Memorandum 93-10

Subject: Study F-521.1/L-521.1 - Effect of Joint Tenancy Title on Community Property (Basic Principles Revisited)

PREFACE

At the October 1992 meeting the Commission considered the draft of a tentative recommendation on the effect of joint tenancy title on community property. After a wide-ranging discussion touching on such issues as the purpose and meaning of the transmutation statute, the application of joint tenancy statutes to personal property, the role of joint tenancy and community property presumptions, the public policy preference for community property, and the intention of married persons who take joint tenancy title, the Commission concluded there is no present consensus on the Commission concerning either the basis of existing law or the direction the Commission should be taking to address the problems of existing law.

The Commission requested the staff to prepare a memorandum reviewing the background of the current study, the assumptions on which the tentative recommendation is drafted, and the public policies underlying the draft. The memorandum also should include a discussion of the role of evidentiary burdens, information concerning the transmutation statute, and a more thorough explication of the impact of joint tenancy on creditors' remedies. The memorandum should address the possibility of revision to narrow the transmutation statute and application of the severance statute to personal property such as joint tenancy brokerage accounts.

Attached to this memorandum and referred to in it are letters from the Beverly Hills Bar Association, Probate and Trust Section Legislative Committee (Exhibit 1) and Professor Bill Reppy (Exhibit 2). Exhibit 3 is a copy of the California Supreme Court decision in Marriage of Hilke, 92 Daily Journal D.A.R. 17019 (December 17, 1992).

Exhibit 4 is a redraft of the tentative recommendation on the effect of joint tenancy title on community property, revised as suggested by the staff in this memorandum.

At previous meetings Professor Halbach has suggested that the recommendation also deal with issues of severance of personal property. This is a "severable" issue, though related, and the staff will present separate material on it at a future meeting.

BACKGROUND

The problem of the effect of joint tenancy title on community property has plagued California law since the beginning. Is the property to be treated as joint tenancy or as community property? Each form of tenure has different legal incidents, which can have a substantial effect on rights in the property.

The development of the California law on this matter can be seen as a battle between the presumption that property acquired during marriage is community property and retains its community character through changes in form, and the presumption that joint tenancy title means what it says. Over the years the courts have leaned one way or the other in this battle, depending on trends and currents in the law.

There have been innumerable appellate cases on the issue, along with extensive scholarly commentary. The latest cases are Marriage of Hilke and Marriage of Allen, both involving death of a spouse during pendency of dissolution proceedings but before division of the property. Should the decedent's interest in the property be treated as joint tenancy and pass to the surviving estranged spouse or should it be treated as community property and pass to the decedent's devisees? The Supreme Court has now acted in these cases, which are discussed below.

Until recent years, the law seemed to have reached an equilibrium on the issue. If community funds were used to acquire property and title was taken in joint tenancy, the presumption was that the property had in fact been transmuted from community property to joint tenancy.

But the presumption could be easily overcome by showing the parties did not intend to change the character of the property. The courts and the Internal Revenue Service acquiesced in this somewhat loose approach.

The practice of the courts and I.R.S. has changed, apparently in response to the 1985 enactment of the transmutation statute. Now property titled as joint tenancy will be treated as joint tenancy unless there is an express written agreement that it remains community property. This turn of events has caused general and understandable consternation, since joint tenancy ill-serves the needs, and is generally inconsistent with the desires, of many married persons who take joint title without a full understanding of its consequences.

When this state of affairs was brought to the Commission's attention in 1990, the Commission decided to investigate it. The Commission retained Professor Jerry Kasner to prepare a background study on the matter. Professor Kasner's study, "Community Property in Joint Tenancy Form: Since We Have It, Lets Recognize It", was delivered to the Commission in December 1991. There is widespread interest in this study and it has been one of the Commission's all-time best sellers; we continue to receive orders for it. The Commission considered the study and comments received on it in March 1992 (Sacramento), and decided to circulate for broader input a memorandum of policy issues. After reviewing the comments on the policy memorandum in July (San Diego) the Commission decided to prepare a tentative recommendation to the effect that community property remains community property despite a title change to joint tenancy unless the spouses have made an informed transmutation of the community property to joint tenancy; statutory safe harbor forms would be provided to enable spouses who want joint tenancy to get it. The Commission polished the draft tentative recommendation in September (Oakland), but at the October meeting (Sacramento) the Commission decided there is no consensus on the Commission and asked to revisit the policy issues.

MANNER OF PROCEEDING

It is apparent to the staff that on this matter the Commission must abandon its habit of proceeding by consensus. The Commission has worked intensively on this narrow issue for nearly a year without coming to a resolution. The history of the Commission's consideration of the matter and the discussions at the meetings make clear that unanimity will not be achieved. This is not unexpected; experts in this area, including the Executive Committee of the State Bar Probate, Trust Law & Estate Planning Section, are also divided.

The staff recommends that the Commission proceed by formal vote so that we can get a resolution of this matter. The problems are real and continuing, and have become more pressing. The legal community is looking to the Law Revision Commission for some clarification of the law. Judicial resources are being diverted to deal with this matter which should be resolved by legislation. Any rule, so long as it is clear and people can rely on it, is better than the present confusion.

COMPARISON OF COMMUNITY PROPERTY WITH JOINT TENANCY

How do community property and joint tenancy differ? The following discussion is summarized from Sterling, Joint Tenancy and Community Property in California, 14 Pac. L. J. 927 (1983), reprinted in 11 Commun. Prop. J. 17 (1984). For purposes of simplification, we omit some of the intricacies and minor exceptions to the general rules stated.

In this summary we also use an analytical device suggested by the Beverly Hills Bar Association, Probate and Trust Section Legislative Committee (Exhibit 1). We compare the legal incidents of community property not with the legal incidents of joint tenancy but with the legal incidents of separate property held either as joint tenants or as tenants in common. The Beverly Hills analysis would suggest that the differences between community property and joint tenancy are really differences between community property and shared ownership of separate property. We would thus expect the differences to exist whether the

separate property is held as joint tenants or as tenants in common. As the following analysis indicates, the Beverly Hills regime has significant problems. See also Professor Reppy's critical letter (Exhibit 2). In any case, it does not resolve the ultimate question whether the spouses actually intend and should receive joint tenancy treatment when that form of title is imposed on community property. But we have used the Beverly Hills analysis here because we believe it provides a fresh and useful perspective on the problem.

All Forms Available to Married Persons

Civil Code Section 682 provides:

> 682. *Ownership of several persons.* The ownership of property by several persons is either:
> 1. Of joint interests;
> 2. Of partnership interests;
> 3. Of interests in common;
> 4. Of community interest of husband and wife.

See also Fam. Code § 750 ("A husband and wife may hold property as joint tenants or tenants in common, or as community property.")

Despite the availability of all forms of title to married persons, most titles between them are nominally joint tenancy. And, despite the availability of joint tenancy to unmarried persons, most joint tenancies are between married persons.

Ownership Interest

Community property. Community property is owned by the spouses in equal and undivided shares.

Joint tenancy. Separate property held by the spouses in joint tenancy is also owned in equal and undivided shares.

Tenancy in common. Separate property held in tenancy in common is presumed to be in equal and undivided ownership, but the parties may specify different shares.

Management and Control

Spouses have a fiduciary duty in the management and control of marital property of all types, community as well as separate property held jointly or in common. Fam. Code §§ 721, 1100.

Transfers

Community property. A spouse acting alone may transfer the entire interest in community property, subject to several important statutory exceptions:

(1) Real property cannot be conveyed, encumbered, or leased for more than a year without joinder of both spouses. Fam. Code § 1102.

(2) A gift of community personal property requires written consent of the other spouse. Fam. Code § 1100(b).

(3) A disposition of community personal property used as home or home furnishings or clothing of spouse or children requires written consent of the other spouse. Fam. Code § 1100(c).

A violation of these restrictions (or at least the real property restriction) voids the transaction in its entirety, except that the transfer may be recognized as to the interest of the transferring spouse after the community is severed by dissolution or death.

Joint tenancy. An owner of separate property held jointly may transfer only the owner's interest in the property. The transfer converts the joint title to tenancy in common among the new owners. A purported transfer of the entire property by one owner acting alone is only effective as to the interest of that owner.

Tenancy in common. A transfer of separate property held in common is treated the same as a transfer of property held jointly.

Dissolution of Marriage

Community property. Community property is divided between the spouses and becomes separate property at dissolution of marriage. If for some reason the property is not divided, at dissolution of marriage by operation of law the community property becomes separate property held by the spouses as tenants in common. It does not remain community property since community property can only be owned by married persons.

Joint tenancy. Separate property held by the spouses as joint tenants was historically not subject to the jurisdiction of the court. That has now changed, however, and the court may divide it in the same manner as community property on request of a party. Fam. Code § 2650. If for some reason the property is not divided at dissolution, the joint tenancy title remains in place, with survivorship consequences

for the spouses; dissolution of the marriage does not sever the joint tenancy or create a tenancy in common since marriage is not a requirement of joint tenancy tenure.

Tenancy in common. Separate property held in common is treated the same at dissolution as property held jointly.

Partition

Community property. Community property is not subject to partition until dissolution of marriage. Code Civ. Proc. § 872.210(b).

Joint tenancy. An owner of separate property held in joint tenancy has an absolute right to partition the property at any time, dividing the formerly undivided interests in the property.

Tenancy in common. Partition of separate property held in common is treated the same as partition of property held jointly.

Rights of Creditors

Among the most dramatic differences between community property and separate property held in joint tenancy or tenancy in common are treatment of rights of creditors.

Unsecured creditors. During the lifetime of the spouses, an unsecured creditor may reach all the community property for a debt incurred by either spouse, but may reach only the debtor spouse's one-half interest in separate property held in joint tenancy or tenancy in common.

After the death of a spouse, all community property remains liable for the debts of the spouse; the decedent's one-half interest in separate property held in tenancy in common is liable; and no separate property held in joint tenancy form is liable.

Secured creditors. Where both spouses execute a security agreement or encumbrance, the creditor's rights extend to the entire property regardless whether it is community property or separate property held as joint tenants or tenants in common. Where only one spouse executes a security agreement or encumbrance, the results differ wildly and whimsically:

(1) The rights of the secured creditor in community property will vary depending on whether the property is real or personal, whether the one-year voidability period as to real property has run, and whether the marriage has been terminated by dissolution or death; depending on the circumstances the creditor's right in the community asset may be all, half, or nothing. See discussion under "Transfers", above.

(2) As to separate property held as joint tenants or tenants in common, during the lifetime of the spouses a secured creditor may reach the one-half interest of the debtor.

After the death of a spouse, the secured creditor can reach the debtor's one half interest in tenancy in common property. But as to joint tenancy property, the creditor can reach all of the property if the debtor is the survivor and none of the property if the debtor is the decedent.

Survivorship

Community property. Each spouse has the right of testamentary disposition of the spouse's one-half interest in community property. Absent a will, the interest passes to the surviving spouse.

Joint tenancy. Neither spouse has the right of testamentary disposition of any portion of separate property held as a joint tenant. The property passes to the surviving spouse by right of survivorship.

Tenancy in common. Each spouse has the right of testamentary disposition of the spouse's one-half interest in separate property held as a tenant in common. Absent a will the interest passes in whole, half, or third to the surviving spouse, depending on the number of children, parents, and their issue left by the decedent. Prob. Code §§ 6101, 6401.

Avoidance of probate

Community property. The surviving spouse may take community property passing by will or intestate succession from the deceased spouse without probate, although probate is available if so desired, for example to cut off creditor claims. Prob. Code § 13500 et seq.

Joint tenancy. Separate property held by the deceased spouse as a joint tenant is not subject to probate. It has been argued that joint tenancy has a competitive advantage over community property in respect to ease of passage, since title to joint tenancy can be cleared immediately on the basis of an affidavit of death, whereas community property requires a 40-day delay and some title insurance companies require a court order before clearing title.

Tenancy in common. Separate property held by the deceased spouse as a tenant in common is subject to probate except as to the portion that passes to the surviving spouse.

Taxes

A major concern is the income tax basis of property after death of a spouse. The decedent's interest both in community property and in separate property held as a joint tenant or tenant in common receives a new basis as of the date of death. But the tax treatment of the survivor's interest varies. Whether a new basis is desirable depends on whether the property has appreciated or depreciated in value.

Community property. The surviving spouse's interest in community property receives a new basis as of the date of the deceased spouse's death.

Joint tenancy. The surviving spouse's interest does not receive a new basis as to separate property held as a joint tenant.

Tenancy in common. The surviving spouse's interest does not receive a new basis as to separate property held as a tenant in common.

DIFFERENT APPROACHES

Our problem is to determine what the law should be when joint tenancy title is imposed on community property, either as a result of community funds having been used to acquire the property in joint tenancy title form or as a result of a community property asset having been retitled as joint tenancy.

The differences in treatment between community property and joint tenancy are fairly dramatic. Even if we use the Beverly Hills reinterpretation of the law, which says that the differences are not due to the joint tenancy title form but are merely differences between community property and separate property ownership, the title form does cause major differences, particularly when we deal with survivorship and its consequences: right to will the property, intestate rights to the property, rights of creditors, probate requirements, and taxes.

California law favors community property as a shared form of tenure between married persons. The law presumes that property acquired during the marriage is community, but the presumption is rebuttable. Although the law disfavors joint tenancy, the law also rebuttably presumes that property actually titled as joint tenancy is in fact joint tenancy.

How is the law to resolve this conflict and avoid the present confusion? The Legislature has spoken with respect to division of the property at dissolution of marriage. For that purpose, "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." Fam. Code § 2580(a)(2). The presumption affects 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.
> Fam. Code § 2580(b).

The application of the statutory community property presumption at dissolution of marriage is the subject of the new Supreme Court case, Marriage of Hilke. In Hilke (and the companion Allen case), community property had joint tenancy title imposed on it; a dissolution proceeding was pending when one of the spouses died; should the property be treated as joint tenancy and pass to the survivor or as community property and pass one-half to the decedent's beneficiaries. The Supreme Court in Hilke ruled that the community property presumption applies. The court also ordered published the Court of Appeal decision in Allen which reached the same conclusion.

These cases do not resolve the community property/joint tenancy problem, however, since they deal with only one aspect of it--treatment of the property at dissolution of marriage.

Extend Community Property Presumption to Termination of Marriage by Death

One approach to the joint tenancy/community property issue that has frequently been suggested is to extend Family Code Section 2580 so it applies in all cases and is not limited to dissolution of marriage. This would have the advantage of treating the property consistently for all purposes. It would also help ensure that the parties understand their community property is being converted to separate property by taking title as joint tenants. It would not, however, ensure that they are aware of the full consequences of separate property joint tenancy, including the inability to will it and possible adverse tax consequences.

Important to resolving the problem is a determination of what people intend or think they are getting by taking joint tenancy title. Many experts have told us that people do not intend or think anything--they simply do what a broker tells them to do. Others have said that people do intend something--they intend that the property pass to the surviving spouse and that it pass without probate.

Community Property With Right of Survivorship

The concept that, if people think they are doing anything by taking joint tenancy title they think they are passing property to the survivor without probate, has been the underlying assumption of a number of proposed solutions to the community property/joint tenancy thicket. It serves as the basis for the many proposals we have seen to treat community property in joint tenancy form as community property with right of survivorship.

Under this formulation, the property has all the attributes of community property except that at death it passes to the surviving spouse by right of survivorship and is not subject to testamentary disposition. This is the outcome for which the Beverly Hills analysis

seeks to provide a theoretical underpinning. It is also suggested by Professor Kasner in his background study for the Commission and is the basis of the Los Angeles County Bar Association Probate and Trust Law Section, Executive Committee recommendation. As nearly as we can tell, this would receive community property tax treatment by IRS.

This approach has also been favored by the staff in the past. However, our faith in the concept that survivorship is really what people understand and want has been shaken by information from the State Bar Probate Section that even though people understand the concept of survivorship, they still believe they have the right to will their half of the "joint tenancy" property. (Of course they can, but only after severing the joint tenancy property and converting it to something else.) Moreover, it appears that many people are not aware that by taking joint tenancy property out of their probate estate, they also take it out of the pour-over trust created in their will. Finally, many are unaware that community property, if it is not willed elsewhere, passes to the surviving spouse without probate; joint tenancy title form is unnecessary for this purpose. Community property is a more flexible form of tenure that most likely enables most people to achieve what they really want.

Community Property Unless Transmuted

These considerations have led the staff to the conclusion that the transmutation rules, which apparently control the matter right now, should continue to control and the law should make this clear. Thus community property would continue to be community property despite a change in title form to joint tenancy unless there is an express written transmutation that satisfies statutory requirements. This, combined with a requirement that the conversion to joint tenancy be an informed one, was the basis of the last tentative recommendation draft considered by the Commission. This approach is favored by a minority of the State Bar Probate Section Executive Committee.

Joint Tenancy Absolute

The majority of the State Bar Executive Committee favor a different approach. They believe title should mean what it says. If property is titled as joint tenancy it should be presumed that it is joint tenancy. It will pass automatically to the survivor at death, which will simplify title clearing. It is not clear under their formulation whether the presumption would be rebuttable, and if so what would be sufficient to rebut it. While it would be nice if title could mean exactly what it says, this is not possible, since there is always the potential for forgery, fraud, mistake, and the like.

The concept here appears to be that people will just have to become educated that if they put joint title on property it passes to the survivor and can't be willed, with all the consequences, tax and otherwise. No more mushy intent stuff. Of course, if it were that easy to educate people, this problem wouldn't still be plaguing California law.

Survivorship Marital Property

Another approach that has been advocated is to leave joint tenancy and community property alone and to create a new form of title that has the attributes of community property during life and passes by right of survivorship at death. Then, if this is what people really want, they can simply take property in that form of title and they will know exactly what they're getting. The problems with this approach are that it would require a massive education program, would add yet another title form to an already confused area, and would be prospective only. We would still need to address the issue of the vast numbers of existing joint tenancy titles imposed on community property.

Community Property or Joint Tenancy Depending on Intent

Another suggestion is in essence to return California law to the good old days where parties could argue the property is community or joint tenancy depending on whichever is most advantageous, by means of oral transmutation or other loose proof of intent. The problem with this approach is that the transmutation statute was enacted to cure

abuses in characterizing property based on casual oral comments and implications from conduct, and there would be strong resistance from the family law bar to return to the former high litigation approach.

Of course, more minor modifications of the transmutation statute could be geared to joint tenancy, or perhaps the joint tenancy/community property issues could be governed by special transmutation rules applicable only to them. Professors Kasner and Halbach would pursue these lines. The Commission has requested additional background on the transmutation statute.

TRANSMUTATION

The transmutation statute was enacted on recommendation of the Law Revision Commission effective January 1, 1985. It provides:

> Fam. Code § 852. Form of transmutation
>
> 852. (a) A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.
>
> (b) A transmutation of real property is not effective as to third parties without notice thereof unless recorded.
>
> (c) This section does not apply to a gift between the spouses of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature that is used solely or principally by the spouse to whom the gift is made and that is not substantial in value taking into account the circumstances of the marriage.
>
> (d) Nothing in this section affects the law governing characterization of property in which separate property and community property are commingled or otherwise combined.
>
> (e) This section does not apply to or affect a transmutation of property made before January 1, 1985, and the law that would otherwise be applicable to that transmutation shall continued to apply.

The Commission Comment to this section notes that it "imposes formalities on interspousal transmutations for the purpose of increasing certainty in the determination whether a transmutation has in fact occurred."

Purpose of Statute

The Commission's recommendation pointed out that the former California rule of easy transmutation, while convenient and practical, generated extensive litigation in dissolution proceedings.

> The convenience and practice of informality recognized by the rule permitting oral transmutations must be balanced against the danger of fraud and increased litigation caused by it. The public expects there to be formality and written documentation of real property transactions, just as it expects there to be formality in dealings with personal property involving documentary evidence of title, such as automobiles, bank accounts, and shares of stock. Most people would find an oral transfer of such property, even between spouses, to be suspect and probably fraudulent, either as to creditors or between each other.
> 18 Cal. L. Revision Comm'n Reports 214 (1984).

The statute has achieved its intent. Family practitioners report that the statute has effectively ended litigation over alleged transmutations.

The statute has been construed in two appellate cases.

Blair Case

In Estate of Blair, 199 Cal. App. 3d 161, 244 Cal. Rptr. 627 (1988), the spouses had bought a house during marriage, taking title as joint tenants. They later separated and a dissolution proceeding was pending when the wife died, having willed her property to her sister. The husband argued he should take the property by right of survivorship under the presumption created by the joint tenancy form of title. The sister argued there was an agreement or understanding that the property was to remain community, and that written declarations and admissions of the parties in the dissolution proceeding supported this. The Court of Appeal held that the written declarations and admissions made during litigation would not satisfy the transmutation statute's requirement of an express writing since those statements were only for the purpose of dissolution of marriage. Moreover, there are different presumptions for characterizing community property in joint tenancy form at dissolution of marriage and at death: the common law joint tenancy presumption controls at death, whereas the statutory community property presumption controls at dissolution.

The court was troubled by its decision, however, and was critical of this state of the law. The court felt the common law presumption of joint tenancy should not apply and the community property presumption applicable to dissolution cases should apply for purposes of determining rights at death as well.

> Our role, however, is only to decide this case. The concerns we have expressed are more properly addressed by the Legislature which can provide that the community property presumption under section 4800.1 [now Family Code § 2580 (community property presumption for property held in joint form)] applies to those cases in which a spouse holding joint tenancy property dies during the pendency of a dissolution proceeding.
> 199 Cal. App. 3d at 170.

The Supreme Court in Hilke has now found a way to extend the community property presumption without legislative action.

MacDonald Case

The other case construing the express written declaration requirement for transmutation is Estate of MacDonald, 51 Cal. 3d 262, 272 Cal. Rptr. 153, 794 P. 2d 911 (1990). In that case the husband made a beneficiary designation for community property IRA accounts to a trust for his children of a former marriage; the wife signed a consent to the beneficiary designation. When the wife's heirs sought her half of the community property in the accounts, the husband argued that her consent to the beneficiary designation transmuted the community property to his separate property. The court held that a consent to a beneficiary designation is not a transmutation since a transmutation must contain language that expressly states that a change in the characterization or ownership of the property is being made.

Although we have heard criticism of this holding, the staff believes it is correct and properly effectuates the Commission's intent in enacting the transmutation statute. A consent to a beneficiary designation is not and should not be considered a transmutation of community property by the consenting spouse to the separate property of

the other spouse. The consent is just what it says it is--an agreement that on the death of the other spouse it may pass as consented to. It is certainly not a waiver by the consenting spouse of any other rights in the property, including the right to revoke the consent and the right to receive the spouse's one-half interest in the account in the event of termination of the marriage by dissolution. The court properly determined that the consent to the beneficiary designation is not a transmutation since in order for a writing to be a transmutation it must indicate agreement that the character of the property is being changed. This is now codified in Probate Code Section 5022.

The MacDonald construction of the transmutation requirement has led Professor Kasner to argue that most joint tenancies created since the 1985 enactment of the statute may not be valid--they may not have been created by an express writing indicating a change in ownership joined in, consented to, or accepted by the spouse adversely affected.

Although Professors Kasner and Halbach have suggested that the transmutation statute requires revision, the staff does not believe this would be desirable. To return us to the situation before enactment of the transmutation statute moves us backward rather than forward. Although the looseness of the prior law allowed a surviving spouse to argue the property remained community for tax purposes, this still left unresolved issues of creditor rights, heir and beneficiary rights, etc. The staff believes it is better to have clear rules governing these matters.

STAFF RECOMMENDATION

The question comes down to that posed by Professor Kasner in his background study for the Commission on this issue: "How far should the Legislature go in protecting people from themselves and from their advisors?" In the staff's opinion it is indisputable that the law is in disarray, and that the Commission would perform a tremendous service to the people of California by straightening it out.

What should be the result when joint tenancy title is imposed on community property? In the past the result has been to transmute the community property to separate property held as joint tenants, subject to retransmutation to community property by agreement or understanding of the parties.

The staff believes the guiding principle in the formulation of the rules should be the intent of the parties. But, what do they intend? We have previously assumed that they intend to pass the property to the surviving spouse without probate, for the most part. However, we have been informed that in fact most people do not intend anything in particular--they're just doing what some broker told them to do.

If we cannot make any generalizations about intent, can we at least determine that one form of tenure is generally preferable? Up until now we have consistently concluded that community property is the preferable form of tenure. This is based on the fact that community property can achieve the same results as joint tenancy, with greater flexibility and tax advantages.

To recapitulate:

(1) Protection against mismanagement. There are no limits on the right of a joint tenant to deal with and dispose of the joint tenant's one-half interest in joint tenancy property, including encumbering or disposing of the interest in the family home. The law protects a spouse substantially against mismanagement and depletion of the community by the other spouse.

(2) Right of survivorship. Joint tenancy has a right of survivorship, although a joint tenant can defeat this by severing the joint tenancy before death. Community property approaches the same result from the opposite direction--the decedent may pass the one-half interest by will, but it goes to the survivor if not willed otherwise.

(3) Passage without probate. Joint tenancy passes without probate. The surviving spouse takes community property without probate, although the option is available to probate the property if desired, e.g. to clear title or cut off creditor claims.

(4) Clearing title. Title to joint tenancy real property can be cleared in the survivor by means of an affidavit of death; the possibility of a prior severance is guarded against by the requirement

that the severance be recorded before death. Title to community real property may be cleared by an affidavit of death; the possibility of a will to a person other than the surviving spouse is guarded against by a 40-day waiting period during which an adverse claim may be recorded.

(5) Creditors' claims. Joint tenancy offers substantially more protection against creditors than community property. Whether the law should favor a surviving joint tenant at the expense of legitimate creditors of the decedent is questionable. The legal system fosters commerce by ensuring that just debts will be paid. An aberrant doctrine like joint tenancy, based on feudal technicalities, at best causes informed creditors to deny credit to a joint tenant or to require all joint tenants to join in a transaction. At worst, it causes an uninformed creditor or an involuntary creditor such as a personal injury victim to go unpaid to the benefit of the surviving joint tenant. It may be that the surviving spouse is a dependent of the decedent and requires some protection from creditors of the decedent. There are devices in the law for this purpose, such as the probate homestead; the meat-axe approach of joint tenancy is not necessary.

(6) Income taxes. Generally community property will be advantageous to spouses whose marriage is terminated by death because the property will have appreciated in value and will receive a double step-up in basis for income tax purposes. However, this may not be true for some properties acquired in the past year or two; in a declining market joint tenancy may be preferable in order to avoid a double step-down in basis.

Each of the many approaches that has been suggested to resolve the issues has advantages and disadvantages. Of these, the staff believes the four following come closest to achieving an adequate resolution. The staff recommends the fourth of the four approaches.

Easy transmutation. One approach is to return the law to its status before enactment of the transmutation statute. Joint tenancy title would create a presumption that the property is separate property held in joint form, but this would be subject to rebuttal by evidence that the title was for convenience only and the parties did not intend to change the property's community character. The advantages of this

approach are obvious--the loose system is advantageous to the surviving spouse, providing greatest flexibility to allege whatever is in the spouse's interest. It is a high litigation approach, for example in the recent appellate cases where death occurs during dissolution proceedings and beneficiaries of the deceased spouse are at odds with the surviving spouse. The transmutation statute has solved problems such as this in the dissolution context, and the staff would oppose any effort to weaken the statute for purposes of dissolution. An alternative would be to provide a special statute for joint tenancy transactions (which would not be governed by the general transmutation statute), or to exempt joint tenancy transactions from the transmutation statute.

Community property with right of survivorship. Another approach is to provide that joint tenancy title means what it says, at least at death, and the property passes by right of survivorship; this is the so-called "community property with right of survivorship" approach. The primary benefits of this approach are that property retains its community character throughout the marriage and at dissolution, but in case of death there would be relative certainty of title and simplicity of transfer. Presumably under this approach a community property agreement between the parties would not be honored, since the agreement would not appear on the face of the title and would be overridden by the title form. And suppose, on the other hand, the spouses really do want to hold their property as joint tenants; would this approach preclude it? The other drawbacks to the approach are well-known--persons end up in this title form without knowledge of its consequences, it can defeat their will or trust, it adds yet another variation to an already confused body of law, and whether it would receive favorable tax treatment by IRS is not certain.

Extend community property presumption. The courts and practitioners have been generally happy with the approach of existing Civil Code Section 4800.1 that marital property held in joint title form is presumed community for purposes of division at dissolution of marriage. Many appellate court decisions struggling with the joint tenancy/community property issue have bemoaned the fact that they are powerless to extend the statute beyond dissolution proceedings and have

noted pointedly that the Legislature has power to do this. The Hilke case represents a modest court extension of the statute. The staff has explored this approach at length, but cannot recommend it. The statute would presume that all jointly titled marital property is community, even if it has a separate property source. This would go far beyond what seems reasonable in confiscating a person's separate property and destroying the possibility of tracing. It would be a dramatic and not readily defensible change in the law of marital property. Trying to deal with the effect of joint tenancy title on community property is already extraordinarily complex without expanding the scope of the project to cover its impact on separate property as well.

Transmutation required. The staff approach is to provide that community property remains community property despite imposition of joint tenancy title, unless the parties knowingly transmute it to separate property held in joint form. The advantages of this approach are that it keeps property in the form most advantageous to most married persons, but allows those who really do want a separate property joint tenancy to get it. This is the approach taken in the draft tentative recommendation last considered by the Commission.

We would make one significant change from the last draft--we would recast the rule as a presumption rather than a legal conclusion. Thus community property on which joint title was imposed would be rebuttably presumed to remain community property. Evidence of a transmutation would be sufficient to rebut the presumption. This will address the concern expressed by some Commissioners at recent meetings that earlier drafts did not make clear who would have what burden when the issue got to court.

A copy of the revised staff draft of the tentative recommendation is attached. Exhibit 4.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

EXHIBIT 1

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Key: _____

November 19, 1992

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

Re: Memorandum 92-68

Dear Mr. Sterling:

On behalf of the Beverly Hills Bar Association, Probate and Trust Section Legislative Committee, I wish to comment on your study entitled "Effect of Joint Tenancy Title on Community Property." I think this phrase correctly captures an important issue, which is that joint tenancy is merely a form of title, and not a type of title. Form of title must be distinguished from type of title. Only two types of property exist in California, community (including quasi-community property) and separate. Property must be either community property or separate property. Joint tenancy is neither one of these. It is merely a form of title which creates a presumption as to the underlying character of the property.

§682 of the Civil Code defines several interests in property, including a "joint interest." A joint interest is something more than joint tenancy title, it is what is sometimes referred to as "true joint tenancy property." Civil Code §683 defines "joint interest" as requiring not only joint tenancy form of title, but also present and equal ownership of the property with the right of survivorship. It is of some interest to note that Schedule E on a Federal Estate Tax Return refers to joint interest, and not to joint tenancy.

We do agree that joint tenancy is a form of title. As your study accurately states, the crucial determination is the effect of joint tenancy title on community property. Title, after all, is only a presumption. In the case of joint tenancy, the presumption is that the underlying property is a joint interest held in equal shares by two or more joint tenants as their separate property. The Rules of Evidence tell us how to overcome such a presumption.

Because joint tenancy is a form of title, and not a form of property, it is inaccurate to refer to converting community property to joint tenancy. A quick look at the Transmutation Statute, Civil Code §5120.730, will show that transmutations are from community property to separate or separate property to community. Existing law, at least as of January 1, 1992, meticulously followed the distinction between a form of title and form of property, as well as joint tenancy title versus "joint interest." I, therefore, urge you to maintain these distinctions, not only in your discussions and draft comments, but also in your statute.

We also suggest that the comparison of community property to joint tenancy is not correct. This is seen clearly by taking note of the numerous situations in which community property could be held in a single name or in the name of a nominee. I could, for example, by writing a check on a community property account purchase a piece of property in the name of me and my son, intending that he should have it when I die. The fact that it is in joint tenancy form does not make it any the less the community property of my wife and myself. In the example, I have no intent to make a present gift to my son, nor do I have any intent to transfer any of the property. Many other examples like this can be constructed. It would be more appropriate to compare community property to a "joint interest."

We, therefore, strongly object to the enactment of proposed §861, et seq., of the Family Code, because it introduces into the law in California the suggestion that there is a new form of property called "joint tenancy," which is undefined. The inconsistency is apparent, when one goes from subdivision (a), which refers to "joint tenancy," and thence to subdivision (b), which refers to "joint tenancy form." This section would also do critical harm to §5110.730, which refers only to separate property and community property. Please let us not, indirectly, create a new form of property called joint tenancy.

Very few changes are actually required in order to clarify the situation in California. These include:

1. Recognizing, either through an educational program or through a clarifying statute that community property may be held in joint tenancy form;

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

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

This scheme requires very little change in the Property Law, as we know it. It does not create any new form of property, nor any problems for title companies. It does not cause any property to change form, whether from community property to separate property or from separate property to community. Rather, all it would do is clarify the burden of proof required to show what the property really is.

I have asked many practitioners and many clients over the years why they placed property into joint tenancy form. Without exception, the answer was, it was done in order to create a right of survivorship to avoid probate. The only people who would disagree with this are those who, after the fact, change their minds. Recognizing that community property held in joint tenancy form has a right of survivorship is merely carrying out the original intent of the parties and would avoid a legal nightmare.

Very truly yours,

KENNETH G. PETRULIS
for the Beverly Hills
Bar Association, Probate,
Trust and Estate Planning
Legislative Committee

KGP:jh
Enclosure

JOINT TENANCY: A MERE FORM OF TITLE

Most authors inaccurately treat joint tenancy as an interest in property. In California, joint tenancy is a form of title which creates a presumption that the underlying property interest is the separate property of two or more joint tenants who hold the property in equal shares. In fact, most property held in joint tenancy by married couples in California is most likely community property. While joint tenancy is an important form of title with a significant history in California, it is not an interest in property, but merely a form of title.

In dealing with property issues, it is important to distinguish the form of title from the character of the underlying property interest. Form of title is only a presumption, while the underlying interest is a substantive right. Evidence Code §637 provides that things possessed by a person are presumed owned by that person. Thus, the owner of legal title to property is presumed to be the owner of full beneficial title. See Evidence Code §662. The presumption created by title, however, may be rebutted by clear and convincing proof.

First, we need to consult the Civil Code. While the Civil Code defines various property interests, joint tenancy is not defined as a property interest. Something more akin to the common law joint tenancy is the "joint interest" defined in Civil Code §683.

A joint interest, which is defined in the Civil Code, is something more than joint tenancy. Under Civil Code §683, in order for a "joint interest" to exist, there must be more than mere title. A "joint interest" is defined as an "interest owned by two or more persons, in equal shares, by a title expressly declared to be joint tenancy." As defined, then, a joint interest requires:

1. Title in joint tenancy form, and

2. An interest owned by two or more persons.

We must, therefore, focus on whether the term "interest owned" adds additional substantive requirements that go beyond the mere joint tenancy title.

"Ownership" is "the right of one or more persons to possess and use [a thing] to the exclusion of others. In this code, the thing of which there may [be] ownership is called property." CC Section 654. There are two types of ownership, absolute and qualified. Under CC Section 679, absolute ownership is where one person has sole dominion or control over property. Qualified ownership, under CC Section 680, is ownership shared with one or more persons.

The concept of ownership introduces the right of a person to possess and use the thing to the exclusion of others (but not, of course, other joint owners). Therefore, if property is taken in

joint tenancy form for convenience sake, it may be, and frequently is the case that one or more of the joint tenants have no right of ownership. Such a situation would occur, for example, if a parent added a child or children as joint tenants on the family home with the intent that the children would receive the home on the parent's death and without intending to transfer any present ownership right. Such property placed in joint tenancy for the sake of convenience only is not a joint interest, because there is no interest owned by the other joint tenant. Although it might be difficult and costly to prove, an action for a resulting trust would show beneficial ownership only in the parent. The right of the parent to possess and use the house could be enforced in court.

"Right" is defined by Black's Legal Dictionary, as the capacity to call upon state enforcement, by force of law or by administration, for example, through the police force. Under CC Section 654, ownership is a right of one or more persons to possess and use a thing to the exclusion of others. This right is the capacity to have the State enforce the right to possession and use. State enforcement might include a law confirming the right, a Court Order upholding the right, or an administrative act in support of the right.

The presumption created by legal title must not be confused with the fact of ownership. We should not assume that a joint tenancy is separate property owned equally by the joint tenants. Legal title reflects only presumed ownership of the property, as distinguished from equitable title which establishes true, beneficial ownership. Our laws have always distinguished the two. This principle is exemplified by recently repealed Civil Code §853 and the case law related to resulting trusts. Likewise it is common to include in a trust the power to hold property in the name of the nominee. The form of title creates only a presumption. While that presumption is strong enough to form the basis for a title policy, the presumption can be overcome by clear and convincing proof. See Evidence Code §662. If the evidence shows the property to be something other than a joint interest, the presumption of title will be overcome and the property will be treated according to its true nature.

Now, when we look at joint tenancy, we can recognize it for what it is, a mere form of title. That form of title, however, is significant. It will, for example, as allowed by Probate Code §5000, transfer legal title to the surviving joint tenant upon the death of another joint tenant. California Law exempts such transfers of title from probate, without regard to whether a joint interest exists and without the formalities of a will: "A provision for a nonprobate transfer on death in [a]...conveyance...is not invalid, because the instrument does not comply with the requirements of the execution of a will, and this code does not invalidate the instrument." Probate Code § 5000(a).

In order for a joint interest to exist there must be more than mere title. Two or more persons must have a "right," enforceable in Court or otherwise by law, to exercise control over property. If two persons hold title as joint tenants, it is not a joint

interest unless each has a legally enforceable right to control the property. If property is placed in joint tenancy for the sake of convenience only, then the property is not a joint interest.

The discovery that joint tenancy is a mere presumption under California Law has been made before. In the case of Siberell v. Siberell, (1932) 214 C. 767, 7 P.2d 1003, a deed to a husband and wife created a presumption of joint tenancy, in which the interest of each spouse was separate property. (214 C. 772) The Court held that evidence may be offered that the property was, in fact, community property, despite its joint tenancy form. Similarly, see the matter of The Estate of Fisher, (1988) 198 Cal.App.3d 418, 244 Cal.Rptr. 5, where the Court held that a savings account opened by the decedent as a joint tenancy account with his mother, was not necessarily a joint interest passing to the surviving joint tenant. The Court received evidence consisting of a statement in the will that the true nature of the property was separate property of the decedent subject to disposition as he intended.

Married persons may freely "transmute" their property from community property to separate property or separate property to community property, by agreement, with or without consideration. Civil Code Section 5110.730 provides that transmutations are not valid, however, unless made in writing by an express declaration. The parties must expressly declare that they are "effecting a change in the character of ownership of [their] interest". Estate of MacDonald (1990), 51 Cal. 3d 262, 273, 272 Cal. Rptr. 153.

Section 5110.730 of the Civil Code and the MacDonald case compel the conclusion that a standard joint tenancy deed does not transmute community property to separate. The MacDonald case expressly stated that "...a writing signed by the adversely affected spouse is not an 'express declaration' for the purposes of section 5110.730(a) *unless* it contains language which expressly states that the characterization or ownership of the property is being changed." Ibid, 272. Obviously a joint tenancy deed which refers only to a transfer to joint tenants is not sufficient to meet this burden and does not transmute community property to separate property as we have all, previously, so casually assumed.

In Revenue Ruling 87-98, the IRS issued a ruling to the effect that while title held by a couple in joint tenancy form raised the presumption that the spouses intended to terminate the community interest and transmute the property from community to separate, that presumption could be overcome by evidence that the spouses intended the property not to be transmuted to separate property.

If the couple discussed in Revenue Ruling 87-98 lived in California and placed their community property into joint tenancy form, it would not lose its community property nature. and become a joint interest half the property of each because, pursuant to the holding in Macdonald, there was no language expressly stating that the character of the property was being changed.

Another area, where the importance of the distinction between joint interest and joint tenancy appears, is in the area of federal

estate taxes. On Federal Estate Tax Form 706, Schedule E requires that "joint interests" be listed, not joint tenancies. Therefore, savings accounts owned 100% by a decedent, but held in joint tenancy form, would be listed on Schedule B, the cash schedule, rather than Schedule E. A joint tenancy account would be listed on Schedule E only in the event that there had been actual transfer in the interest in the cash during the decedent's lifetime. A similar analysis would apply to real property.

Joint tenancy is merely a form of title. It's place, in California, has been taken by the joint interest which requires both title in joint tenancy form and joint ownership. Because of the strong presumption that joint tenancy property is the separate property of the tenants, we should still counsel against it's use. But, understanding how the presumption of title can be overcome can solve tax and ownership problems created when property is taken in joint tenancy form.

EXHIBIT 2

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December 2, 1992

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RE: California Law Revision Commission Recommendations on Joint Tenancies

Dear Mr. Petrulis:

Thank you for sending me the article "Joint Tenancy: A Mere Form of Title." I cannot agree with your view that joint tenancy is not a form of ownership, a type of separate ownership. In England there were three types of co-ownership: tenancy in common, joint tenancy, and tenancy by the entireties. There was, of course, no community property, so England could not have had a two-category system of community vs. separate ownership. Joint tenancy is most clearly seen as a different form of ownership (as opposed to title) when compared to tenancy by the entirety. The spouses holding by the entirety were viewed as seized per tout et non per my and because of the doctrine of coverture the husband was effectively the sole owner. Management powers and creditors' rights differed considerably with respect to joint tenancy and tenancy by the entirety properties.

The word "tenancy" is associated in English land law with more than title -- with ownership. It comes from tener, to hold, and the chief lord of the land owning in fee enormous acreage nevertheless was a "tenant" under feudal theory holding under the king.

I have never researched the issue but have always assumed joint tenancy was recognized in California for the benefit of unmarried persons who wished to co-own with a right of survivorship. Recognition of joint tenancy gave unmarrieds a choice of ownership in tenancy in common and joint tenancy. Use of one of these phrases in a deed was not a matter of a form of title but controlled such matters as creditors' rights. For example a mortgagee who did not foreclose before his co-owner died survived by the other joint tenant had no security interest but would have if the ownership were tenancy in common. To attribute this different result, so critical to the mortgagee, to a mere form of title and not a difference in the ownership interest of the mortgagor in my view stretches the notion of "form of title" beyond its common understanding.

You are quite right that the mere use of the words "as joint tenants" in a deed did not always create a joint tenancy. There could be many reasons for the failure, including lack of one or more of the four unities (e.g., the instrument elsewhere said grantee A was getting a one-third interest and B two-thirds). Likewise use of the term "community property" in a deed does not always create community ownership; the grantees may be unmarried. The most useful legal term to describe the use of "in joint tenancy" and "as community property" in a deed is the word "recital." Just because the recital is sometimes ineffective does not strike me as a reason for finding some other term to use to define the ownership interest. Indeed, do not notions of symmetry in the law drive you to seek a different word than "community property" (to be the equivalent of "joint interest") so that the recited term is not the same as the phrase used to define ownership?

Possibly the use of different terms would help the bar appreciate that the recital is not conclusive of the form of ownership, but we are well used to accepting that a recital of community property does not assure that ownership is community and thus should have little trouble realizing that the recital of joint tenancy does not always create a joint tenancy ownership.

I think *Estate of MacDonald* was wrongly decided because the writing there was ample to reveal intent to transmute. No matter how *MacDonald* was decided, however, Civil Code section 5110.730 has the beneficial effect of eliminating the bizarre *Siberell* presumption of transmutation. That presumption was stronger than you describe it in the article you sent me. Even if the instrument not signed by either grantee spouse revealed on its face the spouses had used community rather than joint tenancy funds to buy the land, the *Siberell* line of cases presumed there had been a then-allowed oral transmutation of the community money to joint tenancy. Because the oral transmutation underlying *Siberell* no longer is valid, a recital of joint tenancy can raise a presumption that joint tenancy funds were used for the purchase but the presumption is readily displaced upon proof that community funds were used.

I agree with you that California like Nevada and Texas should give married persons the option of owning community property with right of survivorship, although apparently you do not like that term.

By the way, I cannot agree with your point in the first paragraph of your 19 November 1992 letter to Nat Sterling that quasi-community property is a type of community property. I am aware of the recent statutory attempt to have quasi-community property treated as community for creditors' rights purposes but do not think the Legislature thereby intended to have state law attach to property interests the moment a couple move to California from, say, Oregon and at the moment of change of domicile take a half ownership from the wife's solely owned Oregon earnings (acquired when the pair was domiciled there during marriage) and transfer that half interest to the husband, which must occur if quasi-community property is a form of community property.

Very truly yours,

William A. Reppy, Jr.
Professor of Law

WAR:jma

CC: Nat Sterling

FAMILY LAW

Community Property Presumption Survives Former Spouse's Death Before Property Rights Are Resolved in Bifurcated Proceedings

Cite as 92 Daily Journal D.A.R. 17019

In re the Marriage of JOYCE J. and ROBERT W. HILKE.

JUNE MUELLER, as Administrator, etc.,
Respondent,
v.
ROBERT W. HILKE,
Appellant.

No. S025205
Ct. of Appeal
No. B-056544
Sup. Ct. No. 175282
California Supreme Court
Filed December 17, 1992

For the purpose of division of property upon dissolution of marriage, property acquired by the parties during marriage in joint tenancy form is presumed to be community property. (Civ. Code, § 4800.1, subd. (b).)[1] This case requires us to determine the character of a marital residence -- title to which was held by the spouses in joint tenancy -- when, after entry of a judgment dissolving the marital relationship, followed by the wife's death, the trial court exercised its reserved jurisdiction to divide the marital property. The trial court applied the presumption set forth in section 4800.1 and found the residence to be community property. The Court of Appeal reversed, reasoning that the wife's death intervened before that statute could be applied, so that the husband's right of survivorship as a joint tenant prevailed. We reverse.

Factual Background

Robert and Joyce Hilke married in 1955. In 1969 they purchased a residence, taking title as "husband and wife, as joint tenants." On January 27, 1989, Mrs. Hilke filed a petition to dissolve the marriage. The parties stipulated to an order bifurcating the proceeding, terminating their marital status, and reserving jurisdiction over all other issues, including support and property division.

Before any of the property issues were adjudicated, Mrs. Hilke died.[2] Thereafter, the administrator of her estate was substituted as a party. (Code Civ. Proc., § 385; Kinsler v. Superior Court (1981) 121 Cal.App.3d 808, 812.) There had been no change in the title to the property between its acquisition and the date of Mrs. Hilke's death.

The trial court denied Mr. Hilke's motion for summary adjudication of the property's character. The matter proceeded to trial on the undisputed facts set forth in the preceding two paragraphs. Neither party contended there had been any contributions of separate property toward purchase of the residence, and there was no claim of an agreement that the property would be the separate property of either spouse. The trial court determined it retained jurisdiction to decide all of the real property issues that could have been decided had they been presented at the time the parties' marital status was dissolved. It then held that the residence was the parties' community property. The Court of Appeal reversed, and we granted review to address the effect of section 4800.1 on the present situation.

Analysis

A discussion of the development of the statute with which we are concerned will assist our resolution of this dispute. Before 1966, California courts applied a rebuttable presumption that ownership interest in property was as stated in the title. Thus, a residence purchased with community funds, but held by a husband and wife as joint tenants, was presumed to be separate property in which each spouse had a one-half interest. The presumption arising from the form of title created difficulties upon divorce or separation when the parties held title to their residence in joint tenancy. A court could not award a house so held to one spouse for use as a family residence for that spouse and the children, unless the presumption arising from the joint tenancy title could be rebutted by evidence of an agreement or understanding to the contrary. (In re Marriage of Lucas (1980) 27 Cal.3d 808, 813-814.)

To remedy the problem, the Legislature in 1965 added the following provision to former section 164: "[W]hen a single family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon divorce or separate maintenance only, the presumption is that such single family residence is the community property of said husband and wife." (Stats. 1965, ch. 1710, § 1, pp. 3843-3844.)

Former section 164 was repealed in 1969 in connection with the enactment of the Family Law Act. (Stats. 1969, ch. 1608, § 3, p. 3313; In re Marriage of Lucas, supra, 27 Cal.3d 808, 814, fn. 2.) Effective January 1, 1970, an almost identical provision in section 5110 replaced the substance of former section 164. (Stats. 1969, ch. 1608, § 8, p. 3339.)

Section 5110, in turn, was amended in 1983 and the presumption regarding marital property held in joint tenancy form for the purpose of division of property upon dissolution of marriage was moved to newly adopted section 4800.1. The presumption was expanded to cover all property acquired during marriage in joint tenancy form. (Stats. 1983, ch. 342, § 1, p. 1538.)

In an effort to ensure application of the presumption to marital property held in joint tenancy form, no matter when acquired (see In re Marriage of Buol (1985) 39 Cal.3d 751; In re Marriage of Fabian (1986) 41 Cal.3d 440), the Legislature in 1986 amended

section 4800.1 to include its finding that "[i]t is the public policy of this state to provide uniformly and consistently for the standard of proof in establishing the character of property acquired by spouses during marriage in joint title form, and for the allocation of community and separate interests in that property between the spouses." (Stats. 1986, ch. 539, § 1, p. 1924; § 4800.1, subd. (a)(1).) The Legislature found that a compelling state interest exists to provide for uniform treatment of property, and accordingly amended the statute to provide that section 4800.1 shall apply to all property held in joint title regardless of the date of acquisition of the property or the date of any agreement affecting the character of the property. (§ 4800.1, subd. (a)(3).)

The nub of this case is whether the community property presumption of section 4800.1 applies to the residence owned by Mr. and Mrs. Hilke. If it does not, then the presumption arising from the form of title is that the spouses were joint tenants and Mr. Hilke consequently succeeds to the property by right of survivorship, absent a transmutation. (See Tenhet v. Boswell (1976) 18 Cal.3d 150, 155-156; § 5110.730 [methods of transmutation].) We turn, therefore, to the question of whether the prerequisite for its application is met: that is, whether the instant proceeding involves a division of property upon dissolution of marriage. (§ 4800.1, subd. (b).)

The parties do not dispute that the trial court reserved jurisdiction to decide property issues when it entered its judgment terminating the parties' marital status. (See § 4515, subd. (c).) The death of one of the spouses abates a cause of action for dissolution, but does not deprive the court of its retained jurisdiction to determine collateral property rights if the court has previously rendered judgment dissolving the marriage. (McClenny v. Superior Court (1964) 62 Cal.2d 140, 144; Kinsler v. Superior Court, supra, 121 Cal.App.3d at pp. 811-812.) Mrs. Hilke's petition for dissolution alleged that the residence was community property. Mr. Hilke's response alleged that the full extent of community property had not been determined. The trial court properly exercised its retained jurisdiction to decide the issue despite Mrs. Hilke's intervening death, and its order requiring the sale of the residence and equal division of the proceeds between the former spouses effected a division of property upon the dissolution of a marriage. (§ 4800.1, subd. (b).) By its terms, section 4800.1 applies.

Mr. Hilke urges that section 4800.1 creates an evidentiary presumption that applies only at the division of property stage of a dissolution proceeding. It does not, in his view, "automatically convert" joint tenancy property to community property the moment a dissolution proceeding is filed. For this proposition, with which we do not quarrel, he cites Estate of Blair (1988) 199 Cal.App.3d 161 (Blair). Blair involved a situation similar to the present case but for the fact that the wife died before the entry of any judgment respecting the parties' marital status. Because, as we have seen, an action for legal separation or dissolution is personal to the spouse, the proceeding in Blair abated at the wife's death. The question of the character of the marital residence arose in the context of a proceeding brought by the wife's personal representative under Probate Code section 851.5, claiming that her estate owned a one-half interest in the residence. The Court of Appeal in Blair declined to apply section 4800.1, reasoning that for the purpose of determining the character of real property on the death of one spouse, there is a presumption "'that the property is as described in the deed and the burden is on the party who seeks to rebut the presumption.'" (Blair, supra, 199 Cal.App.3d 161, 167 [quoting Schindler v. Schindler (1954) 126 Cal.App.2d 597, 602].) This result was correct, since the abatement of the marital action by virtue of the wife's death precluded the court from making a division of property. Blair does not, however, dictate the identical result in the present case, since here the trial court had dissolved the spouses' marriage before the wife's death, and had reserved its jurisdiction to determine property issues in subsequent proceedings.

Recently the Court of Appeal for the First District considered a case involving facts and issues similar to those we address today. Justice King, writing for the court in In re Marriage of Allen (1992) 8 Cal.App.4th 1225 (review granted Nov. 12, 1992 (S028952)), concluded as we do that the presumption contained in Civil Code section 4800.1 applies to the division of property held in joint tenancy form if a former spouse dies after entry of a bifurcated judgment dissolving the parties' marital status and reserving property issues for later adjudication. (Id. at pp. 1231-1235.)[3]

Mr. Hilke argues that section 4800.1 in any event may not, consistently with due process, be applied retroactively to the marital residence the parties acquired in 1969. In support of this contention, he cites In re Marriage of Buol, supra, 39 Cal.3d 751, and In re Marriage of Fabian, supra, 41 Cal.3d 440. He contends that if a community property presumption applies at all in this case, it can be only that form of the presumption that existed when the parties bought their residence in 1969. Former section 164 allowed rebuttal of the presumption by any understanding or agreement, oral or written, that the property was to be held as indicated in the title. Thus, he reasons, his declaration in support of his motion for summary adjudication -- that the spouses desired the survivorship feature of joint tenancy when they acquired the property, and never made any contrary agreement -- sufficed to rebut the presumption. (In re Marriage of Lucas, supra, 27 Cal.3d 808.)

We disagree with his initial premise. Section 4800.1 may be applied on the facts of this case even though the property was acquired before its enactment.

There can be no doubt that the Legislature intended courts to apply section 4800.1 in a division of property upon dissolution of marriage, regardless of the date of acquisition of the property, for the statute expressly says so. (§ 4800.1, subd. (a)(3) ["[T]he Legislature intends that the forms of this section and Section 4800.2, operative on January 1, 1987, shall

apply to all property held in joint title regardless of the date of acquisition of the property or the date of any agreement affecting the character of the property. . . ."].) Unless there are constitutional impediments to its application, therefore, we may not refuse the statutory mandate.

Retroactive legislation may not be applied when it constitutes an ex post facto law or an impairment of an existing contract, or when to do so would impair a vested property right without due process of law. (In re Marriage of Fabian, supra, 41 Cal.3d at p. 447.) We are concerned in this case only with the question of whether section 4800.1 impairs a vested property right.

As we have recognized in a similar context, a vested property right is one that is not subject to a condition precedent. (In re Marriage of Buol, supra, 39 Cal.3d at p. 757, fn. 6; In re Marriage of Bouquet (1976) 16 Cal.3d 583, 591, fn. 7.) Mr. Hilke's claim fails at the threshold, for his survivorship interest in the marital residence is plainly subject to the condition precedent that he survive Mrs. Hilke. As Mr. Hilke himself notes in his brief on a collateral point, severance of a joint tenancy -- by eliminating the survivorship characteristic of the joint tenancy form of ownership -- theoretically affects the expectancy interest of the other joint tenant, but does not involve a diminution of his or her present vested interest. Put another way, a joint tenant has no vested interest in being the surviving tenant. The community property presumption of section 4800.1 therefore may be applied retroactively in the circumstances of this case.

The factual distinctions between this case, on one hand, and Buol and Fabian, on the other, bear emphasis. In Buol the spouses had an oral agreement that the wife's earnings and the house she purchased and maintained with them were her separate property; at all relevant times -- when she purchased the house and throughout the trial -- proof of an oral agreement was all that was required to protect her separate property interest. (In re Marriage of Buol, supra, 39 Cal.3d at p. 757.) Section 4800.1, requiring for the first time a writing to establish a separate interest in property held in joint tenancy form, was enacted during the pendency of the husband's appeal. To determine whether retroactive application of the section 4800.1 would contravene due process, we examined factors enumerated in In re Marriage of Bouquet, supra, 16 Cal.3d at page 592: the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance on the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions. (In re Marriage of Buol, supra, 39 Cal.3d at pp. 761-763.) On consideration of those factors, we concluded that application of section 4800.1 to a proceeding commenced before the effective date of the statute would impair the wife's vested property rights without due process of law. (39 Cal.3d at p. 763.)

In Fabian, we addressed the issue of the retroactivity of section 4800.2, a companion measure to section 4800.1 that provides for reimbursement of separate property contributions to community property unless there is a signed writing waiving reimbursement. During their marriage, Mr. and Mrs. Fabian purchased a motel, taking title as "husband and wife as community property." (In re Marriage of Fabian, supra, 41 Cal.3d at p. 443.) The husband invested in the motel some $275,000 of his separate assets. The parties had no agreement that he would be reimbursed for that sum. The trial court found that the motel was community property and, applying then-current law, that the husband had made a gift to the community of his contribution. During the pendency of the husband's appeal, section 4800.2 was enacted, in effect reversing the presumption of the prior law and resurrecting the husband's separate property interest. (41 Cal.3d at pp. 443-444.) Analyzing the Bouquet-Buol factors, we held that retroactive application of section 4800.2 would unconstitutionally impair the wife's vested interest in the property. (41 Cal.3d at pp. 448-451.)

In both Buol and Fabian, a spouse's vested property interests were infringed without due process by retroactive legislation enacted during the pendency of the appeal. In the present case, by contrast, Mr. Hilke's interest was not vested but rather contingent on his surviving his former wife.[4] We need not engage in extensive analysis of the Bouquet-Buol factors as they might apply in this situation, because in the absence of a vested interest, retroactive legislation does not violate due process.

Application of section 4800.1 to this case yields the conclusion that the residence was community property. The statute delineates two ways of rebutting the presumption, but neither is available: the deed does not contain a clear statement that the residence is separate property and not community property, and the record contains no proof that the parties made a written agreement that the residence was separate property. (§ 4800.1, subd. (b).) It follows that the trial court properly ordered the residence sold and the proceeds divided equally between the parties. (See § 4800, subd. (a).)

In light of our interpretation of section 4800.1, it is unnecessary to address Mrs. Hilke's alternative contentions.

Disposition

The judgment of the Court of Appeal is reversed.

PANELLI, J.

WE CONCUR:
LUCAS, C.J.
MOSK, J.
KENNARD, J.
ARABIAN, J.
BAXTER, J.
GEORGE, J.

Ronald C. Stevens, Judge.

ATTORNEYS

For Appellant

Henderson & Angle and Robert O. Angle for Appellant.

For Respondent

Robert A. McFarland for Respondent.

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."

Further statutory references are to the Civil Code, unless otherwise noted.

Effective January 1, 1994, section 4800.1 has been repealed and replaced with an equivalent provision in the Family Code. (Stats. 1992, ch. 162, §§ 3, 10; see Fam. Code, § 2580 (effective Jan. 1, 1994).)

2. In her will, Mrs. Hilke left her share of the parties' community property to her children.

3. The Reporter of Decisions is directed to publish the opinion in In re Marriage of Allen in the Official Reports. (See Cal. Rules of Ct., rule 976(d).)

4. An additional difference between this case on one hand, and Fabian and Ragi, on the other, is that section 4800.1 was enacted well before Mrs. Hilke filed the petition for dissolution.

1. Civil Code section 4800.1 provides as follows:

"(a) The Legislature hereby finds and declares as follows:

"(1) It is the public policy of this state to provide uniformly and consistently for the standard of proof in establishing the character of property acquired by spouses during marriage in joint title form, and for the allocation of community and separate interests in that property between spouses.

"(2) The methods provided by case and statutory law have not resulted in consistency in the treatment of spouses' interests in property which they hold in joint title, but rather, have created confusion as to which law applies at a particular point in time to property, depending on the form of title, and, as a result, spouses cannot have reliable expectations as to the characterization of their property and the allocation of the interests therein, and attorneys cannot reliably advise their clients regarding applicable law.

"(3) Therefore, the Legislature finds that a compelling state interest exists to provide for uniform treatment of property; thus the Legislature intends that the forms of this section and Section 4800.2, operative on January 1, 1987, shall apply to all property held in joint title regardless of the date of acquisition of the property or the date of any agreement affecting the character of the property, and that that form of this section and that form of Section 4800.2 are applicable in all proceedings commenced on or after January 1, 1984. However, the form of this section and the form of Section 4800.2 operative on January 1, 1987, are not applicable to property settlement agreements executed prior to January 1, 1987, or proceedings in which judgments were rendered prior to January 1, 1987, regardless of whether those judgments have become final.

"(b) 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

#F-521.1/L-521.1 Memo 93-10

EXHIBIT 4

STATE OF CALIFORNIA

California Law Revision Commission

TENTATIVE RECOMMENDATION

EFFECT OF JOINT TENANCY TITLE ON COMMUNITY PROPERTY

January 1993

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN April 15, 1993.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

ns122
01/04/93

Summary of Tentative Recommendation

Historically in California married persons have titled their community property as joint tenancy unaware of the adverse consequences of that form of tenure, including the inability to will it or to obtain community property tax benefits. On the death of a spouse the survivor has had to make a showing that the joint tenancy form was for convenience only and there was no intent to convert the property to joint tenancy. In recent years this informal arrangement has broken down as courts give greater effect to the form of title and the Internal Revenue Service refuses to recognize community property claims for property titled as joint tenancy.

This recommendation is intended to ensure that married persons who take title to property as joint tenants do so knowingly and intentionally. In order to convert community property to joint tenancy, the spouses must transmute the property by an express written declaration; otherwise it remains community property. The recommendation requires persons who assist spouses in titling their property to inform them of the advantages and disadvantages of community property and joint tenancy tenure. A "safe harbor" statutory form is provided with sufficient information and a proper declaration to enable a person to transmute community property to joint tenancy, if desired. The proposed statute is prospective only.

Tentative Recommendation

EFFECT OF JOINT TENANCY TITLE ON COMMUNITY PROPERTY

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

In California it is common for husband and wife to take title to property in joint tenancy form even though the property is acquired with community funds. Frequently the joint tenancy title form is selected by the spouses on the advice of a broker or other person who is unaware of the differences in legal treatment between the two types of property tenure. The spouses themselves ordinarily do not know the differences between the two types of tenure, other than that joint tenancy involves a right of survivorship.[3]

As a consequence, a person who is adversely affected by the joint tenancy title form may litigate in an effort to prove that the spouses did not intend to transmute the community property into joint tenancy. Because joint tenancy is often disadvantageous to the spouses (it frequently frustrates the decedent's trust or other estate plan and results in adverse tax consequences if the property has appreciated in value) the courts in the past have been liberal in relaxing evidentiary rules to allow proof either that the spouses did not intend to

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1. Fam. Code § 750. The spouses may also hold property as tenants in common, although this is relatively infrequent.

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

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

transmute community property to joint tenancy or, if they did, that they subsequently transmuted it back.[4]

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

Legislation enacted in 1965 directly addressed the problem of married persons taking title to property in joint tenancy form without being aware of the consequences and in fact believing the property is community.[7] Former Civil Code Section 5110 was enacted to provide that a single-family residence acquired during marriage in joint tenancy form is presumed community property for purposes of dissolution of marriage. This presumption had a beneficial effect and was expanded

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

5. See, e.g., Siberell v. Siberell, 214 Cal. 767, 7 P. 2d 1003 (1932); Delanoy v. Delanoy, 216 Cal. 23, 13 P. 2d 513 (1932); Tomaier v. Tomaier, 23 Cal. 2d 754, 146 P. 2d 905 (1944). Cases struggling with the issue in the past few years include In re Marriage of Lucas, 27 Cal. 3d 808, 614 P. 2d 285, 166 Cal. Rptr. 853 (1980); Estate of Levine, 125 Cal. App. 3d 701, 178 Cal. Rptr. 275 (1981); In re Marriage of Stitt, 147 Cal. App. 3d 579, 195 Cal. Rptr. 172 (1983); Estate of Blair, 199 Cal. App. 3d 161, 244 Cal. Rptr. 627 (1988); In re Marriage of Hilke, 92 Daily Journal D.A.R. 17019 (1992); In re Marriage of Allen, 92 Daily Journal D.A.R. 11563 (1992) (rev. granted).

6. See, e.g., Marshall, Joint Tenancy Taxwise and Otherwise, 40 Calif. L. Rev. 501 (1952); Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87 (1961); Mills, Community Joint Tenancy--A Paradoxical Problem in Estate Administration, 49 Cal. St. B. J. 38 (1974); Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego, L. Rev. 143 (1981); Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity, 33 Hast. L. J. 771 (1982); Sterling, Joint Tenancy and Community Property in California, 14 Pac. L. J. 927 (1983), 10 Comm. Prop. J. 157 (1983); Kasner, Community Property in Joint Tenancy Form: Since We Have It, Lets Recognize It (1991).

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

in 1983 to apply to all property acquired during marriage in joint tenancy form.[8] The 1983 legislation also made clear that the community property presumption may be rebutted only by a clear writing by the spouses, but that separate property contributions are reimbursable at dissolution of marriage.[9] This legislation is limited in effect and does not address treatment of the property at death of a spouse,[10] or during marriage before dissolution or death.

Community property provides a married person important protections that joint tenancy does not. Community property protections include:

(1) Fiduciary duties in management and control of the property.[11]

(2) Limitations on depletion of the community by gift.[12]

(3) Limitations on disposition of the family home or other community real property.[13]

(4) Prohibition on forced partition of the property during marriage.[14]

(5) Right to will the decedent's community property interest.[15]

(6) Passage of property to the surviving spouse absent a will.[16]

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

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

10. Marriage of Hilke, 92 Daily Journal D.A.R. 17019 (1992).

11. Fam. Code §§ 721, 1100(e), 1101.

12. Fam. Code § 1100(b).

13. Fam. Code § 1102.

14. Code Civ. Proc. § 872.210(b).

15. Prob. Code § 6101.

16. Prob. Code § 6401.

(7) Passage of property to the surviving spouse without probate,[17] and ability of the surviving spouse to elect probate if desired.[18]

(8) Stepped-up income tax basis for appreciated community property share of the surviving spouse.[19]

Joint tenancy provides greater protection than community property from liability for debts for a married person.[20] However, the common law protection is at the expense of a creditor who may be denied payment for a just debt. Moreover, the supposed benefits of protection from creditors are offset by a greater detriment. The law limiting the liability of joint tenancy property may cause a joint tenant to be denied credit, or to be allowed credit only with the other joint tenants and only subject to a security interest in the joint tenancy property. By comparison, the statute governing liability of community property for debts represents sound social policy based on a balanced consideration of all aspects of the debtor-creditor relationship, including the need for fairness to all parties and to encourage extension of credit to married persons.[21]

Other arguments that have been advanced for the desirability of joint tenancy for married persons also are not persuasive.

•Depreciated joint tenancy property retains a higher income tax basis than depreciated community property, but this is relatively

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17. Prob. Code § 13500.

18. Prob. Code § 13502.

19. Int. Rev. Code § 1014.

20. See discussion in Sterling, supra, at 14 Pac. L. J. at 945-951; 10 Comm. Prop. J. at 175-182.

21. California Law Revision Commission, Recommendation relating to Liability of Marital Property for Debts, 17 Cal. L. Revision Comm'n Reports 1 (1984).

unimportant since the vast majority of property in California has appreciated rather than depreciated in value, and community property receives a substantial tax advantage in this situation.

•Joint tenancy property passes automatically to the surviving spouse, but this feature is illusory since either spouse may unilaterally sever the joint tenancy and will the spouse's interest in the property.

•Automatic passage to the surviving spouse may, and frequently does, inadvertently frustrate a well-conceived estate plan that seeks to pass the decedent's share of the property, for example, to a bypass trust or a child of a former marriage.

•The ability to clear title quickly by an affidavit of death is a characteristic of joint tenancy property that applies to community property as well.

The statutory incidents of community property that have been enacted over the years for the protection of married persons correspond with what most married persons want and expect. They are generally advantageous to married persons. Joint tenancy ill-serves the needs of most married persons, despite its wide-spread but uninformed use. For these reasons, the Law Revision Commission believes that the law should ensure that married persons who take title as joint tenants do so knowingly and intentionally.

In order to convert community property to joint tenancy, the spouses should make an express and knowing transmutation of the community property to joint tenancy.[22] Persons who assist married persons in titling their property should be required to inform them of the advantages and disadvantages of community property and joint tenancy. A "safe harbor" statutory form should be enacted with sufficient information and a proper declaration to enable a person to

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22. This is analogous to the "Acceptance of Joint Tenancy" in use in Arizona. The requirement would apply only to community property, not separate property. The law applicable to commingling, tracing, reimbursement, gift, and other principles affecting separate property contributions to community property or joint tenancy would be unaffected. See, e.g., Fam. Code § 2640 (separate property contributions to property acquisition).

transmute community property to joint tenancy, if that is what is really desired. Failure to execute the proper declaration of a knowing and intentional transmutation of community property to joint tenancy should leave the community character of the property unaffected. There should be a one-year deferred operative date for the proposed legislation, in order to give affected persons an opportunity to become informed about the new requirements. The new requirements should apply only to a property acquisition or titling that occurs after the operative date.

The proposed statutory scheme corresponds with the intention of most married persons not to lose basic community property protections merely by taking property in joint tenancy title form, while enabling those who really want joint tenancy treatment to obtain it. The proposed law will provide certainty and minimize litigation over the issue whether the property should be treated as community property or joint tenancy.

Treating the property as community at death will enable passage at death to the surviving spouse without probate. Title to the property can be cleared quickly and simply either by affidavit[23] or by summary court proceeding.[24] It will also avoid possible frustration of the decedent's estate plan since the community property may be passed by will (for example, to an exemption-equivalent testamentary bypass trust, with resultant tax savings for survivors).

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

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23. Prob. Code §§ 210-21; see also Prob. Code § 13540 (right of surviving spouse to dispose of real property).

24. Prob. Code §§ 13650-60.

The Commission's recommendation would be implemented by enactment of the following provisions.

Civ. Code § 683 (amended). Creation of joint tenancy

SECTION 1. Section 683 of the Civil Code is amended to read:

683. (a) A joint interest is one owned by two or more persons in equal shares, by a title created by a :

(1) A single will or transfer, when expressly declared in the will or transfer to be a joint tenancy~~, or by transfer from~~ .

(2) A transfer, when expressly declared in the transfer to be a joint tenancy:

(A) From a sole owner to himself or herself and others~~, or from~~ .

(B) From tenants in common or joint tenants to themselves or some of them, or to themselves or any of them and others~~, or from~~ .

(C) From a husband and wife, when holding title as community property or otherwise to themselves or to themselves and others or to one of them and to another or others ~~, when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants~~ .

(b) A joint tenancy in personal property may be created by a written transfer, instrument, or agreement.

~~(b) Provisions of this section do~~ (c) This section is subject to Chapter 6 (commencing with Section 860) of Part 2 of Division 4 of the Family Code (effect of joint tenancy title on community property).

(d) This section does not apply to a joint account in a financial institution if Part 2 (commencing with Section 5100) of Division 5 of the Probate Code applies to such account.

Comment. Section 683 is amended to recognize enactment of Family Code Sections 860-867, governing the effect of the joint tenancy title on real and personal community property. Those provisions become operative January 1, 1996.

The reference in the section to a grant or devise to executors or trustees as joint tenants is deleted. Rights and duties among joint executors and cotrustees are governed by statute and not by the law of joint tenancy. See Prob. Code §§ 9630-31 (joint personal representatives) and 15620-22 (cotrustees).

The other changes in the section are technical, for organizational purposes.

Fam. Code §§ 860-867 (added). Effect of joint tenancy title on community property

SEC. 2. Chapter 6 (commencing with Section 860) is added to Part 2 of Division 4 of the Family Code, to read:

CHAPTER 6. EFFECT OF JOINT TENANCY TITLE ON COMMUNITY PROPERTY

§ 860. Scope of chapter

860. (a) This chapter applies to real and personal property held between married persons in joint tenancy form if the property has a community property source. Property has a community property source if it is acquired in whole or part with community property or if the form of title is the result of an agreement, transfer, exchange, express declaration, or other instrument or transaction that affects community property.

(b) Nothing in this chapter affects the law applicable to commingling, tracing, reimbursement, gift, or other principles affecting separate property contributions to community property or separate property held in joint tenancy form.

Comment. Sections 860 to 867 govern the effect of joint tenancy title on community property. A husband and wife may hold property as joint tenants (or tenants in common) or as community property. Section 750. Joint tenancy (or tenancy in common) is a form of separate property ownership and is inconsistent with community property. See, e.g., Siberell v. Siberell, 214 Cal. 767, 7 P. 2d 1003 (1932). See, generally, discussion in Sterling, Joint Tenancy and Community Property in California, 14 Pac. L. J. 927 (1983), 10 Comm. Prop. J. 157 (1983).

Section 860 limits this chapter to property held in joint tenancy form that has a community property source. Thus treatment of separate property contributions to community property or separate property held in joint tenancy form is governed by law other than this chapter. See, e.g., Section 2640 (separate property contributions to property acquisition).

This chapter applies to personal property as well as real property. See subdivision (a); see also Section 760 (community property).

Staff Note. We have not tried to extend the current proposal to deal with titling of separate property as joint tenancy between the spouses. Issues involving separate property contributions to joint tenancy are distinct from issues involving community property. The community property issues are considerably easier since both forms of tenure involve equal ownership. Conversion of single-owner separate property to joint tenancy raises much more complex questions of intent to make a gift and differences in intent depending on whether

dissolution or death is at issue, or whether rights during marriage (including creditors' rights) are involved. Separate property problems are already covered statutorily to some extent (e.g., the Lucas reimbursement legislation) and we don't want to bite off more than we can chew in this very complex area.

§ 861. Community property presumption notwithstanding joint tenancy title

861. Property of married persons that has a community property source is presumed to remain community property even though the property is held by the married persons in joint tenancy form. The presumption established by this section is a presumption affecting the burden of proof.

Comment. Section 861 resolves the conflict in the case law between the presumption that property acquired by the spouses during marriage is community property and the presumption that joint tenancy title means what it says. Under Section 861, when these two presumptions conflict, the community property presumption prevails. The community property presumption may be overridden by a transmutation of the property to joint tenancy. See Section 862.

Under this section, community property that is not properly transmuted to joint tenancy remains community property for all purposes and receives community property treatment at death, including tax and creditor treatment and passage without probate (unless probate is elected by the surviving spouse). Prob. Code § 13500. In the case of community real property that passes without probate, the surviving spouse has full power to deal with and dispose of the property after 40 days from the death of the spouse, and title to the property may be established by affidavit. Prob. Code § 13540.

Staff Note. We have recast this section in terms of a presumption, instead of as an absolute rule, in response to concerns expressed by Commissioners at previous meetings.

The Los Angeles County Bar Association, Trusts and Estates Section, Executive Committee does not approve the basic either/or (community property or joint tenancy) approach of this draft, but still favors the "community property with right of survivorship" hybrid. "We feel that the right of survivorship is the main reason most married individuals take title in the joint tenancy form. Furthermore, we feel the right of survivorship is necessary to preserve the dependability of record title and to ensure the availability of title insurance on such property (e.g., title insurance companies would be hesitant to rely on an affidavit of death of joint tenant because there might be a contrary testamentary disposition by the deceased spouse)."

But the Committee does not address the fact that a spouse can easily override the survivorship right simply by unilaterally severing and willing a one-half interest in joint tenancy property. Moreover, a title insurance company may rely on a community property affidavit of

the surviving spouse with respect to real property if 40 days have elapsed after death without a recorded contrary notice. Prob. Code § 13540.

Arthur H. Bredenbeck of Burlingame takes the opposite position from the Committee. He thinks the current approach of the draft is sound and will go a long way to clarifying the confused situation of existing law. "I further believe that the TR, if adopted, will minimize litigation on this issue and provide a level of certainty and comfort to title companies, brokers, financial institutions and other professionals dealing with married persons taking title to property who I feel will more and more become embroiled in litigation when those same married persons, or those claiming under them, become unhappy with the form of title they chose and will look for 'deep pockets' to reduce their lack of information and understanding."

§ 862. Transmutation of community property to joint tenancy

862. (a) The presumption established by Section 861 (community property presumption notwithstanding joint tenancy form) may be rebutted by an instrument that satisfies Chapter 5 (commencing with Section 850) (transmutation of property). The instrument may be a part of a document of title or may be a separate instrument, and may be executed together with a document of title or at another time.

(b) Use of the form provided in Section 864 (statutory form) satisfies this section.

Comment. Section 862 makes clear that the transmutation statute governs creation of joint tenancy from community property. The spouses may transmute community property to joint tenancy by agreement or transfer. Section 850. A transmutation of real or personal property is not valid unless done in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected. Section 852(a). A transmutation of real property is not effective as to third parties without notice of it unless recorded. Section 852(b).

An express declaration transmuting community property to joint tenancy should state that the property is "converted from community property to joint tenancy", or words to that effect expressly stating that the characterization or ownership of the property is being changed. See Estate of MacDonald, 51 Cal. 3d 262, 272 Cal. Rptr. 153, 794 P. 2d 911 (1990). The express declaration requirement may be satisfied by use of the statutory form provided in Section 864.

§ 863. Information concerning form of title

863. (a) Any person who provides a form or other instrument for use by a married person, or who advises a married person, to hold property in joint tenancy form shall inform the married person concerning the advantages and disadvantages of community property and

joint tenancy. The information shall compare legal incidents of the two forms of tenure, including management and control, rights of creditors, intestate succession, testamentary disposition, applicability of probate, and income tax consequences at death.

(b) Use of the form provided in Section 864 (statutory form) satisfies this section.

(c) Failure to provide information that satisfies this section does not affect the validity of a transmutation of community property to joint tenancy that is otherwise valid.

Comment. Section 863 requires that a person who offers married persons the option of holding property in joint tenancy form must provide information comparing community property and joint tenancy. A person who fails properly to inform the married persons may be liable for any adverse consequences that result from the joint tenancy form of title. The information requirement of this section may be satisfied by use of the statutory form provided in Section 864. This section applies only to a form or instrument provided or advice given on or after January 1, 1996. Section 867 (transitional provision).

Staff Note. The Los Angeles County Bar Association, Trusts and Estate Section, Executive Committee is concerned about the potential liability and litigation generated by this section. They would omit this section and provide simply that persons must sign the form provided in Section 864 or they don't get joint tenancy. "By requiring the declaration on the deed, the married couple will receive the appropriate advice without the necessity of nonattorney professionals rendering legal advice which they are ill equipped to provide."

§ 864. Statutory form

864. (a) An instrument transmuting community property to joint tenancy satisfies Sections 862 and 863 if the instrument is made in writing by an express declaration substantially in the following form and signed by each spouse:

DECLARATION OF JOINT TENANCY

NOTICE

IF YOU SIGN THIS DECLARATION, YOU WILL LOSE IMPORTANT COMMUNITY PROPERTY RIGHTS. DO NOT SIGN THIS DECLARATION UNLESS YOU ARE WILLING TO GIVE UP YOUR COMMUNITY PROPERTY RIGHTS.

SOME OF YOUR COMMUNITY PROPERTY RIGHTS ARE SUMMARIZED BELOW. THIS SUMMARY IS NOT A COMPLETE STATEMENT OF THE LAW. YOU MAY WISH TO SEEK EXPERT ADVICE BEFORE SIGNING THIS DECLARATION.

•Management and Control. You and your spouse must act together to transfer any interest in community real property. If you sign this declaration, your spouse acting alone may transfer a one-half interest in the property.

•Rights of Creditors. All of your community property is liable for your debts. If you sign this declaration, only your one-half interest in the property is liable for the debts, and when you die your spouse takes your interest free of debts. By signing this declaration you may impair your ability to get credit.

•Passage to Surviving Spouse. When you die, your one-half interest in community property passes to the beneficiaries named in your will, for example a child or a trust; if you have no will, it passes to your spouse. If you sign this declaration your one-half interest in the property passes to your spouse despite your will.

•Probate. If you leave your interest in community property to your spouse, your spouse may choose whether or not to probate it; if your spouse elects not to probate it, your spouse may establish title within 40 days after your death by recording an affidavit of your death. If you sign this declaration your spouse must take the property without probate; title may be established immediately by recorded affidavit.

•Income Taxes. When your spouse dies you will recive an income tax benefit for community property that has increased in value. If you sign this declaration, you will not receive an income tax benefit for the property unless it has declined in value.

DESCRIPTION OF PROPERTY

The property that is the subject of this declaration is:

_____

Description of Property or Document of Title or Other Instrument Creating Joint Tenancy Title

DECLARATION

We have read the Notice in this instrument and understand that we lose important community property rights by signing this instrument. We declare that we intend to

convert to joint tenancy any community property interest we may have in the property that is the subject of this declaration, and to hold the property for all purposes in joint tenancy and not as community property.

_____ _____
Signature of Spouse Date

_____ _____
Signature of Spouse Date

ACKNOWLEDGMENT

State of California)
County of _____)

On _____ before me, (here insert name and title of officer), personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature _____ (Seal)

(b) Nothing in this section limits or affects either of the following:

(1) The validity of an instrument not substantially in the form provided in this section if the instrument otherwise satisfies Section 862.

(2) The sufficiency of information concerning the advantages and disadvantages of community property and joint tenancy if the information otherwise satisfies Section 863.

Comment. Section 864 provides a "safe harbor" for the requirements of Sections 862 (transmutation of community property to joint tenancy) and 863 (information concerning form of title). This section does not provide the exclusive means by which those sections may be satisfied; any instrument or information that meets the standards in those sections will satisfy them. However, use of the statutory form provided in Section 864 satisfies those sections as a matter of law.

The express declaration provision of this section is consistent with requirements in Civil Code Section 683 ("express declaration" required for joint tenancy) and in Family Code Section 852 ("express declaration" required for transmutation).

§ 865. Effect of transmutation to joint tenancy

865. Transmutation of community property to joint tenancy changes the character of the property for all purposes from community property to separate property held in joint tenancy. A severance of the joint tenancy results in a tenancy in common of separate property interests of the spouses and not community property.

Comment. Section 865 makes clear that a transmutation of community property to joint tenancy results in a "true" separate property joint tenancy and not a hybrid form of tenure. Married persons may hold property as either community property, joint tenants, or tenants in common. Section 750 (methods of holding property); see also Comment to Section 861 (community property presumption notwithstanding joint tenancy form).

At dissolution of marriage the property is treated as separate property and not as community property. See Section 2580 (presumption concerning property held in joint form). However, the property is subject to the court's jurisdiction at dissolution. Section 2650 (jointly held separate property).

§ 866. Effect on special statutes

866. Nothing in this chapter affects any other statute that prescribes the manner or effect of a transfer, inter vivos or at death, of property registered, licensed, or otherwise documented or titled in joint tenancy form pursuant to that statute.

Comment. Section 866 saves existing schemes governing transfer of title, probate and nonprobate, applicable to specified types of property. See, e.g., Vehicle Code §§ 4150.5, 5600.5 (coownership vehicle registration); Health & Safety Code § 18080 (coownership manufactured home, mobilehome, commercial coach, truck camper, or floating home registration). Cf. Civ. Code § 683 (creation of joint tenancy); Fam. Code § 2580 (community property presumption for property held in joint form); Prob. Code § 5305 (presumption that funds on deposit are community property).

§ 867. Transitional provision

867. (a) As used in this section, "operative date" means January 1, 1996.

(b) Subject to subdivision (c):

(1) This chapter applies to property held between married persons in joint tenancy form as the result of an instrument executed or transaction that occurs on or after the operative date, except that Section 863 does not apply to a form or other instrument provided for use by a married person or advice given to a married person before the operative date, whether or not the instrument is executed or transaction occurs on or after the operative date.

(2) Property held between married persons in joint tenancy form before the operative date is governed by law otherwise applicable and not by this chapter.

(c) Property held between married persons in joint tenancy form before the operative date pursuant to an instrument or transaction that satisfies the requirements of this chapter is governed by this chapter.

Comment. Section 867 provides transitional provisions for this chapter. This chapter is subject to a one-year deferred operative date to enable persons affected by this chapter to become familiar with its provisions and to allow for production of forms that will satisfy it.

Staff Note. This section makes the new rules on the effect of joint tenancy title on community property prospective only. The section is drafted on the assumption that it is not constitutional to apply the new rules to community property titled as joint tenancy before the operative date. This assumption derives from the California Supreme Court decision in Buol that Civil Code Section 4800.1 (Family Code Section 2580) cannot be retroactively applied. That section imposes a community property presumption at dissolution of marriage on property held in joint title form.

It is unfortunate to apply the new rules prospectively only, since that leaves to the uncertainties of former law millions of properties acquired before the operative date of the new law. But the Hilke case (Exhibit 3) offers new hope.

In Hilke the Supreme Court backs away from its decision in Buol. The court points out that Buol involved a case where new legislation was enacted during the pendency of an appeal--"we concluded that application of section 4800.1 to a proceeding commenced before the effective date of the statute would impair the wife's vested property rights without due process of law." 92 Daily Journal D.A.R. at 17021 (emphasis in the original). The court goes on to declare that there is no vested property right in joint tenancy property that is constitutionally protected, since the survivor's interest is contingent on survival. The court goes on to hold that the community property presumption of Civil Code Section 4800.1 is properly applied to property acquired before the enactment of the statute.

This is a reversal of direction by the court, and is consistent with the staff's long-held belief that Buol was wrongly decided. The decision is bound to cause confusion in practice, however, since dozens

of Court of Appeal cases have followed the lead of Buol and held that the community property presumption cannot constitutionally be applied to property acquired before its operative date.

In light of Hilke, the staff believes the Commission should apply the proposed legislation retroactively to property acquired before or after the operative date. This approach has several merits:

(1) It provides a clear statutory rule to resolve disputes. Any rule, so long as it is clear, is better than the existing confusion.

(2) It provides the result that is most likely preferable, and arguably fairer, for the great majority of people.

(3) It corresponds with the probable case law conclusion on this issue anyway--community property on which joint tenancy title is imposed is not converted to separate property absent a clear showing of intent to do so.

The staff would recast proposed Section 867 simply thus:

> *§ 867. Transitional provision*
>
> *867. (a) As used in this section, "operative date" means January 1, 1995.*
>
> *(b) This chapter applies to property held between married persons in joint tenancy form as the result of an instrument executed or transaction that occurs before, on, or after the operative date, except that Section 863 does not apply to a form or other instrument provided for use by a married person or advice given to a married person before the operative date, whether or not the instrument is executed or transaction occurs on or after the operative date.*

Fam. Code § 2580 (amended). Community property presumption for property held in joint form

SEC. 3. Section 2580 of the Family Code is amended to read:

2580. (a) For the purpose of division of property upon dissolution of marriage or legal separation of the parties:

(1) Property acquired by the parties during marriage on or after January 1, 1984, and before January 1, 1987, in joint tenancy form is presumed to be community property.

(2) Property acquired by the parties during marriage on or after January 1, 1987, 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.

(b) The presumptions under subdivision (a) are presumptions 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.

(c) Nothing in this section affects the character of property acquired by married persons that is not described in subdivision (a).

(d) Notwithstanding any other provision of this section, if property acquired by the parties during marriage on or after January 1, 1996, in joint tenancy form has a community property source, the property is governed by Chapter 6 (commencing with Section 860) of Part 2 of Division 4 (effect of joint tenancy title on community property).

Comment. Section 2580 is amended to recognize enactment of Sections 860-867, governing the effect of joint tenancy title on community property. Those provisions become operative January 1, 1996. Under them, community property in joint tenancy form remains community property, absent an effective transmutation. Section 861 (community property presumption notwithstanding joint tenancy form). Once transmuted, the property is separate for all purposes, but is subject to jurisdiction of the court at dissolution, as are all other forms of jointly held marital property. Section 2650 (jointly held separate property).

Prob. Code § 5305 (amended). Presumption that funds on deposit are community property

SEC. 4. Section 5305 of the Probate Code is amended to read:

5305. (a) Notwithstanding Sections 5301 to 5303, inclusive, if parties to an account are married to each other, whether or not they are so described in the deposit agreement, their net contribution to the account is presumed to be and remain their community property.

(b) Notwithstanding Sections 2580 and 2640 of, and Chapter 6 (commencing with Section 860) of Part 2 of Division 4 (effect of joint tenancy title on community property) of, the Family Code, the presumption established by this section is a presumption affecting the burden of proof and may be rebutted by proof of either of the following:

(1) The sums on deposit that are claimed to be separate property can be traced from separate property unless it is proved that the married persons made a written agreement that expressed their clear intent that such sums be their community property.

(2) The married persons made a written agreement, separate form the deposit agreement, that expressly provided that the sums on deposit, claimed not to be community property, were not to be community property.

(c) Except as provided in Section 5307, a right of survivorship arising from the express terms of the account or under Section 5302, a beneficiary designation in a Totten trust account, or a P.O.D. payee designation, may not be changed by will.

(d) Except as provided in subdivisions (b) and (c), a multiple-party account created with community property funds does not in any way alter community property rights.

Comment. Section 5305 is amended to make clear that the special transmutation provisions of Family Code Sections 860-867 for the effect of joint tenancy title on community property are not applicable to community property in a multiple-party account. Property rights in such an account are governed by the special provisions of the California Multiple-Party Accounts Law and not by the general Family Code transmutation rules.

Operative Date (uncodified)

SEC. 5. This act becomes operative January 1, 1996.