First Supplement to Memorandum 92-46

Subject: Study F-521.1/L-521.1 - Community Property in Joint Tenancy Form (Comments on Draft of Tentative Recommendation)

Memorandum 92-46 includes a draft of a tentative recommendation on community property in joint tenancy form. The thrust of the draft is that community property titled as joint tenancy remains community property for all purposes unless there has been a knowing and intentional transmutation of the community property to a separate property joint tenancy. We have received several communications concerning the draft.

Comments of Professor Reppy

Exhibit p. 1 is a letter from Professor Bill Reppy, one of the Commission's community property consultants. Professor Reppy notes that in order for the parties to achieve a transmutation under the law as construed by the MacDonald case, they must state that they are changing the tenure of property. It is not sufficient, as the Comment to proposed Section 860 suggests, to state that the property is held "in joint tenancy and not as community property". Rather, the parties should state words such as, "We agree that our community interest in funds paid for this land shall become joint tenancy property." The staff agrees with this point and will correct the misleading language in the Comment.

Comments of Executive Committee of State Bar Probate Section

Exhibit pp. 2-4 is a letter from the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California. The Executive Committee opposes the draft tentative recommendation on the grounds that (1) title should mean what it says both for the sake of simplicity and to preserve the integrity of the recording system and (2) the thrust of the draft is overly prejudicial in favor of community property.

The staff finds neither of these points persuasive. First, title should indeed mean what it says, if the spouses give knowing consent to the form of title. But the problem we are faced with is that the joint tenancy form of title is thrust upon spouses who do not know what they are getting and, when they find out, disagree with the result. Second, there is nothing prejudicial about favoring community property; the law favors community property and has designed it to be protective of the interests of the spouses; there is virtually nothing advantageous in joint tenancy title form except avoidance of creditors, and that aspect of it the staff believes is poor public policy and should not be encouraged.

In any case, the Executive Committee believes that whatever tentative proposal the Commission approves, it should receive wide exposure. If the Commission can approve a tentative recommendation at this meeting the Executive Committee will undertake to distribute it to its 5000+ section members. Also, the proposal can be floated at State Bar and CEB continuing legal education presentations.

Comments of Bob Temmerman

Exhibit p. 5-6 is a letter from Robert E. Temmerman, Jr., of Campbell, writing in his individual capacity as an estate planning attorney. Mr. Temmerman agrees with the Commission's draft:

> I believe that this approach will provide significant benefits for the majority of California married couples who inadvertently hold title as joint tenants. The approach adopted by the Commission also will allow those that truly desire joint tenancy status (for creditor protection or to hold depreciated real estate, etc.) to take title as true joint tenants. Accordingly, I recommend that the Commission circulate the Tentative Recommendation for comment and attempt to get the widest possible input from the estate planning community, title companies, real estate brokers, and other professionals who provide married couples with advice concerning titling.

Mr. Temmerman also questions the reference in Civil Code Section 683 to joint tenancy among executors or trustees; this is existing law although we could look into this issue. And, Mr. Temmerman questions the reference in the safe harbor form to "estate planning professionals"; he would have the signer consult an attorney, since he

is seeing self-styled "professionals" who have neither adequate training nor sufficient malpractice coverage to advise properly concerning the legal consequences of titling.

Hilke and Allen Cases

Also attached to this memorandum is a recent Court of Appeal case of interest. See Exhibit pp. 7-11, In re Marriage of Allen, 92 Daily Journal D.A.R. 11563 (1992). The Allen case is quite similar to the Hilke case, currently pending before the Supreme Court. In Hilke the spouses held community property in joint tenancy form and, during pendency of the dissolution proceeding and before the property had been divided, one of the spouses died. The Hilke Court of Appeal reluctantly held that the law forced it to give the decedent's interest in the property to the surviving joint tenant rather than to the decedent's heirs. The Supreme Court has granted a hearing. The Allen case likewise involves community property in joint tenancy form, where one spouse died before division of the property in the dissolution proceeding. The Allen case is procedurally distinct in that it involved a bifurcated trial: the marriage had actually been terminated and the court had reserved jurisdiction to make a later division of the property. The Court of Appeal held that this distinguishes it from the Hilke situation and the court may award the decedent's share to the decedent's estate rather than to the surviving joint tenant.

There are a number of State Bar Conference of Delegates resolutions attacking directly the problem of death of a spouse during pendency of dissolution proceedings. The Commission's draft tentative recommendation would attack the problem indirectly by making it unlikely that the spouses will end up with joint tenancy property unless they actually and knowingly intend it, and in that case they will bear the consequences of their decision.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Duke University
School of Law
Durham, North Carolina
27706

William A. Reppy, Jr.
Professor of Law

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August 5, 1992

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

RE: Memorandum 92-46: Tentative Recommendation re Community Property in Joint Tenancy Form

Dear Nat:

The proposed official comment to the new section 860 of the Civil Code is misleading. It suggests to a reader that a transmutation will occur, even though the safe harbor form is not used, if the instrument reciting a joint tenancy says the grantee spouses take in "joint tenancy and not as community property." That surely is not express enough under *MacDonald*, as it does not refer to a transmutation. One does not know from the recital that the accepting spouse was giving up testamentary power over a half interest, the right to manage the entire asset, the right to tax benefits, etc. I do not say these attributes of a community to joint-tenancy transmutation have to be spelled out but only that the document of transmutation reveal on its face that the consideration paid for the land was community property. Remember, *MacDonald* holds there can be no extrinsic evidence received to flesh out a document alleged to effectuate a transmutation. The language *MacDonald* wants is this: "We agree that our community interest in funds paid for this land shall become joint tenancy property." That is language of transmutation. The recommended "express declaration" (your words in the comment to section 860) does not reveal any transmutation at all. The reader of your word formula does not know that the funds used to buy the land were not themselves joint tenancy and that the no-community-property disclaimer was not put in solely to rebut the general presumption of community ownership. The point is an important one, and I am not playing trivial word games. The strictness of *MacDonald*, a case where I was the losing attorney and thus keenly aware of what the court says there, requires language showing a *change* of form of ownership not merely a *negation* of one type.

The language in proposed section 862 does, of course, clearly satisfy *MacDonald*.

Sincerely,

William A. Reppy, Jr.
Professor of Law

WAR:jma

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION
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REPLY TO:

Robert E. Temmerman, Jr.
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September 1, 1992

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

Re: Community Property in Joint Tenancy Form
Memorandum 92-46

Dear Nat:

On Saturday, August 29, 1992, the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California met to discuss the proposed Draft of the Tentative Recommendation relating to Community Property in Joint Tenancy Form.

Team 2 had met by conference call prior to the Executive Committee meeting and had recommended to the Executive Committee approval of the Draft Tentative Recommendation with only modest revisions. Team 2 had also suggested that the Tentative

Recommendation be circulated to Section members for additional comment.

Valerie J. Merritt reported to the Executive Committee the wide range of discussion that took place at the Commission's meeting held on July 9 and 10, 1992 in San Diego. Following her oral report, the Executive Committee deadlocked in a 10 to 10 vote to support the CLRC's Draft of the Tentative Recommendation.

Following that vote, a motion was made to amend Civil Code §5110.730 to provide that oral agreements would be sufficient to show the transmutation of joint tenancy to community property. That motion failed on a vote of 6 to 11.

After further discussion, a motion was made and seconded to oppose the Draft of the Tentative Recommendation on the same grounds previously communicated to the Commission (see my letter dated July 3, 1992) and on the further ground that the thrust of the Tentative Recommendation is overly prejudicial in favor of community property. The author of the motion felt that the Tentative Recommendation should have a more balanced approach to the problem. After discussion, that motion passed on a 14 to 6 vote.

The Executive Committee next discussed how widespread any dissemination of a Tentative Recommendation would be in view of the charges that the CLRC has for its material. After some discussion a motion was passed to print the Tentative Recommendation in our Section's Newsletter so it could be freely disseminated to over 5000 of our members for additional comment. I have contacted Sandra Chan, our editor, in an effort to coordinate the dissemination of the Tentative Recommendation in our September mailing of the newsletter. At this time, the mailing is anticipated to be completed on September 15, 1992. Therefore, if the Draft of the Tentative Recommendation is revised, the revisions would have to be completed a few days prior to that deadline to allow the printers to insert the same in the newsletter.

The Commission's Consultant, Professor Jerry Kasner, is scheduled to be a Speaker at the State Bar's Annual Program on this topic. He has assured me he would discuss the implications of the Tentative Recommendation to the audience on both his October 4, 1992 speech in San Francisco and his October 24, 1992 speech in Los Angeles. The issues will also be raised in my presentation set for November 7, 1992 in Palo Alto.

In conclusion, the majority of the Executive Committee members oppose the Draft of the Tentative Recommendation and believe that further input from Estate Planning attorneys is necessary before a Final Recommendation is presented to the State Legislature.

I will be present at the next CLRC meeting to answer any questions that the Commissioners may have.

Sincerely,

Robert E. Temmerman, Jr.
RET/gmd (ster91.let)

cc: Thomas Stikker, CLRC Liaison
Monica Dell'Osso, CLRC Liaison
William V. Schmidt, Section Chair
Valerie J. Merritt, Section Vice Chair

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September 2, 1992

File:_____
Key:_____

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

Re: Memorandum 92-46
Community Property in Joint Tenancy Form (Draft of Tentative Recommendation)

Dear Mr. Sterling:

I am writing this letter in my individual capacity as an estate planning attorney practicing in California. Although I am a member of Team 2 and the Executive Committee of the State Bar Section on Estate Planning, Probate and Trust Law, the views expressed in this letter are not shared by the majority of the members of the Executive Committee of the State Bar. Nonetheless, I believe my views are shared by significant numbers of estate planning attorneys and deserve consideration by the Commission.

As you know, I have followed the Commission's study on Community Property in Joint Tenancy Form from the initial background study prepared by Professor Jerry Kasner through the most recent Draft of the Tentative Recommendation. It is my opinion that the Commission has adopted the correct approach to solving the many problems raised by holding community property in joint tenancy form under California law. The Draft of the Tentative Recommendation recommends that community property held in joint tenancy form will remain community property for all purposes unless it has been actually transmuted to joint tenancy. I believe that this approach will provide significant benefits for the majority of California married couples who inadvertently hold title as joint tenants. The approach adopted by the Commission also will allow those that truly desire joint tenancy status (for creditor protection or to hold depreciated real estate, etc.) to take title as true joint tenants. Accordingly, I recommend that the Commission circulate the Tentative Recommendation for comment and attempt to get the widest possible input from the estate planning community, title companies, real estate brokers, and other professionals who provide married couples with advice concerning titling.

On a more technical nature, I would suggest deleting the proposed modifications to

Civil Code §683 that would allow joint tenancy title to be held on the part of executors or trustees. I do not understand the benefits of the proposed change (the comment is silent on the issue) and I have serious problems with the concept of death of a fiduciary, particularly when that fiduciary may be an institution. Accordingly, I would propose deleting the statutory language that allows a joint tenancy to be created as to executors or trustees.

With respect to proposed §862 "safe harbor" requirement for a transmutation of community property in joint tenancy, I would suggest that the last statement of the warning should be rewritten to read as follows: "You should consult an attorney for further information." I am personally seeing more so called "estate planning professionals" who have neither adequate training or sufficient errors or omissions coverage to enable them to properly advise on the significant legal consequences of titling.

I sincerely hope that the Commission will circulate the proposed Tentative Recommendation for comment to as wide an audience as possible.

I also hope that those affected by the proposed legislation will take the time to share their views with the Commission before its recommendation is finalized.

Please call me if you have any questions.

Sincerely,

Robert E. Temmerman, Jr.
RET/gmd (ster91.let)

FAMILY LAW

Decedent's Share of Marital Property Held in Joint Tenancy Passes Through Decedent's Estate to Heirs

Cite as 92 Daily Journal D.A.R. 11563

In re the Marriage of CLIFFORD G. and CONSTANCE J. ALLEN,

CLIFFORD G. ALLEN,
Appellant,
v.
TAMI L. GRAHAM, as Executrix, etc.,
Respondent.

No. A055473

Sonoma County
Superior Court No. 172090
California Court of Appeal
First Appellate District
Division Five
Filed August 20, 1992

In this case we hold that where there has been a judgment terminating marital status and reserving jurisdiction to determine all other pending issues and one former spouse dies before the court determines the marital property rights of the parties, property held by the parties in joint tenancy does not pass to the other former spouse as the surviving joint tenant, but is divided in the marital dissolution action pursuant to the principles of the Family Law Act. Thus, decedent's share of marital property held in joint tenancy will pass through decedent's estate to his or her heirs. This result acknowledges and confirms the right of decedent's heirs to receive decedent's share of marital property acquired by virtue of the community effort, and eliminates an unjustifiable windfall to the surviving former spouse. It also carries out the intentions and expectations of the parties upon termination of their marital status.

I

Facts

Cliff and Constance Allen were married on April 19, 1980.[1] During their marriage, the parties held two pieces of residential real property as well as bank accounts and other assets in joint tenancy. On February 16, 1989, Cliff filed a petition for dissolution of marriage. Among other things, the petition requested the court to confirm Cliff's community and separate interest in the property held by the parties in joint tenancy.

On March 9, 1989, the parties stipulated to a temporary order which governed their rights to marital property pending a court-ordered division of property. In pertinent part, the stipulation and order provided for mortgage payments, property tax payments, maintenance expenses and homeowner's insurance and made provisions with respect to the use and possession of the real property held in joint tenancy "subject to review in final equalization" or "until further order of the court." Provisions were also made with respect to the parties' various bank accounts, charge cards and the trust account used in Constance's business.

On December 22, 1989, the parties filed an appearance, stipulation and waiver wherein they stipulated that the issue of the status of their marriage could be bifurcated from the other issues and that a judgment dissolving their marriage could be entered by ex parte application. On the same day Constance requested an uncontested dissolution with regard to marital status only, effective upon entry of judgment.

On December 29, 1989, the court entered the requested judgment of dissolution and expressly reserved jurisdiction "over all other issues."

Less than a week after the dissolution was granted, Constance died. She left a will naming her only child from a prior marriage, Tami L. Graham, as the sole beneficiary of her estate. On November 26, 1990, the court allowed Tami to be substituted into the marital dissolution proceedings on behalf of decedent's estate for the purpose of resolving the remaining issues. On April 16, 1991, Tami filed her response to the petition and, among other things, requested that the court confirm her mother's community and separate interest in the real and personal property held by the parties in joint tenancy during their marriage.

Pursuant to the stipulation of the parties, the issue of whether the property held by Cliff and Constance in joint tenancy was community property for purposes of division of property was bifurcated from all other issues and set for trial. If the property was community property, as alleged by Tami, her mother's community half passed to her by virtue of the will. If the property was held in joint tenancy, as alleged by Cliff, he became sole owner of the property by right of survivorship. (See Hogoboom & King, Cal. Practice Guide: Family Law (Rutter 1992) § 8:14.2.)

At trial Tami argued that the assertion and reservation of jurisdiction by the family law court automatically brought into play the presumption set out in Civil Code section 4800.1[2] that "upon dissolution of marriage" property held in joint tenancy is community property, which presumption may be rebutted by a writing in the deed or by a written agreement between the parties.[3] She also argued there was sufficient evidence to establish that the parties mutually treated the joint tenancy as severed. Cliff argued that Tami was not entitled to rely on any of the presumptions or principles applicable to the division of marital property in dissolution proceedings, including section 4800.1, because Constance died before any of the property issues were adjudicated. Consequently, he argued, the only way the joint tenancy property could be transmuted into community property was according to section 5110.730, which requires that the spouses mutually agree in writing that the joint tenancy be severed.

The court held that the real and personal property held by the parties in joint tenancy was community property.[4] Additionally, the court stated "that there was specific agreed upon movement by the parties through their stipulation of March 9, 1989, and activities thereafter which evidence the desire to treat their property as community property in the upcoming dissolution."

II

Did the Family Law Court Have Jurisdiction to Decide the Remaining Property Issues?

We initially consider Cliff's argument that the family law court had no jurisdiction, after Constance's death, to determine the unadjudicated issues. This argument was answered, adverse to Cliff's position, in Kinsler v. Superior Court (1981) 121 Cal.App.3d 808. In facts that parallel our own, Kinsler considered whether the death of a party to a dissolution proceeding, after entry of judgment dissolving the parties' marital status, abated the action and deprived the court of jurisdiction to decide the remaining issues in the case. The appellate court concluded that jurisdiction was not impaired when, prior to the party's death, a judgment dissolving the marriage had been entered containing an express reservation of jurisdiction to decide the remaining issues. The proper procedure under those circumstances was to substitute the estate of the deceased spouse as a party to the dissolution proceeding. (Id. at p. 812.)

The Kinsler court took pains to point out that there is a meaningful difference between cases in which a party dies before a judgment of dissolution is entered and cases in which a party dies after the entry of judgment. Where a party dies before the marriage is dissolved, the dissolution action must abate and the court can make no further orders with respect to property rights, spousal support, costs or attorney fees. (Kinsler v. Superior Court, supra, at p. 811, citing In re Marriage of Shayman (1973) 35 Cal.App.3d 648, 651; see also In re Marriage of Williams (1980) 101 Cal.App.3d 507, 510-511.) On the other hand, when a judgment of dissolution has been entered and a party later dies, the court retains jurisdiction to adjudicate the reserved issues. This case falls within the category of cases where a judgment dissolving the marriage and reserving jurisdiction over remaining issues was entered before the party's death. Consequently, the trial court correctly resolved the jurisdictional issue by substituting decedent's estate as a party to the dissolution action and proceeding to adjudicate the reserved property issues.

After the decision in Kinsler, the Legislature adopted section 4515 providing for a bifurcated or separate trial for termination of marital status. Section 4515, subdivision (c), states: "A judgment granting a dissolution of the status of the marriage shall expressly reserve jurisdiction for later determination of all other pending issues." Having knowledge of the holding in Kinsler, the Legislature thus determined that in all cases where a judgment has been entered terminating marital status and a former spouse thereafter dies before determination of other pending issues, the family law court retains jurisdiction to determine those issues.

It could be argued that this rule should apply as soon as parties to a marriage separate. For example, the Legislature has provided in section 5118 that earnings after the date of separation are separate rather than

community property, and the community interest in professional goodwill of a self-employed professional is also valued as of the date of separation. (See In re Marriage of Green (1989) 213 Cal.App.3d 14, 20-21.) Similarly, section 5120.110, subdivision (c), concerning liability for debts provides that "during marriage" for that purpose does not include any period after the date of separation. We believe, however, that the Legislature has wisely chosen not to use the date of separation as the benchmark for determining whether jurisdiction continues under the Family Law Act, since this date is frequently in dispute and spouses commonly separate and then reconcile.

By contrast, there can be no dispute about the date of a judgment terminating marital status, or that after that date the parties no longer expect to receive the benefits available to married persons. This observation is borne out by several legislative enactments. Probate Code section 6122, subdivision (a)(1), provides that a dissolution of marital status revokes, by operation of law, any disposition or appointment of property made by will to a former spouse.[5] Section 4352 requires that every judgment dissolving a marriage include a notice to the parties that ending the marital state may automatically change a disposition made by will to a former spouse. Thus, the Legislature has specifically provided that the right of one spouse to inherit from the other changes upon dissolution of their marriage.

Under the present circumstances, the trial court was not only correct in holding it had jurisdiction to determine the marital rights of the parties to property, but accomplished justice and equity in doing so. It carries out decedent's intent that her share of the marital estate go to her heir under her will, rather than to her former spouse. Certainly, if the circumstances were reversed, we cannot believe Cliff would envision or desire the operation of survivorship leaving his share of the marital estate to Constance unless this is "the rare case in which one of the spouses wishes to make the macabre gamble that he or she will be the survivor if one of the parties dies pending dissolution." (Estate of Blair (1988) 199 Cal.App.3d 161, 169, fn. 3.) The result in this case is consistent with what the average decedent and former spouse would have wanted had death been anticipated. (See Estate of Luke (1987) 194 Cal.App.3d 1006, 1015.)

III

Did the Family Law Court Err in Applying the Rules and Presumptions Applicable to the Division of Marital Property in Dissolution Proceedings?

Cliff argues there is nothing in the law which sanctions defeating the right of survivorship simply because a dissolution action has been filed. He goes on to argue that the court below erred in applying the rules and presumptions applicable to marital dissolution proceedings and that the "common law presumption" that the character of the property is as set forth in the title should have prevailed. (See generally, Hogoboom & King, op. cit. supra, at § 8:11.) He contends it was improper to allow Tami to come in after-the-fact to "make decisions on behalf of a deceased, and elect to sever a joint tenancy."

Cliff's arguments overlook the effect of the judgment dissolving the parties' marriage on the determination of the issues in this case.[6] As we have seen, the existence of this judgment, entered before Constance's death, allowed the family law court to retain jurisdiction over the remaining issues in this case. The judgment of dissolution provides the compelling difference between the instant case and the case on which Cliff principally relies, Estate of Blair, supra, 199 Cal.App.3d 161.[7]

In Blair, husband and wife bought a house and took title as joint tenants. In the pleadings filed in connection with the dissolution of their marriage, they each indicated a belief that the house was community property. Wife died before a judgment of dissolution was entered which, as we have seen, abated the marital dissolution proceeding. (Estate of Blair, supra, 199 Cal.App.3d at pp. 166-167.) Nevertheless, in the probate proceedings, wife's estate claimed the estate had a one-half ownership interest in the residence by virtue of wife's community interest.

The husband in Blair conceded that if his wife had survived and the parties were litigating their respective rights to their residence in the marital dissolution proceeding, the presumption contained in section 4800.1 would have operated and the residence would have been subject to equal division between the parties. However, husband stressed that the dissolution proceedings were terminated, and the presumption contained in section 4800.1 was not applicable to the probate proceedings.

The appellate court agreed with husband's position and held that the presumption in favor of community property contained in section 4800.1 did not apply outside the dissolution proceeding and that the "common law presumption" arising from the form of title would have to be applied in the probate proceeding. In other words, wife's interest in the residence would pass to husband by operation of law if, on remand, no termination of the joint tenancy could be established.

The court in Blair was obviously troubled by this result and acknowledged it was unlikely that parties who are awaiting a dissolution of their marriage "would envision or desire the operation of survivorship." (Estate of Blair, supra, 199 Cal.App.3d at p. 169.) The court urged the Legislature to amend section 4800.1 to apply the community property presumption to those cases in which a dissolution proceeding is pending. (Id. at pp. 169-170.)

Cliff fails to recognize that Blair clearly points to the path to be followed in this case and that its

reasoning squarely defeats his argument that the common law form of title presumption (and not the presumption contained in section 4800.1) has to be applied. As Blair made clear, the presumption established by section 4800.1 applies in a dissolution action and property held in joint ownership is presumed to be community property. Blair made clear that the unfair result in that case would have been avoided if the dissolution action had not been terminated as a result of wife's untimely demise before the judgment of dissolution was entered. Our ability to achieve a fair and just result is not similarly hampered.

In light of the family law court's continuing jurisdiction to deal with the property issues in this marital dissolution case, it would be unreasonable and wholly inappropriate to limit the court's authority by not allowing it to use the rules and presumptions traditionally applied to dividing marital property after a dissolution of marital status has been entered. The only conceivable reason to do so is because of Constance's death; but the law makes clear that once the family law court has continuing jurisdiction to deal with property issues, a party's death does not impair its ability to ascertain the nature of disputed assets using traditional community property concepts. (In re Marriage of Shayman, supra, 35 Cal.App.3d 648.)

The case of Chirmside v. Board of Administration (1983) 143 Cal.App.3d 205 illustrates the point. In that case, the final judgment of dissolution did not adjudicate the parties' entitlement to the former husband's pension benefits. Five years later, husband died and his sister claimed the pension benefits as the designated beneficiary. Wife also made a belated claim for her community property interest in the benefits. The Chirmside court held that wife's community interest in one-half of husband's contributions to his pension during the course of their marriage could not be defeated simply because husband was no longer living.

Applying traditional community property concepts, the Chirmside court relied on Henn v. Henn (1980) 26 Cal.3d 323. Henn held a community asset that is left unadjudicated in the dissolution decree is subject to future adjudication and the parties, until adjudication, occupy the status of tenants in common no matter how the record title is held. The Henn rule, allowing subsequent litigation, is applicable where there was a partial division of the community property or, like the instant case, where there was a dissolution "unaccompanied by any property adjudication whatsoever." (Henn, supra, at p. 330.)[8] The Chirmside court found nothing in Henn limited its holding to living parties. The court went on to hold that under Henn, upon dissolution, wife's community interest in her husband's pension benefits became an undivided one-half interest as a tenancy in common with her former husband. His death could not operate to deprive her of the tenancy in common interest. (Chirmside, supra, 143 Cal.App.3d at p. 211.)

Similarly, in Bowman v. Bowman (1985) 171 Cal.App.3d 148, a former wife was allowed to assert a community interest in her deceased former husband's pension benefits and life insurance, which had named his current spouse as beneficiary. These assets were not divided in the judgment of dissolution entered 13 years earlier. The court reasoned that even though the pension benefits and life insurance were not divided at the time of dissolution, these assets still belonged to both parties as tenants in common under the reasoning in Henn. The court stated: "It makes no sense to say [the parties] together owned their assets but at his death when the assets matured, they succeeded to [husband's] estate. The law demands the community property of the parties be evenly divided and allows the court to later award assets not adjudicated at the time of the dissolution. These benefits were community property. They were not divided. They still exist and [wife] has a right to her day in court to determine the amount of her interest." (Id. at p. 156.)

Bowman was followed by In re Marriage of Powers (1990) 218 Cal.App.3d 626. Powers examined section 4800.8, enacted by the Legislature in 1987, which empowers a court to make "whatever orders are necessary or appropriate to assure that each party receives his or her full community property share in any retirement plan, whether public or private, including all survivor and death benefits . . . ." Four years after former wife's death, her estate made a claim on her behalf under section 4800.8 for her community share of pension benefits that had not been adjudicated in the parties' dissolution. Husband argued that any interest wife had in his pension plan was terminated by her death and that section 4800.8 was enacted to prevent long-term living spouses from being deprived of their community property interest in pension benefits. Significantly for purposes of the instant case, the court rejected this argument, recognizing the injustice in depriving the deceased spouse the right "to bequeath by will his or her community property interest in the surviving spouse's pension plan." (Powers, supra, at p. 641.) The court ordered husband's employer to pay wife's estate any benefits due, reasoning the "basic objective of the statute is not dependent on whether the nonemployee spouse is living or dead at the time these rights accrue."[9]

Several features of Chirmside, Bowman and Powers are relevant to the determination at hand. First, one party's community property interests were not terminated by virtue of the other party's death. Second, each court applied the presumptions and principles used in dissolution proceedings to assets that had not been adjudicated in the parties' dissolution. Third, the characterization of the ownership of an asset at the time of one party's death did not override the other party's existing community property rights because by operation

of law the unadjudicated community asset had become an asset owned by both parties as tenants in common. Fourth, and most importantly, Powers recognized that a party's interest in unadjudicated community property is not terminated by that party's death and that it would be unjust to deprive the deceased party's estate of its rightful share of the community asset.

In light of the fact that the family law court had continuing jurisdiction to adjudicate the rights of the parties with respect to marital property, we perceive no justification for denying Constance's estate the benefit of the presumptions and principles applicable to marital dissolution proceedings. Despite Cliff's protests to the contrary, our decision does not create any new community property interests nor does it allow a third party to come in after-the-fact to create a property interest that did not exist before. We simply recognize and preserve the interest Constance had in the assets of the marital community, existing upon dissolution, that we conclude was not extinguished by her death.

The judgment is affirmed.

King, Acting P.J.

We concur:

Haning, J.

Chesney, J.*

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* Judge of the San Francisco Superior Court sitting under assignment by the Chairperson of the Judicial Council.

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1. For ease of reference, we will refer to the parties by their first names, Cliff and Constance. (See In re Marriage of Smith (1990) 225 Cal.App.3d 469, 475-476, fn. 1.)

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2. Unless otherwise indicated, all further statutory references are to the Civil Code.

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3. Section 4800.1, subdivision (b) states: "For the purpose of division of property upon dissolution of marriage or legal separation, property acquired by the parties 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 documentary evidence of title by which the 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."

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4. There was no request for a statement of decision under Code of Civil Procedure section 632. We therefore presume "that the trial court made all factual findings necessary to support the judgment for which there is substantial evidence." (Hogeboom & King, op. cit. supra, at § 15 :30.)

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5. Probate Code section 6122 changed the former case law rule that dissolution of marriage had no effect on the will of either spouse. (See Estate of Patterson (1923) 64 Cal.App. 643, 646.)

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6. He also overlooks the fact that even if this were true joint tenancy property, the court's orders affecting the property terminated the unities of interest essential to a joint tenancy. (See Miller & Starr, Cal. Real Estate 2d, § 12:20 et seq.) This is consistent with the holdings of Estate of Seibert (1990) 226 Cal.App.3d 338, Estate of Asvitt (1979) 92 Cal.App.3d 348 and Wardlow v. Pozzi (1959) 170 Cal.App.2d 208, 210; see also Estate of Propst (1990) 50 Cal.3d 448, 455.)

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7. Another case on which Cliff relies, with facts and issues similiar to those here, has recently been granted review by the California Supreme Court. (In re Marriage of Hilke, (S025205) review granted Apr. 16, 1992.)

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8. The Legislature in enacting section 4353 has modified the Henn decision by permitting future litigation over unadjudicated community property or debts to occur by way of a motion in the family law proceeding, rather than by a separate civil action.

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9. The result in Powers may no longer be the law. See Ablamis v. Roper (9th Cir. 1991) 937 F.2d 1450, holding that federal law prevails over section 4800.8 where the nonemployee spouse predeceases the employee spouse.

Trial court:

Sonoma County Superior Court

Trial judge:

Hon. Arnold D. Rosenfield