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## Memorandum 94-28

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### Effect of Joint Tenancy Title on Marital Property: Status of SB 1868

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#### **Background**

At its May 13 meeting the Commission reviewed concerns of the title companies, banks, and realtors with SB 1868 (Campbell). After discussing a number of possible alternative approaches to resolving the problem of the effect of joint tenancy title on marital property, the Commission directed the staff to continue discussions with the interested parties in an effort to find common ground.

The staff met on May 27 with Craig Page of the California Land Title Association, Stan Wieg of the California Association of Realtors, Leesa Speer-Barish of the Beverly Hills Bar Association, Bob Temmerman and Robin Pulich of the State Bar Association, and Jon Glidden of Senator Campbell's office. After several hours of exploring options, we agreed to give further consideration to a compromise approach described below, with the hope of achieving a resolution in advance of the rapidly approaching legislative deadlines. We also agreed that absent a timely resolution, it would be acceptable to move the bill out of the Senate unamended, with a rule waiver. We would not move the bill further unless an agreement of all interested parties is reached; this would give us more breathing space to work out a compromise.

#### **Compromise Approach Being Discussed**

The compromise approach we agreed to consider further is essentially a soft version of the Commission's recommendation:

- The transmutation language would be deleted from the information form provided in the bill.
- The statute would continue to provide an immunity from liability for a broker or other person who gives the information form, but would make clear that a broker or other person is not required to give the form.
- After the information form has been operative for a period of time (e.g., three years), the law would recognize as a safe harbor for

creation of joint tenancy, language signed by the spouses on the face of a deed to the effect that “We accept title as joint tenants with right of survivorship, and not as community property, and not as tenants in common.”

- The statute would make clear that the safe harbor joint tenancy language does not preclude other means of creating joint tenancy that satisfy the transmutation statute.

- The three year or other statutory phase-in will provide an opportunity to ensure that education about the forms of title is working, with the possibility of pulling the plug or doing fine tuning before the safe harbor becomes operative. (Possibly the statute would mandate a report to the Legislature by the Law Revision Commission before the safe harbor becomes operative.)

A copy of the staff’s initial draft of amendments to implement this compromise solution is attached as Exhibit pages 1-6.

This approach recognizes that the Commission’s recommendation addresses three major problems: (1) General lack of public understanding of the consequences of joint tenancy title. (2) Confusion in the law relating to the interrelation of joint tenancy and marital property, particularly the impact of the transmutation statute. (3) Lack of clarity about what sort of instrument will satisfy the transmutation statute.

The compromise approach deals with these problems as follows:

(1) *Lack of Public Understanding.* A statutory information form would be enacted, and brokers who provide the form to their clients would be immunized from liability. It’s a carrot, rather than a stick, to foster education of the public. Such a statute should encourage brokers and others to provide the form when asked by their clients about title. It is in their interest to do so, since it avoids the dilemma of giving advice and provides an immunity. The real estate brokers, for example, will be made aware of the merits of the form through continuing education programs.

Once the education process is occurring, people will be in a position to make an informed decision about the form of title. The law can recognize their title decisions and give full effect to them. In order to make sure this is working properly, the compromise proposal would allow the information form to be operative for several years before the law begins to impose irrevocable consequences on title choice. The implementation delay will allow time for the education process to take hold, and will permit us to monitor the situation. If

education is not happening, we can delete the provisions imposing consequences on title choice before it is too late.

(2) *Confusion in the Law.* The compromise proposal preserves the feature of the Commission's recommendation that clarifies the law on the effect of joint tenancy title on marital property. The character of marital property remains unchanged unless there is a transmutation of the property to joint tenancy.

(3) *Transmutation.* Are escrow instructions a sufficient instrument to satisfy the transmutation requirement? How precise does the transmutation language have to be? The compromise proposal preserves the feature of the Commission's recommendation that provides a safe harbor that guarantees a transmutation for those who want it. Unlike the Commission's safe harbor, the compromise proposal would be a brief one-sentence statement, rather than a full page, on the assumption that education is occurring elsewhere, and not at close of escrow. The one-sentence transmutation is taken from Arizona's "Acceptance of Joint Tenancy" form, which appears to be working well. The one-sentence transmutation would appear on the face of the deed, thereby simplifying future proof problems.

### **Where Do We Go From Here?**

Each of the interested parties is reviewing the compromise proposal. The Commission's Chairperson and Vice Chairperson have informed the staff they believe the proposed compromise is a sufficiently significant departure from the Commission's original recommendation that they cannot approve it without full Commission review.

The only way the proposed compromise, or some other approach, could be enacted this session would be if we are able to move the bill out of the Senate with the understanding that it will not move further until all parties are agreed on the solution.

The staff believes the proposed compromise, while softer than the Commission's original recommendation, accomplishes the same objectives in a similar manner. We believe the compromise offers a sound basis for resolving the problem of imposition of joint tenancy title on marital property, and recommend that the Commission pursue it.

The other practical alternatives at this time are to continue working to develop an acceptable solution for next session, or to put this project on the shelf until the interest groups such as title companies, banks, and realtors reach the

point where they recognize the urgency of the problem and are motivated to push harder for a solution.

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

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Exhibit

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Proposed Compromise Amendments to

SENATE BILL 1868

(shown in ~~strikeout~~ and *italics*)

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.

SECTION 1. Section 683 of the Civil Code is amended to read:

683. (a) 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.

(b) Provisions of this section do 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 the account.

(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).

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. 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 :

(a) *A document of title that includes an express declaration substantially in the following form signed by each spouse: "We accept title as joint tenants with right of survivorship, and not as community property, and not as tenants in common."*

(b) *An instrument that 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~~

*On and after January 1, 1995:*

*(a) A person who provides a married person a copy of the following form 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 :*

**DECLARATION OF JOINT TENANCY INFORMATION FOR  
MARRIED PERSONS**

*(California Family Code § 863)*

**This Information Is a Summary and Not a Complete Statement of the Law. You May Wish To Seek Expert Advice Before Signing this Declaration Taking Title as Joint Tenants .**

**DO YOU WANT TO GIVE UP YOUR COMMUNITY PROPERTY AND SEPARATE PROPERTY RIGHTS IN THE MARITAL PROPERTY DESCRIBED BELOW ? If you sign this declaration take title as joint tenants 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~~ *take title as joint tenants* :

- 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~~ *take title as joint tenants* 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~~ *take title as joint tenants* 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, tenants~~ if you want to keep your separate property rights.

### **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 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 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 the validity of an instrument not substantially in the form provided in this section if the instrument otherwise satisfies Section 862. *No person is required to provide a married person the form prescribed in subdivision (a), and a person 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 not providing the form.*

(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 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 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 of the following*:

(a) *Another 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.*

(b) *A lien or other security interest in property of a married person that is subsequently transmuted to joint tenancy. The prior lien or other security interest remains enforceable to the same extent as if the transmutation had not been made.*

868. (a) As used in this section, “operative date” means January 1, 1995 1999.

(b) ~~This~~ *Except as provided in Section 863, 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 was executed or a transaction that occurred before the operative date is governed by the applicable law in effect at the time the instrument was executed or the transaction occurred.

869. (a) *The California Law Revision Commission shall study the operation of this chapter and make the following reports to the Legislature:*

(a) *On or before December 31, 1997, the commission shall report to the Legislature with recommendations concerning the continuation, modification, or repeal of this chapter.*

(b) *From time to time the commission shall report to the Legislature with recommendations for changes to the statutory form provided in Section 863 to reflect changes in the law or other appropriate revisions.*

SEC. 3. Section 2581 of the Family Code 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, or

tenancy by the entirety, or as community property is presumed to be community property.

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

(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.

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

(3) A ~~declaration~~ of *transmutation* to 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.