First Supplement to Memorandum 94-28

Effect of Joint Tenancy Title on Marital Property: Status of SB 1868 (Further Developments)

Memorandum 94-28 outlines a basic compromise approach on SB 1868 that the various interested parties have under study. In the memorandum the staff argues in favor of the Commission pursuing the compromise approach.

We have now heard informally from the other interested parties. The State Bar Probate Section and the California Association of Realtors believe it is basically a workable solution. The California Bankers Association's specific problems are satisfied, but if the bill will cause problems for the title insurance industry, it will cause problems for them. The California Land Title Association still has problems with the bill, but is willing to continue working with the Commission.

Senator Campbell's office informs us that it will be unrealistic to try to obtain enactment of the proposal at the current legislative session. In addition to the legislative deadline problem and the need to obtain rule waivers at every turn, there is the further complication that the bill will require the extra step of returning to the Senate Judiciary Committee before it goes to the floor for concurrence with Assembly amendments. The Senator's office is concerned that a bill of this importance with far-reaching consequences should not be rushed through under this kind of pressure.

Moreover, the concept of moving the bill while working with the interested parties to develop compromise language is predicated on the assumption that there is no other opposition to it. While all the interested parties we have been working with have agreed to the concept of continuing to work on the bill as it moves through the Legislature, we have just received a letter of opposition from another source — Jeff Strathmeyer — a copy of which is attached to this memorandum as an exhibit.

The Commission needs to decide how it will proceed for next session. The obvious options are (1) continue working on the compromise approach, (2) revisit other solutions and investigate new solutions, or (3) discontinue work on

this topic until there is more general agreement that the problems must be addressed.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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Sen. Thomas Campbell
Attention: John Glidden
State Capitol
Sacramento, CA 95814

FAX (916) 445-6747

Re: SB 1868 [Joint Tenancy]; Letter in Opposition

Dear Senator Campbell:

I am (and have been for the last 12 years) the University of California staff research attorney in charge of Continuing Education of the Bar's *Estate Planning and California Probate Reporter*. The scope of my duties includes monitoring pending legislation relevant to our readers. As a result I have been familiar with the proposed legislation for some time. After reviewing the legislation, I strongly feel that this bill should not be enacted for the reasons discussed below. This opinions stated herein are my own and not those of my employer. Neither I nor, as far as I know, any of my clients have any financial interest in this legislation. My opinions are based on twenty-years as an attorney. I am a certified specialist in Probate, Estate Planning and Trust and have published over 20 articles in the field.

1) **The bill creates undesirable uncertainty with respect to the results of using a transfer device often used by persons of lesser wealth and/or eduction.** One of the effects of this bill is to invalidate joint tenancy titles that are established without compliance with the legislation. By doing so, the legislation adds risk to the use of joint tenancy as a device for passing property at death. This is particularly unfortunate for the millions of Californians of lesser wealth and/or education who are inclined to use joint tenancy as "The Poor Man's Will". If anything, we should adopt legislation which will *increase* the certainty that joint tenancy title will result in a transfer at death to the surviving joint tenant.

2) **The bill is based on a false assumption.** The bill implicitly assumes that joint tenancies are typically created in transactions involving the purchase of real estate. Thus, the bill provides a form which might be executed in order to assure establishment of a valid joint tenancy, and reflects a corrolary assumption that persons wishing to establish a joint tenancy in this situation will effectively do so, because the title insurer will take steps to make sure everything is done properly before insuring the joint tenancy title. Unfortunately, not all joint tenancies in real property are created in title insured transactions. They are often created long after initial purchase by one or more of the joint tenants. Additionally, this bill applies to joint tenancies in personal property, including stocks. In each of these situations there is no

concerned title insurer monitoring the creation of the tenancy to assure compliance with the law. It is irrelevant whether this bill would work if the assumption of monitoring was always correct. Too frequently the assumption is not correct.

3) **It is reasonable to assume this bill will increase litigation.** Because of the false assumption, it is pretty reasonable speculation that there will be many cases in which parties will believe they have created a valid joint tenancy, but will not have actually accomplished this. In many cases the property will nevertheless pass to the surviving joint tenant and no harm will be done, but in other cases, this is not the result. If the joint tenancy is invalid, property will pass as part of the decedent's estate to someone other than the surviving joint tenant spouse if:

A) The will of the deceased spouse does not leave the residue of the estate to the surviving spouse; or

B) The deceased spouse dies intestate and some or all of the joint tenancy property was the separate property of the deceased spouse.

The first scenario is not altogether unusual--particularly in cases of late in life second (or fifth) marriages. A person might use joint tenancy to allocate specific assets to the spouse, but have a will intended to leave "everything else" to that person's children.

The second scenario is the one probably far more common. I don't know what percentage of our citizens die with no will, but I have been led to believe that the number is very high. The CLRC staff probably has data on this.

4) **Doubtful need for this legislation.** I don't think anyone can deny that from a scholar in the ivory tower perspective the law in this area is a confusing mess. Nevertheless, when one considers that millions of people use joint tenancy for their purposes on a regular basis, current law seems to be working remarkably well.

The CLRC study recites that legislation is needed because there has been substantial litigation in this area. In a letter to the CLRC dated January 18, 1993, I questioned the assumption. (See attached.) The reply, in the form of a staff memo (copy attached) was some form of research by gossip, the gist of which was that at a luncheon of estate planners 1/3 had experienced "a problem" with joint tenancy in recent years. There was no analysis of what the problems were or even whether they were problems addressed by the proposed legislation. I remain unconvinced that this legislation is needed.

5) **Better Alternative.** If additional legislation is indeed needed, it should accomplish its purposes without creating doubt about what whether the property will pass to the surviving joint tenant at death. This could be accomplished by legislation providing that joint tenancy

titled property will pass to the surviving tenant regardless of whether the property is community or separate or any combination of both.

Very truly yours,

Jeffrey A. Dennis-Strathmeyer

cc:
California Law Revision Commission
Michael Vollmer, Chair, Estate Planning, Probate and Trust Section, State Bar of California