Memorandum 94-40

Effect of Joint Tenancy Title on Marital Property:
Proposed Legislation for 1995

BACKGROUND

For many years the Commission has been concerned with the problem of treatment of marital property on which joint tenancy title has been imposed. The problem arises from the fact that the various forms of joint ownership available to married persons — community property, joint tenancy, tenancy in common — have different legal incidents.

The Commission first studied this matter extensively some 10 years ago, when it made a recommendation for a statutory solution. However, the Commission withdrew its recommendation before publication and submission to the Legislature because it became convinced that people were satisfactorily dealing with the problem through use of declarations of intent and court confirmation of title.

The Commission renewed its study of the matter in 1990 in response to concerns expressed by practicing lawyers that the informal arrangement of declarations and court confirmation is no longer working. According to reports, the Internal Revenue Service no longer accepted declarations of oral agreements and understandings that property titled as joint tenancy is really community, and courts were taking the same approach. The reason for this change appears to be the 1985 transmutation statute, which requires a writing before community property is converted to separate property, and vice versa.

The Commission engaged Professor Jerry Kasner of University of Santa Clara Law School to prepare a background study on the matter. Professor Kasner's unpublished study, *Community Property in Joint Tenancy Form: Since We Have It, Let's Recognize It* (1991), is by far the Commission's best seller. Hundreds of lawyers have purchased copies of it and, despite lack of publicity, we still get orders for it today from lawyers who have a joint tenancy/community property problem.

Professor Kasner's study recommends that California adopt a simple but workable solution — community property on which joint tenancy title has been imposed is considered to be community property for all purposes except that at death it passes to the surviving spouse by right of survivorship. This preserves most of the beneficial advantages of community property, but gives the married persons probably the one thing they thought they were getting by joint tenancy title: automatic passage to the survivor without probate. The "community property with right of survivorship" solution is also favored by others who have followed this project, including the Beverly Hills Bar Association.

The Commission rejected this approach for two reasons. First, Commissioners felt that we should seek to achieve a system where title means what it says; there is enough confusion in the law as it is without adding another hybrid form of title. Second, practicing lawyers indicated that although people may understand that joint tenancy passes to the survivor without probate, they do not understand that this precludes them from writing a will or trust that makes a different disposition. This is becoming a critical factor with the frequency of second marriages, where spouses may prefer that their half of the property ultimately go to their children of the prior marriage rather than the children of their spouse's prior marriage.

The Commission's recommendation would clarify the law by presuming that imposition of joint tenancy title on marital property does not change the character of the property unless the spouses transmute it to joint tenancy. There would be a statutory form that could be used for the transmutation if desired, that would attempt to inform the spouses of the consequences of a transmutation to joint tenancy. In case of a joint tenancy title made without use of the statutory form, third parties could rely on the apparent joint tenancy title but the property rights as between the spouses and their successors would be determined under general transmutation principles.

This recommendation was supported in the Legislature by both the State Bar Family Law Section and the State Bar Probate Section. It was opposed by a coalition of California Bankers Association and California Land Title Association; the California Association of Realtors was also concerned. The bill's author, Senator Campbell, decided it would be advisable to try to get a consensus of the affected parties. We worked with the opposition during the session, but were unable to achieve a satisfactory solution before the legislative deadlines. The Commission has decided that this is an important problem that merits further

study, with the objective of a workable solution for the 1995 legislative session. The interst groups have pledged to continue working with the Commission on this.

THE PROBLEM

Although many different scenarios are possible involving community property, separate property, and joint tenancy, a common situation is that married persons use community funds to acquire property, which they title as joint tenancy. Appellate cases with some frequency struggle with the characterization of property of this type, since the law presumes both that property acquired during marriage is community property and that property titled as joint tenancy is joint tenancy. The law also presumes that community property and separate property retain their characterization through changes in form.

There are many differences in the legal incidents of community property and joint tenancy, including such diverse matters as management and control (including rights to transfer and encumber the property), rights of creditors, taxation, and treatment at death. Issues involving the characterization of the property thus may arise in a number of different contexts.

Historically the problem most commonly arose at dissolution of marriage. This problem has now been wrestled to the ground by statutes that (1) presume property titled as joint tenancy is in fact community property for purposes of marriage dissolution, (2) give the dissolution court jurisdiction to divide joint tenancy property, and (3) return separate property contributions for acquisition of the property to the contributing spouse.

The issue arises in other contexts as well. Since creditors have different rights against community property than against joint tenancy, the matter comes up in the context of enforcement of judgments. In a recent case, for example, husband and wife took title as joint tenants but characterized the property as community at marriage dissolution. After dissolution the husband's creditor sought to reach the entire community asset, but the former spouses claimed it was really joint tenancy and had been characterized as community property for purposes of dissolution only. The court agreed, noting that a declaration for purposes of dissolution is not necessarily a transmutation, and held the creditor could reach

only the husband's half of the joint tenancy property. Abbett Elec. Corp. v. Storek, 22 Cal. App. 4th 1460, 27 Cal. Rptr. 845 (1994).

For our present purposes, there are four major problem areas where the difference in treatment of community property and joint tenancy becomes important:

(1) **Taxation.** This is really the driving factor behind the Commission's current review of the matter. For federal income tax purposes, on the death of a married person the decedent's half of the property receives a new basis; the survivor's half also receives a new basis if the property is community but not if it is joint tenancy. Thus community property is advantageous for the survivor if the property has appreciated in value but is disadvantageous if it has depreciated in value.

(2) **Probate.** Joint tenancy passes to the survivor without probate, which historically has been a significant attraction for that form of title. Community property generally goes through probate. However, by statute if the community property passes to the surviving spouse, the surviving spouse may elect to take the property without probate. In that case there is a 40-day delay, during which interested persons may record claims of interest, before the surviving spouse may deal with and dispose of the unprobated property.

(3) **Survivorship.** Joint tenancy passes to the surviving spouse; a will is ineffective to make another disposition. Community property passes to the surviving spouse absent a will, but a will may make another disposition of the decedent's one-half interest in the property. With second marriages becoming more common, many spouses wish to be able to will their interest in property to their children from a former marriage, or to pass their interest by a trust. This cannot be done with joint tenancy, although a knowledgeable joint tenant can accomplish that by first severing the joint tenancy.

(4) **Creditors.** All community property is liable for debts of either spouse, but only a joint tenant's interest is liable for debts of that joint tenant. And on death of a joint tenant, the joint tenant's interest passes to the survivor free of the creditor's claim, including a secured interest! The staff believes this is poor public policy, but it is the law and it is likely some persons take title as joint tenants because of the protection against creditors. A contract creditor (but not a tort creditor) can protect itself by requiring signatures of both spouses on the obligation.

It is likely that the particular form of title will have some advantages and some disadvantages for any given spouse, depending on the circumstances of the spouse. If the spouses were aware of the different consequences of each form of title, the spouses could possibly select the most appropriate form of title for their circumstances. As it is, they may know some of the consequences of a particular form of title, but it is unlikely they know all consequences. What we have heard from practitioners most frequently is that people generally understand that joint tenancy passes to the survivor without probate but they do not understand that it may have adverse tax consequences and that they are precluded from willing the property or putting it in a trust.

IS THERE REALLY A PROBLEM?

One of the reasons we had difficulty with our recommendation in the Legislature is skepticism by interest groups (title companies, banks, and realtors) that there really is a problem that needs to be addressed. This attitude is also captured in a letter from Jeff Strathmeyer to Senator Campbell stating, "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 Commission revisited this area of law at the request of practitioners in the State Bar Probate Section because of problems they were encountering. We have recently asked the Bar members to verify this. Copies of the information request and the nine responses we have received so far are attached as Exhibit pp. 6-43.

The responses are quite interesting. The problems encountered in practice with the effect of joint tenancy title on community property fall into two general categories, depending on whether it is in the interest of the survivor that the property be treated as joint tenancy or as community property:

(1) On the death of the first spouse the survivor seeks to characterize the property as community property notwithstanding the joint tenancy title in order to receive the community property tax benefit.

(2) The first spouse to die has sought to will a half interest in the property to someone other than the surviving spouse (often children of a prior marriage) and

the surviving spouse seeks to take the entire property by joint tenancy right of survivorship.

The responses also note a third common joint tenancy problem that is not a marital property issue but is analogous. **(3)** A person puts property into joint tenancy with a child and then seeks to will it other than to the surviving joint tenant, e.g., to all the children equally. This is resisted by the joint tenant child.

The responses all indicate that they have been able to handle problem number **(1)** successfully, commonly by use of a court-ordered determination that the property is community property. IRS has not audited any of the returns in which this was done. In some cases, the court order was not routinely granted and it took some doing to get it, but eventually the problem was resolved. See, e.g., Exhibit pp. 22-43. This information is at variance with information we had earlier received that courts were not granting community property petitions and IRS was not honoring court orders; perhaps there was an initial flurry of activity that has since settled down.

Problem number **(2)** features a dispute between the beneficiaries of the first spouse to die, who want to categorize the property as community, and the survivor, who wants to categorize the property as joint tenancy. This dispute is not easily resolved and can result in litigation, sometimes with inequitable results.

All the problems are amenable to resolution during estate planning, if the spouses see an estate planner before one of them dies. It is noteworthy, however, that estate planners report that persons coming to them generally are unaware of the consequences of joint tenancy tenure and believe they have the right to will the property. One letter indicates that "our client was a career real estate agent, having been in the business for 30 years, but had no idea that she could not will her half of community property when it was held in joint tenancy. She finally convinced her husband to convert the property to community property by signing a new deed after telling him the benefits of a stepped up basis of which she had not heard before seeing me." Exhibit pp. 10-11.

There was one case reported where estate planning was not able to resolve the problem. In that case (involving a multimillion dollar stock brokerage account), the wife tried to change the joint tenancy account to community property, the husband refused, and the brokerage refused to change title to the account, or allow withdrawal of assets, without both signatures. "Our client is still frustrated in carrying out her desires for the disposition of her estate." This

case appears somewhat anomalous, since either spouse acting alone has the legal right to sever a joint tenancy (or partition it), and these rules apply to personal property as well as real property.

The responses indicate that even when the respondents have been able satisfactorily to resolve the problem, e.g. by doing pre-death estate planning or by obtaining a post-death community property order from the court, it invariably is time-consuming and costly. One respondent summed it up thus:

> Finally, I would say that joint tenancy is always a problem on death in some fashion or other. It just does not do what people think it does and always ends up costing the clients money. The traditional "family" just does not exist in California any more, for which the joint tenancy did, in fact, work well for so many years. Exhibit p. 13.

OBJECTIVES

What should we be trying to achieve in the law? Ideally and ultimately, people should be able to understand the consequences of selecting a form of title, and the form of title selected should be honored.

What are the major options, in terms of these objectives?

(1) **Do Nothing.** If we are not convinced that there is a sufficient problem in the law to justify a change, we should discontinue work on this matter. However, even if we think that people who take title as joint tenants do so knowingly and we ought to honor their choice, there is a problem in that the law is not clear that merely taking title as a joint tenant in fact creates joint tenancy. Under the do nothing option, we at least ought to make clear that escrow instructions satisfy the transmutation requirement, or even that acceptance of joint tenancy title is sufficient notwithstanding the transmutation requirement.

(2) **Pursue Current Approach.** The approach of the Commission's current recommendation would address the objectives directly by providing an informational form, making clear that the transmutation statute must be satisfied in order to create joint tenancy, and honoring joint tenancy title if a transmutation is made. If we pursue the current approach, we need to deal with concerns of the opposition, including the concern that an information form given at closing will likely either be ignored or will hold up the transaction, and that the law should not provide a community property presumption for property titled as joint tenancy.

(3) **Abolish joint tenancy.** This has been suggested by the State Bar Probate Section. The staff believes it would be no great loss to eliminate joint tenancy in reliance on community property, and would deal with our main objectives simply by eliminating the choice. The staff does not think this is a realistic alternative, given the populist sentiment for joint tenancy and freedom of choice.

(4) **Repeal transmutation statute.** Repealing the transmutation statute would return us to pre-1985 law, under which the surviving spouse could argue that there was an oral agreement or understanding that property titled as joint tenancy was really community property. This evidently is still being done for tax purposes, according to the recent State Bar responses we have received. This does not satisfy our basic objectives of fostering understanding and having title mean what it says. The repeal would have to be limited to determination of rights at death; the transmutation statute is essential in family law for determining rights at dissolution. A scheme that provides different rules for death and dissolution is not desirable, although it does already occur to some extent in this area.

(5) **Community property with right of survivorship.** Although this is a quick fix, it does not advance our goals of public understanding and having title mean what it says. The staff is reluctant to develop a scheme that forces property to the survivor despite the will of the decedent, unless we have some assurance that the decedent understood the consequences of taking title in joint tenancy.

Clearly, there is no perfect solution. All in all, the staff thinks the approach the Commission has been taking is heading in the right direction, and it is worth continuing to work on it. The remainder of this memorandum addresses issues on the informational form approach.

INFORMATIONAL FORM APPROACH

Distribution of Form

Enactment of a law that gives recognition to joint tenancy form of title is predicated on the assumption that a person has made a knowing selection of that form of title. The information form developed by the Commission is intended to educate the public but also to educate lawyers, brokers, transfer agents, escrow officers, and other persons who deal with property titles.

The Commission has also concluded that we should not try to impose a duty on these persons to distribute the form, but we should find means to encourage

its distribution. Techniques that were included in the Commission's original recommendation are (1) give the form the status of a statutory "safe harbor" for creation of the desired form of title and (2) immunize a broker or other person from liability for any adverse consequences of a married person's choice of title as a result of providing the form. The staff would preserve these features in any revised proposal.

What else can we do? We really want trade associations of persons involved in titling property to publicize the law and the availability of the form in their conferences and continuing education classes. How about something like:

> An attorney, real estate licensee, title officer, escrow agent, securities broker, dealer, or transfer agent, or other person involved in titling property or advising persons concerning title, who is subject to a continuing education requirement imposed pursuant to law, shall receive double credit for approved educational activities concerning the form prescribed in this statute or the forms of title of marital property and their legal incidents.

Effect of Choice of Title Form

If people are more informed about the consequences of their choice of title form, we can give greater effect to that choice. The staff suggests that we codify a title presumption. This would resolve the uncertainty in the law over the clash of the community property presumption with the source presumption with the title presumption for married persons by favoring the title presumption.

Selection of joint tenancy title would be presumed to create joint tenancy ownership interests. The presumption would apply whether or not the married persons use the statutory form, and would apply retroactively as well as prospectively. Retroactive application of the title presumption would be desirable because it would provide consistency in the law, as well as capture existing case law as it relates to title presumptions at death.

The title presumption would also be consistent with the concept that third persons should be able to rely on the apparent title to property. The statute should continue to protect third party reliance on the form of title, even though the actual ownership interests in the property as between the spouses and their beneficiaries may be inconsistent with the form of title.

The presumption should be rebuttable, as it is under existing practice, for purposes of determining the actual ownership interests as between the spouses and their beneficiaries. Proof sufficient to rebut the presumption could be in the

form of a showing such as fraud or undue influence, or execution of a subsequent transmutation of the character of the property. The most important rebuttal evidence, for our current purposes, would remain a showing of contrary intent.

Rebutting the Title Presumption by a Showing of Contrary Intent

Under the informational form approach, there is no assurance that a person understands the consequence of the form of title selected, although there is hope that the person will understand more than at present. In either case, both for titles taken in the future, as well as for existing titles, the law needs to retain the ability of a person to demonstrate that the parties did not intend the form of title they ended up with. Otherwise, the law will not conform to peoples' intent and will yield inequitable results.

The opportunity to go behind the form of title to demonstrate contrary intent corresponds apparently with existing practice, as well as with the law as it existed before enactment of the 1995 transmutation statute. The staff is not particularly happy about preserving this state of affairs, but we are resigned to it. In the staff's opinion, the law should not destroy the possibility of achieving an equitable outcome, even though it is at the expense of lack of certainty and increase of transactional costs.

Role of Transmutation Statute

The staff proposal limits application of the transmutation statute by recognizing the form of title assigned to property. The transmutation statute will thus apply only to changes in the character of property done without a change in title form. This is not inconsistent with the purpose of the transmutation statute, and will help prevent possible overbreadth in its interpretation.

What About Other Forms of Title Besides Joint Tenancy?

California law recognizes three forms of title in which married persons can hold property as coowners — joint tenancy, tenancy in common, and community property. The staff sees no reason why we cannot apply the same rules to any form of title selected, not just joint tenancy. Thus the informational form would indicate the consequences of tenancy in common as well as of community property and joint tenancy, third persons could rely on the apparent title evidenced by the form selected, the law would presume ownership is as stated in the form of title, and the form would be subject to rebuttal for purposes of determining actual ownership rights.

Bottom Line

A staff draft of this proposal is attached to this memorandum as Exhibit pp. 1-5.

The net result of the proposal would be to leave the law pretty much unchanged, although it will stimulate better informed decision making. The law will be clear at least that people can still second-guess joint tenancy title despite the transmutation statute. There will be hope that in the future people will be more circumspect about putting property into joint tenancy.

The staff had thought we would be able to do more in terms of achieving certainty and minimizing litigation costs in avoiding the effects of joint tenancy title, but this is not a practical option as long as the interest groups remain wedded to the existing structure. Perhaps as a result of the current process, more general agreement on goals and ways to achieve them will come about.

Law reform is an evolutionary process and, while the staff is disappointed that we are unable to wipe the slate clean with the comprehensive approach in the Commission's published recommendation on this matter, we also believe that a few modest changes in the right direction are worthwhile. We may be able to do more in the future after the educational component starts to function.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Exhibit

RECOMMENDED LEGISLATION

Fam. Code §§ 860-864 (added). Forms of title of marital property

SECTION 1. Chapter 6 (commencing with Section 860) is added to Part 2 of Division 4 of the Family Code, to read:

CHAPTER 6. FORMS OF TITLE OF MARITAL PROPERTY

§ 860. Scope of chapter

860. (a) This chapter applies to real and personal property held between married persons as joint tenants or tenants in common, or as community property, 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.

(b) 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 coownership form pursuant to that statute.

Comment. Sections 860 to 864 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 and tenancy in common are forms of separate property ownership and are 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), *reprinted in* 10 Comm. Prop. J. 157 (1983).

Subdivision (a) applies this chapter to all marital property titles, whether the property has a community property source, a separate property source, or a mixed community property and separate property source. The title presumption provided in this chapter does not apply, however, at dissolution of marriage. Section 862 (title presumption). *Cf.* Section 2581 (community property presumption for property held in joint form).

Subdivision (b) saves existing schemes governing transfer of title, probate and nonprobate, applicable to specified types of property. See, e.g., Health & Safety Code § 18080 (coownership of manufactured home, mobilehome, commercial coach, truck camper, or floating home registration); Veh. Code §§ 4150.5, 5600.5 (coownership vehicle 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).

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

§ 861. Reliance on apparent title

861. Notwithstanding any other provision of this chapter, if property is held between married persons as joint tenants or tenants in common, or as community property, a person may act in reliance on apparent ownership during the marriage and on apparent rights on death of a spouse, as determined by the form of title, unless the person has actual notice, or constructive notice based on recordation, of a contrary claim of interest in the property.

Comment. Section 861 facilitates transactions involving property in accordance with the form of title. Thus, for example, marital property held in community property form of title that is left to the surviving spouse by will or by intestacy, passes at death without probate (unless probate is elected by the surviving spouse). See 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.

The provisions of this chapter governing the effect of title on marital property are relevant only to controversies between married persons and their beneficiaries and do not generally affect third parties. However, a third party who has actual notice by reason of a claim or court order or other means may not rely on the title form, nor may a third party who has constructive notice by means of a recorded claim of interest in real property.

This section does not affect the ultimate determination of substantive rights as between married persons and their beneficiaries; the substantive rights are determined by other law. Thus, for example, a surviving spouse or beneficiary holding property in joint tenancy form without notice of a contrary claim may convey good title to a bona fide purchaser under this section. This does not relieve the surviving spouse or beneficiary of liability for the value of the deceased spouse's interest in the property if a contrary claim of interest is established.

§ 862. Title presumption

862. (a) If property is held between married persons as joint tenants or tenants in common, or as community property, the ownership interests of the married persons in the property are presumed to be as determined by the form of title.

(b) The presumption established by this section is a presumption affecting the burden of proof and is rebuttable by proof of a contrary intention, including but not limited to proof of a subsequent transmutation pursuant to Chapter 5 (commencing with Section 850) (transmutation of property).

(c) The presumption established by this section does 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).

Comment. Section 862 governs rights in property held between married persons as joint tenants or tenants in common, or as community property, as between the married persons and their beneficiaries. Nothing in the section affects the right of a third person to rely on the apparent title to the extent provided in Section 861.

The section resolves the conflict 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) the form of title controls. Under Section 862, when these presumptions conflict, the title presumption prevails over the community property and source presumptions.

The title presumption may be overridden by proof of a contrary intent. This codifies the law in effect before enactment of the 1985 transmutation statute. Cf. Section 852 (written transmutation requirement). It should be noted that presumptions concerning rights at death under joint tenancy

title may be altered by statute, the joint tenancy survivorship incident not being a vested right. *In re* Marriage of Hilke, 4 Cal. 4th 215, 841 P.2d 891, 14 Cal. Rptr. 2d 371 (1992).

Proof of a contrary intent includes proof of a subsequent transmutation of the character of the property. The spouses may transmute marital 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 existing interest in the property is 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); see also Section 861 (reliance on apparent title).

It should be noted that the title presumption of this section does not override the principles governing division of marital property at dissolution of marriage. See Sections 2581 & 2640 (community property presumption subject to reimbursement of separate property contributions).

§ 863. Statutory form

863. (a) An instrument in the following form may be used to create title between married persons as joint tenants or tenants in common, or as community property:

MARITAL PROPERTY TITLE

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

California law allows husbands and wives to hold property as joint tenants or tenants in common, or as community property. Your choice of the form of title affects the liability of the property for debts and taxes, your ability to pass the property by will or trust, and other important matters. You should read this information carefully before choosing the form of title.

Community Property. Community property is the preferred form of marital property ownership under California law. You and your spouse own community property equally and the property is subject to both your debts. If your marriage is dissolved, the property is divided equally and any separate property contributions you have made are reimbursed. 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 advantage if the property has increased in value and a disadvantage if the property has decreased in value.

Joint Tenancy. Key differences between community property and joint tenancy include:

• Your share of joint tenancy property 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 get back your separate property contributions to joint tenancy property at dissolution of marriage.

• You cannot pass your joint tenancy share by will or put it in a trust as long as the joint tenancy remains in effect.

• Joint tenancy property does not receive a tax advantage or disadvantage.

Tenancy in Common. Key differences between community property and tenancy in common include:

• You can specify unequal ownership shares in a tenancy in common.

• Your share of tenancy in common property 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 get back your separate property contributions to tenancy in common property at dissolution of marriage.

• Your share of tenancy in common property does not go automatically to your spouse when you die, and it must be probated.

• Tenancy in common property does not receive a tax advantage or disadvantage.

DESCRIPTION OF PROPERTY

_____

We intend to hold title to this property in the following form:

___ **Community Property** ___ **Joint Tenancy** ___ **Tenancy in Common**

(Initial only one of the above choices, and sign below.)

_____ _____

Signature of Spouse Date

_____ _____

Signature of Spouse Date

(b) Use of the form prescribed in this section is permissive. Nothing in this section limits or affects the validity of any instrument not in the form prescribed in this section to create title between married persons as joint tenants or tenants in common, or as community property.

(c) No person is required to provide a married person a copy of the form prescribed in this section and a person is not liable for any injury that results from the form of title selected as a consequence of providing or not providing the form. Nothing in this subdivision is intended to relieve a person from liability relating to advice given or an obligation to advise a married person concerning title.

(d) The California Law Revision Commission may from time to time make recommendations to the Legislature for changes to the form prescribed in this section to reflect changes in the law or to make other appropriate revisions.

Comment. Section 863 prescribes an optional form for creating marital property titles. This section does not provide the exclusive means by which joint tenancy, tenancy in common, or community property title may be created. It should be noted that third parties may rely on apparent title. Section 861.

The form prescribed in this section notes the favorable treatment California law provides community property including, if left to the surviving spouse by will or by intestacy, passage at death without probate (unless probate is elected by the surviving spouse). See 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.

Acknowledgment of the form is optional. If the form affects real property it ought to be acknowledged so it is recordable.

Subdivision (c) makes clear that a person, such as a broker, escrow agent, or other advisor, who provides a married person with a copy of the statutory form is immunized from any liability that might result from its use to cause marital property to be held in an inappropriate form of title. The intent of the immunity provision is to discourage uninformed decision-making concerning marital property title by encouraging use of the statutory form which contains useful title information. Subdivision (c) is not intended to relieve an advisor from any common law liability that may exist for improperly advising a married person concerning the form of title (advice that goes beyond merely providing a copy of the statutory form), or to excuse an advisor from any duty properly to

advise a married person that may arise from an attorney-client or other relationship between the advisor and the married person.

864. Continuing education concerning marital property forms of title

864. An attorney, real estate licensee, title officer, escrow agent, securities broker, dealer, or transfer agent, or other person involved in titling property or advising persons concerning title, who is subject to a continuing education requirement imposed pursuant to law, shall receive double credit for approved educational activities concerning the form prescribed in Section 863 or the forms of title of marital property and their legal incidents.

Comment. Section 864 is intended to encourage persons who are in a position to influence the manner in which married persons hold property to become educated concerning the consequences of the different forms of marital property title.

ROBERT E. TEMMERMAN, JR.
ATTORNEY AT LAW
SUITE 240
1550 SOUTH BASCOM AVENUE
CAMPBELL, CA 95008-0841

FAX: (408) 377-7601

TEL: (408) 377-1788

July 26, 1994

Mr. Nat Sterling
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: Effect of Joint Tenancy Title on Marital Property

Dear Nat:

Following your request, I sent a letter to each Executive Committee Member of the State Bar Section on Estate Planning, Trust and Probate Law. A copy of my letter is enclosed.

As of today's date, I have received a total of nine responses, copies of which are also enclosed.

I have not received any responses from two of my colleagues whom I know have participated in significant litigation over the issue of joint tenancy property acquired with community funds.

When I receive further letters, I will forward them to you.

Sincerely,

Robert E. Temmerman, Jr.
RET/gmd (ster725.let)

enclosures

cc: Valerie Merritt, Esq. (with enclosures)

ROBERT E. TEMMERMAN, JR.
ATTORNEY AT LAW
SUITE 240
1550 SOUTH BASCOM AVENUE
CAMPBELL, CA 95008-0641

FAX: (408) 377-7601

TEL: (408) 377-1788

June 30, 1994

1~
2~

RE: Joint Tenancy Property Acquired with Community Property

Dear Executive Committee Member, Advisor, or Team 2 Member:

At the last Executive Committee meeting, I reported to you on the status of SB 1868 regarding joint tenancy property that is acquired with community property. Due to a variety of reasons the Bill is now dead for this legislative session.

The California Law Revision Commission voted at its last meeting to continue to study the matter with an attempt to reach an agreement with the California Land Title Association and other interested parties. The Land Title Association does not believe that there is a problem. Nat Sterling of the CLRC requested that I write each of the members of the State Bar's Executive Committee in the hopes of identifying specific instances, cases, or other scenarios where the issue has been raised.

I would be grateful to each of you if you would take a moment and review your own files and advise me of any actual cases or matters in which you have personal knowledge that involved the issue of joint tenancy real or personal property that was acquired with community property funds in a death context. Was there a dispute as to whether the property passed by right of survivorship or by the decedent's will due to an inadequate transmutation? I would also ask that you check with your colleagues and have them do the same. Unless we can convince the title companies that there is indeed a problem, it is unlikely we will ever get them to the bargaining table to resolve the matter.

Kindly respond by July 15, 1994 with a short factual synopsis of the case, the issue, its resolution or its present status. Additionally, if any of these disputes are a matter of public record, the appropriate county and case number would be exceedingly helpful.

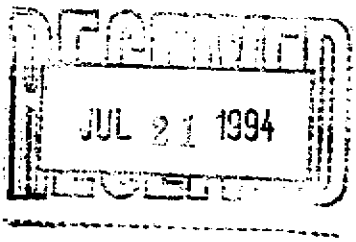
If you have never experienced a problem with joint tenancy property and its treatment at death, I would also like to know that.

Thank you in advance for your anticipated cooperation.

Sincerely,

Robert E. Temmerman, Jr.
RET/gmd (excom627.let)
cc: Nat Sterling

LUCE, FORWARD, HAMILTON & SCRIPPS
ATTORNEYS AT LAW • FOUNDED 1873



MARY F. GILLICK, PARTNER
DIRECT DIAL NUMBER (619) 699-2459

July 19, 1994

VIA FACSIMILE (408) 377-7601
AND U.S. MAIL

Robert E. Temmerman, Jr.
Attorney at Law
1550 South Bascom Avenue
Suite 240
Campbell, California 95008-0641

Re: Joint Tenancy Property Acquired With Community Property

Dear Bob:

I apologize for not getting this to you sooner and hope that you can still make use of the information. I have had two estates in which joint tenancy/community property title has been a problem. Following are the factual scenarios of each:

1. Husband and wife take title in the family residence in joint tenancy. They separate. Husband leaves entire estate to daughter by prior marriage. He dies prior to divorce. The estate and the surviving spouse dispute whether the property is joint tenancy, tenancy in common or community property. The down payment was made primarily with husband's separate funds but a portion was also contributed by the wife. The note was paid throughout the seven year marriage with community funds.

2. Husband and wife acquire real property under title held in joint tenancy with community property assets. The wife makes two wills and states in those wills that all property held in joint tenancy is actually community property and directs her executor to assert her community property interests in the property. Many years later, wife is placed in a conservatorship. Husband does not put joint tenancy property in the conservatorship estate under the theory that it is community property and can be managed outside of the estate. Husband dies. A few years later, the wife dies. Her executor then makes claims against the still open estate of the predeceased husband for the entire value of the joint tenancy property (which has since been sold). As an aside, in this case, the trial court would not

600 WEST BROADWAY, SUITE 2600 • SAN DIEGO, CALIFORNIA 92101 • TELEPHONE (619) 236-1414 • FACSIMILE (619) 232-8311
SAN DIEGO • LA JOLLA • NEW YORK • LOS ANGELES • SAN FRANCISCO

allow evidence of the character of the property contained in the wife's wills to be admitted and held that the property was held in joint tenancy.

I hope this has been helpful.

Very truly yours,

Mary F. Gillick
of
LUCE, FORWARD, HAMILTON & SCRIPPS

MFG:lh

PULICH & LOWE
ATTORNEYS AT LAW
2140 SHATTUCK AVENUE, SUITE 1005
BERKELEY, CALIFORNIA 94704-1258
TELEPHONE (510) 540-8108

FRANK A. LOWE
ROBIN G. PULICH

July 15, 1994

Robert Temmerman, Esq.
1550 South Bascom Ave., Suite 240
Campbell, CA 95008

Re: Community Property held in Joint Tenancy Form

Dear Bob:

I received your letter requesting information on any cases handled by my office concerning possible litigation of the issue of community property in joint tenancy form. Frank Lowe has already responded on behalf of our office. However, I felt a few additional comments might be helpful.

1. Unlitigated Estate Planning Conflicts Between Spouses

In **many** cases we have handled, the fact that community property was held in joint tenancy form created a considerable problem where we represented one of the spouses in doing estate planning. I will briefly describe three such cases.

In the first case, our client decided to leave her half of the substantial community estate, together with her separate property, to charity after a bequest to her sister (there were no children of this long marriage). Her husband opposed this and wanted to leave everything to his nephews. Our client finally severed the joint tenancy in the real property to enable funding her trust even though this resulted in loss of the stepped up basis.

In the second case, our client wanted to leave her half of substantial community property to her children, because her husband of forty-some years had been having an affair. The entire estate was held in joint tenancy, including a multimillion dollar stock brokerage account. Her husband was totally unwilling to change the title to community property, although our client supplied her spouse with articles we had collected on the stepped-up basis issue. The brokerage refused to change title to the account, or allow withdrawal of assets, without both signatures. Our client is still frustrated in carrying out her desires for the disposition of her estate.

In the third case, our client wanted to leave her half of substantial community property to her child because of her ill health and her husband's long term affair with another woman. **Notably, our client was a career real estate agent, having been in the business for 30 years, but had no idea that she could not will her half of community property when it was held in joint tenancy.**

She finally convinced her husband to convert the property to community property by signing a new deed after telling him the benefits of a stepped up basis **of which she had not heard before seeing me.** She then completed her estate planning.

2. Litigation Potentials

Turning to the issue of possible litigation, we narrowly missed a contested dispute in a recent case. In that case, involving a spousal property petition, the surviving spouse and her husband of five years had commingled their separate assets upon getting married and orally agreed they were community property. They then proceeded to put all assets into joint tenancy form including real property previously owned by our client, and improvements were made with community funds. The husband then died. Our client, the surviving spouse, wanted to have the property receive a stepped up basis. Because the deceased husband had a child by a prior marriage from whom he was estranged, we anticipated problems. Fortunately the estranged daughter did not object, and the court granted the petition including the classification of the real property as community property with a stepped up basis.

Finally, I want to mention a case I encountered when I was serving as a judge pro tem in the probate department of Alameda County Superior Court. There the decedent's children by a prior marriage were contesting a spousal property petition brought by the surviving spouse. Joint tenancy assets were involved including real property, and the children's pleadings raised constructive trust issues. The case was going to trial the following week, and was presumably heard by the Probate Commissioner, but unfortunately I never heard the outcome. However, this case illustrates the fact that property held in joint tenancy by spouses can result in litigation, especially in the second marriage situation.

I hope the issue of community property in joint tenancy form will be addressed in a future bill.

Sincerely,

Robin G. Pulich

RGP:gp

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102
(415) 561-8206

July 11, 1994

REPLY TO:
J. Robert Foster

Robert E. Temmerman, Jr.
Attorney at Law
1550 South Bascom Avenue #240
Campbell, CA 95008-0641

Re: Joint Tenancy Property Acquired with Community Property

Dear Bob:

In response to your June 30, 1994, letter, there are two types of cases that we see repeatedly, meaning several times of year:

1. A spouse dies and property passes to the survivor by joint tenancy. The property is community property. We advise the spouse that they do not have a stepped-up basis if it is not community property. We usually recommend that they have a community property set-aside, even though the IRS is not impressed with that order. To date, we have not had anybody that we are aware of lose that community property basis. However, audits are so rare that it does not surprise me. We do advise our clients, in writing, that should they be damaged, they have legal recourse against the entity that advised them to take title as joint tenants. Almost virtually, in every case, clients tell us that the title company automatically gave them the joint tenancy deed.

2. The situation of the decedent spouse now owning the property which was community property, and leaving it to a third party. This is usually a second marriage situation with two different sets of children. We see this one from various perspectives. We now advising our clients who have an interest in setting aside the joint tenancy that they probably can do so, since there was not a formal transmutation. Again, we also advise that litigation should be considered against the escrow company.

Within our office, insofar as actual litigation is concerned, we have only had one case in the past three years where we found it necessary to file litigation. That was a situation where during the course of a divorce, one of the parties died. The court found that the joint tenancy title superceded the decedent's community property interest. Since we represented the wife, the surviving joint tenant, I do not know whether or not the other attorney in fact sued the title company, though I know he was considering it. The cases wer Mock v. Mock, In Re Marriage of Mock, and In Re the Estate of Mock, #667334 consolidated.

Finally, I would say that joint tenancy is always a problem on death in some fashion or other. It just does not do what people think it does and always ends up costing the clients money. The traditional "family" just does not exist in California any more, for which the joint tenancy did, in fact, work well for so many years.

Sincerely,

J. ROBERT FOSTER

JRF/bbr

PULICH & LOWE
ATTORNEYS AT LAW
2140 SHATTUCK AVENUE, SUITE 1005
BERKELEY, CALIFORNIA 94704-1258
TELEPHONE (510) 540-8108

FRANK A. LOWE
ROBIN G. PULICH

July 8, 1994

Robert E. Temmerman, Jr.
Suite 240
1550 South Bascom Avenue
Campbell, CA 95008-0641
Re: Joint Tenancy Property Acquired with Community Property

Dear Bob:

In response to your letter requesting joint tenancy/community property cases, I can state that this office has handled at least ten cases which were the same following general pattern: husband and wife had acquired property in joint tenancy (typically real property) with community property funds that had appreciated dramatically by the time of one spouse's death. In an attempt to secure the benefits of a stepped-up basis and treatment as community property rather than joint tenancy, a spousal property petition was filed in order to acquire a judge's order confirming the decedent's community property interest in the husband and wife's property.

The resolution in these cases has been to obtain that court order (without dispute by any other parties). While these cases are a matter of public record because we did file the petitions, I have not reviewed our records to list them all individually.

I should also state that in addition to those cases where we actually have had to take action, it is part of my routine to advise all estate planning clients about (1) the nature of joint tenancy and the nature of community property, and (2) why holding title in one or the other can have surprising results if one is not informed. Thus, even though there is no public record or dispute, many of my clients are surprised to find that they hold property as joint tenancy when they really wish they held it in community property, and thereafter, they either change the deeds for real property or execute a community property agreement between themselves. None of those cases are a matter of public record but I can state that this problem comes up frequently.

Sincerely,

Frank A. Lowe

FAL:mlw
(FALmemo:\temmerma.ltr)

GRAY CARY WARE
▲FREIDENRICH
A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW
1200 PROSPECT STREET, SUITE 575
LA JOLLA, CA 92037-3610
TEL (619) 454-9101
FAX (619) 456-3075

EDWARD V. BRENNAN
WRITER'S DIRECT DIAL
(619) 456-3028

July 7, 1994

Robert E. Temmerman, Jr., Esq.
1550 South Bascom Avenue, Suite 240
Campbell, CA 95008-0641

Re: Joint Tenancy Problem

Dear Bob:

I recently handled a matter where a husband and wife established a living trust which declared that all of their separate and community property was subject to the trust. They continued to hold property as joint tenants.

The issue was whether they had transmuted joint tenancy assets to a trust asset and/or whether subsequent dealing with the joint tenancy account had transferred it back into joint tenancy.

After one spouse died, litigation with remainder beneficiaries ensued to seek a resolution of the issue.

I also have a case in which one spouse died in the middle of divorce proceedings. The decedent had executed a will naming beneficiaries other than the spouse. Property remained in joint tenancy and a dispute is now in process.

It seems that the joint tenancy problems create a daily concern for attorneys.

Very truly yours,

GRAY CARY WARE & FREIDENRICH
A Professional Corporation

By: _____
Edward V. Brennan

EVB:mt
5039645

cc: Executive Committee

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102
(415) 561-8206

July 7, 1994

REPLY TO:

1233 West Shaw, Suite 101
Fresno, CA 93711
Telephone: (209) 225-3500
Facsimile: (209) 225-5583

Robert E. Temmerman, Jr., Esq.
1550 South Bascom Avenue, Suite 240
Campbell, CA 95008-0641

Re: Joint Tenancy/Community Property

Dear Bob:

I have your letter of June 30, 1994, and, believe it or not, cannot recall any specific situations where a joint tenancy form of holding property acquired with community funds caused any major problems. I have, of course, had numerous situations of joint tenancy which was sourced in community property, but in every situation I can remember, we were able to "finesse" the situation in order to obtain desired tax results.

With best wishes,

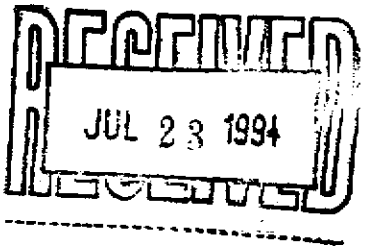
Sincerely,

Robert L. Sullivan, Jr.

RLSjr:adb

PS - Hope you enjoyed your trip!

R. 17



IRWIN D. GOLDRING
ATTORNEY AT LAW
1925 CENTURY PARK EAST, SUITE 950
LOS ANGELES, CALIFORNIA 90067-2710
TELEPHONE (310) 201-0304
TELECOPIER (310) 277-7994

July 21, 1994

Robert E. Temmerman, Jr., Esq.
Suite 240
1550 South Bascom Avenue
Campbell, CA 95008-0641

Re: Joint Tenancy Property Acquired with Community Property

Dear Bob:

On this issue my experience has been that most clients, or people who decide to put property into joint tenancy, intend it as an easy method of transferring property to their spouse. My experience has also been that for the most part the fears which we all express concerning basis adjustment at the first death don't come up - usually because the people are not involved in near term sales and eventually when they do sell it the accountant or the lawyer just takes the position that it was community property and steps up both halves. I find the State of California is not nearly so aggressive about this issue as it once was. (Perhaps, that's because they have changed the law or the regs in that regard but I don't remember.)

Having said the above let me tell you about a recent situation which I had, which is the problem with which you are dealing. There was a second marriage in 1959 and some time thereafter a home was purchased and put in joint tenancy, although it is probable that at least to begin with it might have been the separate property of the husband, but at worst (for him) was community property.

After some years when the parties were not getting along they entered into a community property agreement which delineated the separate property of the parties and further stated that either of them had the right to convey or will their share of community property no matter how held, including joint tenancy. [The surviving spouse, wife, does not recall this agreement though her signature appears to be on it.]

This community property agreement was drawn by the husband's attorney. The wife was not represented. Some time thereafter the husband changed his will, unbeknownst to the wife, and willed his share of the house to his daughter. At the time the husband did not attempt to sever the joint tenancy by the use of a "straw man" (which was the general practice then) nor did he later attempt to convey his interest when it became settled that a straw man wasn't needed and that one party to a joint tenancy could sever the joint tenancy by a conveyance out of his or her own share. The same attorney that drew the property agreement between the parties also drew the husband's will. He is deceased, as is the husband.

At the husband's death, of course, the wife had severed the joint tenancy and took tile in her name alone. A Section 9860 petition was filed in the husband's estate to seek to draw his half interest back into the estate. The case was eventually settled with the wife keeping the house, but only to protect other property which the child by the first marriage had in joint tenancy with the father, which was probably separate property, but maybe not.

Where the problem of joint tenancy title arises more often is where a surviving spouse ends up putting property in joint tenancy with a child with no intention that the property go only to that child and leaves a will with contrary devises. But, I don't think that's the case that you are concerned with - at least in your current information request.

Sincerely yours,

IRWIN D. GOLDRING

IDG:hs

WARREN A. SINSHEIMER III
ROBERT K. SCHIEBELHUT
K. ROBIN BAGGETT
MARTIN J. TANGEMAN
THOMAS M. DUGGAN
MARTIN P. MOROSKI
DAVID A. JUHNKE
STEVEN J. ADAMSKI
THOMAS D. GREEN

M. SUZANNE FRYER
CYNTHIA CALDEIRA
W. ARTHUR GRAHAM
SUSAN S. WAAG
ROY E. OGDEN
THOMAS J. MADDEN III
CHRIS A. CARR
MARIA L. HUTKIN

SINSHEIMER, SCHIEBELHUT & BAGGETT
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
POST OFFICE BOX 31
SAN LUIS OBISPO, CALIFORNIA 93406-0031
805-541-2800

STREET ADDRESS
1010 PEACH STREET
FACSIMILE
805-541-2802

CLIENT
0285001

July 22, 1994

Robert E. Temmerman, Jr., Esq.
1550 South Bascom Avenue, Suite 240
Campbell, California 95008-0641

Re: Joint Tenancy Property Acquired with Community Property

Dear Bob:

This is in response to your letter of June 30, 1994. Your letter arrived while I was out of the office on vacation, and your requested response date also came and went while I was away. However, I hope that these responses may still be of some use to you.

I am limiting my response to your specific question of problems that have arisen where community assets were acquired in joint tenancy form. The more common problem is where a joint tenancy title is used for homemade estate planning resulting in possibly unintended disposition of the decedent's property, such as to one child rather than to all.

In the context of your question, I had occasion to arbitrate a dispute several years ago where a decedent and his spouse had used a mix of community and separate funds to acquire a home. The marriage was the second (at least) for each spouse. Each spouse had a will which left his or her estate to the survivor for life, remainder to the children of the prior marriage. The husband died, and the surviving wife claimed exclusive fee title as surviving joint tenant. The children of the husband by his prior marriage sought to set aside the joint tenancy or impose a constructive trust.

On the facts of the case, I concluded that the joint tenancy title controlled. The law is strongly in favor of that result. This may be why the title companies do not see that there is a problem. They might see it differently if it could be shown that the joint tenancy resulted from the advice or suggestion ("this is the way everybody takes title") of the title company's escrow officer.

The other situation which has arisen on several occasions in my practice has to do with only the potential problem of an IRS or state claim of no step-up in basis where an asset is in joint tenancy. Depending on my ability to convince the client of the necessity for doing anything at all, we have used a variety of tools, usually a community property petition, to get

a court order that the nominal joint tenancy is in fact community property. I am not aware of a problem coming up on a later audit, either because the survivor died before there was a disposition or there has not been an audit.

I have used this approach with the variation of a disclaimer and a probate in the context of trying to get the asset into some kind of bypass trust. Again, I have not had the issue come up on audit. CPAs may have more experience with IRS approaches on the basis issue, although I sense that most agents are not strongly educated or motivated in this area.

It seems that from a title insurer's perspective, none of these issues would be "problems", unless they had assisted in the selection of the form of title. I have long felt that some day somebody would have good facts to go after an escrow officer or new accounts person or an account executive at a brokerage firm for pushing people into joint tenancies.

I hope that this is helpful.

Sincerely,

SINSHEIMER, SCHIEBELHUT & BAGGETT

WARREN A. SINSHEIMER

WAS:gh
g:\perswas\1Temmer.722

CINNAMON, CASTERTON & HAGEDORN
AN ASSOCIATION OF LAW CORPORATIONS
ISIS RIVER PARK DRIVE, SECOND FLOOR
SACRAMENTO, CALIFORNIA
95815
TELEPHONE (916) 929-6500

MAIL TO:
P. O. BOX 254948
SACRAMENTO, CALIFORNIA 95865-4948
FAX (916) 929-2124

MICHAEL M. CINNAMON
JAMES C. HAGEDORN, INC.
MICHAEL P. CASTERTON
G. ANTHONY TESSIER, JR.
MICHAEL S. CINNAMON
WILLIAM P. FAIRWELL
SUNNY D. DOBASHI
THOMAS A. BUSCH

July 11, 1994

In Reply Refer To:
9086-706

Robert E. Temmerman, Jr.
Attorney at Law
1550 South Bascom Avenue, Suite 240
Campbell, CA 95008-0641

RE: JOINT TENANCY PROPERTY ACQUIRED WITH COMMUNITY PROPERTY

Dear Bob:

I am dictating this letter as I am leaving town, and for that reason am enclosing a Declaration of Surviving Spouse and Points and Authorities filed in support of a spousal property petition in the Estate of Charley L. Scott, Sacramento County Case No. 93PR1791.

This matter involved substantially appreciated parcels of real property, record title to which was held in the names of the decedent and his surviving spouse, as joint tenants. We were seeking an Order that the property was in fact community property so that a full step-up in income tax basis could be obtained. The Probate Department in Sacramento County takes the position that the mere fact that title to property was taken in joint tenancy is sufficient to transmute the character of the property to true joint tenancy property, regardless of the source of the funds used to purchase the property. If title to property was taken in joint tenancy after January 1, 1985, the Court will not normally grant an Order that the property was in fact community property unless there is a written transmutation of the property from joint tenancy to community property.

We argued that, under *Estate of MacDonald*, a transmutation of community property cash to joint tenancy real property does not occur unless there is a writing which expressly states that the characterization or ownership of the property is being changed.

The Court granted the Order we sought, even as to parcels acquired after January 1, 1985, but declined to base its decision on *Estate of MacDonald*. Instead, the Court decided its equitable powers, and

found that the Declaration of the Surviving Spouse indicated that the parties always intended that their property remain community property.

Very truly yours,

CINNAMON, CASTERTON & HAGEDORN

Brenda Hollf for

THOMAS A. BUSCH /BRENDA HOLLF

TAB:blh
Enclosures

CINNAMON, CASTERTON & HAGEDORN
THOMAS A. BUSCH, ESQ., State Bar No. 86031
1515 River Park Drive, Second Floor
Sacramento, California 95815
Telephone: (916) 929-6800

Attorneys for Petitioner

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

Estate of: CHARLEY L. SCOTT, Decedent.	CASE NO. 93PR1791 POINTS AND AUTHORITIES IN SUPPORT OF SPOUSAL PROPERTY PETITION

Hearing date:
Department:
Time:

INTRODUCTION

1. Civil Code §5110 provides that, except as provided in §§5107 and 5108 (which define separate property) all real property situated in California and acquired during the marriage by a married person domiciled in California is community property. Thus, unless the source of the property acquired during marriage is separate property, the acquired property is community property. (See also 11 Witken, Summary of California Law (9th ed., 1990), Community Property, Section 24, page 395.)

2. However, when community property is used to acquire property, the title to which is taken in joint tenancy (which is a separate property, common law estate), the questions arises

whether the acquired property remains community property or whether its character has been changed to the separate property, common law estate of joint tenancy.

3. The question originates from the case of Siberell v. Siberell (1932) 214 Cal.767, where the California Supreme Court stated at page 773 that:

> "...a community estate and a joint tenancy cannot exist at the same time in the same property. The use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property, but instead is a joint tenancy with all the characteristics of such an estate."

4. Subsequent cases have limited the effect of the language quoted above and have made it clear that, while taking title to property in joint tenancy raises the presumption that the spouses have agreed to change the community property character of the funds used to purchase the property, it is not conclusive as to the existence of such an agreement. The presumption can be rebutted by evidence that the spouses did not intend or agree to change the character of their community property when they took title to the acquired property in joint tenancy.

5. For example, in Tomaier v. Tomaier (1944) 23 Cal.2nd 754, the Court stated at page 757 that:

> "It is the general rule that evidence may be admitted to establish that real property is community property even though title has been acquired under a deed executed in a form that ordinarily creates in the grantee a common law estate with incidents unlike those under the law of community property. ...It has in fact been held unequivocally that evidence is

> admissible to show that husband and wife who took property as joint tenants actually intended it to be community property. (citations omitted) Such rulings are designed to prevent the use of common law forms of conveyance to alter the community character of real property contrary to the intentions of the parties."

The Tomaier Court went on to state that the language in the Siberell decision that "the use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property" should be understood as stating the applicable rule only in the absence of any evidence of an intent to the contrary (Tomaier, supra., pages 758-759).

6. In Socol v. King (1950) 36 Cal.2nd 342, the Court stated at page 345 that:

> "...it is well settled in this state that the form of the instrument under which husband and wife hold title is not conclusive as to the status of the property and that property acquired under a joint tenancy deed may be shown to be actually community property or the separate property of one spouse according to the intention, understanding or agreement of the parties."

7. Thus, California courts have consistently held that the mere fact that husband and wife take title to property as joint tenants does not mean that the character of the property used to acquire the property was thereby altered from community property to a separate property form of ownership. As the Court stated in Jenkins v. Jenkins (1957) 147 Cal.App.2nd 527, at 528-529:

> "It is a common practice for husband and wife who have acquired funds as community property to use the same in the purchase of real property and to take title thereto as joint tenants, being motivated solely by a desire to have the privileges of survivorship. It frequently happens that they have no intention of

abandoning community ownership and do not understand that placing the title in joint tenancy would affect the change of ownership or would serve any purpose other than to avoid the necessity of proceedings in probate. If the evidence is sufficient to convince the Court that the parties had no agreement and no intention to alter the community character of the property, it may properly be determined that it remains community property notwithstanding the fact that title was knowingly taken in joint tenancy."

8. Moreover, the transmutation of community property to a separate property form of ownership after January 1, 1985, is governed by Civil Code §5110.730, which provides that a transmutation of real property is not valid unless made in writing by an express declaration. In Estate of MacDonald (1990) 51 Cal.3rd 262, at 272, the Supreme Court held that a writing is not "...an "express declaration" for the purposes of section 5110.730(a) unless it contains language which expressly states the characterization or ownership of the property is being changed." (Emphasis supplied.) Thus, merely accepting title to property in joint tenancy, or signing escrow instructions which state that title will be taken in joint tenancy, is clearly insufficient under MacDonald to alter the character of the community property used to purchase the property. A seller's deed to husband and wife, as joint tenants, contains no language stating that the characterization or ownership of community property used to acquire the real property is being changed. Nor do escrow instructions signed by husband and wife, which indicate only that they will take title to the real property in joint tenancy, contain any statement

that the characterization or ownership of community property used to acquire the real property is being changed.

9. (It should be noted that the reference in the majority opinion in MacDonald to Civil Code §683, in its discussion of a writing sufficient to satisfy Civil Code §5110.730(a), cites a transfer "from a husband and wife, when holding title as community property...to themselves, when expressly declared in the transfer to be a joint tenancy...". Such language, while arguably less than an express statement that the characterization or ownership of property is being changed, is at least evidence that the parties are aware that property which was previously held as community property will now be held as joint tenancy property. As set forth above, such evidence does not appear in a seller's deed or in escrow instructions.)

REAL PROPERTY ACQUIRED PRIOR TO JANUARY 1, 1985

10. As the cases cited above provide, prior to January 1, 1985, when husband and wife used community property to acquire property to which they took title as joint tenants, a presumption arose that they had agreed to change the character of the community property used to acquire the property to a separate property form of ownership. That presumption could be rebutted by evidence that the spouses had not in fact agreed to change the character of their community property.

11. For example, in Jenkins v. Jenkins (supra) at 582-529, the Court recited the trial court's findings that the spouses took title in joint tenancy at the suggestion of friends and an escrow clerk; that they did not know what the difference between joint tenancy and community property was; and that they had not discussed taking title in joint tenancy among themselves. Based on those facts, the Court of Appeal upheld the trial court's "...finding that the property remained community property..." despite the fact that title was taken in joint tenancy.

12. In Blankenship v. Blankenship (1963) 212 Cal.App.2nd 736, at 742, the Court of Appeal, reviewing similar facts, stated:

> "When the conduct of the spouses shows that they regard the property as their marital property and where, as here, it appears that they never actually understood characteristics and effect of a joint tenancy, there is a sound basis for a trier of fact to conclude that they never intended to change the character of their property."

13. As set forth in the Spousal Property Petition, Charley and Janis Scott acquired all of their property with community property. They never intended or agreed to change the character of their community property, and they never believed that they had done anything which might have effected such a change. They understood their property to be marital property, to be community rather than separate property, and their actions with respect to their property reflect that understanding.

14. Though it is submitted that all property acquired by Janis and Charley during their marriage was at all times

community property, if the Court finds that the mere act of taking title to property in joint tenancy, or the signing of escrow instructions indicating that title would be taken in joint tenancy, was sufficient to change the character of community property to a separate property form of ownership, then it is submitted that the facts set forth in the Spousal Property Petition are sufficient for the Court to find that the Dry Creek Road and Kenmar Road properties (which were purchased prior to January 1, 1985) had been re-transmuted to community property prior to January 1, 1985. Prior to that date, it was possible to change the character of property by oral agreement or common understanding of the parties. Woods v Security-First National Bank (1956) 46 Cal.2nd 697, 701; Estate of Levine (1981) 125 Cal.App. 3rd 701, 705. The agreement could be express or implied (In re: Marriage of Jafeman (1972) 29 Cal.App 3rd 244, 255), and it could be inferred from the conduct and declarations of the spouses (In re: Marriage of Garrity and Bishton (1986) 181 Cal.App. 3rd 675, 685). As the Court stated in Estate of Raphael (1949) 91 Cal.App. 2nd 931, at 939: "All that is required to show an executed oral agreement of transmutation is proof of the parties' acts and conduct in dealing with their property."

15. As set forth in the Spousal Property Petition, throughout their marriage, and clearly prior to January 1, 1985, Janis and Charley intended, agreed and understood that the Dry Creek Road and Kenmar Road properties were the community

property of their marriage. All improvements made to the properties and all expenses incurred in connection with the properties were paid with community funds. All rents generated by the properties were deposited into community property accounts. The properties were at all times managed as community property. The fact that neither of them had wills did not particularly concern them because they believed that the community property of their marriage would pass automatically to the surviving spouse, as they intended. If the properties lost their community property character at the time they were acquired, the subsequent acts and conduct of Janis and Charley with respect to the properties clearly indicate that their character had been changed to community property prior to January 1, 1985.

PROPERTY ACQUIRED AFTER JANUARY 1, 1985

16. As set forth in paragraph 8 above, in order to change the character of property after January 1, 1985, an express written declaration is required. In Estate of MacDonald, supra, the Supreme Court specifically held that in order for an express written declaration to effect a change in the character of property held by a married couple, that writing must (1) be signed by at least one, and arguably both, of the spouses, and (2) expressly state that the character or ownership of the property is being changed.

17. As set forth in the Spousal Property Petition, Charley and Janis acquired all of their property with community property. Unless they agreed to change the character of the property they acquired, it too was community property. After January 1, 1985, any agreement to change that community property character would have to be in writing; it would have to be signed by at least one of them; and it would have to expressly state that the community property was being changed to separate property. As set forth in the Spousal Property Petition, neither Janis nor Charley ever signed any document with respect to any property they acquired which stated that they were changing the character of their community property to separate property. Thus, it is clear that the 32nd Street and Santa Ana Avenue properties, which were acquired with community property funds after January 1, 1985, were at the time of acquisition, and still remain, community property.

STOCK IN SCOTT HOUSE MOVERS, INC.

18. Civil Code §5110 provides that, except for property owned prior to marriage or acquired during marriage by gift or inheritance, or which is the proceeds of a cause of action which is separate property, all personal property acquired by a married person domiciled in California is community property. The fact that stock is held in the name of one spouse is not conclusive as to its character, and if it is determined that the stock was acquired with community property, its character will

be determined to be community property, absent an agreement that its character has been changed by agreement between the spouses. Estate of Baer (1947) 81 Cal.App.2nd 830.

19. As set forth in the Spousal Property Petition, the stock in Scott House Movers, Inc., though held in the name of Charley L. Scott, was acquired during the marriage of Janis and Charley, and the source of its acquisition was entirely community property. Janis and Charley never agreed to change the community property character of the stock. Both Janis and Charley were active in the business, and throughout their marriage they managed the business as their community property and understood and agreed that the business was community property.

CONCLUSION

20. California courts have consistently held that, when a married couple uses community property funds to purchase real property, title to which is taken in joint tenancy, a presumption arises that the spouses have agreed to change the character of the community property to a separate property form of ownership. That presumption may be, and often has been, rebutted by evidence that the spouses never intended or agreed to change the character of their property, but rather intended, understood or agreed that the property held in joint tenancy remained community property. The California Supreme Court's holding in MacDonald, supra, calls into question whether the

ATTACHMENT 6d

Facts Supporting Passage or Confirmation of Property to Surviving Spouse

Charley L. Scott and I were married on September 1, 1968. Charley was eighteen years old at that time. Neither of had any significant assets at the date of our marriage, and neither of us received gifts or inherited property of significant value during our marriage. Charley died intestate on August 16, 1993. All of the property which we owned at Charley's death was acquired during our marriage, either with our earnings or with credit based on our earnings.

During our marriage, Charley and I bought several parcels of vacant land, some of which we later improved by moving houses onto them or constructing other improvements. In each case, we took title to the real property as husband and wife, as joint tenants.

When we bought our first property, we were asked by the title officer, at the time we signed papers to close the escrow, how we wanted to hold title. We asked how it was usually done and were told "...husband and wife as joint tenants". We were advised that since California is a community property state, it didn't really matter whether or not the words "as joint tenants" are added to the words "husband and wife". From time to time when we purchased property we worked with a real estate agent. We were always advised to take title as joint tenants, because "...everybody does it that way".

When we took title to real property as joint tenants, it was not our intent to change the character of the community property we used to purchase the real property, nor did we believe that a joint tenancy title had any effect on community property. Had we been advised that this could be the case, we would never have taken title as joint tenants. We never discussed changing the character of our property from community property, nor did we desire any change, and we certainly never agreed to change the character of our property from community property. We never signed any document which stated that the character or ownership of the property we purchased was being changed <u>from</u> community property <u>to</u> a separate property form of ownership.

Both Charley and I participated in all decisions relating to our real property, including obtaining loans secured by the property, selling and leasing the property. We did not understand or believe that either of us could act independently with respect to any interest in our real property. Nor did we understand or believe that any interest in our real property could somehow be exempt from the claims of creditors of one or the other of us. We did not have wills, but that fact did not particularly concern us, because it was our understanding that community property passed automatically to the surviving spouse, which was the way we intended it to go.

We considered all the property we acquired to be the property of our marriage. We did not believe or understand that there was

any difference between community property and property held in joint tenancy.

1. 4521 Dry Creek Road, Sacramento, California. We acquired this property in 1977 for $7,500. The seller transferred title to "Charley L. Scott and Janice M. Scott, his wife, as joint tenants." Our records do not reveal whether we signed escrow instructions which stated how we would hold title to the property. The down payment was made with savings which we had accumulated during our marriage, and the seller carried back a note which we repaid with our earnings. In 1978, we took out a loan secured by the property in order to improve a residence which we had moved onto the property. We refinanced the property twice in subsequent years. All loan payments were made with our earnings, as were all expenses paid in connection with the property and all improvements made to the property. For a time, this property was our home. The property was also rented during our marriage and all rents were deposited into community property accounts. During the entire time Charley and I owned the property, it was our intent, understanding and agreement that this property was the community property of our marriage. At no time did we intend, understand or agree that we had separate property interests in the property.

If the Court holds that the mere act of taking title in joint tenancy was sufficient to change the character of our community property to a separate property form of ownership, then it is my contention that the facts set forth above and in the introduction to this declaration constitute an understanding and agreement that,

subsequent to the date on which Charley and I took title as joint tenants, and prior to January 1, 1985, the character of the property was changed from separate property to community property.

Based on these facts, which are representative of our acts, agreements and understanding regarding the character and ownership of the property, it is my contention that at Charley's death the entire interest in the Dry Creek Road property was community property. I request that (1) the Court determine that Charley's one-half community property interest in the Dry Creek Road property passes to me under California Probate Code Section 6401(a) and (2) the Court confirm that the remaining one-half community property interest in the Dry Creek Road property belongs to me under California Probate Code Section 100.

2. 4831 Kenmar Road, Sacramento, California. Charley and I bought this property in November, 1983 for $10,000. We signed escrow instructions which indicated that we would take title as joint tenants, and the seller transferred title to "Charley L. Scott and Janice M. Scott, husband and wife, as joint tenants." We purchased the property with savings we had accumulated during our marriage. We took out a loan on the property in 1984 to make improvements to the property. All loan payments were made with our earnings. All expenses paid in connection with the property were paid with our earnings. For a time, this property was our home. The property was also rented during our marriage and all rents were deposited into community property accounts. During the entire time Charley and I owned the property, it was our intent, understanding

and agreement that this property was the community property of our marriage. At no time did we intend, understand or agree that we had separate property interests in the property.

If the Court holds that the mere act of taking title in joint tenancy was sufficient to change the character of our community property to a separate property form of ownership, then it is my contention that the facts set forth above and in the introduction to this declaration constitute an understanding and agreement that, subsequent to the date on which Charley and I took title as joint tenants, and prior to January 1, 1985, the character of the property was changed from separate property to community property.

Based on these facts, which are representative of our acts, agreements and understanding regarding the character and ownership of the property, it is my contention that at Charley's death the entire interest in the Kenmar Road property was community property. I request that (1) the Court determine that Charley's one-half community property interest in the Kenmar Road property passes to me under California Probate Code Section 6401(a) and (2) the Court confirm that the remaining one-half community property interest in the Kenmar Road property belongs to me under California Probate Code Section 100.

3. 7029 32nd Street, Sacramento, California. Charley and I purchased this property in April, 1986 for $34,000. We signed escrow instructions which indicated that we would take title as joint tenants, and title was transferred by the seller to "Charley L. Scott and Janice M. Scott, husband and wife, as joint tenants".

The down payment was made with savings we had accumulated during our marriage. All payments on the loan used to acquire the property were made from our earnings. In 1987 we obtained a loan secured by a second deed of trust on the property to make improvements to the property. All payments on this loan were made with our earnings. All expenses paid in connection with the property and the costs of all improvements made to the property were paid with the earnings of our marriage. This property was our residence at the time of Charley's death.

Though we took title to the property as husband and wife as joint tenants, it was not our intent, and we did not agree, to change the character of our property from community property. We took title as joint tenants because that was the way we had always done it. We had no idea that a joint tenancy title had any effect on community property. We did not discuss changing the character of our property from community property nor did we desire any change. We did not sign any document which stated that the character or ownership of the property was being changed from community property to a separate property form of ownership. As with all of our property, we considered this property to be owned equally by both of us and to be the community property of our marriage.

Based on these facts, which are representative of our acts, agreements and understanding regarding the character and ownership of the property, it is my contention that at Charley's death the entire interest in the 32nd Street property was community property.

I request that (1) the Court determine that Charley's one-half community property interest in the 32nd Street property passes to me under California Probate Code Section 6401(a) and (2) the Court confirm that the remaining one-half community property interest in the 32nd Street property belongs to me under California Probate Code Section 100.

4. 1241 Santa Ana Avenue, Sacramento, California. We purchased this property from the Public Guardian of Sacramento County in June, 1989 for $25,000 (Conservatorship of Carlton Rodolf, Case No. 94016). We signed a Real Property Bid and Offer to Purchase stating that we would take title as joint tenants, and the Public Guardian transferred title to "Charley L. Scott and Janice M. Scott, husband and wife, as joint tenants". We paid the entire purchase price with the proceeds of the sale of another property which we had acquired during our marriage. The only expenses incurred with respect to this property since the date of purchase were property taxes, which we paid with our earnings.

Though we took title to the property as husband and wife as joint tenants, it was not our intent, and we did not agree, to change the character of our property from community property. We took title as joint tenants because that was the way we had always done it. We had no idea that a joint tenancy title had any effect on community property. We did not discuss changing the character of our property from community property nor did we desire any change. We did not sign any document which stated that the character or ownership of the property was being changed from

community property to a separate property form of ownership. As with all of our property, we considered this property to be owned equally by both of us and to be the community property of our marriage.

Based on these facts, which are representative of our acts, agreements and understanding regarding the character and ownership of the property, it is my contention that at Charley's death the entire interest in the Santa Ana Avenue property was community property. I request that (1) the Court determine that Charley's one-half community property interest in the Santa Ana Avenue property passes to me under California Probate Code Section 6401(a) and (2) the Court confirm that the remaining one-half community property interest in the Santa Ana Avenue property belongs to me under California Probate Code Section 100.

5. Stock in Scott House Movers, Inc. At his death, Charley and I owned one hundred percent (100%) of the shares of Scott House Movers, Inc. The shares stood in Charley's name alone. The business was originally a sole proprietorship started by Charley's father. Charley worked in the business off and on from the time he was a teenager. In 1979, Charley began to manage the business. At that time the business was conducted by Charley and his brother Bill. When the business was incorporated in 1983, Charley and Bill were each issued fifty percent (50%) of the stock. Charley bought out Bill's interest in the corporation in 1988, using cash saved during our marriage. I have been active in the business for many

years and have for many years been an officer and director of the corporation.

Though the shares were held in Charley's name, they were acquired with the earnings of our marriage and any value in excess of the amount paid for them is the direct result of the efforts of Charley and I during our marriage. Charley never contended that the stock or any interest in the business was his separate property. Charley and I understood and agreed that the business was owned equally by us and was the community property of our marriage.

Based on these facts, which are representative of our acts, agreements and understanding regarding the character and ownership of the property, it is my contention that at Charley's death the entire interest in the stock of Scott House Movers, Inc. was community property. I request that (1) the Court determine that Charley's one-half community property interest in the stock passes to me under California Probate Code Section 6401(a) and (2) the Court confirm that the remaining one-half community property interest in the stock belongs to me under California Probate Code Section 100.

6. Personal Property. As with the real property and stock in the business that Charley and I owned, it was our understanding, intent and agreement that all of our personal property, tangible and intangible, was the community property of our marriage. Based on this understanding, intent and agreement, it is my contention that at Charley's death all of our personal property was community

property. I request that (1) the Court determine that Charley's one-half community property interest in our tangible and intangible personal property passes to me under California Probate Code Section 6401(a) and (2) the Court confirm that the remaining one-half community property interest in our tangible and intangible personal property belongs to me under California Probate Code Section 100.