#F-521.1/L-521.1

ns123
10/15/92

Memorandum 92-68

Subject: Study F-521.1/L-521.1 - Effect of Joint Tenancy Title on Community Property

Attached to this memorandum is a revised draft of the tentative recommendation relating to the effect of joint tenancy title on community property, to implement decisions at the Commission's September meeting in Oakland. Also attached are letters from the Los Angeles County Bar Association, Trusts and Estates Section, Executive Committee (Exhibits pp. 1-2) and from Arthur H. Bredenbeck of Burlingame (Exhibits pp. 3-4).

The draft has been recast so the emphasis is not so much to disfavor joint tenancy as to ensure that the spouses make an informed decision if they take title as joint tenants. Staff notes following provisions in the draft raise issues for Commission review.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

RONALD C. PEARSON
ATTORNEY AT LAW
FOX PLAZA
2121 AVENUE OF THE STARS, SUITE 1700
LOS ANGELES, CALIFORNIA 90067
TEL (310) 201-0338
FAX (310) 552-3220

September 10, 1992

VIA FAX

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

Re: Study F-521.1/L-521.1
Community Property in Joint Tenancy Form.

Dear Nat:

As we discussed during our telephone conversation yesterday, the Executive Committee of the Trusts and Estates Section of the Los Angeles County Bar Association (the "Committee") has reviewed the tentative recommendation relating to community property in joint tenancy form. The comments set forth below reflect the unanimous views of the Committee.

1. Declaration of Joint Tenancy. The Committee agrees that after the MacDonald case, the strict requirements of Civil Code Section 5110.730 must be met in order to transmute community property into joint tenancy. The Declaration of Joint Tenancy contained in your tentative recommendation should be sufficient for this purpose.

2. Advice by Professionals Regarding Form of Title. The Committee notes you have given considerable thought on how to ensure that proper advice is given to married couples regarding the various forms of title. Although there is some merit in placing liability on individuals who fail to give the proper advice, we are concerned that proposed Family Code Section 861 may not accomplish the purpose and will result in a substantial amount of litigation. We feel other avenues should be explored that would not be as potentially litigious. One alternative might include requiring all deeds which transmute community property to joint tenancy to include the above declaration which must be signed by the married couple prior to recordation. If the declaration is not signed, then the presumption of community property would apply. By requiring the declaration on the deed, the married couple will receive the appropriate advice without the necessity of nonattorney professionals rendering legal advice which they are ill equipped to provide.

3. Joint Tenancy without Right of Survivorship. Your tentative recommendation provides that if the above declaration is not signed by a married couple, and they take title as joint tenants, their property will be treated as community property for all purposes, including testamentary disposition (i.e., the surviving joint tenant would have no right of survivorship). Your recommendation essentially adopts the minority view of the State Bar. For the reasons stated in our prior letter on this subject, dated March 10, 1992, we believe the presumption of community property should apply for all purposes during life; except that at death the right of survivorship would apply to convey the deceased spouse's interest in the property to the surviving spouse. We feel that the right of survivorship is the main reason most married individuals take title in the joint tenancy form. Furthermore, we feel the right of survivorship is necessary to preserve the dependability of record title and to ensure the availability of title insurance on such property (e.g., title insurance companies would be hesitant to rely on an affidavit of death of joint tenant because there might be a contrary testamentary disposition by the deceased spouse).

In conclusion, we believe that this extremely difficult topic requires further consideration particularly with respect to the issues discussed above.

Sincerely,

Ronald C. Pearson

RONALD C. PEARSON

RCP:ms
cc: Executive Committee

CARR, MCCLELLAN, INGERSOLL, THOMPSON & HORN
ATTORNEYS AT LAW
SECURITY PACIFIC BUILDING
216 PARK ROAD, POST OFFICE BOX 513
BURLINGAME, CALIFORNIA 94011-0513
TELEPHONE (415) 342-9600
FACSIMILE (415) 342-7685

ALBERT J. HORN
DAVID C. CARR
ARTHUR H. BREDENBECK
NORMAN I. BOOK, JR.
QUENTIN L. COOK
ROBERT A. NEBRIG
MARION L. BROWN
RICHARD C. BERRA
CRAIG STUPPI
L. MICHAEL TELLEEN
MAUREEN McQUAID
LAGE E. ANDERSEN
KEITH P. BARTEL
MARK A. CASSANEGO
LAURENCE M. MAY

PAUL V. SIMPSON
DAVID M. McKIM
EDWARD J. TREDINNICK
MICHAEL J. McQUAID
PENELOPE C. GREENBERG
ROBERT W. PAYNE
KRISTI COTTON SPENCE
MARK D. HUDAK
JAMES R. CODY
JORDAN W. CLEMENTS
PAUL A. AHERNE
EDWARD J. WILLIG III
SARAH J. DiBOISE
W. GEORGE WAILES
SUZANNE L. YAMAMOTO

RONALD F. GARRITY
SPECIAL COUNSEL

STEVEN D. ANDERSON
LINDA R. BECK
JAMES F. BLOOD
LAURA E. INNES
LESLIE KANE
JEREMY W. KATZ
LORI A. LUTZKER
CAROL L. MUSSMAN
KIMBERLY A. PESAVENTO
TERESE M. RADDIE
DONALD W. ROBINSON
CAROL B. SCHWARTZ
ANDREW J. SCOGGIN
LISA H. STALTERI
MOIRA C. WALSH
D. KENT WESTERBERG

SAN FRANCISCO OFFICE
TWENTY-SECOND FLOOR
ONE CALIFORNIA STREET
SAN FRANCISCO
CALIFORNIA 94111
TELEPHONE (415) 362-1400
FACSIMILE (415) 362-5149

LUTHER M. CARR
FRANK B. INGERSOLL, JR.
ROBERT R. THOMPSON
CYRUS J. McMILLAN
OF COUNSEL

September 9, 1992

Law Revision Commission
RECEIVED

File: _____
Key: _____

VIA FEDERAL EXPRESS
Mr. Nat Sterling
California Law Revision Commission
4000 Middlefield Rd., Suite D-2
Palo Alto, California 94303-4739

This letter is written to support and congratulate the L.R.C. on its wisdom and vision for being willing to submit for comment its clear TR on community property in joint tenancy form; I write it as a practicing estate planning attorney (and a speaker for various professional organizations on community property issues) and not in my capacity as a member of the Executive Committee of the State Bar Estate Planning, Trust & Probate Law Section or its Team 2 charged with studying community property issues.

From the comments you have already received during the course of the LRC study of this issue, I'm certain that it is clear to you as well as to a number of us practioners that not only is their significant public confusion but also confusion among professionals as to the meaning of a joint tenancy title of property acqired by a married couple with community property funds. Throughout California history, courts have been asked to interpret this issue and the rulings have sought to provide "equity" to the parties by basing their rulings on differing legal interpretations.

Recent legislation defining transmutation requirements and legislation applying fiduciary duties between spouses have only further added to, and, in my opinion, further complicated this legal confusion.

The LRC TR draft, if finally enacted, will go a long way to clarifying future title holdings and will continue to favor California's community property tradition which attempts to provide equal rights to both spouses.

I further believe that the TR, if adopted, will minimize litigation on this issue and provide a level of certainty and comfort to title companies, brokers, financial institutions and other professionals dealing with married persons taking title to property who I fear will more and more become embroiled in litigation when those same married persons, or those claiming under them, become unhappy with the form of title they chose and will look for "deep pockets" to reduce their lack of information and understanding.

I have read the letter of Robert Temmerman dated September 2, 1992, and agree with his specific comments and suggested changes.

Very truly yours,

Arthur H. Bredenbeck

AHB:jaf

#F-521.1/L-521.1

STATE OF CALIFORNIA

California Law Revision Commission

TENTATIVE RECOMMENDATION

EFFECT OF JOINT TENANCY TITLE ON COMMUNITY PROPERTY

October 1992

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN January 15, 1992.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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

nsl22
10/15/92

Summary of Tentative Recommendation

Historically in California married persons have titled their community property as joint tenancy unaware of the adverse consequences of that form of tenure, including the inability to will it or to obtain community property tax benefits. On the death of a spouse the survivor has had to make a showing that the joint tenancy form was for convenience only and there was no intent to convert the property to joint tenancy. In recent years this informal arrangement has broken down as courts give greater effect to the form of title and the Internal Revenue Service refuses to recognize community property claims for property titled as joint tenancy.

This recommendation is intended to ensure that married persons who take title to property as joint tenants do so knowingly and intentionally. In order to convert community property to joint tenancy, the spouses must transmute the property by an express written declaration; otherwise it remains community property. The recommendation requires persons who assist spouses in titling their property to inform them of the advantages and disadvantages of community property and joint tenancy tenure. A "safe harbor" statutory form is provided with sufficient information and a proper declaration to enable a person to transmute community property to joint tenancy, if desired. The proposed statute is prospective only.

Tentative Recommendation

EFFECT OF JOINT TENANCY TITLE ON COMMUNITY PROPERTY

A husband and wife in California may hold property in joint tenancy or as community property.[1] The two types of tenure, one common law and the other civil law, have different legal incidents--the spouses have different management and control rights and duties, creditors have different rights to reach the property, and the property is treated differently at dissolution of marriage and at death.[2]

In California it is common for husband and wife to take title to property in joint tenancy form even though the property is acquired with community funds. Frequently the joint tenancy title form is selected by the spouses on the advice of a broker or other person who is unaware of the differences in legal treatment between the two types of property tenure. The spouses themselves ordinarily do not know the differences between the two types of tenure, other than that joint tenancy involves a right of survivorship.[3]

As a consequence, a person who is adversely affected by the joint tenancy title form may litigate in an effort to prove that the spouses did not intend to transmute the community property into joint tenancy. Because joint tenancy is often disadvantageous to the spouses (it frequently frustrates the decedent's trust or other estate plan and results in adverse tax consequences if the property has appreciated in value) the courts in the past have been liberal in relaxing evidentiary rules to allow proof either that the spouses did not intend to

---

1. Fam. Code § 750. The spouses may also hold property as tenants in common, although this is relatively infrequent.

2. See, e.g., Sterling, Joint Tenancy and Community Property in California, 14 Pac. L. J. 927 (1983); 10 Comm. Prop. J. 157 (1983).

3. See, e.g., Bruch, The Definition and Division of Marital Property in California: Towards Parity and Simplicity, 33 Hast. L. J. 769, 828-38 (1982).

transmute community property to joint tenancy or, if they did, that they subsequently transmuted it back.[4]

The result has been general confusion and uncertainty in this area of the law, accompanied by frequent litigation[5] and negative critical comment.[6] It is apparent that the interrelation of joint tenancy and community property requires clarification.

Legislation enacted in 1965 directly addressed the problem of married persons taking title to property in joint tenancy form without being aware of the consequences and in fact believing the property is community.[7] Former Civil Code Section 5110 was enacted to provide that a single-family residence acquired during marriage in joint tenancy form is presumed community property for purposes of dissolution of marriage. This presumption had a beneficial effect and was expanded

---

4. See, e.g., Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 159-68 (1981).

5. See, e.g., Siberell v. Siberell, 214 Cal. 767, 7 P. 2d 1003 (1932); Delanoy v. Delanoy, 216 Cal. 23, 13 P. 2d 513 (1932); Tomaier v. Tomaier, 23 Cal. 2d 754, 146 P. 2d 905 (1944). Cases struggling with the issue in the past few years include In re Marriage of Lucas, 27 Cal. 3d 808, 614 P. 2d 285, 166 Cal. Rptr. 853 (1980); Estate of Levine, 125 Cal. App. 3d 701, 178 Cal. Rptr. 275 (1981); In re Marriage of Stitt, 147 Cal. App. 3d 579, 195 Cal. Rptr. 172 (1983); Estate of Blair, 199 Cal. App. 3d 161, 244 Cal. Rptr. 627 (1988); In re Marriage of Hilke, [2 Cal. App. 4th 433 (1992)] (rev. granted); In re Marriage of Allen, 92 Daily Journal D.A.R. 11563 (1992).

6. See, e.g., Marshall, Joint Tenancy Taxwise and Otherwise, 40 Calif. L. Rev. 501 (1952); Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87 (1961); Mills, Community Joint Tenancy--A Paradoxical Problem in Estate Administration, 49 Cal. St. B. J. 38 (1974); Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego, L. Rev. 143 (1981); Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity, 33 Hast. L. J. 771 (1982); Sterling, Joint Tenancy and Community Property in California, 14 Pac. L. J. 927 (1983), 10 Comm. Prop. J. 157 (1983); Kasner, Community Property in Joint Tenancy Form: Since We Have It, Lets Recognize It (1991).

7. Cal. Assem. Int. Comm. on Judic., Final Report relating to Domestic Relations, reprinted in 2 App. J. Assem., Cal. Leg. Reg. Sess. 123-24 (1965).

in 1983 to apply to all property acquired during marriage in joint tenancy form.[8] The 1983 legislation also made clear that the community property presumption may be rebutted only by a clear writing by the spouses, but that separate property contributions are reimbursable at dissolution of marriage.[9] This legislation is limited in effect and does not address treatment of the property at death of a spouse,[10] or during marriage before dissolution or death.

Community property provides a married person important protections that joint tenancy does not. Community property protections include:

(1) Fiduciary duties in management and control of the property.[11]

(2) Limitations on depletion of the community by gift.[12]

(3) Limitations on disposition of the family home or other community real property.[13]

(4) Prohibition on forced partition of the property during marriage.[14]

(5) Right to will the decedent's community property interest.[15]

(6) Passage of property to the surviving spouse absent a will.[16]

---

8. Civ. Code § 4800.1, enacted by 1983 Cal. Stats. ch. 342, § 1. See California Law Revision Commission--Report Concerning Assembly Bill 26, 1983 Sen. J. 4865 (1983).

9. Civ. Code § 4800.2, enacted by 1983 Cal. Stats. ch. 342, § 2.

10. Marriage of Hilke, [2 Cal. App. 4th 433 (1992)] (rev. granted).

11. Fam. Code §§ 721, 1100(e), 1101.

12. Fam. Code § 1100(b).

13. Fam. Code § 1102.

14. Code Civ. Proc. § 872.210(b).

15. Prob. Code § 6101.

16. Prob. Code § 6401.

(7) Passage of property to the surviving spouse without probate,[17] and ability of the surviving spouse to elect probate if desired.[18]

(8) Stepped-up income tax basis for appreciated community property passing to the surviving spouse.[19]

Joint tenancy may provide some protection for a married person from liability for debts.[20] However, the common law protection is at the expense of a creditor who may be denied payment for a just debt. Moreover, the supposed benefits of protection from creditors are offset by a greater detriment. The law limiting the liability of joint tenancy property may cause a joint tenant to be denied credit, or to be allowed credit only with the other joint tenants and only subject to a security interest in the joint tenancy property.

By comparison, the statute governing liability of community property for debts represents sound social policy based on a balanced consideration of all aspects of the debtor-creditor relationship, including the need for fairness to all parties and to encourage extension of credit to married persons.[21] The California Law Revision Commission believes the debt liability consequences alone of joint tenancy compel the conclusion that community property is the preferable form of property tenure.

Other arguments that have been advanced for the desirability of joint tenancy for married persons also are not persuasive.

•Depreciated joint tenancy property retains a higher income tax basis than depreciated community property, but this is relatively

---

17. Prob. Code § 13500.

18. Prob. Code § 13502.

19. Int. Rev. Code § 1014.

20. See discussion in Sterling, supra, at 14 Pac. L. J. at 945-951; 10 Comm. Prop. J. at 175-182.

21. California Law Revision Commission, Recommendation relating to Liability of Marital Property for Debts, 17 Cal. L. Revision Comm'n Reports 1 (1984).

unimportant since the vast majority of property in California has appreciated rather than depreciated in value, and community property receives a substantial tax advantage in this situation.

•Joint tenancy property passes automatically to the surviving spouse, but this feature is illusory since either spouse may unilaterally sever the joint tenancy and will the spouse's interest in the property.

•Automatic passage to the surviving spouse may, and frequently does, inadvertently frustrate a well-conceived estate plan that seeks to pass the decedent's share of the property, for example, to a bypass trust or a child of a former marriage.

•The ability to clear title quickly by an affidavit of death is a characteristic of joint tenancy property that also applies to community property.

The statutory incidents of community property that have been enacted over the years for the protection of married persons correspond with what most married persons want and expect. They are generally advantageous to married persons. Joint tenancy ill-serves the needs of most married persons, despite its wide-spread but uninformed use. For these reasons, the Law Revision Commission believes that the law should ensure that married persons who take title as joint tenants do so knowingly and intentionally.

In order to convert community property to joint tenancy, the spouses should make an express and knowing transmutation of the community property to joint tenancy.[22] Persons who assist married persons in titling their property should be required to inform them of the advantages and disadvantages of community property and joint tenancy. A "safe harbor" statutory form should be enacted with sufficient information and a proper declaration to enable a person to

---

22. This is analogous to the "Acceptance of Joint Tenancy" in use in Arizona. The requirement would apply only to community property, not separate property. The law applicable to commingling, tracing, reimbursement, gift, and other principles affecting separate property contributions to community property or joint tenancy would be unaffected. See, e.g., Fam. Code § 2640 (separate property contributions to property acquisition).

transmute community property to joint tenancy, if that is what is really desired. Failure to execute the proper declaration of a knowing and intentional transmutation of community property to joint tenancy should leave the community character of the property unaffected. There should be a one-year deferred operative date for the proposed legislation, in order to give affected persons an opportunity to become informed about the new requirements. The new requirements should apply only to a property acquisition or titling that occurs after the operative date.

The proposed statutory scheme corresponds with the intention of most married persons not to lose basic community property protections merely by taking property in joint tenancy title form, while enabling those who really want joint tenancy treatment to obtain it. The proposed law will provide certainty and minimize litigation over the issue whether the property should be treated as community property or joint tenancy.

Treating the property as community at death will enable passage at death to the surviving spouse without probate. Title to the property can be cleared quickly and simply either by affidavit[23] or by summary court proceeding.[24] It will also avoid possible frustration of the decedent's estate plan since the community property may be passed by will (for example, to an exemption-equivalent testamentary bypass trust, with resultant tax savings for survivors).

In short, community property tenure is more advantageous to the parties than joint tenancy in the ordinary case, and corresponds to the ordinary expectations of the parties who take joint tenancy title form. Community property in joint tenancy form should receive community treatment for all purposes, unless the parties clearly indicate in writing their intent to hold their interests as separate property joint tenants.

---

23. Prob. Code §§ 210-21; see also Prob. Code § 13540 (right of surviving spouse to dispose of real property).

24. Prob. Code §§ 13650-60.

The Commission's recommendation would be implemented by enactment of the following provisions.

Civ. Code § 683 (amended). Creation of joint tenancy

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

683. (a) A joint interest is one owned by two or more persons in equal shares, by a title created by a :

(1) A single will or transfer, when expressly declared in the will or transfer to be a joint tenancy~~, or by transfer from~~ .

(2) A transfer, when expressly declared in the transfer to be a joint tenancy:

(A) From a sole owner to himself or herself and others~~, or from~~ .

(B) From tenants in common or joint tenants to themselves or some of them, or to themselves or any of them and others~~, or from~~ .

(C) From a husband and wife, when holding title as community property or otherwise to themselves or to themselves and others or to one of them and to another or others~~, when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants~~ , subject to Chapter 6 (commencing with Section 860) of Part 2 of Division 4 of the Family Code (effect of joint tenancy title on community property) .

(b) A joint tenancy in personal property may be created by a written transfer, instrument, or agreement.

~~(b)~~ (c) Provisions of this section do not apply to a joint account in a financial institution if Part 2 (commencing with Section 5100) of Division 5 of the Probate Code applies to such account.

Comment. Section 683 is amended to recognize enactment of Family Code Sections 860-866, governing the effect of the joint title on community property. Those provisions become operative January 1, 1995.

The reference in the section to a grant or devise to executors or trustees as joint tenants is deleted. Rights and duties among joint executors and cotrustees are governed by statute and not by the law of joint tenancy. See Prob. Code §§ 9630-31 (joint personal representatives) and 15620-22 (cotrustees).

The other changes in the section are technical, for organizational purposes.

Staff Note. We have deleted the language about a devise to executors or trustees as joint tenants at the suggestion of Bob Temmerman. We have also restored in new subdivision (b) language of existing law inadvertently omitted from the last draft.

Fam. Code §§ 860-866 (added). Effect of joint tenancy title on community property

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

CHAPTER 6. EFFECT OF JOINT TENANCY TITLE ON COMMUNITY PROPERTY

§ 860. Scope of chapter

860. (a) This chapter applies to property held between married persons in joint tenancy form if the property has a community property source. Property has a community property source if it is acquired in whole or part with community property or if the form of title is the result of an agreement, transfer, exchange, express declaration, or other instrument or transaction that affects community property.

(b) Nothing in this chapter affects the law applicable to commingling, tracing, reimbursement, gift, or other principles affecting separate property contributions to community property or joint tenancy property.

Comment. Sections 860 to 866 govern the effect of joint tenancy title on community property. A husband and wife may hold property as joint tenants (or tenants in common) or as community property. Section 750. Joint tenancy is a form of separate property ownership and is inconsistent with community property. See, e.g., Siberell v. Siberell, 214 Cal. 767, 7 P. 2d 1003 (1932). See, generally, discussion in Sterling, Joint Tenancy and Community Property in California, 14 Pac. L. J. 927 (1983), 10 Comm. Prop. J. 157 (1983).

Section 860 limits this chapter to property held in joint tenancy form that has a community property source. Thus treatment of separate property contributions to community property or joint tenancy property is governed by law other than this chapter. See, e.g., Section 2640 (separate property contributions to property acquisition).

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

Staff Note. At the September meeting the suggestion was made that the statute cover personal property expressly. We have not done this since it is clear from the context of the Family Code that references to community property include both real and personal property. This is also noted in the Comment to the section.

The suggestion also was made at the September meeting that issues of commingled community and separate property should be addressed in the statute. We have done this by adding subdivision (b) preserving separate property principles.

We have not tried to extend the current proposal to deal with titling of separate property as joint tenancy between the spouses. Issues involving separate property contributions to joint tenancy are distinct from issues involving community property. The community property issues are considerably easier since both forms of tenure involve equal ownership. Conversion of single-owner separate property to joint tenancy raises much more complex questions of intent to make a gift and differences in intent depending on whether dissolution or death is at issue. Separate property problems are already covered statutorily to some extent (e.g., the Lucas reimbursement legislation) and we don't want to bite off more than we can chew in this very complex area.

§ 861. Transmutation of community property to joint tenancy

861. (a) Property held between married persons in joint tenancy form that has a community property source is joint tenancy and not community property if the community property is transmuted to joint tenancy by an instrument that satisfies Chapter 5 (commencing with Section 850) (transmutation of property) and is signed by both spouses. The instrument may be a part of a document of title or may be a separate instrument, and may be executed together with a document of title or at another time. Use of the form provided in Section 863 (statutory form) satisfies this subdivision.

(b) If subdivision (a) is not satisfied, property held between married persons in joint tenancy form that has a community property source is not transmuted from community property to joint tenancy and remains community property.

Comment. Section 861 makes clear that the transmutation statute governs creation of joint tenancy from community property. The spouses may transmute community property to joint tenancy by agreement or transfer. Section 850. A transmutation of real or personal property is not valid unless done in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected. Section 852(a). This section adds the requirement of the signature of both spouses, since a transmutation to joint tenancy could adversely affect the interest of either spouse. A transmutation of real property is not effective as to third parties without notice of it unless recorded. Section 852(b).

An express declaration transmuting community property to joint tenancy should state that the property is "converted from community property to joint tenancy", or words to that effect expressly stating that the characterization or ownership of the property is being

changed. See Estate of MacDonald, 51 Cal. 3d 262, 272 Cal. Rptr. 153, 794 P. 2d 911 (1990). The express declaration requirement may be satisfied by use of the statutory form provided in Section 863.

Under this section, community property that is not properly transmuted to joint tenancy remains community property for all purposes and receives community property treatment at death, including tax and creditor treatment and passage without probate (unless probate is elected by the surviving spouse). Prob. Code § 13500. In the case of community real property that passes without probate, the surviving spouse has full power to deal with and dispose of the property after 40 days from the death of the spouse, and title to the property may be established by affidavit. Prob. Code § 13540.

Staff Note. We have added a requirement that the transmutation be signed by both spouses, following suggestions made at the September meeting. This may be viewed as a clarification of the transmutation statute, since a transmutation of community property to joint tenancy potentially adversely affects the rights of both spouses.

The Los Angeles County Bar Association, Trusts and Estates Section, Executive Committee does not approve the basic either/or (community property or joint tenancy) approach of this draft, but still favors the "community property with right of survivorship" hybrid. "We feel that the right of survivorship is the main reason most married individuals take title in the joint tenancy form. Furthermore, we feel the right of survivorship is necessary to preserve the dependability of record title and to ensure the availability of title insurance on such property (e.g., title insurance companies would be hesitant to rely on an affidavit of death of joint tenant because there might be a contrary testamentary disposition by the deceased spouse)."

But the Committee does not address the fact that a spouse can easily override the survivorship right simply by unilaterally severing and willing a one-half interest in joint tenancy property. Moreover, a title insurance company may rely on a community property affidavit of the surviving spouse with respect to real property if 40 days have elapsed after death without a recorded contrary notice. Prob. Code § 13540.

Arthur H. Bredenbeck of Burlingame takes the opposite position from the Committee. He thinks the current approach of the draft is sound and will go a long way to clarifying the confused situation of existing law. "I further believe that the TR, if adopted, will minimize litigation on this issue and provide a level of certainty and comfort to title companies, brokers, financial institutions and other professionals dealing with married persons taking title to property who I feel will more and more become embroiled in litigation when those same married persons, or those claiming under them, become unhappy with the form of title they chose and will look for 'deep pockets' to reduce their lack of information and understanding."

§ 862. Information concerning form of title

862. (a) Any person who provides a form or other instrument for use by a married person, or who advises a married person, to transmute community property to joint tenancy shall inform the married person

concerning the advantages and disadvantages of community property and joint tenancy. The information shall compare legal incidents of the two forms of tenure, including management and control, rights of creditors, intestate succession, testamentary disposition, applicability of probate, and income tax consequences at death. Use of the form provided in Section 863 (statutory form) satisfies this subdivision.

(b) Failure to provide information that satisfies subdivision (a) does not affect the validity of a transmutation of community property to joint tenancy that is otherwise valid.

Comment. Section 862 requires that a person who offers a married person the option of transmuting community property to joint tenancy must provide information comparing community property and joint tenancy. A person who fails properly to inform the married person may be liable for any adverse consequences that result from the joint tenancy form of title. The information requirement of this section may be satisfied by use of the statutory form provided in Section 863 (statutory form). This section applies only to a form or instrument provided or advice given on or after January 1, 1995. Section 866 (transitional provision).

Staff Note. The Los Angeles County Bar Association, Trusts and Estate Section, Executive Committee is concerned about the potential liability and litigation generated by this section. They would omit this section and provide simply that persons must sign the form provided in Section 863 or they don't get joint tenancy. "By requiring the declaration on the deed, the married couple will receive the appropriate advice without the necessity of nonattorney professionals rendering legal advice which they are ill equipped to provide."

§ 863. Statutory form

863. (a) An instrument transmuting community property to joint tenancy satisfies Sections 861 and 862 if the instrument is made in writing by an express declaration substantially in the following form and signed by each spouse:

DECLARATION OF JOINT TENANCY

NOTICE

IF YOU SIGN THIS DECLARATION, YOU WILL LOSE IMPORTANT COMMUNITY PROPERTY RIGHTS. DO NOT SIGN THIS DECLARATION UNLESS YOU ARE WILLING TO GIVE UP YOUR COMMUNITY PROPERTY RIGHTS.

SOME OF THE COMMUNITY PROPERTY RIGHTS ARE SUMMARIZED BELOW. THIS SUMMARY IS NOT A COMPLETE STATEMENT OF THE LAW. YOU MAY WISH TO SEEK EXPERT ADVICE BEFORE SIGNING THIS DECLARATION.

•Management and Control. Both spouses must act together to transfer community real property. Either spouse may act alone to transfer a one-half interest in joint tenancy.

•Rights of Creditors. All community property is liable for a debt of a spouse. Half of joint tenancy property is liable for a debt of a spouse; on the spouse's death the property passes to the survivor free of the spouse's debts. This may impair the ability of a joint tenant to obtain credit.

•Passage to Surviving Spouse. Community property passes to the surviving spouse if there is no will. Joint tenancy passes to the surviving spouse whether or not there is a will.

•Right to Will Property. Each spouse may will a one-half interest in community property, for example to a child or a trust. A spouse may not will joint tenancy property; it all passes to the survivor despite the decedent's will.

•Probate. Community property passes to the surviving spouse without probate, unless the survivor elects probate; title may be established 40 days after death by recorded affidavit. Joint tenancy passes to the survivor without probate; title may be established after death by recorded affidavit.

•Income Taxes. At death community property results in a savings in income tax if property has increased in value. Joint tenancy results in a savings in income tax if property has decreased in value.

DESCRIPTION OF PROPERTY

The property that is the subject of this declaration is:

_____

Description of Property or Document of Title or Other Instrument Creating Joint Tenancy Title

DECLARATION

I have read the Notice in this instrument and understand that I lose important community property rights by signing this instrument. I declare that I intend to convert to joint tenancy any community property interest I may have in the

property that is the subject of this declaration, and to hold the property for all purposes in joint tenancy and not as community property.

_____ _____
Signature of Spouse Date

_____ _____
Signature of Spouse Date

ACKNOWLEDGMENT

State of California)
County of _____)

On _____ before me, (here insert name and title of officer), personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature _____ (Seal)

(b) Nothing in this section limits or affects either of the following:

(1) The validity of an instrument not substantially in the form provided in this section if the instrument otherwise satisfies Section 861.

(2) The sufficiency of information concerning the advantages and disadvantages of community property and joint tenancy if the information otherwise satisfies Section 862.

Comment. Section 863 provides a "safe harbor" for the requirements of Sections 861 (transmutation of community property to joint tenancy) and 862 (information concerning form of title). This section does not provide the exclusive means by which those sections may be satisfied; any instrument or information that meets the standards in those sections will satisfy them. However, use of the statutory form provided in Section 863 satisfies those sections as a matter of law.

The express declaration provision of this section is consistent with requirements in Civil Code Section 683 ("express declaration" required for joint tenancy) and in Family Code Section 852 ("express declaration" required for transmutation).

§ 864. Effect of transmutation to joint tenancy

864. Transmutation of community property to joint tenancy changes the character of the property to separate property joint tenancy for all purposes. A severance of the joint tenancy results in a tenancy in common of separate property interests of the spouses and not in community property.

Comment. Section 864 makes clear that a transmutation of community property to joint tenancy results in a "true" separate property joint tenancy and not a hybrid form of tenure. Married persons may hold property as either community property, joint tenants, or tenants in common. Section 750 (methods of holding property); see also Comment to Section 861 (transmutation of community property to joint tenancy).

At dissolution of marriage the property is treated as separate property and not as community property. See Section 2580 (presumption concerning property held in joint form). However, the property is subject to the court's jurisdiction at dissolution. Section 2650 (jointly held separate property).

§ 865. Effect on special statutes

865. Nothing in this chapter affects any other statute that prescribes the manner or effect of a transfer, inter vivos or at death, of property registered, licensed, or otherwise documented or titled in joint tenancy form pursuant to that statute.

Comment. Section 865 saves existing schemes governing transfer of title, probate and nonprobate, applicable to specified types of property. See, e.g., Vehicle Code §§ 4150.5, 5600.5 (coownership vehicle registration); Health & Safety Code § 18080 (coownership manufactured home, mobilehome, commercial coach, truck camper, or floating home registration). Cf. Civ. Code § 683 (creation of joint tenancy); Fam. Code § 2580 (community property presumption for property held in joint form); Prob. Code § 5305 (presumption that funds on deposit are community property).

§ 866. Transitional provision

866. (a) As used in this section, "operative date" means January 1, 1995.

(b) Subject to subdivision (c):

(1) This chapter applies to property held between married persons in joint tenancy form as the result of an instrument executed or transaction that occurs on or after the operative date, except that Section 862 does not apply to a form or other instrument provided for

use by a married person or advice given to a married person before the operative date, whether or not the instrument is executed or transaction occurs on or after the operative date.

(2) Property held between married persons in joint tenancy form before the operative date is governed by law otherwise applicable and not by this chapter.

(b) Property held between married persons in joint tenancy form before the operative date pursuant to an instrument or transaction that satisfies the requirements of this chapter is governed by this chapter.

Comment. Section 866 provides transitional provisions for this chapter. This chapter is subject to a one-year deferred operative date to enable persons affected by this chapter to become familiar with its provisions and to allow for production of forms that will satisfy it.

Fam. Code § 2580 (amended). Community property presumption for property held in joint form

SEC. 3. Section 2580 of the Family Code is amended to read:

2580. (a) For the purpose of division of property upon dissolution of marriage or legal separation of the parties:

(1) Property acquired by the parties during marriage on or after January 1, 1984, and before January 1, 1987, in joint tenancy form is presumed to be community property.

(2) Property acquired by the parties during marriage on or after January 1, 1987, 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.

(b) The presumptions under subdivision (a) are presumptions 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.

(c) Nothing in this section affects the character of property acquired by married persons that is not described in subdivision (a).

(d) Notwithstanding any other provision of this section, if property acquired by the parties during marriage on or after January 1, 1995, in joint tenancy form has a community property source, the property is governed by Chapter 6 (commencing with Section 860) of Part 2 of Division 4 (effect of joint tenancy title on community property).

Comment. Section 2580 is amended to recognize enactment of Sections 860-866, governing the effect of joint tenancy title on community property. Those provisions become operative January 1, 1995. Under them, community property in joint tenancy form remains community property, absent an effective transmutation. Section 861 (transmutation of community property to joint tenancy). Once transmuted, the property is separate for all purposes, but is subject to jurisdiction of the court at dissolution, as are all other forms of jointly held marital property. Section 2650 (jointly held separate property).

Prob. Code § 5305 (amended). Presumption that funds on deposit are community property

SEC. 4. Section 5305 of the Probate Code is amended to read:

5305. (a) Notwithstanding Sections 5301 to 5303, inclusive, if parties to an account are married to each other, whether or not they are so described in the deposit agreement, their net contribution to the account is presumed to be and remain their community property.

(b) Notwithstanding Sections 2580 and 2640 of, and Chapter 6 (commencing with Section 860) of Part 2 of Division 4 (effect of joint tenancy title on community property) of, the Family Code, the presumption established by this section is a presumption affecting the burden of proof and may be rebutted by proof of either of the following:

(1) The sums on deposit that are claimed to be separate property can be traced from separate property unless it is proved that the married persons made a written agreement that expressed their clear intent that such sums be their community property.

(2) The married persons made a written agreement, separate form the deposit agreement, that expressly provided that the sums on deposit, claimed not to be community property, were not to be community property.

(c) Except as provided in Section 5307, a right of survivorship arising from the express terms of the account or under Section 5302, a beneficiary designation in a Totten trust account, or a P.O.D. payee designation, may not be changed by will.

(d) Except as provided in subdivisions (b) and (c), a multiple-party account created with community property funds does not in any way alter community property rights.

Comment. Section 5305 is amended to make clear that the special transmutation provisions of Family Code Sections 860-866 for the effect of joint tenancy title on community property are not applicable to community property in a multiple-party account. Property rights in such an account are governed by the special provisions of the California Multiple-Party Accounts Law and not by the general Family Code transmutation rules.

Operative Date (uncodified)

SEC. 5. This act becomes operative January 1, 1995.