Second Supplement to Memorandum 93-32

Subject: Study F/L521.1 – Effect of Joint Tenancy Title on Community Property (Additional Comments on Tentative Recommendation)

Attached to this supplementary recommendation are comments of Michael D. Markovitch of Los Angeles (Exhibit pp. 1-3), further remarks of Alvin G. Buchignani of San Francisco (Exhibit pp. 4-6), and comments of Jeffrey A. Dennis-Strathmeyer of Berkeley (Exhibit pp. 7-8). Also attached is a copy of Mr. Strathmeyer's February 1 letter (Exhibit p. 9), referred to in his comments.

Mr. Buchignani reiterates his points that the creditor-avoidance aspects of joint tenancy are important and should not be eroded. He believes the law is well settled and should be left alone.

Mr. Markovitch is concerned about potential liability and problems that could arise as a result of the requirement that a lay person give advice concerning the form of title. He advocates "community property with right of survivorship" because it will provide all the advantages of community property during marriage and at dissolution, but will pass easily and quickly to the survivor at death. He acknowledges the possible disruption to the decedent's estate plan that could be caused by passage of the property by survivorship rather than under the decedent's will or trust. He would address this matter by allowing the survivor to disclaim. He would address debtor-creditor issues by making the decedent's interest subject to the decedent's creditors.

Mr. Strathmeyer opposes the tentative recommendation. He visualizes only two situations in practice where property titled as joint tenancy would be substantially affected by the proposal. In each of these situations he believes the effect of existing law is to pass the property to the survivor as intended, but the statute would yield an unintended result. He states that joint tenancy is the poor man's will, and to interfere with passage of the property to the survivor, particularly by retroactive application of the legislation, will disrupt peoples' intent.

Mr. Strathmeyer suggests that the Commission should give further consideration to the concept of community property with right of survivorship.

He also thinks the transmutation statute is causing problems and should be restricted to dissolution cases; it should not apply to determine title to property at death. And he believes that choice of law problems need to be addressed for out of state property.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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May 7, 1993

VIA FACSIMILE TRANSMISSION & U.S. MAIL
(415) 494-1827

Nathaniel Sterling, Esq.
California Law Revision Commission
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Re: California Law Revision Commission

Dear Mr. Sterling:

I find myself in the process of deciding how my wife and I should hold title to an account with a stock broker. The source of the funds to be invested in this account is community property and I wish my wife to enjoy the tax benefit that community property would have on my death, but I also want the account to pass to her automatically on my death without her having to incur the fees of an attorney, or the involvement of an over-burdened court system. If the account is held by us as Community Property, the broker could insist on a spousal set-aside order to prove that my interest passed to my wife.

I am writing belatedly to comment upon the article in the Spring 1993 Newsletter of the Estate Planning Trust & Probate Section of the State Bar, concerning the California Law Revision Commission's recommendations on the effect of joint tenancy title on community property.

When law becomes so complicated that it cannot be understood by intelligent lay persons (let alone intelligent lawyers) then it no longer serves the public purpose, and when the effect of the law is to lay traps for well-meaning lay persons (let alone well-meaning lawyers) then it certainly does more harm than good.

I am greatly concerned that if the Law Revision Commission's recommendations as described in the Spring 1993 Newsletter are carried out, then real estate brokers, escrow officers and other persons dealing in good faith in real estate may find themselves liable to a third party who considers himself to have been

damaged, years after the events have occurred which allegedly caused that damage, just because of the use of a standard printed form of deed. The proposed legislation appears to require a non-lawyer to give legal advice, just because he provided the form. Does this include a stationery store? The cause of action may not arise until the death of a party, many years after that party "mistakenly" took title in joint tenancy, and when the party sued may not be able to establish that the proposed law was complied with, even if the law was complied with.

If our law is to serve the public, it must be kept simple to the extent possible, even if by achieving this simplicity, certain benefits may be forfeited.

As an alternative to the present recommendation of the Law Revision Commission, I would like to offer the following solution to the problem:

A. Change current California law to provide that holding property as Joint Tenants (meaning joint tenants with right-of-survivorship) is merely a form of holding title and does not change the underlying nature of that property whether that be separate property or community property; that when community property is held between spouses in "Joint Tenancy" it retains it character as community property, but unlike other community property, on a decedent's death, the decedent's interest passes automatically to the surviving (joint tenant) spouse.

B. Change California disclaimer law to provide that a surviving spouse can disclaim a "right-of-survivorship" in joint tenancy property and, on doing so, such property would pass as if there had been no such right-of-survivorship, but, after such a disclaimer, allowing the surviving spouse to take whatever interest she would receive under the deceased spouse's will or by intestacy had the right-of-survivorship never existed. If the surviving spouse wished to disclaim the deceased spouse's interest in the property altogether, this could be done with appropriate language. Internal Revenue Code Section 2518(b)(4)(A) would appear to recognize such a disclaimer. Thus certain estate plans could be saved even though title was held in Joint Tenancy.

C. If the better opinion is that a creditor of a deceased

person should not be prejudiced because a deceased person's interest in joint tenancy property is no longer available to that person's creditors, then change the California law to provide that, like property held in a revocable trust, the interest of a decedent prior to his death in joint tenancy property should also be available to his creditors.

I believe that the above changes are simple, are understandable, and would achieve one important result, namely that a surviving spouse could acquire title to a deceased spouse's interest in real or personal property without the need for the intervention of the court system and without having to incur the expense of counsel's fees which, unfortunately, in most urban areas of California, are not affordable by the average person (particularly with a family to support); and yet would allow the surviving spouse to retain the tax benefit that community property offers.

Sincerely yours,

MICHAEL D. MARKOVITCH

MDM:ps
cc: Susan House, Esq.
Robert E. Temmerman, Jr., Esq.
Robert E. Bennett, Esq.

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May 7, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
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Re: Law revision Commission tentative recommendation on joint tenancy title and community property

Ladies & Gentlemen,

On May 6th, 1993, I wrote a letter to Mr. Robert E. Timmerman of the State Bar's Estate Planning Section regarding the above. He has suggested that I send you a copy, which is enclosed. You already have the enclosures, so they are not being resubmitted.

Very sincerely,

Alvin G. Buchignani

AGB/pzg
Enclosure

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May 6, 1993

Robert E. Timmerman, Jr., Esq.
1550 So. Bascom Avenue, Suite 240
Campbell, CA 95008

Re: Law Revision Commission tentative recommendation on joint tenancy title and community property

Dear Mr. Timmerman,

I am glad to see that the Estate Planning Section is working on the Law Revision Commission's tentative recommendation regarding joint tenancy and community property.

My own view is that the law in this area should be left alone. At least it is well settled, and those persons who desire to have the tax advantages of community property, while still holding record title in joint tenancy, can easily do so by a simple written agreement.

I feel that the proponents of the recent recommendation are so concerned about the tax benefits of community property that they are willing to forego the existing benefits of joint tenancy for those who need it most.

It is not surprising that a survey of the clients of estate planning lawyers would indicate a preference for the presumption of community property. I suggest that a survey be done of the clients of neighborhood legal assistance lawyers, or the clients of legal aid lawyers.

The principal advantage of joint tenancy is the shield that it provides to each spouse against the creditors of the other spouse. For many people, this can be a very valuable protection, and it can become even more valuable if the debtor spouse should die. The proponents of the recommendation seem to feel that such protection is somehow unjustified, perhaps on the theory that each spouse should always be liable for the debts of the other. Such a rule would be appropriate for spouses who are jointly engaged in a business, but it does not work well at all for many married persons whose only significant asset is the family home.

A creditor who wishes to have the family home as security for a debt will ordinarily obtain a deed of trust, signed by all parties of record. The creditor who

does not have such a deed of trust will ordinarily not place much reliance on the family home as the source of repayment.

Joint tenancy can be a great comfort to a person whose spouse, without disclosing it, incurs a significant liability for unpaid withholding taxes, or any other debt that is not approved by the uninvolved spouse. At least one-half of the property may be considered safe in such instances. The proposal would wipe away all such protection, leaving the innocent spouse completely at the mercy of any creditor of the other spouse.

When this matter came up several years ago, I urged that it be dropped at that time. I am enclosing a copy of some correspondence that I wrote then, and the reply that I received.

Very sincerely,

Alvin G. Buchignani

AGB/pzg
Enclosures

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Fax Memorandum

May 12, 1993

To: California Law Revision Commission
Fax Number: (415) 494-1827
Pages including this: 2

Re: Effect of Joint Tenancy Title on Community Property

I noted the comments on the Tentative Recommendation with interest. I also note that there still has been no circulation of my February 1, 1993 letter in which I noted the lack of substantiation of certain assumptions underlying this study.

In any case, I will undoubtedly lobby against enactment of this proposal, and I want to take this last moment opportunity to state the most important reasons:

THE BOTTOM LINE REGARDING DISPOSITION OF PROPERTY: In most situations property will pass to the surviving spouse regardless of the impact of the proposal. There are only two situations in which the study is relevant and the statute does not handle them well:

1) The will of the first spouse to die leaves the residue of the estate to someone other than the surviving spouse.

2) Property is acquired, in whole or part, with separate property of the first spouse to die and this person dies intestate.

Under the law as it existed before enactment of the transmutation statute, the effect of a joint tenancy title in these two situations was to pass the titled asset to the surviving spouse. (There may be technical complaints about the clarity of the law on this point, but this is the way things worked in the real world.)

Under the proposed statute, the result is changed. In the first situation noted above, the property would pass under the will. I challenge the Commission to provide even modest documentation that this result is consistent with the intent of more than an extremely small percentage of persons taking title as joint tenants.

I don't doubt that few of California's 32 million citizens are experts on joint tenancy (not me either), but they are going to know considerably less about the law if the legislature enacts this proposal.

In the second situation, heaven only knows what the result is. I suspect that shares of the separate property pass by intestate succession to the decedent's children--a real surprise indeed! To some extent this is already a problem because of the ill advised decision to apply the transmutation statute to transfer of property at death, rather than just division of property on divorce. In any event, it now appears that a conveyance of Blackacre from Husband to "Husband and Wife as Joint Tenants" is a nullity because it does not satisfy the "express declaration" requirements of the statute. (Heaven help us if the litigators ever figure this out.)

THE POOR MAN'S WILL: It is often said that Joint Tenancy is the poor men's will. In this connection I recall reading in some CLRC study somewhere that the overwhelming majority of our citizens die with no will at all. I think it is unseemly for a bunch of prosperous highly educated lawyers (whose well advised clients are not affected by this legislation) to sit around and weaken this method of transfer, as if to punish those who have the impudence to fail to seek estate planning. In my mind, doing so on a retroactive basis borders on an abuse of power.

LOOSE ENDS:

1) Something needs to be done about the transmutation statute and the problem of the invalid conveyance noted above.

2) There seems to be a failure to consider the fact that the scope of this statute is limited to real property. It is one thing to think that a miracle might happen and title companies and real estate brokers will give advice to persons taking title to property. But what about securities, etc.?

3) The alternative of some form of community property with right of survivorship needs to be reconsidered.

4) I agree with Luther Avery's comments about the choice of law problems.

Very truly yours,

Jeffrey A. Dennis-Strathmeyer

JEFFREY A. DENNIS-STRATHMEYER
ATTORNEY AT LAW

File: F-521.1

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February 1, 1993

Nathaniel Sterling
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Re: Study F-521.1/L-521.1 - Effect of Joint Tenancy Tile on Community Property

Dear Nat:

The January 22, 1993 staff response to my letter of January 18, 1993 is an unfortunate example of the same kind of assumption invention which caused the letter to be written in the first place.

I questioned the validity of the "frequent litigation" assumption and the response is an anecdote about the number of hands that get raised at a luncheon if you ask if they "had ever experienced any problems in recent years with the effect of joint tenancy title on community property." Were these people asked whether these problems involved litigation? Were they asked whether it was their litigation (or were they just passing along the same bar association rumor)? Could they solve their problems without litigation? Were their problems the kinds of problems the proposed recommendation would solve? On what basis does the staff assume that this show of hands justifies the study? Without answers to these sorts of questions, the show of hands is worthless. Is this the best evidence the Commission has to offer the legislature and the people of California before tinkering with a system that may in fact be meeting the needs of lots of people?

With respect to tax/transmutation issue, the staff waives the red flag of fraud. But that assumes the answer to the question. The question is, did we ever have much fraud and/or litigation on this issue back in the days when transmutation was easy? Did we have lots of cases in which children or others attacked the validity of joint tenancy deeds in situations in which community property was being held in joint tenancy? [If we did, I can't see why we wouldn't have similar or more litigation under community property deeds, but I digress.]

I would like to see some better documentation of the existence and extent of a problem. To twist the words of the old Wendy's commercial, I've seen the advertising, now I want to see the beef.

Very truly yours,

Jeffrey A. Dennis-Strathmeyer