Study F/L-521.1 May 9, 1994

First Supplement to Memorandum 94-24

Effect of Joint Tenancy Title on Marital Property: Further CLTA Comments

We have received a copy of a letter from the California Land Title Association (CLTA) attached as an Exhibit, concerning the Commission's recommendation on the effect of joint tenancy title on marital property.

The letter makes the point that, realistically, married persons will routinely sign statutory or other transmutation forms; any concerns raised by information in the forms will occur too late in the transaction. Thus the proposal could backfire, ensuring that married persons end up as joint tenants, with no recourse.

This is a substantial problem, that the Commission has considered in the past. The Commission has felt that married persons will not routinely sign the forms, and that the forms will have an educational effect on brokers and others who may advise the married persons. CLTA disagrees with this assessment.

CLTA suggests an alternate approach: presume that marital property titled as joint tenancy is community, but after the death of the first spouse the survivor could make an election to receive joint tenancy treatment. This is an interesting suggestion, although it has problems. The heirs of the first spouse to die (as well as creditors of the decedent) would be unlikely to agree that it is fair to let the surviving spouse make an election as to whether the property will pass under the decedent's will or go by right of survivorship. It is also not clear whether IRS would buy into this scheme; we have discussed the matter with Professor Kasner, who thinks it could go either way. "Community property with right of survivorship" would probably be a better approach along these lines.

The staff believes the Commission needs to discuss these matters. It now appears that there will be one additional Senate Judiciary Committee hearing date after the Commission's May meeting. We have therefore asked that the matter be put over until then to give the Commission an opportunity to discuss the CLTA letter. CLTA has agreed to send a representative to the May meeting.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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May 6, 1994

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

Dear Senator Campbell:

The California Land Title Association has been spending a great deal of time working with the staff of the California Law Revision Commission, representatives of the Probate Section of the California State Bar as well as our own members discussing the provisions of SB 1868 relating to joint tenancy. It is the goal of the Law Revision Commission to create a rebuttable presumption that property acquired as joint tenancy by a husband and wife is actually community property. This presumption could be rebutted by an instrument in a form which is set out in SB 1868 entitled "Declaration of Joint Tenancy" which could be executed together with the document of title (for example the deed by which a husband and a wife acquire property) or at another time. The assumption underlying the legislation is that there are benefits to be derived from holding title as community property which weigh in favor of spouses taking title as community property. However, in many cases spouses are not aware of the particular advantages and disadvantages to holding title as either community property or as joint tenancy when they make a decision about how to hold title. One of these advantage/disadvantage issues is whether or not a joint tenancy survivor would enjoy a stepped up basis on the death of one of the joint tenants. This would be the case if the title to the property is held as community property.

As you are aware, the vesting of title to real property is often done as part of an escrow transaction which is handled by a title company or an escrow company. The escrow officer is certainly not in a position to render any legal advice to a customer as to what manner in which to hold title to real property. It is often the case that the manner of holding title to real property is either specified in the escrow instructions or has been specified in the deposit receipt. In fact, the California Association of Realtors standard deposit receipt contains a space for identifying how title is to be vested. A great deal of the confusion in this area surrounds the inability of spouses to be adequately educated prior to the time a decision is made on how to hold title to real property.

It is critical, however, to note that the practice of escrow personnel will determine whether or not the purpose of SB 1868 is furthered or in fact actual escrow practices will

have the opposite affect from that intended. If escrow practices change so that every time there is an escrow instruction that property be held in joint tenancy the escrow prepares the separate declaration of joint tenancy form, then you will have a circumstance in which the presumption of community property will never apply. The California Land Title Association believes this would be absolutely contrary to the intent of the Law Revision Commission. While there may be an assumption that if spouses are given the declaration of joint tenancy in escrow it may cause them to reconsider their instruction to have title taken as joint tenancy, it is our view that when presented with this declaration at a closing, it is already too late. They have already instructed the escrow to prepare the documents as joint tenancy and loan documents have been prepared on the same basis. Where any delay to revise documents could cause a delay in closing, spouses will simply execute the declaration in order to avoid the delay; thereby, insuring that rather than having the presumption apply, the presumption will in fact not apply at all. This is largely a matter of educating people in the manner in which title should be held and making that decision at the time of closing will, in most cases, be too late in the process.

We have discussed with the California Law Revision the possibility of putting a language in the deed itself which then could be acknowledged by the grantees (buyers). Currently, a deed is executed by the sellers but not by the buyers. The idea is that by putting this language in the deed and having the grantees execute the deed, that they would be aware that they were acquired in property in joint tenancy and that the presumption would not apply. It is a stretch however, to presume that some language indicating that spouses are taking title to property as joint tenancy with the right of survivorship and not as community property has any real meaning to the grantees. In fact, if that becomes an alternative, I would envision a standard practice whereby the language would be incorporated in every deed since the parties have asked that title be vested in joint tenancy in order to make absolutely clear that the property is joint tenancy, once again defeating the purpose of SB 1868.

Therefore, in either the case of a (1) declaration in the deed or a (2) separate declaration to be executed at the time of the closing, a change in escrow practice would make certain that the presumption would not apply. This would obviously be contrary to the effect that the California Law Revision Commission is seeking.

The California Land Title Association understands why the Law Revision Commission has suggested that community property be favored as a manner of vesting title with a husband and wife. However, we think it is a mistake to establish a statutory scheme which will have the real world affect of making it absolutely clear that title taken as joint tenancy is joint tenancy thereby not enabling people to take advantage of the community property claim later that the property was community property. Instead, we would suggest the possibility that a presumption be enacted into law that gives to the surviving the ability to rebut the presumption of joint tenancy at such time that there has been a death of one of the joint tenants.

Presently, Section 13540 of the Probate Code, provides that after forty days from the death of a spouse, the surviving spouse has full power to sell, convey, lease, mortgage or

otherwise deal with the community or quasi community property. It also allows the surviving spouse to record an affidavit of the facts that established the right of the spouse to make the disposition. It would seem that since the current law recognizes the right of a surviving spouse to dispose of the real property which was community property that it also might be appropriate to allow the spouse as part of the affidavit to make a declaration that although the property was vested in joint tenancy it was in fact community property. Approaching the joint tenancy problem in this way uses an existing statutory scheme recently revised by the Commission.

There currently seems to be an analogy to the suggestion that the surviving joint tenant be allowed to make a final election as to whether to affirm the presumption of community property. Section 141 of the Probate Code sets forth the rights that may be waived by a surviving spouse, including an interest in property that is the subject of a nonprobate transfer on death. If an affirmative election is made, it could be made as part of the Probate Code Section 13540 affidavit by which a surviving spouse may dispose of community property. An election might also be included in the Spousal Property Petition (CRC Form DE-221) filed under Probate Code Section 13650. Alternatively, the affidavit of death recorded by a surviving spouse under Section 210 of the Probate Code could set forth the election of the surviving spouse to have the presumption apply or treat the joint tenancy property as actual joint tenancy. If no affidavit is recorded electing the manner of vesting within a prescribed period then the title would be as vested of record.

We are clearly concerned that in trying to reach the objective of the Law Revision Commission the declaration will introduce more inflexibility. Your comments on our suggestion would be welcome.

Sincerely,

Craig C. Page
Vice President
Legislative Counsel

CP/dc

SB 1868 (CAMPBELL)

PROPOSED AMENDMENTS

- o Married Couples could vest title as Joint Tenants
  - When title is taken as joint tenants, a legal presumption is created, presuming the property is held as community property (existing provision of bill)

- o Eliminate the declaration of intent to hold as joint tenants from the bill entirely

- o When one of the married spouses dies, the surviving spouse would have two options:

  1) Do nothing and keep the property as community property
     - Would get "stepped up" tax benefits (existing federal law)
     - Could sign affadavit of survivorship w/in 40 days to create a right of survivorship (existing state law)

  2) Surviving spouse would sign a declaration at that time of deceased spouse's death stating intent to hold property as joint tenants
     - must sign w/in 40 days of death for declaration to be binding

- o Two-year delay in implementation (1997)
  - This would give title insurers and practioners time to educate themselves and adjust their businesses and practices accordingly

Under this approach the presumption of community property would exist indefinately, unless the spouses subsequently recorded a new vesting of title which is not joint tenancy (e.g. tenants in common, community property, etc.)

CLTA OPPOSITION TO SB 1868 (Campbell)

1. If the bill becomes law, title insurers will vest title in married individuals who have instructed us to vest title as joint tenants by routinely requiring the declaration, thus forever barring any community property presumption. This is completely contrary to the intent of the bill.

2. The bill overlooks the impact (favorable) on real property title held as joint tenants by a husband and wife if one spouse files a petition in bankruptcy. (In re Gorman).

3. The expectations of a surviving joint tenant that title will vest in them would be defeated by the bill. A widow could find herself owning her residence with her stepchildren who were the heirs under the decedents will.

4. Title insurance companies would be required to significantly change their operations regarding deeds of trust held in joint tenancy. However, this effort would not result in the true purpose of the bill: educate the public regarding the potential legal and tax consequences of holding property in joint tenancy.