Second Supplement to Memorandum 94-40

Effect of Joint Tenancy Title on Marital Property:
Comments of California Land Title Association

Attached to the supplemental memorandum as an Exhibit are comments we have received from the **California Land Title Association** Forms and Practices Committee on the staff's proposed approach to the effect of joint tenancy title on marital property.

The Committee does not think there is a sufficient problem in the law to merit corrective legislation, with its potential for creating new problems. Exhibit pp. 1-3. John Hoag's personal observation is that "community property with right of survivorship" could address the concerns of the estate planning bar. Exhibit p. 4.

Respectfully submitted,

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Re Effect of Joint Tenancy on Marital Property: Memorandum 94-40 Dated August 10, 1994 and First Supplement to Memorandum 94-40 Dated September 16, 1994

Dear Mr. Sterling:

As promised in an earlier letter to you, I indicated I would let you know what the result was of the discussion during the California Land Title Association Forms and Practices meeting in Sacramento on September 8 and 9 concerning Memorandum 94-40. There was a fair amount of discussion about the memorandum with recitations from the memorandum from several people to support each individual argument.

The vote of the group was to follow your advice on pages 2, 5 and 7 of the memorandum:

1. "First, Commissioners felt that we should seek to achieve a system where title means what it says ..." [page 2]

2. "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 [this seems to be an uncharacteristic malediction against title companies] 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'." [page 5]

3. "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 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."

The members of the Forms and Practices Committee considered the proposed legislation unnecessary.

The position of the committee is simply the committee's opinion. Our disagreement with the commission's approach is we do not think that there is a statiscally significant problem. It may be true that an estate planner may decide to follow a course of action without thinking about it's implications. But to enact into law a statute which may

create new problems to solve the problems of a few estate planners, who may not have fully analyzed consequences of taking title in a particular way, seems unwise. It seems unwise because we have a system that works, in a global sense, well. Micro or macro management of individual real estate decisions seems intrusive. What would be the next step? A scholarly (and perhaps practical) discussion of the advantages of fee simple absolute title versus a life estate with a remainder?

As a California lawyer and drafter of the California Land Title Association Manual of Title Practices, I do think it is important that the commission think about- even though it disagrees with our approach- the fact that the Forms and Practices Committee of the California Land Title Association is comprised of experienced underwriters from title agents and major title insurers in California and that group has concluded that this piece of legislation will cause unnecessary confusion for them in insuring titles to real property. The members of the committee come from all over California: From three person title offices to 500 person title operations.

Hence, the opinion of the committee is not the opinion of one individual. It is the opinion of approximately forty individuals with fairly diverse agendas for each of their companies.

In my opinion, both the memorandum and the recommended legislation are technically flawed. For example, the memorandum tells us that

> California law recognizes three forms of title in which married persons can hold property as coowners- joint tenancy, tenancy in common, and community property. [page 10]

Married persons may also hold title as tenants in partnership (a recognized tenancy in California).

I want to make several personal observations about the idea of legislating education of real property owners. First, I don't think it can be done successfully since all of us know that (a) asymmetries of information are always with us and that (b) even with perfect information (if there is such a thing) people make the right choice in time one; but it's the wrong choice for future events in time two. How do you legislate a

world of perfect choices for all the many changes that occur in the lives of the choice maker?

I want to make some other observations specifically about Memorandum 94-40.

The language of the Memorandum is, in too many places, troubling. In the comments to the statutory changes, words and phrases like 'good title', 'titling', 'expert advice' and 'marital property titles' appear. The meaning of these words and phrases is colloquial and could be made clearer.

More importantly, the comment to proposed section 860 tells us '[t]he title presumption provided in this chapter does not apply, however, at dissolution of marriage.' The comment to proposed section 862 tells us '[t]he presumption established by this section does not affect the manner of division of property upon dissolution of marriage or legal separation of the parties ...'. Does the presumption apply to both legal separation and dissolution of marriage?

One last observation. With all the foregoing said, the proposal seems well-intentioned and thoughtful. Nonetheless (and this is my personal observation) a form of ownership of the title to real property between married individuals that is denominated 'community property with right of survivorship' would eliminate the language mystery presently attending the reading of our real property (and family law statutes) by estate planning practitioners. (I think the major enigma is with the reading of the statutes; not the language of the existing statutes). The idea of a way of owning community property with right of survivorship (a tenancy) could be reinforced with real estate industry constituencies by providing a conclusive presumption in favor of bona fide purchasers and lenders who rely on the record title being what it appears to be on the record. It would be important to verify with real certainty that this new form of holding title to real property, 'community property with right of survivorship', would qualify, in fact, for community property tax treatment at death.

Very truly yours,

John C. Hoag
Assistant Regional Counsel