#F-521.1/L-521.1

ns84
07/06/92

First Supplement to Memorandum 92-34

Subject: Study F-521.1/L-521.1 - Community Property in Joint Tenancy Form (Comments of State Bar Team 2)

Attached to this supplementary memorandum is a letter from Team 2 of the Estate Planning, Trust, and Probate Law Section commenting on issues involved with community property in joint tenancy form. We will discuss their comments at the meeting in connection with the matters to which they relate.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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July 3, 1992

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

Re: Memorandum 92-34

Dear Mr. Sterling:

On Wednesday, July 1, 1992, seven members of Team 2 met to discuss Memorandum 92-34 on the subject of Community Property in Joint Tenancy Form (Comments of policy issues).

Those members of Team 2 that participated in the three hour discussion were: Stewart J. Beyerle (Palo Alto), Elizabeth M. Engh (Oakland), J. R. Hastings (San Anselmo), Frank A. Lowe (Berkeley), Valerie J. Merritt (Glendale), Robin G. Pulich (Berkeley) and myself (Campbell). William L. Hoisington (San Francisco) was not present, but did submit written comments.

THE MAJORITY VIEWPOINT

Team 2 has been assigned the Law Revision Commission Study on Community Property in Joint Tenancy Form. The Executive Committee of the State Bar of California Section on Estate Planning, Trust and Probate Law has also devoted a significant amount of time debating the policy issues raised by Professor Kasner's study.

The majority of the Executive Committee members subscribe to the view that when a husband and wife use community property to purchase real property and the deed to them describes them as "joint tenants with right of survivorship" then the property is community property with right of survivorship and no power of testamentary disposition. This view point is supported by two fundamental principles:

1. Keep it Simple!

   The majority of the Executive Committee members believes that misunderstandings and disputes are less frequent when we adhere to fairly simply rules of property law that the average citizen can understand without the assistance of a lawyer. The majority believes that the simplest rule is one that says, "if you die owning record title to property as a joint tenant with your spouse, you have no right to dispose of your interest in that property by will. Never mind how title got to be that way, where the money came from, or what you did or did not agree to, sign, or understand."

2. Preserve the Integrity of the Recording System.

   The recording statutes are designed to identify who owns what property. "Ownership" is significant only to the extent it defines the rights, powers, privileges and responsibilities of an identifiable person with respect to identifiable property. Any rule that would make title dependent upon off-record agreements or understandings and/or tracing the origins of the consideration paid for the acquisition or improvement of property impairs the dependability of record title and the highly successful California land title insurance system that was founded upon it.

THE MINORITY VIEWPOINT

Team 2 and a minority of the Executive Committee members agree with the staff's conclusions as set forth in Memorandum 92-34. Team 2 believes that when a husband and wife use community property to purchase real property and the deed to them describes them as "joint tenants with right of survivorship" then, in the absence of transmutation to separate property, the property is community property with no right of survivorship and with a power of testamentary disposition.

This viewpoint is supported by the principle of fundamental fairness. The minority of the Executive Committee members and Team 2 believe that most married couples do not understand that they are giving up the right of testamentary disposition when they acquire property as joint tenants. As long as the marriage is a happy one and the passage of property is in conformance with their testamentary desires, married couples would expect the property in question to pass to the surviving spouse. However, at any time married persons disagree or wish to make an alternate disposition of their property, Team 2 and a minority of the Executive Committee members believe that since the joint tenancy form of ownership is not clearly understood, it is fundamentally fair to allow a spouse to dispose of his or her community property interest in such property by will.

I have attached to this letter a document entitled "Community Property/Joint Tenancy: A Framework for Final Resolution of Position of Executive Committee". A vote was taken at the Executive Committee meeting of the State Bar's Section on Estate Planning, Trust and Probate Law held on June 27, 1992. Members of the Committee were allowed to vote only once for either Proposition 2, Proposition 3, or Proposition 4. Twelve members voted for Proposition 2 (right of survivorship with no power of testamentary disposition). Five members vote for Proposition 4 (no right of survivorship and with power of testamentary disposition unless spouses manifest assent to joint tenancy). Three members voted for Proposition 3 (which in essence is Proposition 2 plus a warning of some sort). The five non-Executive Committee members of Team 2 have voted in favor of Proposition 4.

POLICY ISSUES DISCUSSED IN MEMORANDUM 92-34

The balance of this letter will specifically address points raised in Memorandum 92-34.

Bill Hoisington pointed out and Team 2 agrees that current law would require the IRS to accept that community property in joint tenancy form is indeed community property absent an effective transmutation to joint tenancy. Accordingly we believe that the staff has it backwards at the bottom of page 2. We think the IRS has to accept that community property in joint tenancy form is community property upon a showing of the source of funds.

On page 3 of the Memo, Nat Sterling stated that Professor Kasner recommended in his background study 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. Team 2 disputes whether this is truly Professor Kasner's position. Team 2 interpreted his background study as one of raising the issues, but not advocating one result over another.

Team 2 agrees the with staff that the California Law Revision Commission must prepare legislation to deal with the existing problems of community property in joint tenancy form. Team 2 does not subscribe to the Luther Avery suggestion of leaving the law alone

for a few years so that the parties can solve their problems. Team 2 believes that legislative clarification is indeed desirable. We also agree with the staff that the conflict between the standards imposed in Civil Code Section 5510.730 and 4800.1 are more apparent than real. Accordingly, Team 2 believes that we should not disturb this aspect of existing law.

With respect to the severance of the survivorship right, Team 2 agrees with the staff that, if a survivorship right is imposed on community property in joint tenancy form, then it becomes essential to allow a spouse to terminate the survivorship right and dispose of his or her interest by will. Team 2 also believes that upon termination of the right of survivorship, the property would revert to true community property and not to each spouse's separate property as tenants in common.

Team 2 also spent a significant amount of time discussing what form of notice, if any, would be required in order to terminate any statutorily imposed survivorship right. Team 2 believes that notice is an explosive issue for our clients who may some day face the issue of terminating the survivorship right. There was some sentiment expressed for the non-confrontational ability to terminate the survivorship right. Team 2 decided to defer further discussion on this matter until the Commission determines the direction that any proposed legislation will take.

Team 2 agrees with the staff that there is still a role for true joint tenancy in California. The majority opinion of the Executive Committee would probably disagree with the staff's conclusion that joint tenancy between married persons is not a desirable form of tenure. However, Team 2 agrees with the staff's general proposition and feels that there should be room in California law for husbands and wives to impose true joint tenancy on their property. For tax purposes, in an economy with depreciating real estate, married couples may very well wish to hold property in joint tenancy form to prevent a double "step down" in income tax basis. They may very well also desire to shelter their property from creditors. Team 2 would disagree with the staff recommendation that it should not be easy for spouses to impose true joint tenancy on their property. Team 2 subscribes to the position that if married couples wish to hold title in joint tenancy, it should be clear that true joint tenancy is indeed what was intended. The existing transmutation statute makes it difficult enough. Team 2 certainly would not want to make it more difficult for clients.

Team 2 believes that any legislation would eventually have to address the issues of quasi-community property in joint tenancy form. However, we suggest deferring consideration of those issues until the policy decisions have been finalized. Team 2 would also suggest deferring consideration of the issue of retroactivity until the dust settles on the policy issue decision.

In conclusion, although Team 2 and a minority of the members of the State Bar's Executive Committee on Estate Planning, Trust and Probate Law support the staff's conclusions, the majority of the Executive Committee members does not.

The Executive Committee is sending Valerie J. Merritt, Vice-Chair, and Melitta Fleck to the next meeting of the California Law Revision Commission. They will be available to answer any questions that the Commissioners or the staff have concerning the position of the Executive Committee and Team 2.

Team 2 encourages the Commissioners to study this matter carefully and to listen attentively to its consultant, Professor Kasner, before finally resolving the policy issues. Any legislation that is promulgated as a result of this study will have far reaching consequences on every California married couple.

Respectfully Submitted,

Robert E. Temmerman, Jr.
Chair, Team 2
RET/gmd (ster72.let)

cc: Team 2 Members
Executive Committee Members
Professor Kasner

COMMUNITY PROPERTY/JOINT TENANCY

(Executive Committee - June 27, 1992)

A Framework For Final Resolution
Of
Position Of Executive Committee

Assume that husband and wife use community property to purchase real property and the deed to them describes them as "joint tenants with ~~power~~ right of survivorship."

Proposition #1: The property is not "true" joint tenancy property unless there has been a written expression of the mutual intention of husband and wife to change the character of the property into their respective separate property ("transmutation").

Proposition #2: In the absence of transmutation to separate property, the property is community property WITH right of survivorship and NO power of testamentary dispostion. No warning of, or assent to, the loss of the power of testamentary dispostion would be required.

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Proposition #3: (Prop. #2, plus warning) In the absence of transmutation to separate property, the property is community property WITH right of survivorship and NO power of testamentary dispostion. However, the law would require all escrow instructions being signed by A husband and wife to contain a 12pt WARNING that taking title to property as "joint tenants" eliminates any right to dispose of any interest in the property by Will. Failure to provide the warning would result in a $1,000 penalty, but would have no effect on the succession of ownership to the surviving joint tenant.

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Proposition #4: (Prop. #2, plus assent)	In the absence of transmutation to separate property, the property is community property with NO right of survivorship and WITH power of testamentary disposition, unless a statutory form of deed is signed by both purchasing spouses and a box on the deed indicating that title is being taken "as joint tenants with right of survivorship and with no power of dispostion by Will" is checked.
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Proposition #5:	In the absence of transmutation to separate property, the property is community property with NO right of survivorship and WITH power of testamentary disposition.

Assume that Proposition #2, #3, or #4 is the law and all of any preconditions to the property being community property WITH right of survivorship and with NO power of testamentary dispostion have been complied with. The question now is, How may either spouse terminate the right of survivorship and reclaim the power of testamentary dispostion.

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