limiting the ability of spouses to change the character of the property by an oral agreement or understanding.

The IRS seems willing to accept for income tax purposes whatever characterization the state gives to the property. The fact that ~~California now requires a writing to effect a transmutation appears~~ to have prompted IRS no longer to accept the spouses' oral agreement or understanding that property held in joint tenancy form is really community. Presumably a written agreement would do the trick, and that is one of the possible solutions listed below.

COMMENTS ON POLICY ISSUES

The comments we received on our policy issue memorandum supplement those previously brought to the Commission. Omitting the various details and facets raised by the commentators for the moment, here is a brief summary of positions we have seen so far.

Professor Kasner's background study recommends that community property in joint tenancy form be treated as community property for all purposes, except that at death it passes by right of survivorship rather than by testamentary disposition. Professor Kasner has also forwarded us material on Arizona practice, which enables spouses who really want joint tenancy to specify their intent on a form.

State Bar of California, Estate Planning, Trust and Probate Law Executive Committee majority believes that the law should presume the property remains community for all purposes except that it passes by survivorship at death. The minority position is that joint tenancy form should not affect testamentary disposition of the property, i.e. the property remains community for all purposes unless there is an actual transmutation to a separate property joint tenancy.

Los Angeles County Bar Association, Probate and Trust Law Executive Committee would treat the property as community property that passes to the surviving spouse at death, but passage at death to the survivor would be characterized as a testamentary disposition rather than as a right of survivorship. Severance would require notice to the other spouse.

Beverly Hills Bar Association, Probate, Trust & Estate Planning Legislative Committee would treat the property as community subject to a right of survivorship. This treatment would apply retroactively, except for a transitional provision for property acquired between 1985 and the effective date of the new law.

Professor Reppy would liberalize transmutation rules for those who wish to create true joint tenancy. He suggests that community property with right of survivorship treatment can be achieved by contract, but notes that the Texas statutory community property with right of survivorship is apparently treated favorably by IRS. Rev. Rul. 87-998, 1987-2 C.B. 207 "strongly suggests a right of survivorship can be

annexed by the legislature (as well as the parties) on to community property and if the legislation says the property is still community for purposes of creditors' rights and management and control during marriage, the crazy loophole of § 1014(b)(6) is available for it."

Professor Weisberger urges consideration of Wisconsin's "survivorship marital property", a special form of title that is given community property tax treatment at death by IRS. Management and control during marriage is either joint or separate, depending on whether title is "and" or "or".

Luther Avery does not support any statutory approach to community property in joint tenancy form. "The law today should not be further altered or amended ... Let the law alone for a few years and the parties will solve the problems."

These positions are thoughtfully articulated and elaborated in the letters, which bear careful reading. The letters contain many important comments and suggestions. A couple of items that struck the staff as particularly interesting in the letters include:

--The State Bar Executive Committee believes that most people understand there will be a right of survivorship at death if the property is taken in joint tenancy form, but they do not understand that this means they are giving up the right to will their one-half interest in the property.

--We have heard consistently from practitioners that it would be a mistake to create a new title form, "Community Property with Right of Survivorship." However, the State Bar Executive Committee by a 9-8 vote now favors creation of the new form of title. They had been ~~concerned that a new title form would just create~~ confusion in the minds of the public without changing the habits of title of the majority. Sentiment on the committee has now "shifted in favor of creating the new form of title to at least allow for the possibility of educating the public into accepting the better form of title. It would allow for more meaningful choices to be made by at least some of the public."

At this point many issues have been identified, but none resolved. The staff suggests that the Commission proceed to make policy decisions on the key issues needed to outline the general

approach to dealing with community property in joint tenancy form. With that, the staff will assemble a draft of a tentative recommendation that implements the main decisions and in the process addresses smaller issues that have been identified. This will enable us to have a complete draft for the Commission's September meeting, with the possibility of circulating it for comment and having a final draft ready for introduction in the 1993 legislative session.

STAFF ANALYSIS

Existing Title Presumptions v. New Title Form

Of the commentary we have received so far, there are two basic approaches offered for dealing with the problem of community property in joint tenancy form:

(1) Tackle the problem head on by statutorily prescribing the consequences of holding property in this manner.

(2) Side-step the issue by creating a new title form or approach that may be used by spouses with more clearly-intended results.

The main argument in favor of approach #2 is that it has worked well in other community property jurisdictions. The main argument against it is that, in California, it has the potential of confusing even more an already confused situation.

The staff notes, however, that approach #2 is prospective only--available for titles taken in the new form after the operative date of the new form. It does not address the problem of construing existing titles. Moreover, it does not address the likelihood that in the future, despite the existence of the new title form, people will continue to acquire property with community assets and take title as joint tenants.

So it appears that approach #1 will still be necessary whether or not approach #2 is adopted (unless the Luther Avery approach is followed, which is to do neither). The staff recommends that the Commission proceed to prepare legislation to deal with existing problems of community property in joint tenancy form; if we are satisfied with the treatment we develop, the treatment could be extended to a new title form to the same effect.

Is Community Property in Joint Tenancy Form Basically Community or Basically Joint Tenancy?

It is the general belief of commentators on these issues that persons who put community property in joint tenancy form do not really understand the consequences of doing that. Nor do they clearly intend that the property remain community or that it be converted into separate property ownership (joint tenancy).

Should the property be considered basically community property (with perhaps a right of survivorship attached) or basically joint tenancy property? It is the clear preference of the commentators that community property is generally preferable, and that if persons understood what they were doing they would specify that it remains community. The law has implemented this concept for division of the property at dissolution of marriage (Civil Code § 4800.1), and a common suggestion is that the community presumption for property in joint tenancy form be extended to treatment at death as well.

The staff agrees that the property should remain community for all purposes, with the possible exception of rights at death (discussed below). A transmutation should be required to change the basic nature of the property from community to separate. Existing Civil Code Section 4800.1 requires joint tenancy property to be treated as community at dissolution of marriage unless there is (1) a clear statement in the deed or other documentary title evidence that the property is separate and not community, or (2) a written agreement of the spouses that the property is separate. The transmutation statute (Civil Code § 5110.730) requires a written express declaration to change the character of property, signed by the spouse whose interest is adversely affected. These two statutes are consistent in intent, even though their standards differ somewhat. (Both were the result of Law Revision Commission recommendations.)

It has been suggested by a number of commentators that the transmutation statute should be liberalized to enable an intent to create a true separate property joint tenancy to be shown. The staff disagrees with these suggestions. The strict requirements reduce litigation in this litigation and perjury-prone area, and support the general approach of favoring community property.

The only issue, in the staff's opinion, is the interrelation of the two different standards in Civil Code Sections 5110.730 and 4800.1. This was discussed at some length in a previous memorandum. The transmutation statute (§ 5110.730) would govern a conversion of community property to separate property. The dissolution statute (§ 4800.1) applies to any property in joint tenancy form, whether its source is community or separate. If the transmutation statute is satisfied and community property is in fact converted to a true separate property joint tenancy, does the dissolution statute still operate to presume the property community for dissolution purposes? The staff believes the answer to this question is yes, although the transmutation would undoubtedly satisfy the exemption provision of Section 4800.1 for a written agreement or documentary evidence of separate property intent. The conflict thus appears more apparent than real to the staff, and we would not further disturb this aspect of the law.

Rights at Death

Many of our commentators believe that if the spouses mean anything by putting community property in joint tenancy form, they intend that the property should pass to the surviving spouse at death. The State Bar Committee was not so sure about this, however. The "overwhelming majority of the members of the Executive Committee believe that most married people do not understand the issues at all." With that opinion, the vote was only 5 to 4 in favor of conforming the law to people's purported understanding. (Nine persons abstained on this question "on the grounds that there is no understanding to be conformed to!")

Whether or not people think they are getting a survivorship right by taking title as joint tenants, most commentators to the Commission believe that the form of title should confer such a right. A minority on the State Bar Committee disagrees, and would treat the property as community (i.e., subject to testamentary disposition or, absent a will, passing by intestate succession to the surviving spouse). Under this view, community property in joint tenancy form would remain community property absent an actual transmutation to separate property.

If we assume that people don't have any idea what they're doing when they title property as joint tenancy, then the State Bar minority position makes sense--ignore the form of title and go by the source of funds. Community property in joint tenancy form remains community property for all purposes, unless there is a transmutation that meets the strict transmutation requirements.

Most commentators believe spouses understand that joint property will pass to the survivor without probate, and that the law should recognize this intent. The staff historically has taken this view, but we are not so sure any more, in light of the State Bar comments.

Actually, this may be a case of six of one, half a dozen of the other. Both joint tenancy property and community property may pass to the surviving spouse without probate. The only difference is that the decedent's half interest in community property is subject to a contrary disposition by will; failing that, it passes to the survivor by intestate succession.

The traditional analysis of community property in joint tenancy form is that the property is either community property, with all its attributes, or joint tenancy property, with all its attributes. Proponents of treating community property in joint tenancy form as in effect community property with a right of survivorship, such as the State Bar majority, are in essence advocating a hybrid form of tenure. The State Bar minority, treating the property as either community or separate, is more aligned with traditional analysis.

Severance of Survivorship Right

The critical point concerning the proposal for a hybrid community property with right of survivorship, in the staff's opinion, is the extent to which the property can be willed, notwithstanding the survivorship right. Although joint tenancy property passes to the survivor, this does not occur if the decedent "severs" the joint tenancy and wills a one-half interest. If community property in joint tenancy form ordinarily passes by right of survivorship, can it also be severed and the decedent's interest willed?

The commentators have a variety of views on this issue.

--Professor Kasner suggests severability in the same manner and subject to the same restrictions as true joint tenancy.

--The State Bar Executive Committee would provide that the survivorship right is subject to unilateral termination and the property subject to testamentary disposition thereafter. Some sort of notice would be necessary.

--The Los Angeles County Bar Committee would consider the joint tenancy designation to be a testamentary disposition to the survivor. A spouse could not terminate the joint tenancy or transfer an interest without notice to the other.

--Professor Reppy cautions that making a survivorship right that is severable in the same manner as joint tenancy should be done circumspectly in view of the possibility that the more the property resembles joint tenancy, including joint tenancy terminology, the greater the risk of unfavorable tax treatment by IRS.

--The Beverly Hills Bar Committee would recognize community property in joint tenancy form as property "on which a right of survivorship has been imposed". By implication, the ability unilaterally to sever and will a one-half interest would not be recognized, although the committee's letter does not address this point specifically.

--Wisconsin survivorship marital property may not be severed unilaterally.

The staff believes that, if a survivorship right is imposed on community property in joint tenancy form, it is essential to allow a spouse to terminate the survivorship right and will the spouse's interest in the property. Otherwise, the community property in joint tenancy form would be tied up in a way that neither community property nor joint tenancy property is tied up. By innocently putting a joint tenancy designation on a community asset, married persons would hinder their ability to do further estate planning in the event of changed circumstances.

The staff likewise believes that, if a survivorship right is imposed on community property in joint tenancy form, a will should not be able to act on the decedent's interest in the property unless the survivorship right has been terminated during the testator's lifetime. The same considerations that require severance of a joint tenancy during the life of the joint tenants compel the conclusion that the community property survivorship right must be terminated during the lives of the spouses--considerations of estate planning and avoidance of fraud.

Is There a Role for True Joint Tenancy?

Suppose the spouses actually know what they are doing and for some reason (e.g. avoidance of creditors) wish to have true joint tenancy property. The commentators suggest a variety of ways this could be done:

--Allow a clear statement of separate property character or a written separate property agreement to override the community property presumption and control the joint tenancy classification, as Civil Code Section 4800.1 does now at dissolution. Beverly Hills Bar Committee.

--A deed referring to a "right of survivorship" would create a community property hybrid, but a reference to "joint tenancy" or "joint tenants" would create true separate property joint tenancy. Professor Reppy.

--A written instrument would satisfy the transmutation statute for conversion of community property to separate if signed by both spouses. An alternative is to use the Arizona approach of requiring a person to sign an Acceptance of Joint Tenancy form in order to obtain true joint tenancy. Professor Kasner.

--Require use of the words "with right of survivorship" in the title, since their presence would increase the likelihood of public understanding that joint tenancy involves survivorship. State Bar Committee.

The staff believes that, as a general rule, joint tenancy between married persons is not a desirable form of tenure. It causes estate planning problems and tax problems. It confers no advantage in probate

avoidance, since community property can pass to a surviving spouse without probate. The only benefit we can see is creditor avoidance, and the staff believes this is not sound social policy.

However, the staff also believes that, for populist political reasons, married persons should continue to be allowed to impose true joint tenancy on their property. But this should not be made easy, and the staff would make clear that the existing transmutation statute would govern, requiring an express statement that the property is separate and not community, signed by the spouse giving up community rights in the property.

Should Proposed Legislation Deal With Community Property in Tenancy in Common Form, or with Quasi-Community Property in Joint Tenancy Form?

The general commentary we have received on these issues is negative, and the staff agrees. These issues are not of the same magnitude as the community property/joint tenancy problem, and the matter is complex enough without further complicating it with these side issues. When we have developed our basic rules we can check to see whether it would make any sense to extend them to these other areas.

Retroactivity Issues

One concern has always been, when the Commission has considered these matters in times gone by, how to make any changes in law apply retroactively to property acquired before the operative date of the changes. The commentators offer a number of suggestions concerning transitional provisions that could be instituted, many of them keying off the fact that the transmutation statute already applies to transactions occurring during 1985 and later.

Rather than get into the details of retroactivity at this point, the staff would wait until we have the policies settled. We would then prepare alternative approaches that could include full retroactivity, prospective application only, or a transitional period, depending on the particular policy adopted.

CONCLUSION

In the past the staff has been a proponent of treating community property in joint tenancy form as a hybrid with community property attributes but passing by right of survivorship at death. This is also Professor Kasner's recommendation to the Commission and the position of most of the commentators on the policy memorandum.

Nonetheless, after reweighing all the comments and issues, the staff now finds the State Bar minority position more compelling. Under this approach, community property in joint tenancy form remains community property for all purposes, including testamentary disposition at death, unless there has been an actual transmutation of community property to separate property that satisfies the transmutation statute--a written express declaration made, joined in, consented to, or accepted by the spouse whose interest is adversely affected.

Arguments supporting this treatment are:

(1) Comments on the policy memorandum indicate that married persons ordinarily do not understand what they are doing when they take property as joint tenants, including the fact that they are giving up testamentary rights. Our earlier support for right of survivorship treatment was based on the assumption that married persons know and understand the consequences of this aspect of joint tenancy.

(2) Community property treatment is generally preferable for married persons.

(3) Rights of survivorship should be disfavored because of their socially undesirable impact on rights of creditors.

(4) The problems of adverse IRS treatment of survivorship rights are avoided.

(5) It is a cleaner solution than the right of survivorship, which requires detailed legislation to clarify severance rights.

(6) This approach is most consistent with existing law, and will require minimal legislation, mainly for clarification purposes.

This is not to say that the staff would oppose community property with right of survivorship. This is also a satisfactory solution to the problem of community property in joint tenancy form. It is just

that the approach of treating the property as community absent a transmutation now appears to the staff to deal with all the same problems in a simpler more direct way.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

STATE OF CALIFORNIA
PETE WILSON, Governor

CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
(415) 494-1335

#F-521.1/L-521.1 March 26, 1992

To: Interested Persons
From: Nathaniel Sterling, Executive Secretary
Re: COMMUNITY PROPERTY IN JOINT TENANCY FORM

The California Law Revision Commission has under study the matter of property acquired with community funds in joint tenancy form. The Commission has considered a background report prepared for it by Professor Jerry Kasner of the University of Santa Clara Law School and has reviewed comments received on issues identified in the background report. The Commission now solicits further input from interested persons. Comments on the issues raised in this memorandum should be sent to the Commission not later than MAY 1, 1992.

When property is acquired in joint tenancy form with community property funds, the primary issue is whether the property remains community, consistent with the source of the funds, or becomes joint tenancy, consistent with the form of title. Historically, courts have found the source of the funds determinative, absent a clear showing of contrary intent; in recent years courts have given the form of title greater significance, despite a showing of contrary intent.

The situation is complicated by the adoption effective January 1, 1985, of a strict statutory rule governing transmutations of community and separate property between spouses. Civil Code § 5110.730. The statute's requirement of an express declaration in writing to change the status of property may affect both the creation of joint tenancy titles and the rule followed by the courts for several years that an oral agreement or understanding between the spouses may be used to show that joint tenancy property retains its community status.

ISSUE 1. SHOULD THE LAW FAVOR COMMUNITY PROPERTY OR JOINT TENANCY.

Is the source of funds approach or the title approach preferable? Does it make a difference what the legal issue is--e.g., rights of creditors, division of the property at dissolution, rights at death of a spouse (including income tax treatment)?

ISSUE 2. APPLICATION OF TRANSMUTATION STATUTE.

Does, or should, the transmutation statute apply to determine whether community property has been converted to joint tenancy? Is, or should, the mere recitation of joint tenancy title in a deed satisfy the statute's requirement of an "express declaration"? What more is, or should be, required--an escrow instruction signed by the parties requesting joint tenancy title form? a recitation in the deed that the property is held as joint tenancy "and not as community property"? Should statute of frauds exceptions such as part performance be applied to the transmutation statute? Should the transmutation statute be liberalized? Should it be revised to provide that a transmutation occurs if a written declaration of title is joined in, consented to, or accepted by both spouses?

ISSUE 3. APPLICATION OF COMMUNITY PROPERTY PRESUMPTION AT DISSOLUTION.

Does, or should, the community property presumption at dissolution of marriage (Civil Code § 4800.1) override the transmutation statute? Does, or should, the community property presumption for multiple-party accounts in financial institutions (Probate Code § 5305) override the transmutation statute? Is it possible to reconcile the treatment of joint tenancy property as community property for marital dissolution purposes, but as separate property for all other purposes?

ISSUE 4. WHAT DO MARRIED PERSONS REALLY UNDERSTAND AND WANT.

What do people understand they are getting when they put community property in joint tenancy form--independent management and control? protection from creditors? ability to partition? right of survivorship at death? Should the law conform to people's understanding of what they accomplish by taking title in joint tenancy?

ISSUE 5. COMMUNITY PROPERTY WITH RIGHT OF SURVIVORSHIP.

Some commentators believe that by putting community property in joint tenancy form married persons generally want the property to retain all its community attributes except that it should pass by right of survivorship at death. Since most community property states now recognize a right of survivorship can exist in community property, are there good reasons to preserve the contrary California rule, particularly in view of the potential adverse federal income tax consequences? If the law is to honor the expectations of the parties, how best can this be achieved?

(a) Many community property states have a hybrid form of tenure--community property with right of survivorship. If California were to authorize this, the public would need to learn to deal with another title form--a sobering prospect given the problems with existing title forms.

(b) Community property held in joint tenancy form could be recognized by the law as community property on which a right of survivorship has been imposed. There would need to be a means by which the survivorship right is unilaterally severable to enable testamentary disposition (as with joint tenancy property). The Law Revision Commission has tentatively recommended this in the past but has not previously sponsored legislation because of retroactivity concerns.

(c) The law might presume that spousal joint tenancies are community property, absent an express agreement otherwise. This would broaden the community property presumption applicable at marriage dissolution. There would also be retroactivity issues for this approach.

(d) Spousal joint tenancy could be treated as community property for all purposes, including disposition at death. The joint tenancy designation would be treated either as a testamentary or a nontestamentary disposition to the surviving spouse. The law would need to make clear that a different testamentary or nontestamentary disposition could be made. Retroactivity issues would be a concern.

ISSUE 6. SEPARATE PROPERTY (INCLUDING QUASI-COMMUNITY PROPERTY).

Should any legislation on community property in joint tenancy form also deal with separate property (including quasi-community property) in joint tenancy form? E.g., is a gift intended? do rights at dissolution vary from rights at death?

ISSUE 7. TENANCY IN COMMON.

Should any legislation on community property in joint tenancy form also deal with community property in tenancy in common form? How often does this form of tenure occur? Are the two types of tenure sufficiently inconsistent that legislative clarification would be beneficial?

ISSUE 8. LEGISLATIVE CLARIFICATION.

Is legislative clarification of any or all of the issues raised in this memorandum desirable or undesirable?

SANTA CLARA UNIVERSITY

SCHOOL OF LAW

(408) 554-4115

April 6, 1992

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

Dear Nat:

Enclosed is a copy of a letter I received from Kenneth G. Petrulis of Los Angeles relative to the Arizona joint tenancy deed. My Research Assistant has confirmed through recent Arizona cases that the standard joint tenancy deed form in Arizona contains the phrase "and not as a community property estate and not as tenants in common." Whitmore V. Mitchell, 733 P2d 310 (1987); Estate of Calligaro V. Owen, 768 P2d 660 (1988); Valladee v. Valladee, 718 P2d 206 (1986). In the Valladee opinion, the court refers to this as "The Usual 'Boilerplate' language, universally employed in Arizona joint tenancy deeds...."

I find the "Acceptance of Joint Tenancy" form particularly interesting. It would appear to constitute the express written declaration required under the transmutation statute. It would enable practitioner and clients who want the advantages of a "true" joint tenancy, such as possible creditor, to obtain it.

If the rules of either Civil Code Section 4800.1 and 4800.2 or Probate Code section 5305 were made applicable to all joint tenancies, with a provision for survivorship (and unilateral severence of the right of survivorship under civil code section 683.2), the addition of the "Acceptance of Joint Tenancy" form should satisfy most advocates of the "true" joint tenancy.

Sincerely,

Jerry A. Kasner
Professor of Law

SANTA CLARA, CALIFORNIA 95053

PETRULIS & LICH
ATTORNEYS AT LAW
SUITE 2490
11601 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90025-1760
TELEPHONE (310) 575-3030
TELECOPIER (310) 575-3033

DAVID E. LICH
KENNETH G. PETRULIS

March 27, 1992

Prof. Jerry A. Kasner
Professor of Law
University of Santa Clara
Bergin Hall
Santa Clara, CA 95053

Dear Prof. Kasner:

Enclosed is a copy of the Joint Tenancy Deed form that I referred to at your lecture the other week. I was given it by a member of my study group who mentioned that it had a check off as to community property and separate property. I thought the same from my brief review of the deed.

Since the date of your lecture I look more closely at the deed form and found that it is not a check-off but rather a confirmation that the property is separate property, not community property. I have since contacted practitioners in Arizona and confirmed that they have no check-off type of deed that would allow joint tenancy property to be designated as community property on the deed itself.

The Legislative Committee of the Beverly Hills Bar Probate Section of which I am a member, has recommended to the Law Revision Commission that there be a presumption that joint tenancy property acquired during marriage be presumed to be community property. There is also a feeling that this check-off type of procedure on the joint tenancy deed indicating either separate or community property would be an ideal way to clarify the situation.

As you note in your outline, the court in Lucas does pay lip service to California cases holding that joint tenancy title can be overcome by an agreement between the spouses and that form of title is not reflective of the true status of the property. Perhaps codifying this principle might be the answer:

> "Property acquired by spouses during marriage in joint form, including property held in tenancy-in-common, joint tenancy, tenancy by the entirety, or as community property is presumed to be community property. This presumption is a presumption affecting the burden or proof and may be rebutted by either of the following:

1. A clear statement in the deed or other document evidence of title by which property is acquired, that the property is separate property and not community property."

2. Proof that the parties have made a written agreement that the property is separate property."

Community property held in joint tenancy form shall pass to the surviving spouse, joint tenant, by the filing of an Affidavit Death of Joint Tenant."

This approach would also tie in well with the transmutation statute 5110.730 of the Civil Code and the McDonald case, each of which would require an express declaration, to transmute community property into separate property. Both the Code and McDonald would seem to suggest that neither the joint tenancy deed, nor the Affidavit Death of Joint Tenant would be sufficient to transmute true community property into separate property. It could be argued that at the present time, even if an Affidavit Death of Joint Tenant is filed, because it does not meet the requirements of explicitness as set forth in 5110.730 and McDonald, that the community property retains its community property form even though title has passed to the surviving joint tenant spouse. Joint tenancy, after all, is only a form of title which creates a presumption.

My apologies for my leap of faith concerning Arizona law. If our Legislative Committee can be of any help to you please let me know.

Yours very truly,

KENNETH G. PETRULIS

KGP/rg
enclosure

Acceptance of Joint Tenancy

State of)
) ss.
County of)

_____ and _____

each being duly sworn upon oath for himself or herself and jointly but not one for the other deposes and says:

THAT I am one of the Grantees, Mortgagees, or Beneficiaries named in that certain

_____ which is dated _____ ,and
Type of Instrument

executed by _____

as Grantor, Mortgagor or Trustor and _____

_____as Grantee, Mortgagee or Beneficiary and which instrument concerns the following described property:

THAT the interests of the undersigned are being taken by them as Joint Tenants with right of survivorship.

THAT each of us individually and jointly hereby assert and affirm that it is our intention to accept said instrument as such Joint Tenants and to acquire any interest in, or any proceeds arising out of said property, not as tenants in common and not as community property but as Joint Tenants with right of survivorship.

_____

_____

Subscribed and sworn to before me this____ ____day of _____, 19 _____ , by

My commission expires:

_____
Notary Public

CHICAGO TITLE INSURANCE COMPANY

When recorded, mail to:

OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL

Recording Number

of

ESCROW NO.

Joint Tenancy Deed

For the consideration of Ten Dollars, and other valuable considerations, I or we,

do hereby convey to

as joint tenants with right of survivorship and not as a community property estate and not as tenants in common, the following-described property located in the County of , State of Arizona:

Subject to current taxes and other assessments, reservations in patents and all easements, rights-of-way, encumbrances, liens, covenants, conditions, restrictions, obligations and liabilities as may appear of record, the Grantor warrants the title against all persons whomsoever.

The undersigned Grantees accept delivery of this deed as joint tenants with right of survivorship and not as a community property estate and not as tenants in common.

Dated: _____.

Accepted and approved:

SEE ACCEPTANCE OF JOINT TENANCY

Grantee

Grantor

ATTAHCED HERETO AND MADE A PART HEREOF

Grantee

Grantor

STATE OF _____ }
County of _____ } ss.
Acknowledgement of _____

Date of Acknowledgement: _____

This instrument was acknowledged before me this date by the persons above-subscribed and if subscribed in a representative capacity then for the principal named and in the capacity indicated.

9

Notary Public

My commission expires:

BANCROFT
AVERY
&
MCALISTER

Memo 92-34

EXHIBIT 3

Study F-521.1/L-521.1
Law Revision Commission
RECEIVED
APR 08 1992
File:
Key:
OUR FILE NUMBER

Attorneys at Law

601 Montgomery Street
Suite 900
San Francisco, CA 94111
415/788-8855
Fax: 415/397-1925

Walnut Creek Office:
1350 Carlback Avenue
Suite 330
Walnut Creek, CA 94596
510/256-8200
Fax: 510/945-8932

LUTHER J. AVERY

April 6, 1992

9911.81-35

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

COMMUNITY PROPERTY IN JOINT TENANCY FORM

Gentlemen:

This responds to your March 26 solicitation of comments.

Civil Code Section 5110.730 plus Estate of McDonald, 51 Cal. 3d 262 (1990), plus Civil Code sections 5125-5128 seem to me to virtually eliminate the ability of husband and wife to deal with real estate without each having the advice of independent counsel. Moreover, when coupled with Civil Code sections 4800, 5102-5103 and 5110, it is difficult to see whether it matters if something is called joint tenancy property since it will end up being a matter of negotiation between husband and wife if either tries to sever the joint tenancy and both can claim joint tenancy property was intended to be community and at the death or dissolution of marriage the result will be treated as if it were community property.

In response to your issues, my reaction is as follows:

Issue 1: The law should not "favor" community versus separate property (joint tenancy). The law should favor justice and ease of understanding and ease of compliance. Neither the source of funds nor the title approach is preferable. However, from the standpoint of justice, the source of funds is probably closer to what the parties would desire. From the standpoint of understanding and ease of compliance, I believe the title approach is preferable. Certainly from the standpoint of creditors the title approach is preferable. From the standpoint of division of property on distribution or rights at death of a spouse (including income tax treatment), it should not matter which approach is taken under the present law regarding rights of the parties. There is an income tax problem if the property has

appreciated and is truly joint tenancy property. But the only resolution to the income tax problem is to change the tax laws.

Issue 2: Application of the transmutation statute should require both parties have independent advice in writing concerning the consequences. Thereafter, any writing sufficient to memorialize the intent of both parties and be recorded should be sufficient.

Issue 3: No, the presumption is Civil Code sections 4800.1 should not prevail over a transmutation. It is necessary for the parties to have certainty in their property dealings.

Yes, it is possible to reconcile the treatment of joint tenancy property as community property for marital dissolution with the concept that joint tenancy is separate property ownership. However, the question simply restates the Issue 1. Either the joint tenancy property is community property or it is not. The joint tenancy property cannot simultaneously be separate and community. The treatment of the property at distribution can be directed by statute or determined by the parties or the court.

Issue 4: In my opinion, it is the rare married persons who are capable of understanding and explaining the difference between community property and joint tenancy owned by married persons. Even married lawyers do not understand unless both married persons are lawyers conversant with family law. Even they probably do not know the creditor rights rules. The law should not attempt to conform to people's understanding; the law should encourage people to have an understanding if one is needed.

Issue 5: Most people put community property in joint tenancy form out of ignorance and at the institution of some misguided stock broker or real estate broker or agent. It seems to me your question assumes you know what is "the expectations of the parties." I do not have statistics, but in my experience as many newly married persons include one with property and one without as two persons with no property.

Consider, for example, the not uncommon situation where one spouse with property buys a residence for the married couple or pays a substantial down payment and puts the property in joint tenancy. The intention is, in my opinion, if we divorce it is my property, if I die it is your property. There is no consideration that some of it may be community property.

I do not support option (a) community with right of survivorship for a variety of reasons. Option (b) is almost as bad. Option (c) is probably where the law is today as a practical matter for spousal joint tenancies. Option (d) would be a source of confusion unless the rules were limited to the residence held in spousal joint tenancy and then there would be problems of defining the residence.

In view of AB1719, in my opinion, the law today should not be further altered or amended. That eliminates any new retroactivity problems. Let the law alone for a few years and the parties will solve the problems.

Issue 6: I would recommend not doing anything relating to quasi community property held in joint tenancy, particularly if AB1719 is enacted.

Issue 7: No. There should be no new legislation dealing with joint tenancy or tenancy in common property that is community property. Legislative clarification will simply result in more uncertainty and litigation. There is already ample legislation that is causing the existing issues discussed.

Issue 8: In my opinion, "legislative clarification" of the issues raised in the memorandum is undesirable.

Yours sincerely,

Luther J. Avery

LJA cet

EXHIBIT 4

PETRULIS & LICH
ATTORNEYS AT LAW
SUITE 2490
11601 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90025-1760
TELEPHONE (310) 575-3030
TELECOPIER (310) 575-3033

DAVID E. LICH
KENNETH G. PETRULIS

April 15, 1992

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

Re: Community Property in Joint Tenancy Form

Dear Mr. Sterling:

I am writing on behalf of the Legislative Committee of the Probate, Trust & Estate Planning section of the Beverly Hills Bar Association. We have followed the Law Revision Commission's development of the issues and possible solutions to the difficulties created by community property held in joint tenancy form. As practitioners, we find that almost without exception, clients approaching us with joint tenancy property are under the impression that because it was acquired with community property funds that it indeed remains community property.

While we know that as a legal matter, the joint tenancy form creates a presumption under the Evidence Code that the property is separate property; it is only a presumption. The true nature of the property may still be either separate or community. The real question comes at death. Can the property be transferred to the surviving joint tenant consistent with its community property nature?

Civil Code § 683 defines "joint interest" property as property which, among other things, has title expressly declared to be a joint tenancy. In the following discussion we accept the code's distinction between "joint interest" and title in joint tenancy form. The term "joint tenancy" is used when referring to title and is not necessarily equivalent to joint interest, as defined under Civil Code § 683. The joint tenancy form does not necessarily determine the underlying nature of the property, which in a true joint interest would be in equal shares the separate property of each of the joint tenants.

Generally, the effect of joint tenancy is to remove the property from the decedent's estate immediately upon death. For example, a

single mother places her separate property home in joint tenancy with her daughter, not intending to give the daughter ownership rights during her lifetime, but rather to transfer the home to the daughter at her death. The transfer, to the daughter at the mother's death, is effective and may not be set aside by the estate. This is true, even though the underlying nature of the property was one hundred percent the separate property of the mother and not a true joint interest. (Under Civil Code Section 683 property is not a joint interest unless it is owned by two or more persons in equal shares).

Likewise, when community property is held in joint tenancy form, it will pass to the surviving spouse and will not form part of the probate estate unless the surviving spouse elects otherwise. The primary reason for electing to probate the property or pass it through a spousal property petition is the general feeling in the legal community that this will enhance the chances of having the property treated as community property for federal tax purposes.

We agree with the Law Revision Commission that a new form of title such as "community property with right of survivorship" is an unsatisfactory solution to the problem. The new form of title would create confusion for everyone and would create a new area of law without legal precedent.

Our recommendation to the Law Revision Commission involves the least change possible to existing law while giving as much consideration as possible to the expectations of people holding joint tenancy property today.

We recommend you propose changes which would:

1. Recognize that community property may be held in joint tenancy form;

2. Adopt the presumption that property held by a husband and wife in joint tenancy form and acquired during marriage be presumed to be community property at the time of death, similar to Civil Code Section 4800.1; and,

3. Recognize community property held in joint tenancy form as community property on which a right of survivorship has been imposed.

While there may be some retroactivity concerns about this approach, we feel they are minimal. Prior to January 1, 1985, when Civil Code Section 5110.730 became effective, spouses could have oral agreements transmuting property. In most instances this would allow the true nature of any joint tenancy property to be proven. It is therefore only the period January 1, 1985 to the present which may cause some concern for retroactivity.

With respect to this window we suggest that, having due regard for the new presumption that joint tenancy property acquired during marriage by a husband and wife is in fact community property, the law allow proof of oral agreements transmuting community property held in joint tenancy form to separate property during the period January 1, 1985 to the effective date of the new law.

The new law might parallel in form Civil Code Section 4800.1 which already creates the presumption that, at the time of dissolution, that joint tenancy property acquired during marriage is in fact community property. For example:

> "Property acquired by spouses during marriage in joint form, including property held in tenancy-in-common, joint tenancy, tenancy by the entirety, or as community property is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:
>
> "1. A clear statement in the deed or other document evidencing title by which property is acquired, that the property is separate property and not community property.
>
> "2. Proof that the parties have made a written agreement that the property is separate property.
>
> "Community property held in joint tenancy form may pass to the surviving spouse, joint tenant, by the filing of an Affidavit Death of Joint Tenant."

This approach would also tie in well with the transmutation statute 5110.730 of the Civil Code and the MacDonald case, previously cited by the Law Revision Commission. Both the statute and the MacDonald case require an express declaration to transmute community property into separate property. Under this interpretation of the Code and Macdonald, neither the joint tenancy deed nor the Affidavit Death of Joint Tenant are sufficient to transmute true community property into separate property. It could be argued that at the present time, even if an Affidavit Death of Joint Tenant is filed, because it does not meet the requirements of explicitness as set forth in 5110.730 and MacDonald, that the community property retains its community property form even though title has passed to the

surviving joint tenant spouse. Joint tenancy, after all, is only a form of title which creates a presumption.

Yours very truly,

KENNETH G. PETRULIS

KGP/rg

cc: Jeffrey Altman
Joni Ackerman

EXHIBIT 5

Duke University
School of Law
Durham, North Carolina
27706

William A. Reppy, Jr.
Professor of Law

Telephone (919) 684-3804
Facsimile (919) 684-3417
Telex 80282

April 24, 1992

Nathaniel Sterling, Esq.
California Law Revision Commission
4000 Middlefield Rd, #D-2
Palo Alto, CA 94303-4739

Re: Request for Comments on Issue of
COMMUNITY PROPERTY IN JOINT TENANCY FORM

Dear Nat:

I do not think "community property with right of survivorship" is a "new" form of title. Although a statute must be passed to assure that the courts will understand how to deal with such a form of co-ownership, it can be achieved today for all practical purposes: on a regular community property deed the spouses could sign a contract in which each agrees to devise his or her property to the other, such contract to be rescindable by one spouse giving written notice to the other of rescission. The contract could further provide that the survivor agrees to reduce probate costs by using the community property set aside laws to effectuate his or her acquisition of a half interest on death of the survivor. (The latter is just a bit more complex than setting up a good record chain of title based on survivorship under a joint tenancy).

One difference that may exist between the above use of current law and use by Nevada spouses of that state's statutory community property with right of survivorship is that the half interest is within decedent's estate for purposes of payment of debts. It is not clear to me in Nevada whether the decedent's one half passes to the survivor free of liability for separate debts of the decedent (and community debts to the extent he or she was liable). I have assumed in California joint tenancy property passing outside the will can be reached for a number of debts such as "necessaries" obligations. The extent to which a survivorship on true joint tenancy property defeats creditors is not an issue I am an expert on. I do know under the theory of *Zeigler v. Bonnell*, 52 Cal. App. 2d 217, the decedent's creditor often can get nothing from the half interest passing by survivorship. (That has always struck me as not socially desirable and a rule based on feudal mysticism of the four unities of joint tenancy law).

I suggest the Commission, if it drafts a provision enabling spouses to employ a deed whereby they take land as community but include a probate avoidance device that the latter not be called "right of survivorship." That phrase just rings bells in the heads of the IRS folks that we don't want them to hear -- the term is firmly rooted in joint tenancy law and causes the IRS to instinctively feel the survivor should not get a stepped basis in his or her half, the astonishing tax loophole that remains for community property states.

As you know I further believe Civil Code § 5110.730 should be amended so that the specificity required of an inter-spousal transfer of property is no more than that required by the "regular" statute of frauds applied to nonspousal transfers of land. If a statute is to be enacted allowing a form of deed of community property whereby the surviving spouse obtains full title without probate proceedings, the statute should make clear

whether true common law joint tenancy remains an option for the spouses. General notions of freedom of contract suggests it should be. After all, they can become tenants in common and thereby limit the creditors' of each to one half of the property. True joint tenancy just presents a different way to do the same thing.

If the new statute is passed recognizing community property with a built-in at-death transfer, I think the statute should provide that a deed referring to "right of survivorship" creates this kind of interest but a deed including the words "in joint tenancy" or "as joint tenants" creates "true" separate-property joint tenancy. These rules should be written into the revised § 5110.730.

My San Diego Law Review article (basically an expanded report I did for the Law Revision Commission) contains cites to IRS rulings that accept the Washington "community property agreement" as not destroying the community nature of the property on to which a contract to will is affixed. Research needs to be done as to whether the IRS in Washington (and Idaho which has the same device) is backing away from the rulings that give the stepped up basis. There is a difference in the Washington law from what I propose for California: the passage of title at death there via the "contract" does not have the severability feature suggested for California. That is, both spouses must act to amend or rescind the contract-to-will portion of the community property agreement. The proposed California package with a unilateral right to rescind (giving notice) looks a lot like common law severability of joint tenancy. Thus if we discover the IRS in Washington and Idaho is freely granting stepped-up basis to the survivor under the passage of title there by a real contract (taking both parties to rescind), we cannot be 100% sure the IRS would have the same approach in California. We need to find out what the IRS is doing in Nevada under its statute actually referring to the passage of a half interest in the community property at death to the surviving spouse as taking effect through "right of survivorship" (the term I would eschew in California legislation except for dealing with what happens when these words appear in a deed without any mention of "joint tenancy.")

Regarding your inquiry about quasi-community property in joint tenancy form, under present law it seems § 4800.2 means there is a gift of the appreciation occurring after the transmutation (which cannot be done under *MacDonald* simply through a normal deed but requires adding much text about what the donor-grantor knows and intends to do) but not a gift of the value of a half interest at the time the deed takes effect (because of the right retained to get reimbursement in this amount unless there is an express waiver of that right). Federal tax law will not allow a stepped up basis in the case of community property that used to be spouse's sole and separate property, so tax considerations seem to me (without further study) to be insignificant. I have always thought § 4800.2 was intent defeating and that in fact a gift is intended most of the time when a person takes his separate property and signs a deed putting it in the name of himself and his spouse. I suspect an attempt to repeal section 4800.2 tacked on to the legislative package we are discussing might doom the whole thing in the legislature, however.

This has been dashed off rather quickly as I am in the middle of lots of law school work: grading papers, writing exams, handling the admissions process (as this year's faculty chairman of the Admissions Committee). I hope it makes sense.

Sincerely,

Bill

William A. Reppy, Jr.
Professor of Law

WAR:jma

EXHIBIT 6

Duke University
School of Law
Durham, North Carolina
27706

Study F-521.1/L-521.1
Law Revision Commission
RECEIVED
JUN 0 8 1992
File:
Key:

William A. Reppy, Jr.
Professor of Law

Telephone (919) 684-3804
Facsimile (919) 684-3417
Telex 80282

June 3, 1992

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

RE: Community Property in Joint Tenancy Form

Dear Nat:

We recently exchanged correspondence in which you advised me that the I.R.S. was now reportedly taking the position in disputes with California practitioners that where a right of survivorship is affixed to community property and one spouse dies, the survivor does not get a stepped up basis in her half interest under I.R.C. § 1014(b)(6). Apparently I.R.S. in California was asserting the property was for tax purposes joint tenancy and not community property.

As you know, Texas has statutory community property with right of survivorship. A friend of mine recently wrote me that she had been assured by a Texas law professor that this hybrid qualified under § 1014(b)(6) for a survivor's stepped up basis due to Rev. Rul. 87-998, 1987-2 C.B. 207. You've probably read it but I somehow had missed it. The state referred to is obviously California under pre-*MacDonald* transmutation law. I think the Texas law professor is correct that the Revenue Ruling strongly suggests a right of survivorship can be annexed by the legislature (as well as the parties) on to community property and if the legislation says the property is still community for purposes of creditors' rights and management and control during marriage, the crazy loophole of § 1014(b)(6) is available for it.

Sincerely,

Bill

William A. Reppy, Jr.
Professor of Law

WAR:jma

Enclosure

was community property under state law.

Rev. Rul. 87-98

ISSUE

If property is held in a common law estate but, for state law purposes, the property is characterized as community property, then is that property community property for purposes of section 1014(b)(6) of the Internal Revenue Code?

FACTS

D and *D*'s spouse *S*, residents of community property state *X*, purchased real property in *X* with community funds and took title as joint tenants with rights of survivorship. However, *D* and *S* later executed joint wills in which they declared the property to be a community asset.

Although *X* is a community property state, under the laws of *X*, spouses may hold property in joint tenancy or other common law estate. Because the laws of *X* do not make specific provision for the coexistence of a common law estate and a community property interest, taking title in a common law estate raises the presumption that the spouses intended to terminate the community interest, effectively transmuting the property's character from community to separate. This presumption is overcome by evidence that the spouses intended for the property not to be transmuted to separate property, in such a case, the community nature of the property is preserved. Under the law of *X*, an express statement of such intent in joint wills precludes transmutation by reason of taking title in joint tenancy.

D died in 1985. At the time of *D*'s death, the fair market value of the property was 100*x* dollars. The value of *D*'s one-half interest in the property was included in *D*'s estate for federal estate tax purposes.

LAW AND ANALYSIS

Section 1012 of the Code provides that the basis of property shall be the cost of such property.

Section 1014(a) of the Code provides that the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall be the fair market value of the property at the decedent's death.

Section 1014(b)(6) of the Code provides that the surviving spouse's one-half share of community property held by the decedent and the surviving spouse under the community property laws of any state shall be considered to have been acquired from the decedent if at least one-half of the whole of the community interest in the property was includible in determining the value of the decedent's gross estate for federal estate tax purposes.

Rev. Rul. 68-80, 1968-1 C.B. 348, concerns property that was obtained by a husband and wife as tenants in common. Even though acquired in exchange for community assets, it constituted separate property under state law. The ruling holds that the property was not community property for purposes of section 1014 (b)(6). Accordingly, the surviving spouse's interest did not take a fair market value basis on the death of the first spouse. However, the controlling factor was the state law determination that the property did not constitute community property. *See Morgan v. Commissioner*, 309 U.S. 78 (1940) (local law creates legal rights and interests; federal law determines the federal tax treatment thereof).

In the present situation, under the laws of *X*, the property remained community property. Even though the property was held in joint tenancy, a common law estate, the clear intention of *D* and *S*, as expressed in their joint wills, prevented its transmutation to separate property. Because it is community property under state law, it is also community property within the meaning of section 1014(b)(6). Therefore, *S*'s interest in one-half of the property receives a fair market value basis under section 1014(a). The interest in the one-half of the property that was considered to have padded from *D* and that was included in *D*'s estate also receives a fair market value basis pursuant to the provisions of section 1014(a). Accordingly, after *D*'s death, *S* owns the entire property with a basis of 100*x* dollars.

HOLDING

If property held in a common la estate is community property und state law, it is community propert for purposes of section 1014(b)(6) c the Code, regardless of the form i which title was taken.

Section 1016.—Adjustments to Basis

26 CFR 1.1016-3: Exhaustion, wear and tear obsolescene, amortization, and depletion fo periods since February 28, 1913.

Reduction of basis under optional standar mileage rate method for computing deductibl expenses for business use of an automobile. Se Rev. Proc. 87-49, page 646.

---

26 CFR 1.1016-5: Loans from Commodit Credit Corporation.

What is the proper adjustment to basis ir the case of property pledged to the Commod ity Credit Corporation as collateral for a loan and included by the taxpayer in income pursuant to section 77. See Rev. Rul. 87-103, page 41.

Part III.—Common Nontaxable Exchanges

Section 1041.—Transfers Of Property Between Spouses Or Incident To Divorce

26 CFR 1.1041-1T: Treatment of transfer of property between spouses or incident to divorce.
(Also Sections 61, 454; 1.61-7, 1.454-1)

Transfer of property between spouses or incident to divorce. The deferred, accrued interest on U.S. savings bonds is includible in the transferor's gross income in the taxable year in which the transferor transfers the bonds to the transferor's spouse or former spouse in a transfer described in section 1041(a) of the Code. The transferee's basis in the bonds immediately after the transfer is equal to the transferor's basis in the bonds increased by the interest income includible by the transferor as a result of the transfer of the bonds.

Rev. Rul. 87-112

ISSUES

(1) If a taxpayer transfers United States savings bonds to the taxpayer's spouse or former spouse in a transfer described in section 1041(a) of the Internal Revenue Code, must the

JUNE MILLER WEISBERGER
PROFESSOR OF LAW
UNIVERSITY OF WISCONSIN LAW SCHOOL
MADISON, WISCONSIN 53706
(608) 263-7407

RESIDENCE: 2021 VAN HISE AVENUE
MADISON, WISCONSIN 53705
(608) 238-7337

May 1, 1992

Memo to: California Law Revision Commission

From: June Weisberger

Re: Community Property in Joint Tenancy Form

The following are comments on the above topic based upon the law and experiences in Wisconsin since Wisconsin became the ninth community property state on January 1, 1986:

1) Wisconsin's special form of community property, survivorship marital property, has been part of Wisconsin's law since the adoption of its community property system (based upon the Uniform Marital Property Act). IRS has recognized survivorship marital property as a form of communityproperty for tax purposes and this treatment by IRS has raised none of the problems which may be anticipated for some version of "community property in joint tenancy form." Thus Wisconsin married couples have an option to retain the advantageous tax treatment of community property and the convenience of nonprobate survivorship by classifying an asset as survivorship marital property.

2) A married couple may title an asset as survivorship marital property pursuant to Wis. Stat. s. 766.60. If they attempt to acquire an asset post-determination date (see s. 766.01(5)) as joint tenancy property, a special classification rule states that the asset is survivorship marital property. This simplification as well as the availability of survivorship marital property by titling are important parts of Wisconsin's marital/community property regime and should be seriously considered in California.

3) Survivorship marital property differs from joint tenancy during the life of the parties as to management and control. While a joint tenancy may be severed unilaterally by a joint tenant, such is not the case for survivorship marital property. If the asset is titled as H and W, as survivorship marital property, then both spouses must join together for management and control. If, on the other hand, the asset is titled as H or W, as survivorship marital property, then either spouse may manage and control (in good faith) the entire asset (subject to the special gifting rules of s. 766.53). Where there is "or" titling, a spouse may manage and control a portion but the remaining portion is still survivorship marital property. (These management and control rules are contained in s. 766.60.)

4) For the couple's homestead, Wisconsin has a special joinder rule for spouses, regardless of the form of ownership, for selling, gifting or mortgaging of this special asset. This joinder rule was part of Wisconsin's law (s. 706.02(1)(f) before 1986 and continues to be in effect thereafter.

5) As for tenancy in common, if a couple attempts to acquire an asset as tenancy in common after their determination date, a special classification rule states that the asset is marital property. (This is a companion rule to the joint tnenacy-survivorship marital property rule summarized above in #2. Both rules may be found in s. 766.60(4)(b).)

6) Finally, in an attempt to clarify the result when a married couple pre-determination date acquired a joint tenancy and continue post-determination date to pay the mortgage principal with marital/community property dollars (or make capital improvements post determination date with marital property dollars), there is a special rule that states, to the extent there is a conflict between the incidents of joint tenancy, including its survivorship attribute, and the incidents of marital property, the incidents of joint tenancy prevail. Section 766.60(4)(a) was added to address legislative concern that a joint tenancy asset owned by a Wisconsin married couple prior to 1986 might have a probate component when marital property was used post 1985 to make mortgage payments.

Based upon Wisconsin's six years of experience living with its version of the Uniform Marital Property Act, I urge that serious consideration be given to the working concepts incorporated into Wisconsin's Marital Property Act establishing survivorship marital (community) property. (For further analysis of Wisconsin's survivorship marital property, see Marital Property Law in Wisconsin, a publication (3 volumes) of the State Bar of Wisconsin.)

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102
(415) 561-8289

June 4, 1992

REPLY TO:
Valerie J. Merritt
Calleton & Merritt
500 N. Brand Blvd.
Suite 975
Glendale, CA 91203
(818) 545-7595

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

Re: Community Property in Joint Tenancy Form

Dear Commissioners:

The Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California discussed issues of community property in joint tenancy form at its meetings on February 29, 1992, April 26, 1992, and May 30, 1992. The discussion at the last of these meetings was almost three hours long. During those meetings, a consensus is emerging about our recommendations for the treatment of community property in joint tenancy form. This letter is an attempt to articulate that emerging consensus, articulate the minority positions, and define the issues decided by the Executive Committee to date.

In the course of discussing the various issues, and in the attempt to answer the policy issues as framed by Nat Sterling in his March 26, 1992, memorandum to interested persons, many votes were taken by the Executive Committee. We discussed those issues out of order and rephrased many of them; however, in order to allow you to relate our decisions to your questions, I have used his issue number headings below. In the course of taking votes over time (in some cases over several months' time), there appear to be inconsistencies in approach. I believe that the inconsistencies can be reconciled by giving due regard to the discussions that surrounded the various votes, and I have attempted to articulate these positions in this letter.

The Executive Committee recognizes that the name of the study "community property in joint tenancy form" is itself a misnomer under current California law as the Supreme Court decided in 1932 in the case of Siberell v. Siberell, 214 Cal. 767, that community property can not co-exist with joint tenancy. One of the conclusions of the Executive Committee is that the law should be revised to overrule that holding. This would be a major change in California law, but one which a clear majority of the Executive Committee believes to be desirable. It is our understanding that Professor Kasner believes that community property can co-exist with a survivorship feature and does so in other states. Obviously, one of the issues to be addressed eventually by such a major change is the issue of retroactivity and potential constitutional issues regarding property rights.

ISSUE 1.

The Executive Committee voted overwhelmingly to retain the positions of current California law that community property is presumed for property acquired by married couples during marriage, that such presumption is rebuttable (based upon tracing), and that community property can not be transmuted into separate property except by an express written agreement signed by both spouses.

The Executive Committee voted 14 to 2 in favor of the concept that community property used to acquire joint tenancy titled assets should retain its community property character. The Executive Committee then voted 15 to 2 in favor of the proposition that the right of survivorship issue should make a difference.

FIRST PORTION OF ISSUE 2.

In answer to the question: "Should a transmutation statute apply to determine whether community property has been converted to true (i.e., separate property) joint tenancy?", the Executive Committee voted 17 to 1 for "yes." The vote was 17 to none for "yes" if the question was slightly reworded to "Should a transmutation statute apply to determine whether community property has been converted to community property with a right of survivorship?" The Executive Committee answered the question "Should the mere recitation of a right of survivorship on a deed be sufficient to pass the property to the survivor and cut off the right of testamentary disposition?" with "yes" by a vote of 14 to 3.

The discussion surrounding these votes indicated a large support for the creation of a new form of California community property where a right of survivorship can, in effect, be substituted for the right of testamentary disposition of the community property, such that the creation of joint tenancy title is not inherently antithetical to this new form of community title. Other relevant votes were 18 to 3 in favor of the statement: "On, death, property acquired with

community property funds by a husband and wife during marriage and held in joint tenancy form, passes by right of survivorship and there is no right of testamentary dispostion," and 14 to 4 in favor of the statement: "Property acquired with community property funds by husband and wife during marriage and held in joint tenancy form in every other respect shall be treated as community property, except that it passes by right of survivorship and there is no right of testamentary disposition."

THE DISSENTING VIEW

In each case, there was a significant minority position. One member of our group believes strongly that there is no need to revise the basic community property system, and that only the transmutation statute need be changed, to make it easier to recognize the transmutation from community property to separate property that the creation of a joint tenancy title necessarily involves.

At least two members who were at the May meeting, and two more who were at the April meeting but unable to attend the May meeting, believe strongly that the creation of a joint tenancy form of title with community property funds should not cut off the right of testamentary disposition at all, but that the right of testamentary disposition should continue. They believe the transfer which does not meet the standards of a transmutation should not create a survivorship feature, despite the form of title. They believe each of the spouses should retain full testamentary disposition over all community property. If there is no specific devise to the contrary in a Will, under current law, the community property would pass to the surviving spouse without probate. The minority group does not favor the creation of a new type of community property which has a severable feature of testamentary disposition that can be converted into survivorship.

ISSUE 3.

The Chair of the Executive Committee spoke with two members of the Family Law Section about their beliefs regarding the applicaton of the community property presumptions at dissolution. They expressed they were generally happy with the current scheme of presumptions. Because this is beyond the usual scope of our Executive Committee's field of expertise, we decided not to address these issues at this time. Nevertheless, the belief was expressed that it is a reasonable goal to reduce the differences in the presumptions between the treatment of property during the marriage, at dissolution and at death. We may come back to this issue at a later meeting, as we do estate planning for individuals with dissolution proceedings pending, and we may have a few comments about this area.

ISSUE 4.

While commentators may feel comfortable with the belief that many married couples who put community property into joint tenancy form want the survivorship feature, the members of the Executive Committee were less sanguine. In exploring the issue of what married people understand and want, the overwhelming majority of the members of the Executive Committee believe that most married people do not understand the issues at all. The group was unanimous in believing that most married couples give no thought at all to the issues of independent management and control (with the possible exception of accounts with financial institutions), protection from creditors, or the ability to partition. The Executive Committee voted 16 to 2 in favor of the idea that most married couples understand that there will be a right of survivorship at death if title is in joint tenancy. Despite that vote, there was a vote of 12 to 3 in favor of the concept that most married people do not understand that they are giving up the right to dispose of the joint tenancy assets by Will. This reflected the viewpoints that many married couples have no understanding at all, and many members of the public believe that a Will can override the survivorship feature of the joint tenancy title. Since misunderstanding is so common, the vote was only 5 to 4 in favor of conforming the law to people's purported understanding. Instead 9 voted to abstain from answering that question on the grounds that there is no understanding to be conformed to!

ISSUE 5.

Despite the strongly articulated belief that most people who create joint tenancies do not fully understand what they are doing, there was another strongly articulated belief that most people do have a vague understanding that the property will pass automatically at death, without the need for a probate proceeding. For this reason, the votes on the following statements were as follows:

> Absent an express agreement to the contrary, California law should presume (rebuttably) that spousal joint tenancies are community property with a right of testamentary disposition.
>
> Yes = 2 No = 14
>
> Absent an express agreement to the contrary, California law should presume (rebuttably) that spousal joint tenancies are community property without a right of testamentary disposition, but with a right of survivorship.
>
> Yes = 12 No = 4

In May the Executive Committee voted 9 to 8 in favor of expressly creating a new form of title designated as community property with a right of survivorship. This result was a major shift from an earlier vote of 18 to 3 opposing the creation of such a new form of title. The discussion surrounding the votes on the two separate occasions helps to explain the discrepancies. On both occasions, the opinion was strongly voiced that no matter what the law is, no matter how much we lawyers try to educate brokers and the general public, people will still overwhelmingly use the joint tenancy form of title. At the time of the earlier vote, the sentiment was that the new form of title would just create confusion in the minds of the public, without significantly changing the habits of title of the majority. At the time of the recent vote, sentiment had shifted in favor of creating the new form of title to at least allow for the possibility of educating the public into accepting the better form of title. It would allow for more meaningful choices to be made by at least some of the public.

Another vote was taken on the following proposition:

> Community property held in joint tenancy form should be recognized by the law as community property with a right of survivorship. The survivorship right (but not the other community property attributes) could be unilaterally severable in order to restore the usual community attribute of testamentary dispositon.

Yes = 11 No = 3 Abstain = 3

The nos were largely from those who felt this type of property should not have a right of survivorship at all, and all community property in joint tenancy form (assuming no transmutation agreement) should have a testamentary right of dispostion. The abstentions were based primarily on a concern that the language regarding the unilateral severance of the survivorship feature was too broadly worded and might have problems to it.

ISSUE 8.

The Executive Committee believes the current state of the law is such a mess that something needs to be done to clarify it. We recognize that the current requirement that transmutations must be written is an improvement in the law, even if some of the effects of the change in the law have been unintended.

There was a strong minority sentiment to tinker very little with our current system. As stated earlier, at least one member believes strongly that the only change to be made is that the transmutation statute should be changed to make it easier for community property to be transmuted into a true separate property joint tenancy. Two to four members believe that

legislation is needed to clarify that community property does not acquire a survivorship feature when placed into joint tenancy title, but retains all of the attributes of traditional community property.

The majority of the Executive Committee believes that more substantial changes ought to be made to the law. They want to redefine the rules so that the creation of a joint tenancy is not antithetical to community property. That would also require a revision of the statute that states that community property has a right to to testamentary disposition. The transmutation statutes should establish some sort of standards to change from traditional community property to community property with a survivorship feature. There was basic agreement that spouses would have to evidence consent to create survivorship, but the belief seemed to be that something less than an express writing signed by both might suffice. We did not have time to explore the permutations of what those standards would be. "Severance" of community property in joint tenancy form would be treated differently than a usual severance of joint tenancy. Instead of changing to a tenancy in common, it would change to community property without survivorship. Thus a "unilateral termination of the right of survivorship" (a term preferred over "severance") would reinstate the community property right of testamentary disposition, but would not sever the community property. There is a need to work more on how to effect such a "unilateral termination," with regard to notice, one document for all joint tenancy assets, etc.

BALANCE OF ISSUE 2, ISSUE 6 AND ISSUE 7

The balance of Issue 2 questions which were not addressed at the beginning were deferred. It is our hope to get to some of these issues as part of our meeting scheduled for June 27. They will undoubtedly be rephrased, as many of the questions assume a goal different from the ultimate goals articulated by the Executive Committee.

We briefly discussed the separate property issues raised. The consensus was that no legislation is required in this area, because there is no transmutation by the creation of a joint tenancy and the presumption of community property is only a rebuttable presumption. Any legislation that deals with community property in joint tenancy form might deal with separate property also, to be consistent and to conform. Unless joint tenancies are created with the equal contribution of half of the consideration from each joint tenant, they almost always involve a gift, but frequently that is not what the parties intended. As stated earlier in our discussion of people's intent, most people do not even think of the many practical issues involved in taking title as joint tenants, and clearly they do not know enough law to understand the consequences of their actions. Thus, they may intend to use joint tenancy title, but not realize that the chosen form of title necessarily means each tenant owns half of the asset. As stated earlier, we do not want to change rights at dissolution, even if they vary from those at death.

We decided to leave out a discussion of the issues of tenancy in common at this time. It is the belief of the Executive Committee that tenancies in common are rarely used by married couples and are most often used for separate property when they are used. We may return to this issue later.

OTHER ISSUES.

Much of the discussion by the Executive Committee was within the framework of joint tenancies of real property. Real property title is an area of state law where few conflict of laws issues arise. The Executive Committee realizes that personal property is portable and multi-state, thus requiring greater consideration of conflict of laws issues. The differences and similarities between joint tenancies of real and personal property were not explored at length, and are a topic for further discussion in the future.

An issue that was raised several times during the discussions, but which there was not time to separately address, is whether the creation of a joint tenancy form of title for an asset acquired with community property funds is inherently a transmutation or a designation of beneficiary to take effect at death. If one is willing to change the attributes of community property so that it does not inherently confer the right of testamentary disposition (which some would argue is already true for life insurance, multiple party accounts, and certain other assets), then it may be that the creation of joint tenancy title is not a transmutation at all and not subject to the transmutation statutes. If that is so, then there is still the need to address what standards must be met to remove the right of testamentary disposition and create the right of survivorship.

There was some sentiment expressed during the discussion to alter the law regarding the creation of all joint tenancies, so that no joint tenancy with a right of survivorship could be created unless the words "with right of survivorship" were in the title. The Executive Committee believes that the presence of these words would increase the likelihood of members of the public understanding that creation of a joint tenancy creates a right of survivorship. If the words were missing, a "joint tenancy" would not have a survivorship feature. The property would be subject to testamentary disposition. We understand that there may be constitutional issues if this change is not prospective only. This idea was not discussed in detail, but probably will be revisited.

SUMMARY.

The Executive Committee believes the time has come to remove the provision of law that holds that joint tenancies and community property are mutually exclusive. The Executive Committee believes that the presumptions of the law should favor community

property, presuming that joint tenancies of married couples are community property for all purposes except that the property passes by survivorship at death. The Executive Committee believes that numerous changes will need to be made to the law to carry out this policy changes.

Very truly yours,

Valerie J. Merritt
Vice Chair, Executive Committee
Estate Planning, Trust and
Probate Law Section

VJM:dt

cc: Executive Committee members