Memorandum 92-17

Subject: Study F-521.1/L-521.1 - Community Property in Joint Tenancy Form (Consultant's Background Study)

Background

It is a common occurrence that married persons in California use community property to acquire an asset, but take title as joint tenants. This situation has bedeviled California law from the beginning, since the civil law community property estate is inconsistent with the common law joint tenancy estate. Each estate has different legal incidents, among the more notable for our purposes being the right of a deceased spouse to will a one-half interest in community property (joint tenancy property passes by right of survivorship), liability of the deceased spouse's one-half interest in community property to the decedent's creditors (joint tenancy property is immune from claims of the decedent's creditors), and a step-up in federal income-tax basis for the surviving spouse's one-half interest in community property (joint tenancy property receives a step-up only on the decedent's half, not both halves).

The basic presumption that an asset acquired during marriage is community property clashes with the basic presumption that property is as stated in the title documents. The courts have ended up trying to ascertain the intent of the parties when the issue arises, which it does frequently. This quest is particularly unsatisfactory since one of the spouses is ordinarily deceased, and the survivor invariably claims an intent that most favors the survivor's interest.

The Commission has long been concerned with this issue. A decade ago the staff prepared an exhaustive study of community property in joint tenancy form, which was published as Sterling, Joint Tenancy and Community Property in California, 14 Pac. L. J. 927 (1983), and also reprinted in 10 Community Property Journal 157 (1983). The Commission issued a tentative recommendation to treat community property in joint tenancy form as community property for all purposes except that at

death it would pass to the surviving spouse by right of survivorship. The Commission eventually decided not to issue a final recommendation on this matter because of concern that retroactive application of the new law to existing joint tenancies would destroy the reasonable expectations of the spouses. The Commission also concluded that, as a practical matter, the same result could be achieved under existing law because the surviving spouse can now take property directly from the deceased spouse whether or not it has a joint tenancy title attached to it, and it can receive favorable community property capital gains treatment by a simple court proceeding declaring the property to be community.

In the past few years this uneasy truce has broken down. We have learned that IRS will no longer give favorable community property tax treatment to property held in joint tenancy form, even with a court declaration that the property is actually community. The Commission felt it was time to reactivate this study, and retained Professor Jerry Kasner to prepare a background study addressing the issue. Professor Kasner's study, Community Property in Joint Tenancy Form: Since We Have It, Lets Recognize It, was distributed to Commissioners and interested persons for comment in January 1992. This study has proved to be a best-seller, and we have sold several hundred copies of the study to interested persons. The comments we have received on the background study are attached to this memorandum as Exhibits 2-5, and are analyzed below. Professor Kasner will be present at the Commission meeting to present the study to the Commission.

Meanwhile, the staff notes the recent case of In re Marriage of Hilke, 92 Daily Journal D.A.R. 260 (January 9, 1992) (attached as Exhibit 1). In Hilke community assets were used to acquire a family home, title to which was taken in joint tenancy form. While marriage dissolution proceedings were pending but before the asset was divided, the wife died. The wife's executor claimed the wife's interest in the home for the estate on a community property theory; the husband claimed the wife's interest in the home on a joint tenancy theory. The court observes that, "This case presents a troublesome aspect of family law. Here, the common law presumption regarding form of title clashes with the statutory presumption that property acquired during the marriage is

community property." After struggling with the same issues that Professor Kasner deals with in his background study, the court ultimately held in favor of the surviving husband. However:

> As indicated, this case is troubling and the result we reach is, in all probability, contrary to the wishes of the decedent. "Our role, however, is only to decide this case. The concerns we have expressed are more properly addressed by the Legislature which can provide that the community property presumption under section 4800.1 applies to those cases in which a spouse holding joint tenancy property dies during the pendency of the dissolution proceeding." (Estate of Blair, supra, 199 Cal. App. 3d at pp. 169-170).
>
> Until the Legislature amends section 4800.1, "... we cannot allow extraneous factors to erode the functioning of joint tenancy. The estate of joint tenancy is firmly embedded in centuries of real property law and in the California statute books. Its crucial element is the right of survivorship ...." (Tenhet v. Boswell (1976) 18 Cal. 3d 150, 160.)

Issues and Goals of Any Proposed Legislation

Team 2 of the State Bar Estate Planning, Trust and Probate Law Section (Exhibit 5) identifies certain issues and goals that this project should address. The staff believes this is a useful listing of objectives, although we are not confident that we will be able to achieve unanimity on all of them. For example, although the staff agrees with Team 2 that legitimate creditors should be paid at death, we will find some proponents of joint tenancy property because it avoids creditors. See, e.g., the attachment to Exhibit 4 from William O'Donnell of the Santa Clara Land Title Company ("I suggest that in these times of financial hardships and significant number of divorced and remarried couples, if a person realized that property held as community property is liable for the debts and obligations of their spouse, while separate property held either as tenants-in-common or joint tenancy is not, a significant number of married couples would continue to favor joint tenancy over community property.") Likewise, the ability to partition community property during the marriage, outside of the context of a court-supervised division, is controversial and is the reason partition of community property is prohibited by statute.

Community Property With Right of Survivorship

One issue raised in Professor Kasner's study is whether California should authorize a new form of tenure--community property with right of survivorship.

The California Land Title Association's Forms and Practices Committee (Exhibit 4) feels that a new title form is unnecessary and unwarranted:

> The present forms of ownership do not contain any ambiguities as to the rights and obligations between husband and wife. The fact that certain members of the public or the legal community do not understand the law should not be the basis for creating a new classification, which, in our opinion, will only serve to create further confusion and will generate a massive amount of litigation between spouses, and will not do anything to preserve the integrity or viability of land titles in California.

John E. Heywood, a Matthew Bender family law writer (Exhibit 3) cautions that if such a new title form is created, care should be taken because the title might amount to a tenancy by the entirety which is not recognized in California. Also, creation of any new title form should be done circumspectly, with broad input not only from the legal community but also the real estate and lending industries.

State Bar Team 2 (Exhibit 5) is opposed to a separate form of title. "Adding another form of title does nothing to solve the community practice and would require not only educating the practitioners and the public as to what current law provides but also educating them as to the uses and abuses of a new form of property holding."

Expansion of Civil Code § 4800.1

Civil Code Section 4800.1 presumes that property held in joint form is community property for purposes of dissolution. Professor Kasner suggests that this presumption should be expanded so that it applies for purposes of rights at death as well; the Hilke court suggests the same.

Mr. Heywood (Exhibit 3) agrees that "some of the problems associated with joint tenancy usage by spouses could be alleviated by creating a rebuttable presumption for all purposes that property acquired by spouses during marriage in joint tenancy form is community

property, unless the instrument of title states 'and not as community property' or words substantially similar in that form." This would make clear that the spouses can take as joint tenants or tenants in common if they really want to. To reinforce this concept, Mr. Heywood also would require brokers and other persons involved in title documentation of property over a certain value to provide the spouses with a statutorily prescribed explanation of the significance of holding in one of the common law title forms. The purchaser would be required to execute and record a statement acknowledging receipt of the explanation as a condition of taking title in one of these forms.

Transmutation Issues

Professor Kasner suggests that one of the reasons for the current difficulties we are having with community property in joint tenancy form is the enactment of a new strict requirement of an express declaration in writing for transmuting community property to separate and vice versa.

Is taking a deed in joint tenancy form a sufficient express declaration to satisfy the transmutation statute and convert community property to joint tenancy property? Professor Kasner suggests that it could be sufficient, provided the spouses have agreed to that form, for example by signing escrow instructions. Professor Paul Goda (Exhibit 2) disagrees, arguing that the cases require a writing showing not just the form of title but showing a change in the manner of tenure.

State Bar Team 2 (Exhibit 5) believes the matter needs to be clarified, and approves Professor Kasner's suggested addition to the transmutation statute, Civil Code Section 5110.730:

> For purposes of this section, a written deed or other document of title, or a written instrument directing the use of a specific title to property, will be deemed an express declaration in writing only if it is signed by both spouses.

The Bar Team believes this would be a desirable clarification since it would ensure that absent a clear written expression of intent of the parties the property will remain community, which gives the desired result in most cases.

Mr. Heywood (Exhibit 3) would go the other way and ease the transmutation statute by making clear that the writing requirement is

subject to traditional statute of frauds exceptions such as part performance. "If traditional contractual exceptions to the writing requirement are found to apply to marital transmutations, the concern over whether a joint tenancy deed not executed by the spouses amounts to an improper oral transmutation may not be a significant issue."

A fundamental problem underlying these concerns is how the transmutation statute interacts with other statutes that presume joint tenancy property is community for purposes of dissolution and that allow reimbursement for separate property contributions made for its acquisition. Professor Kasner finds the transmutation statute inconsistent with the presumption statute for division of property at marriage dissolution. He would provide expressly that the transmutation statute does not override the presumptions that operate in a division of the property at dissolution. Professor Goda disagrees; he would first test the title form against the presumption that the property is community and, if the presumption sticks, would then apply the transmutation test to see whether the property is really community or has in fact been transmuted to separate property.

It is the staff's belief that the property division statutes are intended to be self-sufficient--they grew up separately from and parallel to the transmutation statutes. In effect, the property division statutes are a special form of transmutation statute that prevails over the somewhat different but analogous standards of the general transmutation statute. The specific prevails over the general, and in the property division context the special property division rules for property held in joint tenancy form should prevail over the general transmutation rules.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

FAMILY LAW

Surviving Ex-Spouse Is Joint Tenant Where Property Hasn't Been Divided

Cite as 92 Daily Journal D.A.R. 260

In re the Marriage of JOYCE J.
and ROBERT W. HILKE

JANE MUELLER, Administrator of
the Estate of JOYCE J. HILKE,
Deceased,
Petitioner-Respondent,
v.
ROBERT W. HILKE,
Appellant.

2d Civil No. B056544
Super.Ct.No. 175181

Santa Barbara County
California Court of Appeal
Second Appellate District
Division Six
Filed January 7, 1992

Robert Hilke appeals from a marital dissolution order specifying that a family residence, acquired during the marriage and held in joint tenancy at the time of his wife's death, was a divisible community property asset. (Civ Code, § 4800.1.)[1] We reverse and hold that the filing for dissolution of marriage and a bifurcated judgment on marriage status only, with a reservation of jurisdiction of property issues, does not defeat a joint tenancy survivorship interest.

Robert Hilke and Joyce Hilke purchased a residence in 1969, taking title as "husband and wife, as joint tenants." On January 27, 1989, wife filed a petition to dissolve the 33 year, 11 month marriage. The parties stipulated to an October 12, 1989 order which bifurcated the proceeding, terminated their marital status, and reserved jurisdiction over all other issues.

Before any of the property issues were adjudicated, wife died. Thereafter, the administrator of wife's estate substituted into the case. (Code Civ. Proc., § 385; (Kinsler v. Superior Court (1981) 121 Cal.App.3d 808, 812.)

The matter proceeded to trial based on a stipulation "[t]here had been no change in the title to the subject real property between the date it was acquired in 1969 and the date of Mrs. Hilke's death. . . ." The trial court found it had "retained jurisdiction to decide all the real property issues that could have been decided" when it dissolved the marriage. Relying on Kinsler v. Superior Court, supra, and section 4800.1, it found the residence was community property. The parties were ordered to sell the property and divide the net sale proceeds. Distribution of the sale proceeds was stayed pending husband's appeal.

This case presents a troublesome aspect of family law. Here, the common law presumption regarding form of title clashes with the statutory presumption that property acquired during the marriage is community property. The problem is exacerbated when marital property is held in joint tenancy because ". . . a community estate and a joint tenancy estate cannot exist at the same time in the same property." (Schindler v. Schindler (1954) 126 Cal.App.2d 597, 601.)

Prior to 1966, family law courts characterized property based on form of title and treated joint tenancy interests as separate property. "Thus a residence purchased with community funds, but held by a husband and wife as joint tenants, was presumed

to be separate property in which each spouse had a half interest. [Citation.] [¶] The presumption arising from the form of title created problems upon divorce or separation when title to the parties' residence was held in joint tenancy." (In re Marriage of Lucas (1980) 27 Cal.3d 808, 813.)

In 1965 the Legislature enacted section 164 (later recodified as section 5110) to remedy the problem. A family residence acquired during the marriage was treated as community property for dissolution purposes even if title was held in joint tenancy. This evidentiary presumption worked well, so long as neither spouse died before property issues were adjudicated.

Section 4800.1 was enacted in 1986 to supplant section 5110 and "provide uniformly and consistently for the standard of proof in establishing the character of property acquired by spouses during marriage. . . ." (§ 4800.1, subd.(a)(1).) It expands the community property presumption so that all property acquired ". . . during the marriage in "joint form," including joint tenancy is community property for the purpose of property division on dissolution of marriage or legal separation." (1 Markey, Cal. Family Law Practice & Procedure (1991) § 5.02[2][a], p. 5-20.)

Unfortunately section 4800.1 falls short of its mark if marital property is held in joint tenancy and a spouse dies before the property issues are adjudicated. "[O]n the death of a spouse, that same property is presumptively in fact held as joint tenancy, thus descending in toto to the surviving spouse by right of survivorship absent sufficient rebuttal; and this is so even if a dissolution action had been pending (but not yet reduced to judgment) before the death. [Citation.]" (Hogoboom & King, Cal. Practice Guide, Family Law (Rutter, 1991) § 8:14.2, p. 8-5.)

In Estate of Blair (1988) 199 Cal.App.3d 161, the court recognized that the interplay between joint tenancy survivorship and section 4800.1 can cause mischief. This is because the joint tenancy right of survivorship controls the disposition of property if a spouse dies during the dissolution action.

"An untimely death results in a windfall to the surviving spouse, a result neither party presumably intends or anticipates. This unfairness occurs in the context of a chameleon-like community property presumption which appears upon the filing of a dissolution action, disappears upon death, and potentially reappears upon intestate succession. Citation.] Such a result is not only contrary to the certainty which should be associated with legal process, but contravenes the policy considerations which form the basis of family law matters." (Id., 199 Cal.App.3d at p. 169.)

Since husband and wife took title to the residence as joint tenants, husband ". . . establishe[d] a prima facie case that the property [was] in fact held in joint tenancy." (Schindler v. Schindler, supra, 126 Cal.App.2d at p. 601.) The administrator had to show, by clear and convincing evidence, that the joint tenancy deed was not what it purported to be. (Evid. Code, § 662; In re Marriage of Weaver (1990) 224 Cal.App.3d 478, 486-487.) She failed to do so. In the absence of rebutting evidence, the joint tenancy survivorship presumption prevails. (In re Marriage of Wall (1973) 30 Cal.App.3d 1042, 1047.)

In dicta, the court in Estate of Blair recommended that a spouse seeking a marital dissolution unilaterally sever the joint tenancy to preserve his or her community property interest. (Id., 199 Cal.App.3d at pp. 168-169; see § 683.2; 4 Witkin, Summary of Cal. Law (9th ed. 1988) Real Property, § 283, pp. 481-482.) In the instant case, wife took no steps to sever the joint tenancy.

Alternatively, the administrator could have shown a transmutation. "However, on or after January 1, 1985 such a transmutation could only be proven by an express written declaration 'made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.' (Civ. Code, §5110.730, subd. (a).) . . . . [T]his statutory change effectively imposed a special statute of frauds requirement on the transmutation of marital property [citation] . . . . " (In re Marriage of Weaver, supra, 224 Cal.App.3d at pp. 484-485; see also Estate of MacDonald (1990) 51 Cal.3d 262.)

Section 5110.730 has been strictly construed to prohibit implied or unintended transmutations. For example, evidence that a spouse executed an unrecorded testamentary instrument will not transmute property. (§ 5110.740; Estate of England (1991) 233 Cal.App.3d 1, 5.) Likewise, a spouse's pro forma signature consenting to the creation of an IRA account naming the children as beneficiaries is insufficient. (Estate of MacDonald, supra, 51 Cal.3d at pp. 268-273.)

We reject the administrator's argument that husband's verified pleading, filed prior to wife's death, implicitly waived his joint tenancy survivorship interest. Estate of Blair, supra, indicates that pleadings and deposition testimony will not result in a de facto transmutation. (Id., 199 Cal.App.3d at p. 168.)

It is undisputed that the trial court reserved jurisdiction to decide property issues prior to wife's death. Kinsler v. Superior Court, supra, however, does not stand for the proposition that a reservation of jurisdiction defeats a joint tenant's right of survivorship. Wife's community property claims were

not adjudicated during her lifetime. (Cf. In re Marriage of Shayman (1973) 35 Cal.App.3d 648, 651.) Her death intervened before section 4800.1 could be applied.

The reasoning of Blair is persuasive and controls here. Regardless of whether community property claims are adjudicated in a family law court or probate proceeding, the same joint tenancy survivorship rules apply. Section 4800.1 is an evidentiary presumption that has no legal effect until property issues are adjudicated. (5 Miller, Cal. Practice, Family Law Practice (3rd ed. 1990 supp.) § 1081, p. 31.)

As indicated, this case is troubling and the result we reach is, in all probability, contrary to the wishes of the decedent. "Our role, however, is only to decide this case. The concerns we have expressed are more properly addressed by the Legislature which can provide that the community property presumption under section 4800.1 applies to those cases in which a spouse holding joint tenancy property dies during the pendency of the dissolution proceeding." (Estate of Blair, supra, 199 Cal.App.3d at pp. 169-170.)

Until the Legislature amends section 4800.1, ". . . we cannot allow extraneous factors to erode the functioning of joint tenancy. The estate of joint tenancy is firmly embedded in centuries of real property law and in the California statute books. Its crucial element is the right of survivorship. . . ." (Tenhet v. Boswell (1976) 18 Cal.3d 150, 160.) The order and judgment is reversed. The parties shall bear their own costs on appeal.

YEGAN, J.

We concur:
STONE, P. J.
GILBERT, J.

Ronald C. Stevens, Judge
Superior Court County of Ventura
Robert O. Angle; Henderson & Angle, for Appellant.
Robert A. McFarland, for Respondent.

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1. All statutory references are to the Civil Code unless otherwise indicated. Civil Code section 4800.1 states in pertinent part: "(b) For the purpose of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, tenancy by the entirety, or as community property is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following: [¶] (1) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property. [¶] (2) Proof that the parties have made a written agreement that the property is separate property."

SANTA CLARA UNIVERSITY

SCHOOL OF LAW

Jan. 28, 1992

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Rd. Suite D-2
Palo Alto, CA 94303-4739

Dear Nat:

It has been a long time since I have written to you with a reply to a background study. When Prof. Jerry Kasner lent me a copy of his study, "Community Property in Joint Tenancy Form," I did not realize that I would get so interested. Jerry has written an excellent paper on the complex issues.

As I indicated a few years ago to you, I would personally prefer getting rid of joint tenancies between husbands and wives in California. I do realize the practical difficulties with such a policy change and so I shall deal simply with an interpretation of Jerry's study with regard to California's statute.

On p. 19 of his study, Prof. Kasner stated:

> However, it must be noted that the issues in MacDonald arose from an action, the execution of a consent form to a transfer of property at death, which does not on its face indicate the ownership of the property. A deed indicating title is in the name of husband and wife as joint tenants with right of survivorship does expressly declare the state of the title, if not the intent to transmute property. It could certainly be sufficient to meet the strict test in MacDonald.

Prof. Kasner is correct in his implication in the second sentence of the quotation that it is not "the intent to transmute property" that must be shown as such. It is clear that the majority in MacDonald eliminated any need for direct evidence of intent to transmute property.[1] By extension, I would argue that the express declaration is not directly of the intent to transmute property, although I realize that I may be making a

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1. "We are aware that section 5110.730(a), construed as we have construed it today, may preclude the finding of a transmutation in some cases, where some extrinsic evidence of an intent to transmute exists. But... it is just such reliance on extrinsic evidence for the proof of transmutations which the Legislature intended to eliminate in enacting the writing requirement of section 5110.730(a). In Re Estate of MacDonald, 272 CR 153 at 161.

SANTA CLARA, CALIFORNIA 95053

very fine distinction. Basically, the court is saying that a court need not look beyond the face of a proffered writing to determine whether its writer intended a transmutation.[2]

In the second sentence of the quotation above, Prof. Kasner also speaks of "the state of the title." I take it that his last sentence in the quotation means that "It" ["A deed indicating ... expressly ... the state of the title..."] "could certainly be sufficient to meet the strict test in MacDonald. I believe this is incorrect for three reasons:

1. The statute does not speak of the express declaration of the state of title but of the act of transmutation. It is true that the statute which was construed in California Trust Co. v. Bennett 33 Cal2d 694, CC 683, did indicate that there was a joint tenancy between husband and wife "when expressly declared in the transfer to be a joint tenancy..."[3] But that statute only demanded express declaration of the title, not of the change. 5110.730(a) does not say "A transmutation of real or personal property is not valid unless made in writing by an express declaration ... " [of title.] I believe that 5110.730(a) mandates "A transmutation of real or personal property is not valid unless made in writing by an express declaration ... " [of change of ownership.]

2. The majority in MacDonald states:[4]

> To remedy these problems the Legislature decided that proof of transmutation should henceforth be in writing... Following the approach elucidated in Bennett, we conclude that a writing signed by the adversely affected spouse is not an "express declaration" for the purposes of section 5110.730(a) unless it contains language which expressly states that the characterization or ownership is being changed.

   I believe that MacDonald follows Bennett not because Bennett demands express words of title but simply because Bennett illustrates an express declaration.[5] The express declaration demanded in MacDonald is not of the kind of change, e.g., joint tenancy, but of a change, that is of a transmutation, albeit "ambiguously." It seems to me that Justice Mosk simply carried this a step further by demanding "albeit impliedly, an express declaration of transmutation."[6]

3. Finally, if one interprets the express declaration mandated by 5110.730(a) as merely stating the nature of the title, when the title is that of joint tenancy and the title is expressly stated, then CC 4800.2 allowing reimbursement of

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2. MacDonald at p. 160, referring to CC 683 and Bennett.

3. MacDonald at p. 159.

4. At pp. 158 and 160.

5. Note that MacDonald at p. 160 states, "Unlike section 5110.730(a), however, section 683 explains what the express declaration it calls for must include." It may be inferred that 5110.730(a) demands more than a statement of title.

6. At pp. 161-62.

> separate property will be automatically overridden. This brings back the presumption of gift that so afflicted the issue of transfer of title. I cannot believe that the legislature attempted to override the reimbursement provisions of CC 4800.2 by enacting a form of 5110.730(a) which would disallow reimbursement by a simple change in title.
>
> The problem with which the legislature dealt was not just that of the problem of oral agreements transmuting property but that of implication. There are many spouses who trustingly transfer title but do not intend immediate gifts but rather ways of handling property at death. The California Law Revision Commission is quoted in MacDonald with regard to the problems of implication:
>
> > The Commission further observed that "the rule of easy transmutation has also generated extensive litigation in dissolution proceedings. It encourages a spouse, after the marriage has ended, to transform a passing comment into an 'agreement' or even to commit perjury by manufacturing an oral or implied transmutation."
>
> It seems to me that overriding the reimbursement provisions of CC 4800.2 by enacting a form of 5110.730(a) which would disallow reimbursement by a simple change in title is to extend the problem of implication of transmutation.

Thus, I am certainly in agreement with Prof. Kasner's statements about the need for new legislation,[7] although I think some clarification of his clarification is necessary:

> Legislative clarification is clearly desirable. The form it should take is less clear.

On the bottom of p. 23, Prof. Kasner proposes an addition to CC 5110.730 to take care of the problems of the interrelationships of that section and CC 4800.1 and 4800.2:

> Notwithstanding the foregoing provisions, if title to property is held in a form of ownership specified in Civil Code Sections 4800.1 or 4800.2, or in an account specified in Probate Code Section 5305, the rules and presumptions of those provisions will be fully applicable. Further, if title to real or personal property is held in joint tenancy in accordance with Civil Code Section 683, it shall pass by right of survivorship to a surviving joint tenant or joint tenants.

My difficulties with the suggestion in his first sentence are my surprised questions, "What if there really was a transmutation?" and, "Are there differences between 4800.1 and 4800.2 which would mandate different relationships to the transmutation statute." My difficulty with the suggestion in his second sentence is my surprised question, "What if there really was not a transmutation?" It seems to me that the suggested changes do not try to reconcile CC 5110.730 and CC 4800.1 and 4800.2 but rather simply separate them.

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7. Kasner at p. 23.

Taking MacDonald as a benchmark which is declarative of the law,[8] I would suggest reconciling the sections by the following language:

> Notwithstanding the foregoing provisions, if title is held in a form of ownership specified in Civil Code Sections ~~4800.1~~ the rules and presumptions of that provision must be applied first.[9] If there has been a transmutation under this section and if title to property is held in a form of ownership specified in Civil Code Section ~~or~~ 4800.2, this provision will be applicable.[10]
>
> Notwithstanding the foregoing provisions, if title to property is held ~~or~~ in an account specified in Probate Code Section 5305, the rules and presumptions of those provisions will be fully applicable.[11]
>
> Further, if title to real or personal property is held in joint tenancy in accordance with Civil Code Section 683, it shall pass by right of survivorship to a surviving joint tenant or joint tenants.[12]

Good luck with all of this!

Sincerely,

Paul J. Goda, S.J.

cc: Prof. Jerry Kasner

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8. I believe that this would avoid the problem of retroactivity except for the issue of CC 683 and taking at death.

9. I am not sure that I have this straight. Let me essay an interpretation. If there is a writing which rebuts the form of title under CC 4800.1, then it is not a joint tenancy but has been kept as separate property by the purported grantor. There would then be no issue of transmutation. If there is no writing which rebuts the form of title under CC 4800.1, then the presumed classification would be community property. This then raises the question as to whether there has been a transmutation or whether the case falls under CC 4800.2.

10. I think this is obvious -- let me sell you the Brooklyn Bridge. The implication is that if there has not been a transmutation under CC 5110.730, then 4800.2 would be applicable.

11. PrC 5305 seems to be fully self-contained.

12. I puzzled about this section. As a writer said some years ago, there is a hybrid form of community property with regard to joint tenancy. I suspect there is also a hybrid form of joint tenancy. But if the point of the legislative changes is to clarify, this seems to be the simplest way to handle the situation. I believe, however, that this might be a substantive change which could raise the issue of retroactivity. If there were no express declaration of transmutation into joint tenancy, after 1985 the grantor would have retained his or her separate property interest which would thus go to their devisees or heirs.

Matthew Bender

Matthew Bender
& Company, Inc.
[illegible] Webster Street
Post Office Box [illegible]
Oakland, CA 94604
415 [illegible]

February 20, 1992

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

Re: Study on Community Property in Joint Tenancy Form

Dear Mr. Sterling:

Our office has received a copy of the background study prepared by Prof. Jerry A. Kasner concerning community property held in joint tenancy form. As one of the family law writers in our division, I was particularly interested in the study and wanted to share with you some of the thoughts that came to mind after a preliminary review of the study:

1. Prof. Kasner has posed the possibility of creating a new title form for spouses, namely, "community property with the right of survivorship," or "survivorship marital property," to account for the desire of many spouses to include a right of survivorship in the title to property. Would the use of this form of title be tantamount to the creation of a common law tenancy by the entirety? It may not be, but care should be taken in creating a similar title because, of course, tenancy by the entirety is not recognized in California (although Civ. Code § 4800.1 refers to this title, presumably in connection with out-of-state property).

2. Some of the problems associated with joint tenancy usage by spouses could be alleviated by creating a rebuttable presumption for all purposes that property acquired by spouses during marriage in joint tenancy form is community property, unless the instrument of title states "and not as community property" or words substantially in that form. Prof. Kasner seems to have made a similar suggestion. Civ. Code § 4800.1 could be amended to accomplish this, and the community property presumption could be made to apply to all "joint form" acquisitions.

3. Some of the transmutation concerns raised by Prof. Kasner could be possibly alleviated by statutory clarification of whether the transmutation statutes that require a writing (Civ. Code §§ 5110.710-5110.740) are, or should be, subject to traditional "statute of frauds" exceptions, such as "part performance." One recent case held that the Uniform Premarital Agreement Act is a type of statute of frauds and subject to traditional exceptions [see Hall v. Hall (1990) 222 Cal. App. 3d 578, 587, 271 Cal. Rptr. 773]. It is certainly arguable, by analogy, that the same principle should apply to marital transmutations by agreement. If traditional contractual exceptions to the writing requirement are found to apply to marital transmutations, the concern over whether a joint tenancy deed not executed by the spouses amounts to an improper oral transmutation may not be a significant issue.

4. Whatever action is taken with respect to spousal titles, spouses should be able to continue to acquire property as true joint tenants or as tenants in common if they choose to do so. However, it may be useful to statutorily require all vendors of property over a certain value, and all real estate brokers and commercial lenders, to provide purchasers of real or personal property (such as motor vehicles) with a standardized explanation of the signficance of holding title in joint tenancy or tenancy in common, and to require the purchaser to execute and record a statement acknowledging receipt of this explanation as a condition of taking title in one of these forms. This, in addition to appending the words "and not as community property" to the language of the conveyance should facilitate ascertaining the true intent of the parties in holding title in some joint form other than as community property.

5. Finally, because of the importance of the form of title in California law and the historic usage of certain title forms, any creation of a new title, such as "community property with the right of survivorship," should only be made after receiving the broadest input possible from various segments of society. At least some attempt should be made to reach not only the legal community, but representatives of those very groups who have urged the use of joint tenancies by spouses, namely, the real estate and lending industries. Their cooperation will be needed in reforming the use of titles and it may be useful to seek input on this issue from representatives of their trade groups, if this is feasible.

I hope that these comments are of some benefit as you consider the many policy issues raised by Prof. Kasner's exhaustive study. Thank you for your consideration and the opportunity to comment.

Sincerely,

Jon E. Heywood, J.D.
Staff Writer

cc: Steve Revell
Robin Kojima

Fidelity National Title
INSURANCE COMPANY

Larry M. Kaminsky
Vice President
Assistant General Counsel

February 21, 1992

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

RE: Comments regarding Professor Kasner's Study:
"Community Property in Joint Tenancy Form.."

Dear Mr. Sterling,

Our subsection of the California Land Title Association's Forms and Practices Committee has reviewed the background study by Professor Kasner regarding the classification of marital property in California, "Community Property with Right of Survivorship."

Our committee feels that a new classification is unnecessary and unwarranted. Attached you will find comments by William A. O'Donnell, Vice President of Santa Clara Land Title Company, which reflects the concerns of the California Land Title Association.

The present forms of ownership do not contain any ambiguities as to the rights and obligations between husband and wife. The fact that certain member of the public or the legal community do not understand the law should not be the basis for creating a new classification, which, in our opinion, will only serve to create further confusion and will generate a massive amount of litigation between spouses, and will not do anything to preserve the integrity or viability of land titles in California.

Thank you for allowing us to comment on this study.

Sincerely,
FIDELITY NATIONAL TITLE INSURANCE COMPANY

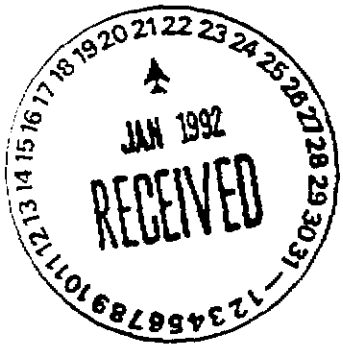
Larry M. Kaminsky
Vice President
Assistant General Counsel

2100 SOUTH EAST MAIN STREET, SUITE 400 • IRVINE, CALIFORNIA 92714 • TELEPHONE (714) 852-9770 (800) 421-8111

Santa Clara Land Title Company

701 MILLER ST. at TAYLOR • SAN JOSE, CA 95110 • (408) 288-7800 • FAX: (408) 275-0824

January 17, 1992



Mr. Larry Kaminsky
Fidelity National Title
2100 South East Main Street, Suite 400
Irvine, CA 92714

Re: Community Property with the right of survivorship

Dear Larry:

I am concerned about the California Law Revisions Commission's proposal concerning the creation of a new form of ownership which combines community property with joint tenancy to form community property with the right of survivorship. We are led to believe that the new form of ownership is necessary because the joint tenancy form of ownership is not understood by the public and title held in joint tenancy acts to transmutate ownership of the personal property used to purchase the real property without an expressed written agreement of the same. However, Professor Kasner's paper does not explain why the public understands the community property form of ownership better than joint tenancy or will understand a new community property with right of survivorship any better. His concerns with the transmutation of ownership has not been found to be a problem by the courts and is not resolved by the proposal.

Professor Kasner starts with the proposal that joint tenancy and community property can not co-exist. He cites cases from the '30's and '40's for the premise that absent a specific written agreement, the acceptance of ownership as a joint tenant can not waive community property interest. Not withstanding 160 years of acquiring title either as joint tenancy, as defined in Section 683, or Community Property, as defined in Section 687, Professor Kasner takes a position that a married couple can not transmutate a community property interest in personal property used to acquire real property held in joint tenancy without a specific written agreement or acknowledgement that they intend to hold title to the real property as joint tenants. He presumes that either one or both spouses acquire property without realizing or understanding how they hold title and thus do not knowingly agree that they are transmutating their community or separate property interest in the cash used to purchase the real property into a joint tenancy interest in the property.

He does not explain how a joint tenancy interest in a jointly held checking account can be transmutated into a community property or a tenant-in-common interest without the same type of agreement. Rather he focuses on real property held in joint tenancy without addressing what would be the same problem for property held as community property or as tenants-in-common between husband and wife.

Professor Kasner introduces the concept of community property with right of survivorshop by stating that even though most married couples hold title to real property as joint tenants, they do not understand the distinction between joint tenancy and community property forms of ownership and believe that their rights and interests in the property are more like community property than joint tenancy. I suggest that in these times of financial hardships and significant number of divorced and remarried couples, if a person realized that property held as community property is liable for the debts and obligations of their spouse, while separate property held either as tenants -in-common or joint tenancy is not, a significant number of married couples would continue to favor joint tenancy over community property.

If it is not broken, don't fix it with new, theoretical unproven ideas which will provide significant new areas of inquiry and testing by future litagation.

Yours,

William A. O'Donnell
Vice President
Legal & Underwritng Counsel

WAO/sc
BO1032

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

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102
(415) 561-8288

Law Revision Commission
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REPLY TO:

Robert E. Temmerman, Jr.
1550 S. Bascom Avenue,
Suite 240
Campbell, CA 95008
(408) 377-1788

February 25, 1992

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

Re: Community Property in Joint Tenancy Form: Since We Have It, Let's Recognize It

Dear Mr. Sterling:

On Wednesday, February 12, 1992, nine members of Team 2 met to discuss Professor Jerry A. Kasner's background study entitled "Community Property in Joint Tenancy Form: Since We Have It, Let's Recognize It."

Those members of Team 2 that participated in the five-hour discussion were: Thomas J. Barger, Esq., James A. Barringer, Esq., Arthur Bredenbeck, Esq., Elizabeth M. Eng, Esq., J. Robert Foster, Esq., David H. Hines, Esq., Frank A. Lowe, Esq., Robin G. Pulich, Esq., and myself. The discussion was lively and the exchange of opinions constructive.

Team 2 began its meeting identifying certain issues and goals that Professor Kasner raised in his background Study. Team 2 believes 2 believes that any proposed legislation should address the following:

1. Ease of transfer between spouses following death;

2. Obtain step-up in tax basis on "both halves" whenever possible;

3. Equal management and control by both spouses;

4. No avoidance of legitimate creditors at death;

5. Ability to partition;

6. Any effects proposed legislation would have on non-spousal joint tenancies or hybrid joint tenancies, i.e. both spouses and third parties;

7. Certainty;

8. Retroactivity;

9. Flexibility, i.e. change of estate plan without changing deeds of record;

10. Understandability.

Once Team 2 identified the issues and goals any legislation should address, it turned its attention to Professor Kasner's conclusions and addressed them one at a time.

A. **Creation and Termination of Joint Tenancies - Proposed Amendment to California Civil Code §5110.730.**

Team 2 agrees with Professor Kasner that the creation of joint tenancy title from community funds requires an express declaration of transmutation in writing signed by both spouses. Team 2 believes that clarity in the law after the *McDonald* case would be helpful and lend certainty to the transmutation statute. Accordingly, Team 2 supports the proposed amendment to California Civil Code §5110.730 as set forth on Page 27 of the consultant's study.

Team 2 believes that with the proposed amendment to the Civil Code affirming the need for an express written declaration of transmutation California Law would then meet the 10 goals set forth above as follows:

1. There is no requirement for probate on community property passing between spouses upon the death of either of them. See Probate Code §13540.

2. Community property receives a step-up in tax basis on both halves when it passes to a surviving spouse under federal law.

3. Community property statutes provides for equal management and control by both spouses.

4. Pursuant to existing statutory law (Probate Code §11440 through §11446 and §13550 through §13554) unsecured creditors of a deceased spouse are generally permitted to reach all of the community property, whether or not there is a probate administration.

5. While community property is not subject to legal partition it may be divided at any relevant time such as at the point of marital dissolution, at death, or in the event that the parties wish to transmute it to a different form of property.

6. Clarification of the law of transmutation would affect only spousal rights in community property and thus would not have any affect on nonspousal joint tenancies or hybrid joint tenancies, or joint tenancies created with separate property.

7. Joint tenancies would not come into effect unless they were intended by the parties and community property would remain unless there was an express intent of the parties to make the change. This would lend certainty to current law.

8. The *McDonald* case appears to be retroactive to all the reported transfers made since January 1, 1985 when the statutory requirement for a written transmutation came into effect. Thus the proposed statutory clarification would apply to purported transfers of community property into joint tenancy form made after January 1, 1985 forward.

9. The parties would have great flexibility in dealing with community property. The default provision is that community property goes to the surviving spouse without the necessity of probate administration. However, either spouse would have the right to dispose of by will their community property interest in any property. Thus, an estate plan could be changed simply and easily; however, there would be no requirement to execute wills or other testamentary documents to have the property transferred to a surviving spouse as most people desire.

10. The law of community property is clear at the moment to most practitioners who study it. Team 2 believes that the best we could hope for in proposed legislation is not to confuse practitioners and the public. By creating additional forms of

property titling or by having another change in California spousal property law, the public would only be further confused.

B. **Community Property with Right of Survivorship.**

After significant discussion, Team 2 voted to oppose any new legislation creating a separate form of title designated "community property with right of survivorship." Team 2 believes that such a separate form of title is unnecessary and will do nothing to cure the "perceived problem". Professor Kasner on Page 40 indicates the main reason for adopting the concept of community property with the right of survivorship is not to cure a defect in the law. Rather it is to cure a lack of understanding in a group of professionals and non professionals who advocate the use of joint tenancies without understanding the consequences. Adding another form of title does nothing to solve the community practice and would require not only educating the practitioners and the public as to what current law provides but also educating them as to the uses and abuses of a new form of property holding. Professor Kasner makes the valid point when he states that an education process would have to be undertaken to acquaint various professional groups with any new form of title when they really did not understand what was wrong with the old form of title.

Team 2 believes that Professor Kasner has made a substantial contribution to an understanding of existing law in his background study. Team 2 would support clarity in the law after the *McDonald* case to provide certainty to the transmutation statute. However, Team 2 would oppose any legislation creating a separate form of title designated "community property with right of survivorship".

The Executive Committee will be meeting on Saturday, February 29, 1992 in Los Angeles. After that meeting, I will be able to report whether the Executive Committee of the State Bar of California has endorsed Team 2's position.

Sincerely,

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

cc: Team 2 Members
William V. Schmidt, Chair
Thomas J. Stikker, LRC Liaison
Monica Dell'Osso, LRC Liaison

COMMUNITY PROPERTY IN JOINT TENANCY FORM:

Since We Have It, Lets Recognize It

by

Jerry A. Kasner
Professor of Law
University of Santa Clara

DECEMBER 1991

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

COMMUNITY PROPERTY IN JOINT TENANCY FORM - SINCE WE HAVE IT, LETS RECOGNIZE IT

I. INTRODUCTION

The status of real and personal property held in the title "joint tenants with right of survivorship" has plagued all of the community property states for years. Texas seemed to avoid the problem by holding that joint tenancy titles for community assets were unconstitutional. While this seemed like a good idea to many, they have abandoned it, and now have a right of survivorship for community property by agreement of the spouses. Nevada agrees there is nothing wrong with holding community property in a title which confers a right of survivorship, as an alternative to a true joint tenancy title. Washington and Idaho have reached the same result through a different approach. New Mexico has adopted a statutory presumption that joint tenancies between husband and wife are community property. California, on the other hand, has not solved the problem, only made it more complicated by adopting legislation which in effect recognizes that community property can be held in joint tenancy form for divorce purposes, but not for any other purpose.

The starting point for a discussion of the conflict between joint tenancy titles and community property rights is Siberell v. Siberell, 214 Cal. 767, 7 P. 2d 1003 (1932),which not only established the rule that

joint tenancy title holding is inconsistent with community ownership, but also that the mere fact title is taken in the names 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 as a joint tenancy with all of the characteristics of such an estate." The court concluded: "from the very nature of the estate, as between husband and wife, a community estate and a joint tenancy cannot exist at the same time in the same property."

As will be developed hereafter, it is difficult to argue with that part of the Siberell opinion which holds joint tenancy title and community property rights are inconsistent, at least under present law. The Supreme Court clearly said so again in Watson v. Peyton, 10 Cal.2d 156, 73 P.2d 906 (1937); and other decisions. What is a little harder to understand is how the mere taking of title in joint tenancy form, without specific action or agreement of one spouse, is sufficient to deprive that spouse of his or her community property rights, to the extent they are inconsistent with joint tenancy rights. The answer is - title alone is not sufficient.

In Siberell, the court also concluded that the parties in effect had a "binding agreement" that the joint tenancy property would not thereafter be treated

as community, but that this rule applied only "in the absence of any evidence of an intent to the contrary." In Watson, the court noted that the wife, who was claiming the community interest, "requested in writing the execution of the joint tenancy deed...." In Tomaier v. Tomaier, 23 Cal. 2d 754, 146 P. 2d 904 (1944), the court specifically held that evidence could be admitted to establish that real property tenancy was community property even though the deed would ordinarily create a common law estate, such as joint tenancy. Also see Trimble v. Trimble, 219 Cal. 340, 26 P. 2d 477 (1933).

However, while the cases indicate that a transmutation of community property to joint tenancy requires a consent or agreement of both spouses, that requirement has not been emphasized in many cases. Further, all that is necessary is that the spouses understand the form of title is joint tenancy, not that they understand this changes their property rights in a material way. The courts seem to believe that a presumption in favor of titles is more important than the fact the parties may not fully comprehend the nature of the title. This is forcefully illustrated by the Supreme Court decision in Marriage of Lucas, 27 Cal. 3d 808, 166 Cal. Rptr. 853, 614 P. 2d 285, (1980), discussed subsequently.

This problem has been compounded by legislative recognition in California Civil Code Section 4800.1 that it is inherently unfair to deprive spouses of community

property rights in joint tenancy property where a marital dissolution is involved. In addition, the legislature has decided as a policy matter to recognize community property rights in various forms of joint bank accounts in California Probate Code Section 5305. The result is de facto recognition of community property rights in joint tenancy property for some purposes, but not others.

Finally, the supremacy of joint tenancy titles is severely challenged by the adoption in 1984 of California Civil Code Section 5110.730, requiring an express declaration in writing to transmute property. As interpreted by the California Supreme Court in MacDonald v. MacDonald, 51 Cal. 3d 262, 272 Cal. Rptr. 153, 794 P. 2d 911, this statute means what it says, and the writing must be specific. Will this override the opinion in Siberell that a joint tenancy title is "tantamount" to a binding transmutation agreement?

It has been estimated that 85% of the real property held by married couples in California is in joint tenancy. See Verrall and Bird, California Community Property, Cases and Materials, Fifth edition, West Publishing Co., at page 84, citing Bayse, Joint Tenancy, a Reappraisal, 30 Cal. St. Bar J 504 (1955); and Sterling, Joint Tenancy and Community Property in California, 14 Pac. L.J. 927 (1983). It should be noted that this estimate is based on surveys mostly taken in

the period from roughly 1950 through 1970. While increased sophistication in estate planning and real property practice has probably led to more use of community property titles, the percentage of joint tenancy ownership between spouses continues to be high.

Why is joint tenancy title so popular? This question must be considered in connection with any proposal to alter the statutes defining such ownership rights. California courts have often alluded to the use of joint tenancy as a "convenient" form of title, and in fact there appear to be a number of people involved in real estate activities, including some lawyers, who believe there is a special form of title called "joint tenancy for convenience only." Implicit in this thinking is the idea that the parties can have the best of both worlds - the convenience of joint tenancy insofar as the rights or survivorship and possibly creditors rights are involved, and community property rights insofar as their relationship with each other is concerned, and for tax purposes. In fact, the legislative action taken in connection with divorce is based on just such an idea - spouses may use the joint tenancy form of title for whatever advantages it has as a form of title, but the law will protect the spouses' community property rights in the event of a divorce.

Is it really possible to have it both ways? To answer that question, consideration must be given to the circumstances under which the distinction between joint

tenancy and community property becomes significant. The most obvious, and the one that seems to result in the most litigation, is the right of survivorship. This right clearly is at odds with the basic community property rule that each spouse may make a testamentary disposition of his or her interest in community property. If both spouses, with full knowledge of the consequences, agree to such a right of survivorship, they are in effect exercising their respective rights to dispose of their respective interests in the community, and this is probably no different than any other form of nonprobate transfer. However, since the joint tenancy title may not require the action of both spouses, this is not always the case.

Management rights are not the same in community property and joint tenancy, although in the case of real estate, they are very close. Since both spouses are coowners of joint tenancy property, both will have to participate in most actions relating to it, including sales, leases, and encumbrances. The rules are essentially the same for community real property under California Civil Code Section 5127. However, in the case of personal property, such as securities, either spouse can normally deal with such community property without the consent of the other under California Civil Code Section 5125, which would not apply to a so-called "true" joint tenancy, i.e., one in which each spouse

owns an undivided one-half interest. Note the special rules here for what are called "revocable" joint tenancies, such as most bank accounts, where either joint owner can deal with the property without the consent of the other.

The right to partition is clearly available in the case of joint tenancy property, but not community property. This distinction may not be of great concern, since an action by one spouse to partition property owned with the other generally indicates a marriage in real trouble, and the special rules for divorce will then apply. However, California Civil Code Sections 5125 and 5127 do permit spouses to assert management rights over community property against each other, even in an adversary setting, without necessarily commencing a proceeding to dissolve the marriage. One joint tenant can encumber his or her interest in joint tenancy property without the consent of the other. Schoenfeld v. Norberg, 11 Cal. App. 3d 755, 90 Cal. Rptr. 47 (1970). Spouses have no such right in the case of community property. On the other hand, since each spouse's interest in a joint tenancy is his or her separate property, the undivided interest of that spouse is not liable for debts of the other spouse except possibly for the necessities of life under California Civil Code Section 5120.130. Community property is generally subject to the debts of either spouse under California Civil Code Section 5120.110.

All of the foregoing indicates there are at least two major areas of concern involving the joint tenancy/community property enigma which should be resolved:

(1) Whether the creation of a joint tenancy with community funds or assets, or for that matter, with the separate funds or assets of either party, requires an express document of transmutation, and to what extent it must be proved that each spouse joined in, consented to, or accepted that document. Until this issue is resolved, the validity of many joint tenancy titles created after 1985 is uncertain.

(2) Whether it is time to recognize a hybrid form of property ownership in which spouses will enjoy community property rights while both are alive, but which will provide for a right of survivorship If so, what will be the impact on creditors and what will be the tax consequences? Should this go as far as California Civil Code Section 4800.1, and in effect convert all interspousal joint tenancies to community property?

II. CREATION OF A JOINT tENANCY AS A TRANSMUTATION

Starting with the assumption that Siberell is still the law of California to the extent it holds that the property interests of joint tenants are fundamentally different than those of spouses in community property, how is the "transmutation" which is required to reach

this result to be established? It seems the focus in California has frequently been the protection of titles, and what is really involved here is a presumption. In Marriage of Lucas, the California Supreme Court found that the use of the separate funds of one spouse to acquire property in joint tenancy form was in effect a "gift" from one spouse to the other. the court did not find that the donor spouse intended to make a gift, or even had any real idea of what rights she had in the property. Instead, the opinion focuses on the importance of protecting titles, and finds that there is strong public policy supporting a presumption that such titles reflect the rights of the parties.

It is difficult for this writer to see what public policy is served by protecting joint tenancy titles when we are dealing with disputes between the joint tenants themselves. Title protection is really intended for third parties, such as creditors, purchasers, and encumberers, in dealing with the property. It is particularly difficult to see how this policy is appropriate when the joint tenants are in a close confidential relationship and not dealing at arms' length with each other. The Lucas decision seems at odds with statutory and case law protecting spouses who unknowingly enter into transactions in which their property rights are impaired.

Case law indicates that California, Nevada, and New Mexico are community property states which follow the view that the mere use of a joint tenancy title, without evidence one or both spouses agreed to it or even understood what it meant, is sufficient to "transmute" their community or separate contributions into a joint tenancy form. Estate of Fletcher v. Jackson, 94 N.M. 572, 613 P.2d 714 (1980); Peters v. Peters, 92 Nev. 687, 557 P.2d 713 (1976). However, it is important to note that in the Fletcher case, an attempt was being made to overturn the survivorship provision so that children of the decedent from a prior marriage could claim as community property. The evidence seemed to clearly indicate each spouse was aware of the survivorship rights of the other spouse. This put the court in the difficult position of either applying a strict transmutation rule, in which case the children would take contrary to the intent of their parent, or, as it chose to do, apply a New Mexico statute creating a presumption that the joint tenancy title would control insofar as third parties were concerned. And it is particularly important to note that New Mexico has adopted a statutory presumption that a joint tenancy between husband and wife is community property, as will be discussed subsequently.

Most of the community property/joint tenancy cases outside of marital dissolutions involve the same issue as the New Mexico case, i.e., enforcement of the right

of survivorship. And the facts of many cases, regardless of the issues, indicate that the only reason the spouses agreed to or accepted the joint tenancy title was the right of survivorship. In Jenkins v. Jenkins, 147 Cal. App 2d 527, 305 P. 2d 289 (1957), the spouses, who purchased their home with community funds, were urged by friends and an escrow clerk to use a joint tenancy title. They had no idea what it meant, or what their community property rights were, or that there was any difference between community property and joint tenancy. The title was disregarded by the court.

This point is forcefully brought home in the Lucas case. The facts indicate that the only discussions of the joint tenancy title related to the fact that the title would pass to the husband at the death of the wife, and that joint tenancy was more favorable from a tax standpoint because the husband was a veteran. The wife, who contributed the separate funds, did not intend to make a gift and did not know the legal significance of the title. In holding the wife was bound by the title, the Supreme Court noted that the presumption arising from the form of title is to be distinguished from the general community property presumption because the joint tenancy presumption arises from "the affirmative act of specifying a form of ownership." While the facts in Lucas tend to show Mrs. Lucas was aware of the form of ownership, there is no evidence she

understood it, and, although the issue was not raised, may have agreed to it on the basis of negligent misrepresentation or at least, mistake. It appears Lucas raises the presumption of title to one that is virtually irrebuttable.

Despite the strong language in the Lucas opinion focusing on protection of titles, the California Supreme Court long ago held that a mere recital in a deed that the property was separate was insufficient to overcome the community presumption. Tolman v. Smith, 85 Cal. 280, 24 P. 743 (1890). In that case, the husband informed the grantor of the deed that he was purchasing the property with separate funds of the wife, and that fact was recited in the deed. Nevertheless, the court upheld the community presumption.

In a strange way, the decision in Lucas reaches a similar result as the Tolman case, but the reasoning is entirely different. In Lucas, the court held the form of title, joint tenancy, created a title presumption that was sufficient to overcome the evidence that Mrs. Lucas never intended to make a gift, and had no idea the title would change her property rights. Having reached that conclusion, the court applied the provisions of California Civil Code Section 5110 in effect at that time to conclude the property was presumed to be community. Thus, unlike Tolman, Lucas relied on the title presumption, then used a statutory presumption that in effect overcame the title presumption.

The court in Lucas does at least pay lip service to several California cases holding that the joint tenancy title could be overcome by evidence of an agreement or understanding between the spouses that the form of title was not reflective of the true status of the property. It cited Tomaier for this proposition, but did not reflect the fact that Tomaier held the taking of title in joint tenancy is not a binding transmutation; rather it raises a presumption that the parties intended a "true" joint tenancy, which presumption could be overcome by other evidence.

After Tomaier, several California decisions, such as Jenkins, followed the presumption approach and found an intention, agreement or understanding that the parties did not intend a true joint tenancy. Frequently cited is Lovetro v. Steers, 234 Cal. App. 2d 491, 44 Cal. Rptr. 604 (1965), which was neither a divorce nor death case. A promissory note had been executed by defendants in favor of plaintiff husband and wife as joint tenants. Subsequently, plaintiff husband released the defendants from part of their obligation. If the note was community property, the husband as agent of the community had the power to reduce the obligation of defendants. If the note was true joint tenancy, he did not. The court found the note was community property. Citing several cases, including Socol v. King, 36 Cal. 2d 342, 223 P. 2d 627 (1950), the court concluded that

in the event there is either an agreement or understanding that the ownership of the property is other than as indicated by the form of title, the presumption of true joint tenancy is overcome. The court also cited Jenkins and Blankenship v. Blankenship, 212 Cal. App. 2d 736, 28 Cal. Rptr. 176 (1963).

In Blankenship, the husband testified he did not know what either joint tenancy or community property was, had never discussed the title with anyone, including his wife, and did not even know that was the form of title until so advised by an attorney. There was substantial evidence that the parties viewed the property as "theirs". Referring to the facts as indicating an understanding that the property was marital property, the court, noting it is "common knowledge that this form of ownership is adopted in order to provide for automatic and inexpensive survivorship at death", held the property was community.

The myriad cases on this issue developed several working rules. The undisclosed intent of one spouse to claim community rights is not evidence of an agreement or understanding between the spouses. Gudelj v. Gudelj, 41 Cal. 2d 202, 259 P.2d 656 (1953); Estate of Levine, 125 Cal. App. 3d 701, 178 Cal. Rptr. 275 (1981). In Palazuelos v. Palazuelos, 103 Cal. App .2d 826, 230 P. 2d 431 (1951), the court did permit evidence that a wife believed the property was community, although she left all decisions on title and investment to her husband.

If only one spouse is ignorant of the consequences of the form of title, but actually participates in the structuring of the title, that spouse may not be able to claim relief. Schindler v. Schindler, 126 Cal. App. 2d 597, 272 P. 2d 566 (1954). This was of course a key element in the Lucas decision. Since the joint tenancy title creates a presumption, it requires a preponderance of evidence to overcome it. Hansford v. Lassar, 53 Cal. App. 3rd 364, 125 Cal. Rptr. 804 (1975); Estate of Casella, 256 Cal. App. 2d 312, 64 Cal. Rptr. 289 (1967); Machedo v. Machedo, 58 Cal. 2d 501, 25 Cal. Rptr. 87, 375 P. 2d 55 (1962).

However, despite the title presumption, evidence that one spouse did not participate in the title decision may be used to rebut the form of title. In Guerin v. Guerin, 152 Cal. App. 2d 696, 313 P. 2d 902 (1957), the court said:

"If one spouse transfers community property into joint tenancy without the consent or participation of the other, the nonparticipating spouse may show the absence of his or her intent to accept such conveyance, but if the latter consents to or participates in the conveyance by any act in writing, the legal effect of such conveyance in joint tenancy may be rebutted only by sufficient proof of a mutual understanding that the property was not to be held in accordance with the presumption arising from the instrument. (Schindler v.

Schindler, supra, p. 604.) (emphasis added)."

Note the court imposed requirement of a consent or agreement of the spouses in writing to validate the title, and consider the present requirement of a writing to establish any transmutation of property from community to separate. The title presumption did not prevail in this case.

The adoption of the new California transmutation statute, California Civil Code Section 5110.730, was made effective for transfers after January 1, 1985, and clearly requires a written declaration for a transmutation. Further, California Civil Code Section 4800.1 presumes property held in joint tenancy is community property for purposes of marital dissolution absent a clear statement that it is not community property in a deed, evidence of title, or a written agreement. California Civil Code Section 4800.2 grants a right of reimbursement for separate contributions to any community property upon marital dissolution absent a written waiver or agreement to the contrary. California Probate Code Section 5305, creating a community property presumption for joint accounts, also indicates the presumption can be overcome by evidence of written agreements of the parties. Thus it appears that the creation of a "true" joint tenancy between a husband and wife has always required a written consent or agreement, either by case decision or statute.

Note that California Civil Code Section 683(a) only requires that the transferor specifies the joint tenancy title, in which case a third person who conveys the property could create the title without the written consent or agreement of the spouses. However, that section also provides that if the spouses hold title to property as community, they can create a joint tenancy when the property is "expressly declared in the transfer to be a joint tenancy." Does this mean if husband and wife invest community cash in the purchase of real property, there is only a true joint tenancy if they expressly agree to the transfer from community to that form of title?

Is the question of joint tenancy vs. community property based on the finding of a transmutation, or on a test of presumptions, or both? although the presumption of title arises frequently in cases, all of the present and past authorities discussed above indicate that the joint tenancy is a consensual arrangement that requires the written agreement or consent of both spouses. In Reppy and Samuel, Community Property in the United States, p. 3-17 (Third edition, 1991) the authors are of the opinion that the cases which seem to uphold the transmutation of community property to joint tenancy by the mere use of that form of title were based on the theory that the parties had orally agreed to that form of title, and prior to 1985, such oral agreements were recognized. However, many of

cases cited above appear to totally ignore any evidence of an agreement, written or oral, to create a joint tenancy. For example, they conclude that a "secret" intent or understanding of one spouse that the property is still community is insufficient. If so, there was clearly no "agreement" between the parties to create the joint tenancy in first place. Lucas attempts to work around that point by arguing that the declaration of form of title is evidence of an agreement. That leads us away from issues of transmutation to issues of presumptions. In effect, all of the cases from Siberell through Lucas seem to argue that taking title in joint tenancy raises a presumption of a transmutation which must in turn raise a presumption of an agreement between the spouses. When such agreements could be made orally, this may have been supportable, although the contrary language in Guerin, Schindler, and other cases already discussed is significant. Although the cases do not for the most part discuss transmutation, they do frequently turn on whether or not the spouse claiming the community interest was at least aware of the form of title. In other words, if both spouses knew the title was in joint tenancy, they in effect orally agreed to the transmutation necessary to change their property rights, even if one or both were not really aware of all of the ramifications of that title.

Will this scenario play out under California Civil Code Section 5110.730, as interpreted by the California Supreme Court in MacDonald? The statute recognizes a transmutation only if evidenced by an express declaration in writing joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected. Assume the title to property is taken by the spouses as joint tenants, and both spouses are aware of that fact. Is a title an express declaration in writing? In MacDonald,, which involved a consent to a transfer at death of funds in an individual retirement account, the court indicated that the requirement of an express declaration will be strictly enforced. The majority opinion indicates that words of gift would be sufficient. A concurring opinion suggests that the word "transmutation" should be used. It would appear the recitation of title alone does not meet this requirement.

However, it must be noted that the issues in MacDonald arose from an action, the execution of a consent form to a transfer of property at death, which does not on its face indicate the ownership of the property. A deed indicating title is in the name of husband and wife as joint tenants with right of survivorship does expressly declare the state of the title, if not the intent to transmute property. It could certainly be sufficient to meet the strict test in MacDonald.

The second requirement, that the express written declaration by joined in, consented to, or accepted by the spouse adversely affected, is also troublesome. If the joint tenancy property is acquired with community funds, it is difficult to see who is adversely affected. Each still owns an undivided one-half of the property, and various other rights, such as to partition, are shared equally. The right of survivorship could hardly be construed to favor one spouse, since there is no way of knowing which will survive. Of course, if either spouse contributes separate funds to the acquisition, this will become a significant factor in establishing an adverse interest.

If husband and wife both execute escrow instructions calling for a joint tenancy title, or sign account cards or similar documents for financial institutions directing the use of joint tenancy title, a strong case can be made that they are joining in the creation of the title. If, however, they do not both sign some written direction as to title, and it nevertheless is placed in joint tenancy, can they have been held to either have consented to or accepted that form of title, without signing anything? It appears that this is possible, on the theory the spouse or spouses consented to or accepted the transmutation, although it would seem to bring oral evidence back into the transmutation picture, something that the 1984

legislation was intended to eliminate. For example, it may be necessary to prove the spouses actually discussed the form of title, or read the deed.

If the express written declaration of transmutation had been required when Lucas was decided, would the result in that case have been different? There is no evidence Mrs. Lucas entered into any express declaration, and there is no evidence that Mr. and Mrs. Lucas had any agreement as to the status of the property, oral or written. This does not mean such a declaration did not exist. It simply was not relevant at that time. Since Mrs. Lucas did transfer separate funds towards the downpayment on the house, there is a strong probability she signed something. Was it an express declaration? The facts clearly indicate she knew the title was in the form of joint tenancy. Does this mean she accepted the deed? Is the recital in the deed sufficient evidence of transmutation? In MacDonald, the majority opinion, as noted above, seems to consider a transfer of title sufficient.

The result of all this is that the new transmutation statute raises many issues as to the validity of joint tenancy titles between husband and wife. Further, it is clearly inconsistent with California Civil Code Sections 4800.1 and 4800.2. To review, Section 4800.1 presumes for marital dissolution purposes that property held in any form of joint ownership between husband and wife is community

property, and this presumption can only be overcome by an express writing to the contrary. This clearly conflicts with California Civil Code Section 5110.730, as it is being interpreted. Section 4800.2 creates a right or reimbursement for a spouse who made separate contributions to the acquisition of the property, again for marital dissolution purposes. It is not clearly inconsistent with the transmutation statute, but does create a right independent of property rights which could be created through a transmutation.

This inconsistency can be explained away in several ways. For example, if the joint form of ownership did not meet the requirements of the transmutation statute to begin with, then there is no jointly owned property covered by Section 4800.1. Also, the issue is really moot where community property sources for the joint tenancy are concerned, since the practical effect of Section 4800.1 is to put the ownership back in community form. Where separate contributions to the joint tenancy are concerned, the lack of an effective transmutation to create the title raises an argument that the property is not held jointly, and does not come under Section 4800.1, In other words,the joint title is meaningless. If this is true, it follows Section 4800.2 does not apply.

The problem also arises in the case of joint bank accounts which are the subject of California Probate

Code Section 5305. This statute also creates a presumption that funds deposited in bank accounts which identify the spouses as co-owners are presumptively community property, but provides a tracing of separate contributions, which remain the separate property of the contributing spouse. In this case, however, a written agreement of the spouses expressing a clear intent that the sums in the account were to be community property would eliminate separate tracing.

The conclusion is inescapable that the validity of many joint tenancy titles between spouses, particularly those created after January 1, 1985, is questionable. Legislative clarification is clearly desirable. The form it should take is less clear.

In Memorandum 91-19, the Consultant's Background Study of issues relating to donative transfers of community property, the author suggested, at page 43, the following provision could be added to California Civil Code Section 5110.730 to deal with joint tenancies:

> Notwithstanding the foregoing provisions, if title to property is held in a form of ownership specified in Civil Code Sections 4800.1 or 4800.2, or in an account specified in Probate Code Section 5305, the rules and presumptions of those provisions will be fully applicable. Further, if title to real or personal property is held in joint tenancy in accordance with Civil Code Section 683, it shall pass by right of survivorship to a surviving joint tenant or joint tenants.

As suggested above, it may and probably would be desirable to add to this new provision language

suggesting that it will not apply if the spouses have made an express written agreement to the contrary.

The above language really pretty much restates the law prior to the adoption of California Civil Code Section 5110.730, that the presumption of title will control. This appears to be consistent with legislative intent in adopting California Civil Code Sections 4800.1 and 4800.2 Insofar as California Probate Code Section 5305 is concerned, the community property presumption is overcome in any case by tracing of separate property contributions to the joint accounts. Since the separate interest is preserved in the absence of a written agreement to the contrary, this does little or no violence to the written declaration requirement in the transmutation statute.

Possibly the most controversial aspect of this proposal is the recognition that a joint tenancy title is fully recognized, along with the right of survivorship. As stated in the proposed language, this really acknowledges the community or separate property contributions to the joint tenancy have been transmuted without complying with the express requirements of the transmutation statute. It also runs contrary to the rule that the unilateral act of one spouse in creating the joint tenancy should not bind the other spouse unless he or she joins in or consents to the action.

However, it should be noted that the California Supreme Court, in the MacDonald opinion, appears to assume that the creation of a joint tenancy title does meet the express written declaration standard of the transmutation statute. It cites the language of California Civil Code Section 683 that a transfer from husbands and wives to themselves, or to themselves and others, "when expressly declared to be a joint tenancy" is sufficient. It concludes that Section 683 is therefore totally consistent with the transmutation statute.

Stated the way the Supreme Court approached the issue in MacDonald, this conclusion seems sound. If both spouses sign a document of transfer indicating a joint tenancy is created from either community or separate sources, that is an express declaration. Further, if one spouse signed a written document transferring separate assets into a joint tenancy title, that would also be a written declaration signed by the spouse whose interest is "adversely affected", i.e., a transfer which in effect gives up a one-half interest in the separate property. However, this still does not cover the situation where, in the case of community transfers to joint tenancy title, only one spouse, or possibly neither spouse, has signed a written declaration. Although less common than it used to be, it is still possible that a deed or other document of title can designate the spouses as joint tenants without

any participation on their part. Even if they have agreed orally that title may be taken in joint tenancy form, they may not have signed a document of transfer.

The statutory language suggested above would override the written declaration requirement, since it reinstates the prior California position that the form of title itself creates at least a presumption of transmutation. However, it does not restore the law prior to 1985 that an oral agreement or understanding can be used to rebut the presumption created by the title. In other words, regardless of the intent of the parties, or the extent they have entered into a written declaration or document of transfer, they are joint tenants.

While this change may satisfy the strong language in cases like Lucas referring to the importance of title, and the concern of family lawyers that joint titles create an almost irrebuttable presumption of community interest for marital dissolution purposes, it certainly does nothing to protect spouses from inadvertent joint tenancies, and may, as discussed subsequently, have severe tax consequences. Without further legislative action, it does not deal with the community status of joint tenancy property, except in the case of marital dissolution and joint bank accounts.

One alternative is to adopt legislation which indicates that the title to property will not be deemed

to result in a transmutation in the absence of a written declaration signed by both spouses creating the title. This is in line with the language of the Supreme Court in MacDonald, but may be contrary to the language in Lucas. While it does not eliminate the possibility that spouses may take title in the form of joint tenancy without adequate understanding the consequences of that form of title, it is certainly consistent with the intent of the legislature in adopting the transmutation statute to require a writing signed by the spouses that supports the change in property rights. Such statutory language, added to California Civil Code Section 5110.730, might read as follows:

> For purposes of this section, a written deed or other document of title, or a written instrument directing the use of a specific title to property, will be deemed an express declaration in writing only if it is signed by both spouses.

As discussed above, this approach may really be just an expression of the law as it has existed since 1985, i.e., the written declaration requirement in the new transmutation statute has wiped out the title presumptions. On this point see Reppy, Community Property Law in California, page 52 (Second Edition, 1988). Professor Reppy has the following comments relative to the effect of joint tenancy deeds since 1985: "In a few pre-1985 cases where community money had been used to to buy land under a deed reciting a joint tenancy, the court said the recital itself was

presumed to be accurate, which necessarily meant the court was also presuming that the spouses had transmuted the community funds into joint tenancy. In most cases, such as Schindler v. Schindler, 126 Cal. App. 2d 597, 272 P.2d 566 (1954), both spouses had accepted the deed. With enactment of the statute of frauds for transmutations, Civil. Code Section 5110.730, proof of a community to joint tenancy transmutation could not be found without proof of such acceptance."

This alternative proposal would modify the language in the transmutation statute that the written declaration need only be consented to or accepted by the spouse whose interest is adversely affected, which language does not require that spouse to actually sign the written declaration. Note that in the MacDonald opinion, the Supreme Court did talk in terms of a "signed writing... by the adversely affected spouse." Throughout its opinion, the court appears to assume the writing would have to be signed, at least by one spouse, to be effective.

This approach is bound to face resistance from advocates of the presumption of title theory. On the other hand, it is not subject to the same defects as the oral transmutation rule, since it requires the same objective evidence, a written declaration signed by the spouses, which was the basis of California Civil Code Section 5110.730.

It should be noted that the report of the California Law Revision Commission titled Recommendations Relating to Marital Property Presumptions and Transmutations, 17 Cal. L. Revision Comm'n Reports 205 (1984), contained a specific recommendation that the form of title to property acquired by a married person during marriage would not create a presumption or inference as to the character of that property, and would not rebut the community property presumption. When the other recommendations pertaining to the transmutation statute were adopted, this provision was not. This seems to indicate an unwillingness to abandon title presumptions in California.

Is there is middle ground? Possibly language that the title will operate as a transmutation if there is a written declaration of title "joined in, consented to, or accepted by both spouses." This is only a very slight modification of the existing statute, and may be what the law now is in any case. It would not clearly establish the necessity the writing be signed by either or both spouses.

III. TERMINATION OF A JOINT TENANCY AS A TRANSMUTATION

Assuming the joint tenancy title is an accurate reflection of the property interests of the husband and wife, what will it take to "retransmute" the joint tenancy to community property? The cases cited earlier

did not clearly distinguish between situations where the joint tenancy title was in effect ignored from its inception, and cases where, through oral transmutation, the property regained or obtained a community property status. Since oral agreements or understandings were enforceable, the distinction was less significant.

With the adoption of the written transmutation rules, the issue of retransmutation becomes extremely important. It will take an express written declaration of the parties to change the character of the property from joint tenancy to community or separate ownership.

In Estate of Blair, 199 Cal. App.3d 161, 244 Cal. Rptr. 627 (1988), discussed by the Supreme Court in footnote 7 of the MacDonald opinion, real property was held in joint tenancy. However, the probate court found there had been a transmutation from joint tenancy to community property by reason of an agreement or understanding between the spouses. This agreement was evidenced by the fact the wife listed the property, their personal residence, as community property in her petition for legal separation. The husband had signed a deposition in which he said he believed the residence to be community property. The appellate court held this was not sufficient to constitute an agreement that would satisfy the requirements of California Civil Code Section 5110.730. In citing the case, the Supreme Court appears to agree with this result. In effect, written declarations of both spouses that they believed the

property was community were not sufficient, because they were not "express." The Supreme Court in MacDonald thus appears to find that written evidence of a joint tenancy title is a sufficient "express declaration" while statements of both spouses, in one case in writing, in the other case, a deposition under oath, was not. Note there was no discussion in the Blair case of the facts surrounding the creation of the joint tenancy, which occurred in 1972.

Given the requirement of an express declaration in writing under the statute, as interpreted by the MacDonald decision, together with the strong title presumptions evidenced by decisions such as Lucas, only a written agreement clearly terminating the joint tenancy could be safely assumed to transmute the property. Any attempt to change this by legislation would do considerable violence to the legislative intent as expressed in the new transmutation statute.

IV. CREATION OF COMMUNITY PROPERTY WITH RIGHT OF SURVIVORSHIP

Assuming joint tenancy titles are valid and enforceable regardless of the intent of the spouses, and that oral agreements or understandings cannot be used either to argue that a joint tenancy was never created, or was transmuted to community property by the parties, is there any way to preserve community property rights regardless of the joint title? One solution has been

the creation of a new form of title, referred to as "survivorship marital property" under Section 11(d) and (e) of the Uniform Marital Property Act, the State of Wisconsin, and the statutes of Nevada, N.R.S. Sec 111.064. The Uniform Act provision reads as follows:

> "(d) Spouses may hold property in any other form permitted by law, including a concurrent form or a form that provides for survivorship ownership.
>
> (e) ... On the death of any spouse, the ownership rights of that spouse in survivorship marital property vest solely in the surviving spouse by nontestamentary disposition at death. ..."

Under the Uniform Act, the spouses may determine that their marital property, which is roughly equivalent to community property, may pass by right of survivorship. This in no way may be construed as a transmutation; for all purposes other than survivorship, the property is treated as marital property. In the Comment following the statute, the following statement is made: "The survivorship estate is not a form of joint tenancy but is a new statutory estate created by the section. It is not intended to carry on the arcane doctrines of joint tenancy but simply to establish a nonprobate survivorship ....

The Wisconsin version of this statute, W. S. A. Section 766.60T(b)(1), indicates that if a document of title expresses an intent to establish a joint tenancy exclusively between spouses, it will be characterized as survivorship marital property. It can also be

characterized as survivorship marital property to begin with.

The Nevada statute, Nev. Rev. Stat ch 111.064, reads as follows:

> (2) A right or survivorship does not arise when an estate in community property is created by a husband and wife, as such, unless the instrument creating the estate expressly declares that the husband and wife take the property as community property with a right of survivorship. This right of survivorship is extinguished whenever either spouse, during marriage, transfers his interest in the community property.

Texas has traveled a long road to reach a similar result. Under prior law, Texas avoided the entire problem by holding that a husband and wife could not create a valid joint tenancy under the Texas Constitution. When the voters changed this rule, the Texas legislature responded by adopting Texas Probate Code Sections 451 through 456. In many ways, the Texas statutes are the most comprehensive. Texas Probate Code Section 451 provides:

> "At any time, spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of a spouse.

Texas Probate Code Section 452 continues:

> "An agreement between spouses creating a right of survivorship in community property must be in writing and signed by both spouses. If an agreement in writing is signed by both spouses, the agreement shall be sufficient to create a right of survivorship in the community property described in the agreement if it includes any of the following phrases:

(1) 'with right of survivorship';

(2) 'will become the property of the survivor';

(3) 'will vest in and belong to the surviving spouse'; or

(4) 'shall pass to the surviving spouse.'"

Note that while the Texas statutes purport to create community property with right of survivorship, they are framed in terms of an interspousal agreement which must be in writing and signed by both spouses. This is quite different than the approach taken under the Uniform Marital Property Act and the statutes of Wisconsin and Nevada. Their approach is to create a new form of title without emphasis on a consensual arrangement between the spouses. The use of an agreement to create a right of survivorship in Texas is similar to the statutes of Washington and Idaho, to be discussed subsequently.

Texas Probate Code Section 453 clearly indicates that the use of the survivorship agreement does not affect the community rights of the spouses during marriage concerning management, control and disposition of the property. Section 454 makes it clear transfers under the right of survivorship are effective by reason of the agreement, and are not testamentary.

Since the reason usually given for the use of the joint tenancy title is to provide for survivorship, these statutes are intended to solve that problem, while avoiding issues of transmutation and marital dissolution

which have caused so much difficulty in California. However, the use of a hybrid title itself creates some new problems. Can the right of survivorship be terminated by the act of either spouse? The Nevada statute clearly permits either spouse to transfer his or her interest in the property to terminate the right of survivorship, and there appears to be no requirement of notice to the other spouse. Texas has specifically covered this point in Probate Code Section 455:

> "An agreement between spouses made in accordance with this part may be revoked in accordance with the terms of the agreement. If the agreement does not provide a method for revocation, the agreement may be revoked by a written instrument signed by both spouses or by a written instrument signed by one spouse and delivered to the other spouse. The agreement may be revoked with respect to specific property subject to the agreement by the disposition of such property by one or both of the spouses if such disposition is not inconsistent with specific terms of the agreement and applicable law."

Given the recent history of California law permitting either joint tenant to unilaterally terminate a joint tenancy, it seems clear a similar right should be given to each spouse to abrogate the right of survivorship in community property. On the other hand, if one spouse can terminate the right of survivorship, will this require notice to the other spouse? Under the joint tenancy rules, California Civil Code Section 683.2 provides that either joint tenant can sever the joint tenancy unilaterally by a deed to a third person, or by execution of a document evidencing an intent to

sever the joint tenancy. However, to be effective, the deed or document must either be recorded prior to death,, or executed and acknowledged earlier than three days before death and recorded not later than seven days after death. There are exceptions for agreements signed by all joint tenants and conveyances from one joint tenant to the other.

If community property with right of survivorship was considered to be an appropriate solution, it might encompass a combination of the Nevada statute and the above rules for severance, somewhat as follows:

> A right or survivorship does not arise when an estate in community property is created by a husband and wife, as such, unless the instrument creating the estate expressly declares that the husband and wife take the property as community property with a right of survivorship. Such property shall be deemed to be community property for all purposes, other than the right of survivorship. This right of survivorship may be terminated in the same manner as the severance of joint tenancy specified in California Civil Code Section 683.2

If this approach were adopted, it would also be necessary to add a subsection 5. to California Civil Code Section 682 reading "Of community interest of husband and wife with right of survivorship." It might also be wise, particularly in view of possible tax considerations, to add a new subsection (c) to California Civil Code Section 683 as follows: Provisions of this section do not apply to title in the form of community property with right of survivorship."

Such a new provision permitting community property with right of survivorship could be added to California Civil Code Section 687, which defines community property.

An alternative method to establish a right of survivorship in community property is found in the interspousal agreement for nonprobate transfers of community property found in the state of Washington. Washington Rev. Code Section 26.16.120 provides in part: "Nothing contained in any of the provisions of this chapter or in any law of this state shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterwards to be acquired, to take effect upon the death of either." The statute goes on to prescribe the formalities for such a agreement, and to provide it cannot affect the rights of creditors.

The Idaho version is found in the General Laws of Idaho Ann. Section 15-6-201, which specifies such agreements are not testamentary, specifies the formalities, and protects creditors. However, in the case of real property, it contains the following subsection:

> "(d) No such agreement shall be effective to pass title to property until it has been recorded, prior to the death of any party thereto, in the recorder's office of the county of the domicile of the decedent and of each county in which real property described there is located;...(emphasis added)"

This appears to require the document to be recorded before the death of either spouse to be effective.

The use of an interspousal agreement has the advantage of separating the right of survivorship from the form of title itself, which may and probably does mitigate any possible adverse federal income tax consequences. On the other hand, both the Texas and Idaho statutes struggle to some extent with the issue of recording such agreements, and how they can be revoked. Since such agreements are inherently testamentary in nature, there should be clear provisions on revocation, and if one spouse is permitted to revoke unilaterally, whether or not notice to the other spouse is required and if so, how it is given.

There are several problems in establishing community property with right of survivorship either through a new form of title or interspousal agreement. Whether the Internal Revenue Service will recognize this form of community property is an issue which will be covered in a later section. Insofar as creditors are concerned, it seems their rights will be determined under community property rather than joint tenancy rules. This could make a considerable difference, as will also be developed later in this discussion.

Where separate property is contributed to the acquisition of community property with right of survivorship, the issues of transmutation may arise.

However, even under the present California statute, it would appear the transferor spouse will have to join in, consent to, or accept a written declaration of title, which would satisfy the statute. Whether the transferor spouse has to actually sign this declaration remains unclear.

What about separate contributions to the acquisition of the community property with right of survivorship? The problem of the constructive gift from one spouse to the other outlined in the Lucas decision will apply here. On the other hand, California Civil Code Section 4800.2 should certainly apply to permit reimbursement in the event of marital dissolution. In all other respects, the property is treated as community while bother spouses are alive. In other words, the addition of survivorship to the community title really does not change the status quo while both spouses are alive.

Possibly the greatest problem with such a new form of title is that no one will use it. Shifting from the well known joint tenancy deed to a new form or title or agreement would involve tremendous change in the practices of financial institutions, title companies, real estate and stock brokers, and even a number of attorneys and accountants. It is the experience of your consultant that many members of these groups and professions are still not aware of the fact community property can be passed from one spouse to the other

without probate administration under California Probate Code Section 13500. In fact, survivorship community property already exists in California in the sense that it does pass to a surviving spouse without the necessity of probate administration unless the deceased spouse makes a contrary testamentary disposition. The main reason for adopting the concept of community property with a right of survivorship is not to cure a defect in the law, but to cure a defect in the practices of a group of professionals and nonprofessionals who advocate the use of joint tenancies without understanding the consequences.

Attorneys who are versed in estate planning generally do not recommend survivorship between spouses, at least in larger estates, because of possible adverse tax consequences. A check by your consultant with a prominent estate planning attorney in Las Vegas, Nevada revealed that he had no experience with the community property survivorship provisions because he did not recommend survivorship planning in any case. An educational process would have to be undertaken to acquaint these various groups with such a new form of title, when they really did not understand what was wrong with the old form of title.

Another difficult area will be quasi-community property. Under California Probate Code Sections 66, 101, 102, 103, and 6401, such assets are treated the

same as community property only when the acquiring spouse dies. While both spouses are alive, the acquiring spouse has complete management and control, possibly subject to some fiduciary limitations. If the nonacquiring spouse is the first to die, quasi-community property is treated as the separate property of the surviving spouse. It would be difficult to translate these variable rights into some form of quasi-community property with right of survivorship. Accordingly, no proposal for such a form of title is included in this study.

V. CONVERTING ALL INTERSPOUSAL JOINT TENANCIES TO COMMUNITY PROPERTY.

In 1984, the California Law Revision Commission issued Study F-521, titled "Community Property in Joint Tenancy Form." In sum, the tentative recommendation of the Commission staff under that study was to apply a statute similar to California Civil Code Section 4800.1 for all purposes. The presumption that property acquired by spouses as joint tenants is community property would have been codified. This presumption could only be overcome by a writing; tracing of separate contributions to the acquisition would be inadequate.

The Commission staff believed that such a presumption was in accord with the general intention of parties in taking title in a joint form, which is certainly supported by the many cases where spouses had no real understanding that joint tenancy altered their

rights. However, in the case of separate property contributions to the acquisition of the jointly titled property, the staff believed that the spouses were aware that they owned the property jointly, and should not be able to recover separate contributions except in the case of divorce, where each would normally expect to recover his or her own property. The study acknowledges the fact creditors have greater rights against community property than joint tenancy property under many circumstances. It also acknowledges the fact spouses could partition joint tenancy, but not community property, but concludes that since the assumption of the study is that most spouses believe the joint tenancy title does not affect their other community property rights, they should not be able to partition the property.

The greatest dispute centered on the testamentary power of the spouses over the property. The Commission had earlier endorsed the concept of community property with right of survivorship. However, the 1984 study recommended that either spouse be permitted to make a testamentary disposition of his or her interest in the property, but only by a specific devise. This created a variety of concerns, including whether or not title could be cleared by affidavit under the joint tenancy title, and the possible tax consequences of this action.

If case law and personal experience are any indication, your consultant believes the principal reason joint tenancy title is used is to avoid probate, which means the right of survivorship is the key. That seems to be a basis of the action taken in Nevada and other jurisdictions permitting a right of survivorship for community property. If it were possible to preserve community rights while alive, but make survivorship available, that would comport with the reality in most situations.

The proposed legislation in that study is comprehensive and presents an alternative which could be considered:

> "Section 5110.510 Community Property presumption
>
> "5110.510. (a) Property the title to which is taken in joint tenancy form by married persons during marriage is presumed to be community property.
>
> (b) The presumption established by this Section is a presumption affecting the burden of proof any may be rebutted by either of the following:
>
> (1) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.
>
> (2) Proof that the married persons have made a written agreement that the property is separate property and not community property.
>
> (c) The presumption established by this section may not be rebutted by tracing contributions to the acquisition of the property to a separate property source. Nothing in this subdivision limits the right of a party to reimbursement for separate

> property contributions pursuant to Section 4800.2.

This proposed legislation did not address the right of survivorship directly, but seemed to assume it would still be available. An additional legislative recommendation in effect dealt with this by providing that a married person could not make a testamentary disposition of the property other than by a specific bequest or devise, subject to any provisions of a contrary written agreement. Also, this proposal did not apply to joint bank accounts.

If this proposed language is again considered, without the troublesome language relating to testamentary dispositions, the following addition, suggested above in connection with the community property with right of survivorship language, could be considered:

> Such property shall be deemed to be community property for all purposes, other than the right of survivorship.

Under California Civil Code Section 683.2, it is possible for either joint tenant to unilaterally sever the joint tenancy and, in effect, partition the property. This is of course inconsistent with the rules relating to community property, since neither spouse can unilaterally partition the property or make a gift transfer of his or her community interest without the consent of the other spouse. As a result, language similar to the following should be added to the statute:

> However, in the event either spouse seeks to sever the right of survivorship, he or she may only do so by a written instrument that evidences such intent to sever the right of survivorship, delivered to the other spouse, or recorded in accordance with the provisions relating to severance of joint tenancies set forth in Civil Code Section 683.2(c). The right of survivorship may also be severed by a written instrument or agreement that severs the right of survivorship signed by both spouses. In the event the right of survivorship is severed, the property shall be classified as community property for all purposes, and neither spouse can convey, encumber, or other-wise deal with said property except in accordance with Sections 5125, 5125.1, 5127, and 5128 of the Civil code.

According to Nat Sterling, there was concern over the retroactivity of the changes proposed in 1984, since they would in effect transmute all existing joint tenancies into community property. As indicated, there was also concern over the testamentary disposition provision, and the possible tax consequences. This proposal also called for the repeal of California Civil Code Section 4800.1, since it covers the same ground.

Another approach to this problem is to adapt the language of California Probate Code Section 5305, relating to multiple-party accounts, and quoted earlier, to cover other forms of joint tenancy. This might read as follows:

> (a) Notwithstanding the provisions of California Civil Code Section 5110.730, property the title to which is taken in joint tenancy by married persons is presumed to be and remains their community property.
>
> (b) The presumption established by this section is a presumption affecting the burden

of proof and may be rebutted by proof of either of the following:

(1) Any contribution to the joint tenancy that is claimed to be separate property and can be traced from separate property will be deemed a separate contribution unless it is proved that the married persons made a written agreement expressing their clear intent that such contributions would be their community property.

(2) The married persons made a written agreement, separate from the joint tenancy title, that expressly provided that contributions to the joint tenancy were not community property.

(c) Except as otherwise provided by a written agreement made by the married persons, the right of survivorship under the joint tenancy title cannot be changed by will.

(d) Either married person may sever the joint tenancy by execution of a written instrument evidencing an intent to sever the joint tenancy, or by a written agreement of both joint tenants.

(e) This provision shall be limited to joint tenancies in which the married persons are the only joint tenants.

This proposal is a blend of California Probate Code Section 5305 and California Civil Code Section 683.2. It is intended to also solve the transmutation problem, since it is an express exception to it. It is clearly inconsistent with California Civil Code Sections 4800.1 and 4800.2, since it provides for tracing. Your consultant shares the view of many that Section 4800.2 is manifestly unfair, since it limits the parties to reimbursement for separate contributions to joint tenancies in the case of marital dissolution. Assuming the rationale of Section 4800.2 is applied here,

proposed Section (b)(1) above could be modified to provide for a right of reimbursement, following the language of Section 4800.2.

All present and proposed legislation seems to ignore joint tenancies involving parties other than the spouses. The last part of the suggested language above is intended to deal with that issue. Basically, it appears that where there are other parties to the joint tenancy, the policy of preserving titles should be fully preserved, and the disposition of the property should be strictly in accordance with the law of joint tenancy. Also, no mention is made here of quasi-community property, for reasons already discussed. For the purposes of any of these proposals, quasi-community property should probably be treated as separate property of the acquiring spouse while both spouses are alive. If it does not pass by survivorship, it should be treated as quasi-community property at the death of either spouse.

The state of New Mexico has adopted a statutory presumption much like the one suggested in the proposed legislation recommended to the Commission in 1984. NMSA Section 40-3-8, subsection B, provides:

> "Property acquired by a husband and wife by an instrument in writing whether as tenants in common or as joint tenants or otherwise shall be presumed to be held as community property unless such property is separate property within the meaning of Subsection A of this section."

Note that Subsection A of the statute defines separate property in essentially the same manner as California, i.e., property acquired prior to marriage, after dissolution or other adjudication between the parties, or by gift, devise, bequest or descent, or by inheritance.

The effect of this statute seems to be almost automatic classification of joint tenancy property, as well as other forms of coownership, as community property. As a result of this statute, at least one New Mexico court has concluded property held in joint tenancy can be community property. Swink v. Sunwest Bankr. (in re Fingaldo), 113 Bankr. 37 (Bank. D.N.M. 1990).

VI. TAX CONSIDERATIONS

A great deal has been said in this discussion, and in all articles and comments written about the joint tenancy-community property problem, of the tax consequences. It is important to focus on those consequences and how the above proposals might affect them.

A good place to start is with the "conventional wisdom" shared by many as to what the tax status of community property held in joint tenancy has been in the past. This can be summarized in the following statements:

1. Prior to 1985, on the death of the first sp;ouse to die, property held in joint tenancy would be treated as community property for federal tax purposes as long as it was subject to probate administration as community property.

2. A few years ago, the Treasury issued a Revenue Ruling in which which it warned that joint tenancy property would no longer be treated as community for federal income tax purposes.

3. As a result of the new stricter transmutation statute, California Civil Code Section 5110.730, effective January 1, 1985, property held in joint tenancies created after that date will not be treated as community property.

In fact, none of those statements is strictly true, although there is a margin of truth in each of them. The Internal Revenue Service has never held property held in joint tenancy between husband and wife can be treated as community property for federal tax purposes. The basis of that legend is probably the Ninth Circuit opinion in United States v. Pierotti, 154 F.2d 758 (9th Cir. 1946). Property was held in a joint tenancy title. When the husband died, the joint tenancy was terminated in favor of the wife. The court determined that the property had been acquired with community funds, and citing Tomaier, decided that under California case law, it would probably be treated as community property for California purposes, since the

parties had an oral agreement or understanding that it was community property. As a result, it was so treated for federal tax purposes. Note the court gave no weight to the fact the surviving spouse had filed a petition to establish the fact of death of the predeceased spouse, which was of course a necessary step at that time in claiming title to the property as surviving joint tenant.

Compare Bordenave v. United states, 150 F. Supp. 820 (D.C.N.D. Cal. 1957). The husband had acquired property in his name alone with community funds, and unilaterally conveyed it into joint tenancy form. His wife signed the deed. Upon the death of the first spouse, the surviving spouse filed a petition to establish the fact of death, and accordingly took title as surviving joint tenant. As was required in such affidavits, she swore that the property was joint tenancy. She subsequently testified that both spouses considered it to be community property. The federal district court held it was not community property, and to a large extent based this determination on the fact that the surviving spouse under penalty of perjury declared it was joint tenancy. On this basis, the court held that since under California law joint tenancy is treated as one-half he separate property of each spouse, it had been transmuted from community.

A California court reached the same conclusion on the same facts in Bordenave v. Franchise Tax Board, 158 Cal. App. 2d 291, 322 P. 2d 260 (1958). The court noted the testimony of the surviving spouse that there was no intent to change the community character of the property. However, the appellate court believed the trial court had given due consideration to the strength of that testimony, given the fact nine years had elapsed since the joint tenancy deed was executed, that she never questioned the form of title, that she affirmed after his death it was joint tenancy, and that as personal representative of his estate, she had executed an inventory listing it as joint tenancy property.

It is submitted these cases gave rise to the proposition that the taxing authorities will treated joint tenancy as community property if you probate it. What the cases really stand for is the proposition that California law will be given effect for federal tax purposes. Although it arose in a different context, the United States Supreme Court decision in Commissioner v. Estate of Bosch, 387 U.S. 456 (1967), held that where the issue is the determination of property rights for federal tax purposes, and state law determines such property rights, the Internal Revenue Service should follow the decisions of the highest state court, or lacking such decisions, engage in its own interpretation of applicable state law. Accordingly, the federal courts recognized the authority in California cases that

joint tenancy title might not reflect the true nature of the property, might have been taken without an understanding of the consequences, or might have been the subject of an oral agreement or understanding between the parties that it really was still community property.

However, the Bordenave cases suggest that a declaration under penalty of perjury that the property is joint tenancy, or for that matter, taking title by right of survivorship, is inconsistent with such an agreement or understanding that the property is still community. In other words, the parties cannot treat it as community property for some purposes and joint tenancy for other purposes. An informal Internal Revenue Service position on this issue was contained in an answer to a question posed to the Regional Commissioner of Internal Revenue by members of the Tax Section of the State Bar of California several years ago. The Commissioner and other Treasury officials indicated that merely probating joint tenancy property as community property would not guarantee community property treatment for tax purposes. The issue would be resolved on a case by cases basis. However, if title was transferred through the joint tenancy procedure, then in their opinion there is at least a "rebuttable presumption" it is true joint tenancy. On the other hand, probate will only be effective if there was an

agreement or understanding between the spouses that the property was community. If the decision to probate was made "unilaterally" by the surviving spouse, its tax treatment as community property "would appear to be questionable." Tax Section News, State Bar of California, Vol. 7, No. 2, pp. 7-8.

The conclusion as to the validity of the first statement of conventional wisdom is that transfer of title under a termination of joint tenancy will raise serious questions if the parties are asserting the property is community, and in all probability, the Internal Revenue Service will take the position the property is true joint tenancy. On the other hand, merely going through the form of probate, or the community property set aside proceeding, does not guarantee it will be treated as community.

Insofar as the impact of the Revenue Ruling is concerned, in the opinion of your consultant, it added nothing new to the prior Treasury position, except some clarification, and was consistent with the position taken by the federal government in the cases cited above. In that ruling, Revenue Ruling 87-98, 1987-2 C.B. 206, husband and wife, who lived in a community property state, purchased property in that state with community funds and took title as joint tenants with right of survivorship. However, they later executed joint wills in which they declared the property was community. The question was whether or not it would be recognized as

community property for federal income tax purposes.

The ruling first notes that the state in question, while permitting title to be held in joint tenancy by husband and wife, made no provision for "the coexistence of a common law estate and a community property interest,..." As a result, taking title in a common law estate raised a presumption that the spouses had terminated their community interest, "effectively transmuting the property's character from community to separate." The ruling cites Revenue Ruling 68-80, 1968-1 C.B. 348, which held that where property was acquired by a husband and wife as tenants in common in exchange for community assets, it constituted separate property under state law. Note the following important language in the ruling: "However, the controlling factor was the state law determination that the property did not constitute community property." All the ruling really says is that if the joint tenancy property would be treated as community property under state law, the federal government will follow that result, and not attempt to apply a separate federal test to determine its status as community property. The ruling goes on to apply state law to find that the declarations in the joint wills prevented the transmutation of the property from community to separate.

The second statement of conventional wisdom was based on the assumption that prior to the issuance of

this ruling, the Internal Revenue Service had indicated joint tenancy property could be treated as community property. As the cases cited above indicate, the Treasury never took that position. It always based its interpretation on applicable state law, which is all it did in this revenue ruling. Thus its conclusion: "If property held in a common law estate is community property under state law, it is community property for purposes of section 1014(b)(6) of the Code, regardless of the form in which title is taken."

With that background, it becomes clear that the third statement of conventional wisdom may be correct. If the tax consequences of joint tenancy title depend on state law, and if the law of California now requires an express written declaration for a transmutation of joint tenancy property into community property, then there is no reason to believe the Internal Revenue Service will not do the same. In this regard, note that under the new transmutation rules, specifically California Civil Code Section 5110.740, the property in Revenue Ruling 87-98 would probably be characterized as separate property for federal income tax purposes.

However, there should also be no reason the arguments advanced in this study relating to the creation of joint tenancy titles cannot be applied for federal tax purposes. If the creation of that title requires an express declaration in writing signed, consented to, or accepted by both spouses for California

purposes, and such a written declaration cannot be found, then the joint tenancy title should be equally ineffective for California and federal purposes, and if the source of the property is community, it should be classified as community for federal tax purposes.

Why is classification of property as community so important? Since 1947, under Internal Revenue Code Section 1014(b)(6), if one spouse dies, and at least one-half of his or her community interest in community property is included in the decedent's estate, the other one-half is treated as is acquired by the surviving spouse from the decedent. Under the general provisions of Section 1014, property acquired from a decedent obtains a new federal income tax basis equal to its fair market value at date or death (or in some cases, a different value under elections provided by Internal Revenue Code Sections 2032 and 2032A). The result is that both halves of the community property achieve a new income tax basis, the decedent's half because it is included in his or her taxable estate, and the survivor's half because it is deemed to have been acquired from the decedent. If the property has appreciated in value during the time the spouses owned it, the result is an increased income tax basis, conventionally referred to as a "stepped up" basis. When the property is sold, this stepped up basis considerably reduces the federal income tax consequences

of the sale. In addition, the higher basis may confer other tax benefits through depreciation, depletion, or other deductions computed with reference to its income tax basis. That was the precise issue in Revenue ruling 87-98.

Internal Revenue Code Section 2040, an estate tax provision, provides that each spouse holding title as a joint tenant is deemed to have furnished one-half of the consideration for its acquisition. as a result, only a one-half interest is included in the estate of the first spouse to die, and the basis adjustment under IRC Sec 1014 only applies to that interest. The one-half interest held by the surviving joint tenant is treated as if acquired by that joint tenant, and is unaffected by the death of the other joint tenant.

In the case of appreciating property, particularly real estate that may have been held by the spouses for several years, the loss of a stepped up basis on the one-half interest of the surviving spouse is a major disadvantage of the joint tenancy title, and has been for years. The real tax issue in this area is the loss of income tax basis.

The 1984 recommendation relating to community property in joint tenancy form raised another so-called tax issue, which may have played a role in the failure of that proposal to be enacted. Where property passes from one spouse to the other by right of survivorship, the estate of the first spouse to die is entitled to a

full deduction for the value of that property in computing its federal estate tax under IRC Sec 2056, relating to the federal estate tax marital deduction. While that appears to be a favorable result, if use of survivorship results in all or must of the property passing to the surviving spouse, the estate of the first spouse may lose the full benefit of what is characterized as the "unified credit amount." That is the amount that may pass free of federal estate tax by reason of the unified credit provided by Section 2010 of the Internal Revenue Code. This credit can shelter as much as $600,000 of the value of the decedent's gross estate from federal estate tax. If all or most of the estate of the first spouse to die passes to the surviving spouse, the value of that credit is lost, and the value of the property in question is simply added to the estate of the surviving spouse, to be taxed when he or she dies.

The comments in connection with the 1984 proposals seemed to advocate elimination of the right of survivorship for community property held in joint tenancy form, which would mean the property would not pass to the surviving spouse, and would instead pass under the deceased spouse's will, hopefully in a way which would preserve the value of the unified credit and avoid simply adding the property rights to the estate of the surviving spouse for estate tax purposes. The

portion of the tentative recommendation which permitted the deceased spouse to make a specific bequest of his or her community interest in the joint tenancy property was intended to respond to that concern, but may have made the proposal unduly complicated.

The question here really is: how far should the legislature go in protecting people from themselves and from their advisors? It seems the one thing most people do understand about joint tenancy is that the property will pass on the death of the first joint tenant to die to the surviving joint tenant. If that is the testamentary intent of the parties, and they seek to effectuate it through a nonprobate transfer in joint tenancy form, the fact that it may have an adverse consequence for federal estate tax purposes should not be a basis for modifying the right of survivorship. As already discussed, there is now in place in California a provision permitting either joint tenant to unilaterally terminate the joint tenancy. There should be no need for a provision permitting this to be done by will. If there is a new recommendation permitting the parties to hold community property in joint tenancy form, the right of survivorship should not be altered.

It should also be noted that since 1984, another technique has evolved to modify or eliminate survivorship where it has adverse estate tax consequences. Internal Revenue Code Section 2518 permits any person to disclaim a gift or bequest, i.e.,

refuse to accept it, and if the requirements of the statute are met, this disclaimer is effective for federal estate and gift tax purposes. In Reg Sec 25.2518-2(c)(4), the Treasury took the position that in the case of joint tenancy property, a surviving joint tenant could only disclaim the right to the interest passing from the deceased joint tenant within nine months of the date of creation of the joint tenancy. After losing major court decisions in this area, the Internal Revenue Service, in AOD 1990-06, and subsequent rulings, now concedes such a disclaimer can be made within nine months of the date of death of the joint tenant. This means a surviving spouse could disclaim a survivorship interest in joint tenancy, allowing it to pass through the estate of the deceased spouse to obtain the value of the unified credit. Of course, a decision on a disclaimer is made by the surviving spouse, not the estate of the predeceased spouse. However, it would be possible to now walk away from joint tenancy survivorship through a disclaimer and preserve the unified credit in the estate of the deceased spouse if the surviving spouse agrees.

The final and most important tax question is whether or not the federal taxing authorities would recognize a state law permitting community property to be held in joint tenancy form. That issue was raised and discussed in the 1984 tentative recommendation, and

has not been resolved in the succeeding years. However, it should be noted that Nevada has had community property with right of survivorship for a period of years, and your consultant is aware of no effort by the IRS to deny community status to such property. Also, it has been noted that the uniform marital property act provides for community property with right of survivorship. The Treasury has issued Revenue Ruling 87-13, 1987-1 C.B. 20, holding that property classified as marital property under the uniform law would be treated as community property for federal tax purposes. Although the ruling makes no specific reference to the right of survivorship, it is at least some authority for the proposition that community property with right of survivorship would be recognized for federal tax purposes.

The strong reliance in Revenue Ruling 87-98 on state law as a basis for treatment of joint tenancy property as community for federal tax purposes suggests that an express statutory provision to that effect would be recognized for federal tax purposes. The language quoted from that ruling specifically notes that the state in question was one which did not permit coexistence of a common law estate, such as joint tenancy, with community property. This suggests that if state law permitted such coexistence, and so defined its property rights, the federal government would follow.

It is frequently argued that the use of a community property title with a survivorship agreement between the spouses, as recognized in Washington, Idaho, and Texas, is less likely to be questioned by the IRS. This may be true. On the other hand, this approach does not solve the problem of parties who take title under the standard form of joint tenancy. The use of the Nevada approach, a title form of community property with right of survivorship, is subject to the same objection as the separate spousal agreement - will spouses really use it?

A clear statutory declaration that property held in joint tenancy form by spouses is presumed to be community property, absent a written agreement to the contrary, should resolve the tax issue. Even a provision for tracing or reimbursement of separate contributions should present no problems. The fact parties are permitted to pass the interest by right of survivorship to the surviving spouse should not really cause tax problems. However, the statute should be absolutely clear that while both spouses are alive, the property will be treated as community for all purposes, and no property rights unique to joint tenancy, such as the right to partition, should be permitted.

VII. CREDITOR ISSUES

Another impediment to the classification of interspousal joint tenancies as community property will

be the impact of creditor claims. As discussed in Sterling, Joint Tenancy and Community Property in Calif0ornia, 14 Pacific Law Journal 927 (1983), only the joint tenancy interest of the debtor joint tenant can be reached to satisfy unsecured creditors, while generally speaking, the entire community can be reached to satisfy the debts of either spouse. California Civil Code Sections 5116, 5120.110, 5122. After the death of either joint tenant, the unsecured creditors of the deceased joint tenant apparently cannot reach the joint tenancy property at all, absent a fraudulent conveyance.

In King v. King, 107 Cal. App. 2d 257, 236 P.2d 912 (1951), a husband borrowed funds from a family member to buy a house occupied by the husband and wife and held as joint tenants. The family member could not reach the wife's joint tenancy interest to satisfy the debt of the husband. Rupp v. Kahn, 246 Cal. App. 2d 188, 55 Cal. Rptr. 108 (1966), seemed to follow a similar rule in an unclear opinion concerned primarily with the issue of fraudulent transfers. Compare the rules for community property, which generally permit unsecured creditors of a deceased spouse to reach all of the community property, whether or not there is a probate administration, so long as the appropriate claims are filed. See generally, California Probate Code Sections 11440 through 11446, 13550 through 13554. Even a creditor who has a lien against the joint tenancy property secured by the interest of only one joint

tenant can foreclose only as that joint tenant's interest, which is severed, but if that joint tenant dies, the lien is lost. See Sterling, supra, page 949.

Many commentators have suggested the differences between the ability of creditrs to reach community and joint tenancy property make no sense, and in Recommendations Relating to Non-Probate Transfers, 15 Cal. Law Revision Comm'n Reports 1620-21 (1980), the Law Revision Commission took the same position. Regardless of the merits of the distinction between creditors' claims against community and joint tenancy property, it does exist. If any form of hybrid title is adopted, the issue of creditors' rights must be addressed. If any of the statutory language suggested above, or similar language indicating that the property will be deemed community property, while both spouses are alive, is adopted, it seems clear creditors have, or should have, the same rights against this property as any other community property while both spouses are alive. However, after the death of a spouse, all of the legal precedents discussed by Mr. Sterling in his article relating to creditors' rights against surviving joint tenants may apply. The underlying rationale for cutting off creditors upon death of the debtor is that the interest of the debtor is much like a legal life estate, which terminates at death by operation of law.

If community property with right of survivorship is adopted as an alternative form of title, either by following the Nevada model or the Washington model permitting the parties to agree to survivorship, it would be reasonable to permit creditors to reach this property in the same manner as they could reach other community assets. The husband and wife have elected this form of title to facilitate transfer of community property at death. It should be treated the same as other forms of community property.

However, should legislation mandate that all existing joint tenancies between husband and wife are to be treated as community property while both are alive, the effect will be to increase the exposure of joint tenancy property acquired before the effective date of the change to the to creditors. The issue of retroactivity is bound to be raised. This issue clearly had an impact on the 1984 staff proposal discussed above, and likely would again.

On the other hand, an attempt to absolve the interspousal joint tenancy property from the rights creditors would normally have against other forms of community property might provide a basis for the Internal Revenue Service to take the position it is not really community property. While your consultant believes merely appending a right of survivorship to community property will not result in nonrecognition of community status for federal tax purposes, attempts to

limit the rights of creditors in this particular form of property might.

Should the statutes be explicit on the rights of creditors? If they are not, and legislation provides that interspousal joint tenancies are to be treated as community property for all purposes other than right of survivorship, there is bound to be litigation. Therefore, it seems clear any proposed legislation must deal with this issue, and in the opinion of your consultant, the community property rules rather than the joint tenancy rules should apply, but only as to titles taken in joint tenancy form after the effective date of the statute.

If this approach is adopted, pre-existing interspousal joint tenancies would not be treated as community property, absent a written declaration of transmutation which would satisfy California Civil code Section 5110.730 and MacDonald. This could produce very unfortunate tax consequences. However, it does preserve the status quo, i.e., these parties are in the same position they would be in if there are no legislative changes.

VIII. CONCLUSION

The requirement of an express declaration in writing by spouses to transmute property from community to separate or separate to community is applicable to both the creation and termination of joint tenancy

titles. While a case can be made that joint tenancies can be created by spouses without the necessity of a writing signed by both of them, language in the MacDonald opinion suggests that joint action is required. Despite public policy considerations apparently upholding the supremacy of titles, as in the Lucas case, there is little reason to assert that rule where the dispute is between the parties themselves. A suggested legislative solution is to amend California Civil Code Section 5110.730 to make it clear the creation of a joint tenancy title is a transmutation of any community or separate property interests of the parties in contributions to the joint tenancy, but only if both parties sign a writing evidencing the creation of that title. The actions of third parties or even of one spouse should not be binding on the other spouse absent such a writing.

Assuming the creation of the joint tenancy title meets the transmutation requirements, consideration must also be given to the effect of that form of title. Evidence is strong that most spouses who specify joint tenancy or joint ownership have no real understanding of the the legal consequences of that action, and are often advised (or misadvised) that there are no legal consequences of this action other than to pass the property by survivorship to the other spouse. The legislature has already accepted the validity of this

view by adopting California Civil Code Section 4800.1 and California Probate Code Section 5305, recognizing community property rights survives joint tenancy titles in the case of divorce and joint ownership in the case of bank accounts. It would be consistent to extend this rule for other purposes.

However, the great difficulty is the approach to be adopted. A separate form of title designated "community property with right of survivorship", following the Nevada model, could be used. But given the fact many joint tenancy titles are created through ignorance, will it be possible to educate the public and their various advisors to use the new form of title, or will they continue to generate standard joint tenancy deeds? If the parties are sophisticated enough to use this optional form of title, they are probably also sophisticated enough to know it is really unnecessary, since community property can pass to a surviving spouse in California without probate administration in any case.

The alternative use of the survivorship agreement following the Washington model is subject to the same complaint. Parties sophisticated enough to understand its use are probably avoiding joint tenancies anyway, and the unsophisticated probably would not use it.

That leaves the approach of reclassifying all interspousal joint tenancies as community property for all purposes, except right of survivorship. Whether this would be effective for federal tax purposes is not

clear. If the Internal Revenue Service is accepting the Nevada and Washington alternatives, it should also accept a law which really reaches the same result by reclassifying joint tenancies, particularly if that law makes it clear a joint tenancy title can coexist with community property interests. However, it seems unlikely the federal government will follow this view if there is an attempt to limit creditors' rights or other community property rights. If joint tenancy property is generally reclassified as community property, this must be effective for all purposes, including management and exposure to creditors.

Such reclassification does deprive spouses of the possibility of creating "real" joint tenancies. In addition to possible limitation on creditors' claims, real joint tenancies permit the parties to partition and otherwise deal with the joint tenancy property as if it were one-half separate property of each spouse. Possibly proposed legislation could provide that if the form of title is "joint tenancy with right of survivorship, and not as community property", it will be recognized as a true joint tenancy. This would have much the same effect as the written agreement permitted under California Civil Code Section 4800.1 and California Probate Code Section 5305.

Finally, if spouses are permitted to hold community property with right of survivorship under any

theory, there should be specific statutory authority permitting each spouse to unilaterally revoke the survivorship provision. The principal issue here is whether or not notice to the other spouse or some form of constructive notice, such as recording, should be required. Your consultant is of the opinion it should be, and believes the present rules governing termination of joint tenancies by the unilateral act of one joint tenant may provide a useful guide.