# Memorandum 94-24

## Effect of Joint Tenancy Title on Marital Property: Status of Bill

The Commission's recommendation on the effect of joint tenancy title on marital property would be implemented by Senate Bill 1868, introduced by Senator Campbell. A copy of the bill is reproduced as Exhibit pp. 1-9. The bill is set for hearing in the Senate Judiciary Committee on May 10 — the last regular hearing date — which falls before the Commission's May meeting. The bill is opposed by the California Land Title Association (Exhibit pp. 10-12) and by the California Bankers Association (Exhibit pp. 13-14).

The basis of CLTA opposition is that there is no problem with existing law, and in any case their members would be unable to insure joint tenancy titles under the proposed legislation because of uncertainty whether the statutory requirements have been satisfied. With respect to the comment that there is no problem with existing law, Professor Kasner (Exhibit pp. 15-17), Robin Pulich of the State Bar Estate Planning, Trust and Probate Law Section (Exhibit pp. 18-22), and Patricia Jasper of Ambrecht & Associates trust and estate planning law firm (Exhibit pp. 23-24), have all written responsive letters effectively refuting the point. With respect to the comment that CLTA members would be unable to insure joint tenancy titles, we have pointed out to them that the proposed legislation includes third party protection for property titled as joint tenancy.

The basis of CBA opposition is that the bill could allow a transmutation to wipe out a preexisting security interest and that the banks would be forced to search the land records to determine whether there is a transmutation that affects a bank account. We have pointed out to them that the bill makes no change in the law on these matters.

We have had a joint meeting in Senator Campbell's office with representatives of CLTA, CBA, and State Bar to explore possibilities for revisions of the bill that would satisfy their concerns and enable them to support the legislation. Concepts that were discussed included requiring a real property transmutation to appear on the face of the deed, and express statutory language that prior liens and encumbrances are unaffected by a subsequent transmutation to joint tenancy. We have cleared these concepts with the Commission's

Chairperson and Vice Chairperson, but so far CLTA and CBA have not responded to drafts of specific language that we have circulated.

An alternative that State Bar representatives have been discussing with CLTA is to provide a statutory form of real property deed, parallel to the general transmutation form set out in the bill, use of which would ensure joint tenancy title and protect title insurers from potential liability.

At the Commission meeting we will make an oral report of the results of these discussions and of the outcome of the Senate Judiciary Committee hearing.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

# SENATE BILL No. 1868

**Introduced by Senator Campbell**

February 24, 1994

An act to amend Section 683 of the Civil Code, to amend Section 2581 of, and to add Chapter 6 (commencing with Section 860) to Part 2 of Division 4 of, the Family Code, and to amend Section 5305 of the Probate Code, relating to joint tenancy.

LEGISLATIVE COUNSEL'S DIGEST

SB 1868, as introduced, Campbell. Joint tenancy: married persons.

Existing law provides for the creation of joint interests, as specified.

This bill would revise and recast the law in this regard to specify that a joint tenancy in real or personal property may be created by a will, deed, or other written instrument of transfer, ownership, or agreement if the document expressly declares that the property is to be held in joint tenancy, subject to the provisions described below.

This bill would provide that if married persons hold property in joint tenancy form as the result of an instrument that is executed or a transaction that occurs on or after January 1, 1995, the property would be presumed to retain its community or separate property form, as specified, unless rebutted by proof of an instrument transmuting the property to joint tenancy, and would provide a statutory form that may be used for that purpose. This bill would provide that the presumption would not affect the manner of division of property upon dissolution of marriage or legal separation. It would authorize a person who is without specified notice to act in reliance upon the joint tenancy form of the property owned by a married person, regardless of whether the property remained community or separate property under



Corrected 3-17-94—See last page. 99 80

these provisions. This bill would specify that these provisions would not affect any other provision of existing law that prescribes the manner or effect of a transfer of property documented or titled in joint tenancy form pursuant to that provision. It also would make related changes.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 683 of the Civil Code is amended
2 to read:
3 683. (a) ~~A joint interest is one owned by two or more~~
4 ~~persons in equal shares, by a title created by a single will~~
5 ~~or transfer, when expressly declared in the will or~~
6 ~~transfer to be a joint tenancy, or by transfer from a sole~~
7 ~~owner to himself or herself and others, or from tenants in~~
8 ~~common or joint tenants to themselves or some of them,~~
9 ~~or to themselves or any of them and others, or from a~~
10 ~~husband and wife, when holding title as community~~
11 ~~property or otherwise to themselves or to themselves and~~
12 ~~others or to one of them and to another or others, when~~
13 ~~expressly declared in the transfer to be a joint tenancy, or~~
14 ~~when granted or devised to executors or trustees as joint~~
15 ~~tenants. A joint tenancy in personal property may be~~
16 ~~created by a written transfer, instrument, or agreement.~~
17 *A joint tenancy in real or personal property may be*
18 *created by a will, deed, or other written instrument of*
19 *transfer, ownership, or agreement if the document*
20 *expressly declares that the property is to be held in joint*
21 *tenancy.*
22 (b) Provisions of this section do not apply to a joint
23 account in a financial institution if Part 2 (commencing
24 with Section 5100) of Division 5 of the Probate Code
25 applies to ~~such~~ *the* account.
26 *(c) This section is subject to Chapter 6 (commencing*
27 *with Section 860) of Part 2 of Division 4 of the Family*
28 *Code (effect of joint tenancy title on marital property).*
29 SEC. 2. Chapter 6 (commencing with Section 860) is
30 added to Part 2 of Division 4 of the Family Code, to read:

## CHAPTER 6. EFFECT OF JOINT TENANCY TITLE ON MARITAL PROPERTY

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.

861. (a) If married persons hold property in joint tenancy form:

(1) To the extent the property has a community property source it is presumed to be community property.

(2) To the extent the property has a separate property source it is presumed to be separate property, subject to commingling, tracing, reimbursement, gift, and other principles affecting separate property.

(b) The presumptions established by subdivision (a) are presumptions affecting the burden of proof and are rebuttable only pursuant to Section 862.

(c) The presumptions established by subdivision (a) do not affect the manner of division of property upon dissolution of marriage or legal separation of the parties pursuant to Division 7 (commencing with Section 2500).

862. The presumptions established by Section 861 may be rebutted only by proof of (1) an instrument in the form provided in Section 863 or (2) an instrument that otherwise satisfies Chapter 5 (commencing with Section 850) (transmutation of property) and includes an express declaration that the property or tenure is converted to joint tenancy or separate property held jointly, or words to that effect expressly stating that the characterization or ownership of the property is being changed. 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.

863. (a) An instrument transmuting community

property or separate property of a married person to joint tenancy satisfies Section 862 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

This Information Is a Summary and Not a Complete Statement of the Law. You May Wish to Seek Expert Advice Before Signing this Declaration.

DO YOU WANT TO GIVE UP YOUR COMMUNITY PROPERTY AND SEPARATE PROPERTY RIGHTS IN THE PROPERTY DESCRIBED BELOW? If you sign this declaration the property will be joint tenancy and will not be community property. You will give up half of any separate property interest you have in the property. Some of the rights you will lose are summarized below.

If You Now Have Community Property ...

You and your spouse own community property equally and the entire property is subject to your debts. You may pass your share of community property by will or put it in a trust, but otherwise it goes automatically to your spouse when you die and does not have to be probated. The surviving spouse gets an income tax benefit if the property has increased in value.

If you sign this declaration:

* Your community property is converted to joint tenancy, owned equally with your spouse.
* Your share may not be subject to your spouse's debts. However, this may limit your ability to get credit without your spouse's signature.
* You cannot pass your share by will or put it in a trust as long as the joint tenancy remains in effect. When you die your share goes automatically to your spouse without probate. Your spouse will get an income tax benefit only if the property has decreased in value.

Do not sign this declaration if you want community property. Instead, you should take title as community

property.

If You Now Have Separate Property ...

You own your separate property absolutely and have full power to manage and dispose of it. If you sign this declaration you make an immediate and permanent gift of half your separate property to your spouse, which you cannot get back at dissolution of marriage and cannot pass by will or trust. When you die your remaining half interest in the property passes automatically to your surviving spouse without probate. You cannot give it by will or put it in a trust as long as the joint tenancy remains in effect.

Do not sign this declaration, and you should not take title as joint tenancy, if you want to keep your separate property rights.

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 information set out above and understand that we give up community and separate property rights by signing this declaration. We declare that we intend to transmute (convert) any community property and any separate property interest either of us has in the property that is the subject of this declaration to joint tenancy, owned by us in equal shares as the separate property of each of us, and to hold the property for all purposes as joint tenants and not as community property or as separate property of either of us alone.

Do Not Sign Unless You Have Read All of the Information Set Out Above.

| _____ | _____ |
|---|---|
| Signature of Wife | Date |
| _____ | _____ |
| Signature of Husband | 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 the validity of an instrument not substantially in the form provided in this section if the instrument otherwise satisfies Section 862.

(c) A person who provides a married person a copy of the form provided in this section is not liable for any injury that results from transmutation of community property or separate property of the married person to joint tenancy as a consequence of providing the form. Nothing in this section is intended to relieve a person from liability for fraudulent or other improper use of the form provided in this section or from liability relating to advice given or an obligation to advise a married person concerning title.

864. Transmutation of community property or separate property of a married person to a joint tenancy changes the character and tenure of the property for all purposes from community property or from separate property of the married person to joint interests of the married persons in the property, the interest of each being the separate property of that joint tenant.

865. Notwithstanding joint tenancy form of title, property of married persons that is not properly transmuted under this chapter to joint tenancy remains subject to disposition on death of a spouse in the same manner as other community property and separate property of a spouse, 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.

866. Notwithstanding any other provision of this chapter, if property is held between married persons in joint tenancy form, a person may act in reliance on the apparent joint tenancy ownership during the marriage

and on the apparent right of survivorship on death of a spouse, whether or not community property or separate property is properly transmuted under this chapter to joint tenancy, unless the person has actual notice, or constructive notice based on recordation, of a contrary claim of interest in the property.

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, except as otherwise provided in that statute.

868. (a) 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 January 1, 1995.

(b) Property held between married persons in joint tenancy form as the result of an instrument that was executed or a transaction that occurred before January 1, 1995, is governed by the applicable law in effect at the time the instrument was executed or the transaction occurred.

SEC. 3. Section 2581 of the Family Code is amended to read:

2581. *(a)* For the purpose of division of property on 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, or 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~~ *one* 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.

*(3) 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).*

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 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 the 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.

CALIFORNIA LAND TITLE ASSOCIATION
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March 25, 1994

COPY

The Honorable Tom Campbell
California State Senate
State Capitol, Room 3048
Sacramento, CA 95814

Dear Senator Campbell:

On behalf of the California Land Title Association, I regret to inform you of our OPPOSITION to your bill, SB 1868. It is our position that the California Law Revision Commission's (CLRC) proposal is ill-conceived and would add unnecessary complexity to a fairly straight-forward process for couples who intend to hold title in joint-tenancy and would create havoc for the title insurance industry. We have expressed our opposition to the CLRC in the past and will contact them again explaining our continued opposition.

As you are aware, this bill would essentially create a presumption in law that married couples who hold title as "joint tenants" actually intend to take the property as community property unless they record a "Declaration of Joint Tenancy" stating otherwise. Specifically, we oppose the bill for the following reasons:

**The Current System of Holding Title in Joint Tenancy Works Adequately and The CLRC Proposal Assumes a Lack of Sophistication on Behalf of Married Homeowners which is Unwarranted**: It is our opinion that the joint tenancy area of law works efficiently, allowing married couples to create an automatic survivorship for the surviving spouse. Our viewpoint is shared by experts, such as Judge Arnold H. Gold of the Superior Court of Los Angeles which handles nearly 40 percent of all probate matters in California. In the attached letter you will see that Judge Gold's comments were as follows:

> ...I have little problem with the law as it now exists, and I believe that the approach utilized in the [CLRC Proposal] would frustrate substantially more intentions and cause substantially more litigation than adherence to the approach of existing law.

He goes on to state:

> ...I believe that in this day and age, the automatic survivorship feature of joint tenancy is so commonly understood by persons owning property that the need for the drastic

shift which the draft recommendation would effect is far outweighed by the frequency with which the parties' desire for automatic survivorship would be frustrated by their failure to adhere precisely to the stringent requirements [of the proposal]

**CLRC Proposal Creates an Extra Level of Complexity in Order to Hold Title as Joint Tenants, Thereby Creating a Preference for Holding Title in Community Property**: By creating a presumption that married couples intend to hold title in community property (even though they have taken the affirmative step of recording title in joint tenancy), married couples would be required to take a further affirmative step of recording a declaration stating their intend to hold property as joint tenants. Obviously, many couples who have already taken the affirmative step of recording title as a joint tenancy will assume their intent was clear and will inadvertently fail to take the further step of recording the declaration, resulting in the title being vested in community property merely by default.

It is our position that the CLRC is antithetical to the intent of married couples utilizing the joint tenancy option and would actually undermine their efforts and decision-making as property owners.

**Current Law Already Provides for Community Property Protections in the Case of Dissolution of Marriage**: California Civil Code Section 4800.1 already provides that real property acquired during marriage --even if held in joint tenancy-- is presumed to be community property for the purposes of dissolution of marriage. Thus, community property protections under existing law already provide adequate protections to both spouses even if they hold title as joint tenants. The community property presumption is rebuttable only by a clear writing of the spouses and is not be met simply if the couple holds title in the real property as joint tenants.

**The CLRC Proposal Presumes that Holding Title in Community Property is Preferable to Holding Title in Joint Tenancy**: The CLRC comments to the proposal cite benefits for holding title in community property ranging from the fiduciary duties in management and control of property to more preferable tax treatment. However, the CLRC proposal presumes that these benefits somehow outweigh the benefits a married couple is seeking under a joint tenancy vesting, such as avoiding probate with the automatic survivorship feature. The vesting of title should be left to the couples to choose, and such things as preferable tax treatment, etc., should be issues couples consider with the guidance of an estate planner, financial planner, tax consultant or attorney. To assume that community property vesting is always preferable to a married couple is meddlesome and intrusive and would contribute to other problems currently avoided with the existing system.

**If SB 1868 Becomes Law, Title Insurers Will Not Vest Title in Married Individuals Who Have Acquired Title to Real Property as Joint Tenants**: Lenders and buyers rely on title insurance policies to accurately reflect the vesting of title. Currently, title insurance companies respect the wishes of couples who wish to hold title as joint tenants and insure that vesting accordingly.

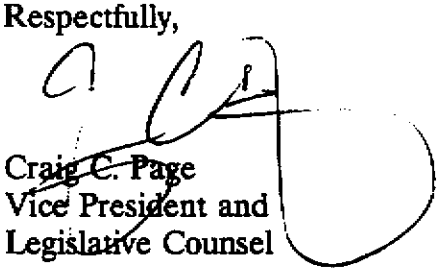
If the CLRC proposal were to become law, title insurers would be forced to create

exclusions in their policies regarding the vesting of title as joint tenancy because the intent of the parties would be uncertain and status of the vesting could change at any time. The CLRC proposal would foster unpredictability by creating a presumption under the law that married couples holding title as joint tenants actually intend to hold title as community property. However, this presumption would change at any time if the couples subsequently record a Declaration of Joint Tenancy provided for in the bill. Even though the recording of the Declaration would be a post-policy event and arguably not covered by the policy, its effect would essentially be retroactively applied to the vesting of title. Thus, title insurance companies would create exclusions in their policies to avoid liability for an event over which they have no control.

Undoubtedly, these types of exclusions would create concerns for lenders buyers who rely upon title insurance policies to accurately reflect the vesting of title and may effect the availability of loans for couples who wish to hold title as joint tenants.

For the aforementioned reasons, we OPPOSE SB 1868.

Respectfully,



Craig C. Page
Vice President and
Legislative Counsel

cc: Charles Fennessey, Minority Consultant
Alison Anderson, Senate Judiciary Committee Consultant
John Glidden, Consultant
Maurine Padden, California Bankers Association
Ed Levy, California League of Savings Institutions

CP/dc

California Bankers Association
Established 1891



April 11, 1994

The Honorable Tom Campbell
Member, California State Senate
State Capitol, Room 3048
Sacramento, CA 95814

RE: OPPOSITION TO SB 1868

Dear Senator Campbell:

On behalf of California Bankers Association (CBA), I regret to inform you that we oppose your SB 1868 which creates a presumption in law that married couples who hold title to real or personal property as joint tenants actually intend to hold the property as community property unless they record a "Declaration of Joint Tenancy" as set forth in the proposed statute.

Our opposition rests on the following grounds:

1. The measure will adversely affect lender's security interest in real property. For example, assume that a loan has been made to a married person secured by his or her property to which his or her spouse is not a party (e.g., property which is held in tenancy-in-common between the spouses). If, after the lien is created, the property was transmuted to joint tenancy form, and the borrower spouse were to die before the loan is repaid, the lender's lien could well evaporate.

2. The measure will adversely affect joint tenancy agreements commonly executed for banking services such as deposit accounts, safe deposit rentals, and purchase of certificates of deposit. It appears to be unreasonable to require banks to initiate a search of the records of the county recorder's office to determine at the outset, or at any time thereafter, whether or not the parties have transmuted their interests in these bank agreements and would, in effect, create an operational nightmare for depository institutions.



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For these reasons, CBA must OPPOSE your SB 1868. Thank you, in advance, for your consideration.

Sincerely,

MAURINE C. PADDEN
VP/Legislative Counsel

MCP:mm
cc: Andrea Austin, California Mortgage Bankers Association
Dave Knight, California Financial Services Association
Ed Levy, California League of Savings Institutions
Richard Mersereau, California Credit Union League
Craig Page, California Land Title Association
Nat Sterling, California Law Revision Commission
Bob Timmerman, State Bar of California
Pat Zenzola, Household International, Inc.

SANTA CLARA UNIVERSITY

SCHOOL OF LAW

Law Revision Commission
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File:

April 4, 1994

The Honorable Tom Campbell
California State Senate
State Capitol, Room 3048
sacramento CA 95814

Dear Senator Campbell:

Nat Sterling of the California Law Revision Commission (CLRC) has sent me a copy of the letter you received from the California Land Title Association (CLTA) relating to SB 1868. As consultant to the CLRC on the joint tenancy/community property issue, I would like to respond to that letter.

The current system of holding title in joint tenancy form, where the joint tenants are husband and wife, and the source of the property is community, is not adequate, and is in fact the bane of estate planners and trusts and estates practitioners thoughout California. Every community property jurisdiction except California has taken some action to deal with issues of right of survivorship where community property is involved. In fact, the solution proposed in your bill closely parallels that adopted in Arizona. It is interesting to note that the Arizona approach was apparently adopted by the land title companies in that state to solve the problem, since it is not a matter of Arizona statutory law. Thus title practice in Arizona dealt with a problem the CLTA claims does not exist.

I was engaged in law practice over 20 years, and have also discussed this problems with countless attorneys. Our view is that the average person does not understand that a joint tenancy title in any way affects their community property rights. I do personally believe that most spouses do understand the property will pass to the surviving spouse without probate administration, although I know many attorneys who believe most lay persons do not even understand that.

With due respect to the CLTA and Judge Gold, I also believe the present law in California will lead to a large amount of litigation, and that the title companies presently insuring joint



SANTA CLARA, CALIFORNIA 95053

tenancy titles between spouses will be unwilling participants. In 1985, the legislature adopted present California Family Code Section 852, which clearly states that a transmutation of real or personal property from community to separate is not effective unless evidenced by an express declaration in writing "made, jointed in, consented to, or accepted b y the spouse who interest is adversely affected." In Estate of McDonald, 51 Cal.3d 262, the Supreme Court made it clear that just any writing would not satisfy this requirement unless "it contains language which expressly states that the characterization or ownership of the property is being changed." In a concurring opinion, Justice Mosk felt the majority did not go far enough - the writing would have to have clear language of transmutation.

Based on this background, there are a number of commentators who believe that all joint tenancy deeds between spouses since the effective date of Sec 852 are invalid in that they do not contain an express declaration of an intent to change or transmute the character of the property from community to joint tenancy. It goes without saying that California law is clear that joint tenancy property is not community property, or else it would not pass by right of survivorship. Even the CLTA acknowledges it was necessary to adopt special legislation applicable only in divorce to overcome this rule.

In fairness, there is an argument that the express written declaration requirement may be satisfied by the joint tenancy deed itself, although it is not signed by the spouses. Others have suggested escrow instructions will provide the writing, if they can be located.

I believe, and in fact have been told, that there are many attorneys ready, willing, and able to attack the validity of these joint tenancy deeds. For example, if a spouse dies and leaves his or her interest in community property to children (particularly children from a prior marriage), I see little doubt that attorneys for the estate, and for the children, would attack the validity of any joint tenancy deed if the property was acquired with community funds. If the deed is invalid, there is no right or survivorship.

Even where there are no family difficulties, it may be necessary to attack the joint tenancy deed because of the extremely adverse income tax consequences that form of title presents for most married couples, which the CLTA did not mention. If the property is question has appreciated in value, then on the death of a joint tenant spouse, his or her undivided one-half interest in it will obtain an increase in its income tax basis to fair market value. If the property is held as community property, federal law provides that the income tax basis of both halves of the community property will be increased to fair market value. In the case of appreciating homes and other real estate, the loss of this tax advantage will require practitioners to assert the joint tenancy titles are invalid.

I should mention that Internal Revenue Service representatives are aware of the change in California law in 1985 and are already seeking a good test case either to pursue within the IRS or in the courts.

The CLTA suggests your bill favors the community property form of ownership. It probably does. So does California law, which has favored the status of community property for spousal property for at least 100 years. Joint tenancy is a common law form of title which does not work well within the community system. the CLTA suggests it has the advantage of "automatic" survivorship. It fails to point out that under Probate Code Sec 13500, both community and separate property pass "automatically" to a surviving spouse, i.e., without probate, unless the surviving spouse requests it. A so-called "set aside" procedure permits the passage of title in a summary proceeding, and many title companies will allow title to pass through an affidavit similar to that used for joint tenancies.

The only real advantages of joint tenancy are possible protection from creditors, and the situation where the property has decreased in value, in which case the new basis at date of death rule discussed above works in reverse, and the basis will actually decrease. If the parties want the joint tenancy for these or other reasons, all they have to do is sign the declaration provided in your bill.

In summary, since 1985, California law requires spouses to in some form enter into an express declaration in writing to change the characterization of their property. A change from community property to joint tenancy is such a change. The declaration form in the statute, or other forms which contain essential declarations, will make this possible. A failure to require a formal acknowledgement of the parties that they are changing their property rights will simply lead to more unintended joint tenancies and more litigation.

Sincerely,

Jerry A. Kasner

Jerry A. Kasner
Professor of Law

c. Nat Sterling

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April 15, 1994



Craig C. Page, Esq.
California Land Title Association
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Sacramento, CA 95853

Re: SB 1868

Dear Mr. Page:

I wish to thank you and John Hoag of Chicago Title for being so generous with your time in discussing SB 1868 with me. As you know from our telephone conversations, I support this legislation out of concern that married people will go right on taking title in joint tenancy and unwittingly losing the benefits of community property. Unless we can devise a written warning which causes married people to inquire, the confusion and misconceptions about joint tenancy will continue.

After our discussions in which we considered putting the warning on the deed itself, rather than a separate declaration of joint tenancy, I prepared a draft deed. The items listed in the draft deed I prepared are all matters that most married couples do not know or understand. While I am not wedded to any particular language (the language on the draft deed is merely a first stab to see how the warning on the deed might look), I believe we simply must give married people some warning which <u>includes basic information</u> on why they should investigate before taking title as joint tenants. I believe that simply stating that people should obtain expert advice, as the Arizona deed does, will have little impact.

While one's initial kneejerk reaction is that there is no need for the proposed legislation, a closer examination of how the current law affects the majority of married persons who unwittingly take title in joint tenancy dictates the conclusion that something has to be done to ensure that spouses make an <u>informed choice</u> when deciding how to hold title. In the balance of this letter I would like to reiterate the issues facing us in deciding how to proceed wth legislation.

By way of background, I am a certified specialist in Estate Planning, Trusts, and Probate, and have frequently served as a judge pro tem in the probate department of the superior court in Alameda County for the past five years. I have also served on the subcommittee which studied the issues and made the recommendations which led to the proposed legislation.

## 1. Confusion of Married Couples About Community Property

I have practiced in this area of law almost exclusively for the past 14 years, and I have seen on a daily basis the consequences of most married persons' total confusion about joint tenancy and community property. My clients generally have no understanding of the tax consequences of community property. They usually took title in joint tenancy form years ago on the advice of a broker. With my office so near the UC Berkeley campus, I routinely see clients who are extremely well educated, well read, and very sophisticated in financial and business matters, who nevertheless almost always state that they "always thought joint tenancy was the same as community property", and had no understanding that their wills did not apply to joint tenancy property.

Something needs to be done to educate people so that they make an informed choice when deciding how to take title. The confusion in this area was studied ten years ago by the California Law Revision Commission which came up with similar recommendations for legislation, which were dropped. Ten years ago, California law recognized oral transmutations. As of January 1, 1985, oral transmutations are no longer recognized in California law.
At this point there are pressing reasons which compel that we pursue the recommendations for legislation to help eliminate the confusion.

## 2. Automatic Ease of Transfer

Joint tenancy is the most common form in which title is held by married people, and ends up being the most expensive. Most people die in their 70's, and a typical surviving spouse owns a home which was acquired years ago in joint tenancy form. Joint tenancy is popularly believed to be a panacea to avoid lawyers and probate.

Since the availability of the "affidavit of surviving spouse" for perfecting title to community property 40 days after the death of the first spouse by recorded affidavit, community property today has the same advantage formerly attributed to joint tenancy ("automatic" ease of transfer), and avoids burdensome attorneys fees and the probate court.

## 3. Obtaining Income Tax Benefits of Stepped Up Basis

Ironically, the average surviving spouse who held title in joint tenancy believing it would avoid probate ends up having to hire a lawyer and file a spousal property petition in the probate court. This step is usually necessary to try to ensure that the surviving spouse will get the benefits of a stepped up basis on the home. Obtaining a spousal property order that joint tenancy property was really community property provides a viable argument, but no guarantee, of a stepped up basis can be obtained. The IRS has not been a party to the judicial proceedings. In one IRS

audit, the stepped up basis was reportedly questioned even though the spouses had a **written** agreement that the property was held in joint tenancy "for convenience only" and really constituted community property. I am informed that there were six pending cases last year in which the IRS was challenging the stepped up basis claimed for joint tenancy property. The IRS has announced its position on this in a recent revenue ruling, and is reportedly seeking a good test case.

Most couples are primarily concerned with protecting the surviving spouse after one of them dies. This is achieved by ensuring the stepped up basis so that the surviving spouse, typically in his or her 70's, can be free to sell appreciated property with minimal taxes. If the home is sold shortly after one spouse dies, the surviving spouse may not even have to use his or her one time exemption of $125,000 of capital gain.

**4. Lack of Ability to Leave Property by Will**

A key disadvantage of joint tenancy title apart from tax considerations is a spouse's lack of ability to dispose of such property by will designating who should receive his or her share of the property.

Educating the public on the fact that joint tenancy property is not subject to testamentary disposition is an essential goal of this legislation. Hopefully it would help avoid litigation in cases attempting to impose a constructive trust over property received by a surviving spouse (often in a secon marriage situation) who takes all property as a surviving joint tenant. These cases usually are brought by the deceased spouse's children who discover that their deceased parent's will is ineffective to provide for them because the property was titled in joint tenancy.

Unfortunately, even when the lack of testamentary control over joint tenancy property is discovered by a spouse prior to death, the problems of having unwittingly held title in joint tenancy are not easily resolved, especially where there is discord in the marriage. I refer to this as the loss of ability to do "nonconfrontational estate planning". I have frequently seen this issue in cases when one spouse becomes ill, and the marriage suffers under the strain, with the other spouse finding a new girlfriend or boyfriend. The ill spouse, who lacks the emotional strength to pursue a divorce, and is physically failing, wants to protect his or her children by a will leaving his or her half of the community estate in trust for the survivor, and then to the children. This issue is especially difficult for people in a second marriage who wish to provide for their children by a prior marriage and did not understand that putting property into joint tenancy eliminated their testamentary control of their assets.

A spouse's inability to will property held in joint tenancy is not easily rectified without the cooperation of the other spouse. While a real property joint tenancy can be severed by a deed

granting one-half, this deed will destroy any argument for getting the stepped up basis for community property. The new deed will have to be recorded and will be disclosed to the other spouse, causing confrontation and further discord. In the case of brokerage accounts and bank accounts, both spouses' signatures are required to change title to these assets from joint tenancy form, with the result that it is usually impossible to regain the right to bequeath the spouse's share of these items by will. Unless both spouses cooperate in signing documents putting property into community property form, both the income tax benefits of a stepped up basis and the right of testamentary disposition are for all practical purposes lost.

Even having taken the step of filing for a divorce, the right of testamentary disposition is not achieved, as illustrated by Estate of Blair, 199 Cal.App.3d 161, 244 Cal.Rptr. 627 (1988). One's right to will one's half of property held in joint tenancy, even when a divorce was pending, is not regained until the divorce becomes final. In the Blair case, the automatic right of survivorship was held to override the will of a wife who died before the divorce became final. The Blair case held that notwithstanding the husband's oral deposition under oath confirming his belief that the property as was community property to be divided in the divorce, no transmutation had occurred.

**5. Claimed Advantages of Joint Tenancy**

One claimed advantage of joint tenancy is that it preserves assets from bankruptcy claims. This advantage is of little or no importance to the hundreds of married couples I see in my practice (which consists of estate planning and probate, and not bankruptcy). In my experience, the advantage of protecting a spouse from creditors is far outweighed by the disadvantages of having to seek a court order to obtain a viable argument for a stepped up basis to protect the spouse from lost income tax benefits.

The other advantage of joint tenancy is when property has depreciated since purchase. A stepped up basis for the home usually far outweighs this disadvantage, except in estates where all the assets have dropped in value.

**6. Gap in Law Concerning Assumptions**

The confusion that most married couples have about joint tenancy being the same as community property has become a more critical issue since 1985. The McDonald case and legislation (Fam. Code 852) set strict requirements for valid transmutations of property. As a result, it is now very difficult to argue that property held in joint tenancy is really community property, especially for property purchased after 1985. As Professor Kasner has pointed out, the deed to spouses as grantees probably does not meet the transmutation requirements, but possibly the escrow instructions signed by the parties would. The legislation proposed would return to the presumptions that the community or separate

property status of property could be traced. It would also go a long way towards informing married persons of the differences in community property and joint tenancy title.

In short, the goal of this legislation to increase the likelihood of informed decisions by married people on how to take title, and to avoid the unwitting loss of benefits of community property form of ownership. I believe we have made significant strides in, and should continue, our dialogue to see if our collaboration can enhance the legislation presently proposed towards achieving this goal of informed choice.

Sincerely,

Robin G. Pulich

RGP:gp

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April 11, 1994

Senator Tom Campbell
State Capitol, Room 3048
Sacramento, CA 95814

Re: SB 1868

Dear Senator Campbell:

I support SB 1868, personally and as a trust and estate planning lawyer, for the following reasons.

1. In my experience, people taking title to property in general do not know the legal effect of any particular form of title. I sold real estate with a large real estate broker in Santa Barbara, California from 1979 to 1984. As an agent, although well-informed by a local real estate attorney in many aspects of contract and real estate law, I was not taught the specific legal effects of joint tenancy and community property title. Until I became a lawyer, I did not know the legal effects of any form of title, even though I had been a property owner at various times with other persons and ultimately with a spouse. The broker for whom I worked told us to inform our clients that there were tax effects resulting from the form of title, but that they should seek legal advice on which form of title to select.

I think it would be beneficial, when couples are acquiring property, particularly joint tenancy property, to have a written description of the attributes of each form of title prior to making a decision, as is proposed by SB 1868. Rarely will they consult an attorney for education in this regard.

2. In our estate planning and tax practice, for one reason or another, clients sometimes do not transfer title to property, which they consider community property but acquired in joint tenancy, to community property prior to the death of one spouse. For tax purposes, when such property was actually acquired with community funds and treated as community property, we desire that the surviving spouse obtain the full stepped up basis. Although it is true that through a fairly simple procedure in the local probate courts, joint tenancy property may be confirmed as the

parties' community property, the IRS need not accept the local court's finding on the issue (see Estate of Bosch, 67-2 USTC 12,472). SB 1868 will solve that frequent problem.

3. The current laws affecting presumptions regarding property acquired during marriage, for dissolution and for death purposes, are confusing to attorneys, let alone laypersons. SB 1868 will clarify and simplify current law.

4. I am informed that SB 1868 protects third persons who rely on the apparent title even though the SB 1868 assumption prevails for other stated purposes. Thus, there should be no title insurance problems.

SB 1868, I believe, will uphold married persons' expectations with regard to community property protections and benefits for property acquired during marriage with community funds, despite their having taken title, usually without understanding, as joint tenants.

Sincerely,

PATRICIA K. JASPER
Counselor at Law

cc: Nathaniel Sterling, Esq.