

## Memorandum 93-35

**Subject: F/L-521.1— Effect of Joint Tenancy Title on Community Property**

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Attached to this memorandum is a staff draft of the recommendation on the effect of joint tenancy title on community property. The staff draft keeps the basic approach of the tentative recommendation that was circulated for comment — community property retains its community character unless it is expressly transmuted to a separate property joint tenancy, with a statutory form provided to accomplish this.

**Differences from Tentative Recommendation**

The staff draft differs from the tentative recommendation in several key respects as a result of comments received concerning the tentative recommendation:

(1) The operation of the statute is made prospective only, rather than retroactive with respect to existing joint tenancies.

(2) The draft now covers separate property as well as community property. Thus separate property commingled with community property would be converted to jointly-held separate property if a proper transmutation document is executed. Otherwise it remains individual separate property, subject to tracing, gift, and other case law principles.

(3) Express reference is made in the draft to the statutory affidavit procedure for clearing title to community property taken by the surviving spouse without probate.

(4) The draft makes clear that it is not a basis for civil liability that a broker or other person fails to give a married person proper information about joint tenancy and community property. (This would not preclude disciplinary action against a licensee who fails to comply with the information requirement. Nor would it preclude common law liability for misadvising a person.)

**Critique of Staff Draft**

We have done this draft at the direction of the Commission at the May meeting. However, the staff no longer believes this is the best approach to the community property/joint tenancy problem. Our concern is that the statutory

form will not change the behavior of brokers and others, who will simply have married persons sign the statutory form as one more item when closing a real estate sale or financing. The effect will be that the law *ensures* that the property is joint tenancy, to the likely dismay of the spouses or their beneficiaries when an issue later arises.

This concern is particularly troublesome now that the draft covers separate property as well as community property. It is probable under the draft recommendation that a person who uses individual separate property to buy the marital residence will be considered to have irrevocably transmuted the individual separate property to jointly held separate property, equally divisible at dissolution of marriage, even though the person's only intent was to pass the property to the surviving spouse if the marriage survived to the person's death.

### **Community Property With Right of Survivorship**

The staff finds itself gravitating back to the old concept of treating community property that has joint tenancy title imposed on it as community with a right of survivorship. This concept could apply to commingled separate property as well. The property would retain all its original characteristics except that it would pass by right of survivorship at death.

The key drawback of this scheme is the unintentional defeat of the decedent's will or trust. We would address this issue by allowing the decedent's interest in the property to pass under a will or trust if the property is specifically identified in the dispositive instrument. This assumes also that IRS would treat community property with right of survivorship as community property for tax purposes; Professor Kasner's report for the Commission concludes that it would.

The concept of community property with right of survivorship is consistent with our general approach to nonprobate transfers. A beneficiary designation sends the property at death, but does not act as a gift or transfer of the property during life. Thus CPWROS would be deemed a beneficiary designation to the person named as joint tenant, but would not have the effect of transmuting a person's property during life. As you can see, this would be the reverse of the approach taken in the tentative recommendation and in the attached staff draft of the recommendation.

### Comparison of Various Approaches

The Commission requested a comparison of the major approaches to dealing with the impact of joint tenancy title on marital property. The major approaches are: (1) presume that it is joint tenancy, (2) presume that it is community property unless transmuted, (3) treat it as community property with right of survivorship, (4) abolish joint tenancy, (5) do nothing. The chart below compares some of the key aspects of each of these approaches.

	Presume JT	Presume CP Unless Transmuted	CPWROS	Abolish JT	Do Nothing
Division at Dissolution	Equal	Trace Separate Contributions	Trace Separate Contributions	Trace Separate Contributions	Unclear
Debt Avoidance	Yes	No	Depends on Draft	No	Unclear
Subject to Will	No	Yes	Depends on Draft	Yes	Unclear
Subject to Probate	No	No	No	No	No
Clear Title by Affidavit	Yes	Yes	Yes	Yes	Yes
Step Up in Tax Basis	No	Yes	Possibly	Yes	No
Politically Feasible	Yes	Yes	Yes	No	Yes

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

**Staff Draft**

RECOMMENDATION

**Effect of Joint Tenancy Title on Marital Property**

**July 1993**

**California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739**

## SUMMARY

Historically in California married persons have taken title to their community and separate property as joint tenants 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 frequently has needed to make a showing that the joint tenancy title was for convenience only and there was no intent to convert the community property or individual separate property to joint interests in separate property. In recent years this informal arrangement has broken down as courts have given greater effect to the form of title and the Internal Revenue Service has refused to recognize community property claims for property titled as joint tenancy unless evidenced by a written agreement.

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 or individual separate property to separate property held as joint tenants, the spouses must transmute the property by an express written declaration; otherwise it retains its original character. The recommendation requires persons who assist spouses in titling their property to provide the spouses a statutory form that informs them of the advantages and disadvantages of community property, separate property, and joint tenancy. The statutory form also includes a proper declaration to enable the spouses to transmute community property or individual separate property to separate property held as joint tenants, if desired. The statutory presumption that community property and individual separate property retain their original character unless transmuted to joint tenancy would apply prospectively to property titled in joint tenancy after the operative date of the statute.

## EFFECT OF JOINT TENANCY TITLE ON MARITAL PROPERTY

A husband and wife in California may hold property in joint tenancy or as community property.<sup>1</sup> 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.<sup>2</sup>

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 or with individual separate property. 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.<sup>3</sup>

As a consequence, a person who is adversely affected by the joint tenancy title form may attempt 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 will or 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 transmute community property or individual separate property to joint interests in separate property or, if they did, that they subsequently transmuted it back.<sup>4</sup>

The result has been general confusion and uncertainty in this area of the law, accompanied by frequent litigation<sup>5</sup> and negative critical comment.<sup>6</sup> It is apparent

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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 Hastings L.J. 769, 828-38 (1982).

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 Allen*, 8 Cal. App. 4th 1225, 10 Cal. Rptr. 2d 916 (1992); *In re Marriage of Hilke*, 14 Cal. Rptr. 2d 371 (1992).

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 Hastings 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*

that the interrelation of community property, separate property, and joint tenancy 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.<sup>7</sup> 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 in 1983 to apply to all property acquired during marriage in joint tenancy form.<sup>8</sup> 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.<sup>9</sup> This legislation is limited in effect and does not address treatment of the property at death of a spouse,<sup>10</sup> or during marriage before dissolution or death.

Community property provides a married person important protections that separate property held as joint tenants does not. Community property protections include:

- (1) Fiduciary duties in management and control of the property.<sup>11</sup>
- (2) Limitations on depletion of the community by gift.<sup>12</sup>
- (3) Limitations on disposition of the family home or other community real property.<sup>13</sup>
- (4) Prohibition on forced partition of the property during marriage.<sup>14</sup>
- (5) Right to will the decedent's community property interest.<sup>15</sup>
- (6) Stepped-up income tax basis for appreciated community property share of the surviving spouse.<sup>16</sup>

Joint tenancy provides greater protection than community property from liability for debts of a married person, both during the marriage and after the death of a spouse.<sup>17</sup> During the marriage the debts of a spouse may only be satisfied out of the spouse's one-half interest in joint tenancy, and after the spouse dies the

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We Have It, Lets Recognize It (1991); Petrusis, *Joint Tenancy: A Mere Form of Title*, 12 Estate Planning, Trust & Probate News, No. 4 at p.8 (State Bar of California 1992).

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).

8. Civ. Code § 4800.1, enacted by 1983 Cal. Stat. 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. Stat. ch. 342, § 2.

10. *In re Marriage of Hilke*, 14 Cal. Rptr. 2d 371 (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. Int. Rev. Code § 1014.

17. See discussion in Sterling, *supra*, 14 Pac. L.J. at 945-51; 10 Comm. Prop. J. at 175-182.

survivor may take the one-half interest free of the spouse's debts. However, the common law protection against debts is at the expense of a creditor who may be denied payment for a just debt. Moreover, the limitation on liability of joint tenancy property may cause a joint tenant to be allowed credit only with the signature of the other joint tenant and only subject to a security interest in the joint tenancy property. By comparison, the statute governing liability of community property for debts represents deliberate 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.<sup>18</sup>

Other arguments that have been advanced for the desirability of joint tenancy for married persons also are problematic.

- Depreciated joint tenancy property retains a higher income tax basis than depreciated community property. However, this is relatively unimportant since the vast majority of decedents' property in California has appreciated rather than depreciated in value, and community property receives a substantial tax advantage in this situation.

- Joint tenancy property may appear to pass automatically to the surviving spouse at death. But either spouse may unilaterally sever the joint tenancy and will the spouse's interest in the property. This is comparable to community property, which passes to the surviving spouse unless willed by the decedent.<sup>19</sup>

- Automatic passage to the surviving spouse under joint tenancy 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. Under community property tenure this unfortunate situation cannot occur.

- The ability to clear title quickly by affidavit of death is an important characteristic of joint tenancy property that is also a feature of community property. Community property passes to the surviving spouse without probate,<sup>20</sup> although the surviving spouse may elect probate if desired.<sup>21</sup> Clear title to community property may be established by affidavit of death.<sup>22</sup>

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

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

19. Prob. Code § 6401.

20. Prob. Code § 13500.

21. Prob. Code § 13502.

22. Prob. Code § 13540.



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 or individual separate property to separate property held as joint tenants, the spouses should make an express and knowing transmutation of the property to joint interests in separate property.<sup>23</sup> A statutory form should be enacted with sufficient information and a proper declaration to enable a person to transmute community property to joint tenancy, if that is what is really desired. A person who assists married persons in titling their property should be required to provide them a copy of the form or equivalent information so that any transmutation will be informed. Failure to execute a proper declaration of a knowing and intentional transmutation of community property or individual separate property to joint interests in separate property should leave the character of the property unaffected.<sup>24</sup>

The community property presumption corresponds with the probable intent of most married persons<sup>25</sup> as well as with the probable effect of existing statute and case law.<sup>26</sup> However, the presumption should be applied prospectively only, in the event that existing joint tenants may have relied on the law in effect at the time the property was subjected to the joint tenancy title.<sup>27</sup> The duty imposed on brokers and other advisers to provide married persons a copy of the statutory form or equivalent information should be deferred for one year; this will allow sufficient time for the advisers to familiarize themselves with the new requirements.<sup>28</sup>

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

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23. This is analogous to the "Acceptance of Joint Tenancy" in use in Arizona. The requirement would apply to both community property and separate property.

24. The law applicable to commingling, tracing, reimbursement, gift, and other principles affecting separate property contributions to community property or joint tenancy would be unaffected unless a valid transmutation is made. See, e.g., Fam. Code § 2640 (separate property contributions to property acquisition).

25. The Law Revision Commission has consulted with a number of estate planning experts active in state and local bar associations. Their experience is that most married persons, when fully informed of the differences in treatment between community property and separate property held as joint tenants, indicate a preference and intent that the property remain community.

26. The requirement in Family Code Section 852 of an express declaration in writing to transmute community property to separate property may negate the effect of many joint tenancy titles and leave unaffected the character of property having a community property source. See discussion in Kasner, *Community Property in Joint Tenancy Form: Since We Have It, Lets Recognize It* (1991); Petrusis, *Joint Tenancy: A Mere Form of Title*, 12 *Estate Planning, Trust & Probate News*, No. 4 at p.8 (State Bar of California 1992).

27. This is not a constitutional issue. Retroactivity of a statutory community property presumption for property in joint tenancy form would be validated by *Marriage of Hilke*, 14 Cal. Rptr. 2d 371 (1992) (a joint tenancy survivorship right is not a vested right before the death of a joint tenant). In any event it is likely that the effect of existing statute and case law is the same as that proposed in this recommendation — community property remains community unless transmuted to separate property joint tenancy. See footnote 25, *isupra*.

28. The proposed legislation includes a statutory form that satisfies the advice and declaration requirements and that may be used by any person to obtain true joint tenancy.

minimize litigation over the issue whether the property should be treated as community property or separate property held as joint tenants.

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<sup>29</sup> or by summary court proceeding.<sup>30</sup> 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 title in joint tenancy 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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29. Prob. Code §§ 210-221; see also Prob. Code § 13540 (right of surviving spouse to dispose of real property).

30. Prob. Code §§ 13650-13660.

## RECOMMENDED LEGISLATION

**Civ. Code § 683 (amended). Creation of joint interest**

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 marital 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 860-868, governing the effect of joint tenancy title on real and personal marital property.

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 §§ 860-868 (added). Effect of joint tenancy title on marital 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 MARITAL PROPERTY

**§ 860. Scope of chapter**

860. This chapter applies to real and personal property held between married persons in joint tenancy form, regardless of whether the property is acquired in whole or part with community property or separate property or whether the form

of title is the result of an agreement, transfer, exchange, express declaration, or other instrument or transaction that affects the property.

**Comment.** Sections 860 to 868 govern the effect of joint tenancy title on marital 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 applies this chapter to all property held in joint tenancy form, whether the property has a community property source, a separate property source, or a mixed community property and separate property source. Thus to the extent joint tenancy tenure is imposed on the property, this chapter governs treatment of separate property contributions to the property and overrides prior law applicable to commingling, tracing, reimbursement, gift, and other principles affecting separate property and community property rights. Cf. Section 2581 (community property presumption for property held in joint form).

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

#### **§ 861. Marital property presumptions notwithstanding joint tenancy title**

861. To the extent property held by married persons in joint tenancy form has a community property source it is presumed to remain community property, and to the extent property held by married persons in joint tenancy form has a separate property source it is presumed to remain subject to commingling, tracing, reimbursement, gift, and other principles affecting separate property. The presumptions established by this section are presumptions affecting the burden of proof and are rebuttable only pursuant to Section 862.

**Comment.** Section 861 resolves the conflicts in the case law among the presumptions that (1) property acquired by the spouses during marriage is community property, (2) property held by the spouses during marriage retains the community or separate characterization of its source, and (3) joint tenancy title means what it says. Under Section 861, when these presumptions conflict, the community property and source presumptions prevail over the title presumption. These presumptions may be overridden only by proof of a transmutation to joint interests in separate property. See Section 862.

Under this section, community property that is not properly transmuted to joint interests in separate property 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). Section 866 (passage of marital property by affidavit of death without probate); see also 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.

Likewise, an individual interest in separate property that is not properly transmuted to joint interests in separate property remains individual and is subject to commingling, tracing, reimbursement, gift, and other principles affecting separate property.

#### **§ 862. Transmutation of marital property to joint tenancy**

862. (a) The presumptions established by Section 861 may be rebutted only by proof of 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 satisfies this section.

**Comment.** Section 862 makes clear that the transmutation statute governs creation of joint tenancy from community property or separate property. The spouses may transmute marital property to joint interests in separate property 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 marital property to joint interests in separate property should state that the property or tenure is converted to joint tenancy or joint interests in separate property, 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 provide the married person a copy of, or the substance of the information contained in, the form provided in Section 864.

(b) Failure of a person to comply with this section is not the basis for any civil liability of the person and does not affect the validity of an instrument that otherwise satisfies Section 862.

**Comment.** Section 863 requires a person who offers married persons the option of holding property in joint tenancy form to provide information concerning the consequences of that type of tenure. The requirement is satisfied by use of the statutory form provided in Section 864. The requirement applies only to a form or instrument provided or advice given on or after January 1, 1996. Section 868 (transitional provision).

Although the duty provided in this section may not serve as a basis for civil liability, failure to comply may be the basis for disciplinary action against a licensee. This section does not address the issue whether there might be common law liability for any adverse consequences that result from inappropriate advice to married persons to hold title as joint tenants.

#### **§ 864. Statutory form**

864. (a) An instrument transmuting community property or individual separate property to joint interests in separate property 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 PROPERTY RIGHTS. SOME OF YOUR 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.**

• **Ownership.** You own your separate property individually and you own community property equally with your spouse. By signing this declaration you convert your ownership of the property so that you and your spouse own the property jointly, each having a one-half interest in the whole.

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

• **Rights of Creditors.** Your separate property and all community property is liable for your debts. If you sign this declaration, only your one-half interest in this property is liable for your debts, and when you die your spouse may be able to take your interest free of your debts. This may limit your ability to obtain credit without the signature of your spouse.

• **Division at Dissolution of Marriage.** At dissolution of marriage, you are entitled to your separate property (including your separate property contributions to acquisition of marital property). If you sign this declaration you and your spouse each are entitled to one-half the property regardless of your separate property contributions.

• **Passage to Surviving Spouse.** When you die, your separate property and your one-half interest in community property pass to the beneficiaries named in your will, for example a child or a trust. If you sign this declaration the property passes to your surviving spouse; you cannot will your interest in the property to anyone else or put it in a trust as long as this declaration is in effect.

• **Probate.** Your spouse may choose whether or not to probate community property after you die, and may establish title without probate by recording an affidavit after 40 days if no one has filed an adverse claim. If you sign this declaration your spouse will take the property without probate; title may be established immediately by recorded affidavit.

• **Income Taxes.** When your spouse dies you will receive 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 decreased in value.

**DESCRIPTION OF PROPERTY**

The property that is the subject of this declaration is:

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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 property rights by signing this instrument. We declare that we intend to convert any community property and any individual interest in separate property we may have in the property that is the subject of this declaration to joint interests in separate property, and to hold the property for all purposes as joint tenants and not as community property or as individual separate 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 provided to a married person if the information otherwise satisfies Section 863.

**Comment.** Section 864 provides a "safe harbor" for the requirements of Sections 862 (transmutation of marital 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 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 interest) and Family Code Section 852 ("express declaration" required for transmutation).

**§ 865. Effect of transmutation to joint tenancy**

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

**Comment.** Section 865 makes clear that a transmutation of community property or separate 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 (marital property presumptions notwithstanding joint tenancy title).

At dissolution of marriage the property is treated as separate property and not as community property. See Section 2581 (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. Passage of marital property by affidavit of death without probate**

866. Notwithstanding joint tenancy form of title, property of married persons that is not properly transmuted under this chapter to joint interests in separate property remains subject to disposition on death of a spouse in the same manner as other community property and separate property, including passage to the surviving spouse without necessity of estate administration and clearance of title by recorded affidavit of death to the extent and in the manner provided in Part 2 (commencing with Section 13500) of Division 8 of the Probate Code.

**Comment.** Section 866 is a specific application of the rule that if marital property is not properly transmuted to joint interests in separate property, it retains its character for all purposes. See Section 861 and Comment (marital property presumptions notwithstanding joint tenancy title). Section 866 serves to draw attention to the fact that for married persons joint tenancy does not offer a significant advantage over community property at death, since community property may also pass to the surviving spouse without probate and title may be cleared by filing an affidavit of death. See, e.g., Prob. Code §§ 13500 (no administration necessary), 13540 (affidavit of death).

**§ 867. Effect on special statutes**

867. 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 867 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 interest); Fam. Code § 2581 (community



property presumption for property held in joint form); Prob. Code § 5305 (presumption that funds on deposit are community property).

**§ 868. Transitional provision**

868. (a) As used in this section, "operative date" means January 1, 1995.

(b) Except as provided in subdivision (d), this chapter applies to property held between married persons in joint tenancy form as the result of an instrument that is executed or a transaction that occurs on or after the operative date.

(c) Property held between married persons in joint tenancy form as the result of an instrument that is executed or a transaction that occurs before the operative date is governed by the applicable law in effect at the time the instrument is executed or the transaction occurs.

(d) 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 January 1, 1996.

**Comment.** Section 868 provides special transitional provisions for this chapter that are an exception to the general transitional provisions found in Section 4.

Under subdivision (c), this chapter does not apply to property acquired before the operative date. Nonetheless, it is arguable that the law under existing cases and statutes is the same as that provided in this chapter. See, e.g., Sections 760 (community property) and 852 (form of transmutation).

**Fam. Code § 2581 (amended). Community property presumption for property held in joint form**

SEC. 3. Section 2581 of the Family Code, as added by 1993 Cal. Stat. ch.\_\_\_\_, § \_\_\_\_, is amended to read:

2581. (a) For the purpose of division of property upon dissolution of marriage or legal separation of the parties, 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~~

(b) The presumption established by subdivision (a) is a presumption affecting the burden of proof and may be rebutted by either of the following:

~~(a)~~ (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.

~~(b)~~ (2) Proof that the parties have made a written agreement that the property is separate property.

(c) A declaration of joint tenancy under Chapter 6 (commencing with Section 860) of Part 2 of Division 4 (effect of joint tenancy title on marital property) satisfies subdivision (b).

**Comment.** Section 2581 is amended to recognize enactment of Sections 860-868, governing the effect of joint tenancy title on marital property. Under those provisions, community property and separate property in joint tenancy form retain their character without change unless there is an effective transmutation of the property. Section 861 (marital property presumptions notwithstanding joint tenancy title). Once transmuted, the property is separate property owned equally by the spouses 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, as amended by 1993 Cal. Stat. ch.\_\_\_\_, § \_\_\_\_, 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 2581 and 2640 of, and Chapter 6 (commencing with Section 860) of Part 2 of Division 4 (effect of joint tenancy title on marital 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 from 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 860-868 for the effect of joint tenancy title on marital 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.