#F/L-521.1 May 6, 1993

First Supplement to Memorandum 93-32

Subject: Study F/L-521.1 – Effect of Joint Tenancy Title on Community Property (Comments of State Bar Probate Section)

Attached to this memorandum as Exhibit pp. 1-3 is a letter from the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section commenting on the Commission's tentative recommendation on the effect of joint tenancy title on community property.

Abolish Spousal Joint Tenancy

The committee proposes an alternate solution to the problem of community property held in joint tenancy form – abolish joint tenancy as a form of tenure between married persons. In support of this proposal the committee notes that (1) it will conform treatment at death with treatment at dissolution and during marriage, (2) community property will pass at death by affidavit as easily as joint tenancy would, (3) other states (particularly states that have tenancies by the entirety) preclude joint tenancy, (4) it would create a simple, clear rule.

The main virtue of this proposal from the staff's perspective is that it would solve the problem of married persons signing the statutory joint tenancy declaration without knowing what they are doing, despite the explanatory language in the form. Under the Bar proposal this wouldn't be a problem because joint tenancy wouldn't be an option.

However, the staff disagrees that this approach would conform treatment at death with treatment at dissolution of marriage. At dissolution there is a presumption that property held in joint form is community property, but the presumption is rebuttable by title evidence or a written agreement that the property is separate and not community. Fam. Code § 2580 (presently Civ. Code § 4800.1). This is more analogous to what the tentative recommendation proposes than abolition of spousal joint tenancies completely.

Moreover, this approach does not address an issue that concerns a number of people – the debtor protection aspects of joint tenancy. Abolition of spousal joint tenancies would deny to married persons a legal right that is available to anyone

else. While the staff has no great love for the debtor/creditor aspects of joint tenancy law, we believe it would be possible politically to make joint tenancy harder to obtain but not to make joint tenancy unavailable altogether. There is populist sentiment in the Legislature for joint tenancy, in the Commission's experience.

Finally, the Bar proposal would not solve the main problem that concerns them – treatment of a mixed separate/community property asset. Presumptions, tracing, etc., would still be required to determine what portion of the asset is community and what portion is the separate property of each spouse for such purposes as rights of testate and intestate beneficiaries and survivors and for federal income tax purposes.

Alternative Suggestions

As an alternative, the Bar Committee has several suggestions for improvement of the tentative recommendation:

(1) Make the legislation prospective only.
(2) Require use of the statutory form.
(3) Eliminate the advice requirement.
(4) Address the issue of combined community and separate property.

(1) The staff agrees that the statute should not be made retroactive for the reason stated in Memorandum 93-32 – practitioners will overreact and seal their clients into unwanted joint tenancies.

(2) In the past the staff has not been excited about the prospect of requiring the statutory form because this could defeat otherwise valid and appropriate joint tenancies. On the other hand, it would certainly solve in a rather simple and direct way many of the problems the tentative recommendation seeks to address. On further consideration, the staff concurs that use of the statutory form (or a substantial equivalent) could be required in order to convert community property to joint tenancy, particularly if the requirement is prospective only and includes a deferred operative date. This would be better than abolishing joint tenancy between married persons outright, in any event.

(3) The staff agrees that the advice requirement should be eliminated for the reasons stated in Memorandum 93-32. If use of the statutory form is required to obtain joint tenancy, the advice issue becomes moot.

(4) The major problem of the Bar Committee is that the tentative recommendation deals only with the effect of joint tenancy title on community

property and not with separate property. How is commingled separate property treated? The staff has avoided dealing with this problem in the tentative recommendation because separate property issues are more complex than community property issues. Community property is owned by the spouses in equal shares, so its conversion to joint tenancy changes nothing. But separate property is often not owned in equal shares, and its conversion to joint tenancy raises gift and other issues that have been extensively litigated. We would hate to try to codify this complex and controversial body of law. So we only specify in this recommendation how the community property component of a jointly-held asset is treated, leaving treatment of any separate property component to case law.

The only approach that appears to the staff even remotely feasible to address this issue would be to make the joint tenancy declaration form not only a conversion of community property to separate property, but also an agreement that any separate property component of the asset is to pass to the survivor at death. We would have to make clear, however, that this does not amount to a present gift of half of a spouse's separate property to the other spouse for purposes of rights during marriage or at dissolution.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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May 4, 1993

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California Law Revision Commission
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Re: CLRC's Tentative Recommendation of Effect on Joint Tenancy Title on Community Property

Dear Mr. Sterling:

The Executive Committee of the Estate Planning, Trust and Probate Law Section considered the above referenced Tentative Recommendation at its long-range planning retreat in Del Mar on April 23, 1993.

Team 2, a Subcommittee of the Executive Committee has studied the California Law Revisions' Commission work in this area dating back to Professor Jerry Kasner's background study. Team 2 had supported the Recommendation with some specific suggestions. Indeed, at the March 5, 1993, meeting of the Executive Committee, the Team had requested the State Bar's Executive Committee to support the Recommendation subject to some "fine tuning." On March 5, 1993 by a vote of 12 to 1, the Executive Committee recommended that the legislation proposed in the Tentative Recommendation not be applied retroactively. The Executive Committee tabled further discussion of the Tentative Recommendation until our April meeting.

Most importantly, Team 2 and the Executive Committee felt that the statute must address the issue of the combined community property and separate property contribution to the acquisition of a joint tenancy asset between spouses. The proposed legislation only deals with a 100% community property contribution. No mention is made as to the treatment of separate property contributions. The proposed Comment to Family Code §860 states "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." At the very least, the Executive Committee believes that this language creates an ambiguity. The Executive Committee believes it is essential to address the issue of the affect of commingled community and separate property sources. The ambiguity cannot remain or it will create many practical problems in operation.

The Executive Committee discussed the difficult practical problems caused by the ambiguity. If there is both separate and community sources in one joint tenancy, does the separate portion pass by survivorship and only the community portion pass as community property (either by intestacy or under the Will)? Does the usual presumption that commingling leads to a presumption all is community apply such that no property passes by survivorship and all must be put through a probate process? If a surviving spouse files a community property affidavit and there was an intestacy, how do the heirs of the separate property portion assert their rights? Should there be changes to the transmutation statues to govern these issues? These and other questions were raised by the Executive Committee during the course of their discussions.

As the discussions continued, it became increasingly clear that the root of many of the problems was in joint tenancy title itself. A motion was made and seconded to abolish all joint tenancies in the State of California. That motion was defeated. Another motion was made to abolish all joint tenancies between husband and wife in the State of California and to presume that if property is titled in joint tenancy, then the property is the community property of the spouses. That motion passed the Executive Committee by a vote of 10-5.

The Executive Committee believes it is important that the reasons for the proposal to abolish all joint tenancies between spouses be understood. One benefit is that it would conform the treatment of joint tenancies at death with the treatment at dissolution and make both consistent with treatment at all points during the marriage. This consistent treatment would be of benefit to all married persons in the State of California. For this reason, we believe this proposal is one the Family Law Section of the State Bar would likely support.

Another reason for support is that the reasons for having joint tenancies between spouses have gradually been disappearing, thanks to prior law reform made at the recommendation of the Commission. It is no longer necessary to probate community property unless a Will disposes of it to someone other than the surviving spouse. Real property in community property title can have title cleared by a simple affidavit procedure, which is very similar to the traditional affidavit of death of joint tenant. Similar affidavits can be utilized for personal property. It is no longer necessary to use joint tenancies to avoid probate. If probate avoidance is the only goal of the married couple, that can be accomplished by community property title.

If this proposal were adopted, California would not be the only state in the United States to have a rule of law that there be no joint tenancies between married couples. States which have tenancies by the entirety do not allow joint tenencies between married couples. It would not be too difficult for other states and entities outside our State to adjust to the change.

We believe that the abolition of joint tenancies between married couples and the statutory presumption that all joint tenancies created after the effective date would be community property would create a simple, clear rule. This rule would be easy for all to understand and for title companies, transfer agents, and others to implement.

While we endorse the creation of a presumption of community property, we did not discuss or vote on whether the presumption should be conclusive or rebuttable. This issue would require further study.

In the event the Law Revision Commission decides that it is not prudent to follow the suggestion to abolish interspousal joint tenancies, the Executive committee believes that the proposed legislation does need significant "fine tuning."

1. The Executive Committee unanimously believes that the proposed legislation should be prospective only.

2. The Executive Committee believes that if a married couple truly wants joint tenancy, then the statutory form should be required. By requiring the statutory form it no longer becomes necessary to impose liability under proposed Family Code §863. Accordingly, the Executive Committee would delete proposed Family Code §863 in its entirety.

3. If the Law Revision Commission proceeds with its proposal, then the Executive Committee believes the legislation must also address the issue of combined separate property and community property contributions to the acquisition of the joint tenancy assets. This matter should be specifically addressed in the statute. As stated earlier, the Executive Committee favors a presumption of community property, but did not decide whether the presumption should be conclusive or rebuttable.

The Executive Committee hopes that the Commission give serious consideration to all the comments it receives on this worthwhile project. In particular, the Executive Committee hopes that the Commissioners will seriously consider the proposal to statutorily abolish joint tenancy between spouses in California.

Respectfully Submitted,

Robert E. Temmerman, Jr.

cc: Don E. Green, CLRC Liaison
Monica Del'Osso, CLRC Liaison
Thomas J. Stikker, CLRC Liaison
Valerie J. Merritt, Executive Committee Chairperson