First Supplement to Memorandum 94-40

Effect of Joint Tenancy Title on Marital Property:
Comment on Proposed Legislation

INTRODUCTION

Memorandum 94-40 contains a staff proposal for legislation clarifying the law on the effect of joint tenancy title on marital property in a way that satisfies the concerns expressed about the Commission's 1994 proposal (SB 1868).

The staff proposal is rather simple:

(1) A statutory form is provided with information about the types of marital property title and a form for obtaining the desired type. This form need not be distributed or used, but persons involved in titling property are encouraged to use it by providing them extra continuing education credits for becoming informed about it and by providing them an immunity from liability for distributing it.

(2) A title presumption is enacted, favoring the form in which property is titled. The title presumption is rebuttable by proof of a contrary intent, but third parties without knowledge of a contrary claim may rely on the apparent title.

The rationale for this proposal is that the form will eventually result in education that will yield titles that more accurately reflect the parties' intent. Meanwhile, the opportunity to second-guess title is necessary to prevent inequity; it also would codify pre-1985 law and what appears to be current practice.

Although the staff is not completely thrilled with this approach, it does move the law in the direction of the policy embraced by the Commission that people should be able to understand the consequences of selecting a form of title, and the form of title selected should be honored.

COMMENTS ON STAFF PROPOSAL

The staff circulated Memorandum 94-40 to the interested persons who have been most closely involved with this project, including representatives of:

State Bar of California, Estate Planning, Trust & Probate Law Section
California Land Title Association
California Bankers Association
California Association of Realtors
Beverly Hills Bar Association
Office of Senator Campbell

Other recipients included our consultant, Prof. Jerry Kasner, Jeffrey Dennis-Strathmeyer, who is CEB Attorney for the Estate Planning and California Probate Reporter, and other persons who ordinarily receive Commission meeting materials relating to family law and probate law.

The comments we have received on the staff proposal are summarized below. We will supplement this memorandum with later-arriving comments.

Professor Kasner (Exhibit p. 1) thinks the proposal will create more problems than existing law. His main concern is the title presumption. In a case where joint tenancy title has been imposed on community property, the title presumption will conflict with the preference in California law for community property, it will ensure that IRS refuses to honor a community property claim, and it will create a burden of proof that will be almost impossible to overcome.

Andrew Landay of Santa Monica (Exhibit p. 2) agrees with the staff proposal. However, he would go further and impose a duty on title personnel to distribute the information form. There would be no liability for a failure to perform the duty.

Jeff Strathmeyer (Exhibit pp. 3-4) notes that the basic issue is how should the property be treated when the title indicates joint tenancy but the decedent's will would send it other than to the surviving spouse. He thinks the form of title is the best indicator of intent, and that the right of survivorship also supports the public policy that favors the surviving spouse and self-sufficiency of the older generation. His suggested solution to the problem is the concept of community property with right of survivorship — marital property in joint tenancy form would be treated as community property subject to a right of survivorship at death. This is consistent with Professor Kasner's background study and also with the position of the Beverly Hills Bar Association.

CONCLUSION

As an alternative to the staff proposal, the Commission should consider the possibility of proposing community property with right of survivorship. Although it is not the staff's first choice, we do think it is a fundamentally acceptable and workable solution to the problem, and would satisfy most of the concerns of the interested parties.

The concept of community property with right of survivorship is that marital property on which joint tenancy title has been imposed is treated as community property for all purposes except that at death it passes by right of survivorship in the same manner as joint tenancy. Professor Kasner's study indicates that this would probably qualify for community property tax treatment at death.

The staff's main problem with this proposal is that it overrides the decedent's will in the common case where the decedent has willed the decedent's half of the property to the decedent's children of a prior marriage; instead, all the property goes to the survivor and the survivor's children of a prior marriage. If the decedent understands the law or sees an estate planner, the decedent can deal with this by first severing the joint tenancy and then willing the property. But often this does not happen.

When the Commission worked on this same problem 10 years ago (before ultimately deciding to do nothing), we addressed the issue by providing that marital property in joint tenancy form is presumed to be community property, subject to a limitation on (rather than prohibition of) testamentary disposition:

> (a) Notwithstanding Section 6101 of the Probate Code, a married person may not make a testamentary disposition of the person's one-half of community property in joint tenancy form except by a specific disposition of the property or by a disposition that makes specific reference to community property in joint tenancy form.
>
> (b) Subdivision (a) does not apply to the extent the right of testamentary disposition of the property is governed by a written agreement between the married persons, including an agreement without limitation that the property is community property.
>
> **Comment**. Subdivision (a) imposes a limitation on testamentary disposition of community property in joint tenancy form that the property be given by a specific devise or by a specific reference to property of that type in a devise. This is intended to ensure that absent a clear and specific intent to dispose of the property, it passes to the survivor. Apart from this limitation, community property in joint tenancy form is community 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 § [13502]. Because the names of both spouses appear on the property title in this form of tenure, title in the survivor may in the ordinary case be cleared by affidavit in the same manner as joint tenancy, without the need for court confirmation pursuant to Section [13650] of the Probate Code.
>
> Subdivision (b) makes clear that the limitation on testamentary disposition applies only absent a written agreement of the married persons that is intended to control. Thus a community property agreement entered into by the spouses that makes no reference to testamentary rights should be construed as an agreement that community property in joint tenancy form is community property for all purposes, without limitation on the right of testamentary disposition.

Under this variation of community property with right of survivorship, we should emphasize in the statute that title can be cleared by affidavit of death in the same manner as any other community property. See Prob. Code § 13540 (40 days after death of spouse the survivor has full power to deal with and dispose of property free of rights of devisees and creditors, unless notice of contrary claim is recorded).

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

SANTA CLARA UNIVERSITY

SCHOOL OF LAW

August 22, 1994

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

Dear Nat:

I have received your most recent communication relating to the joint tenancy community property issue, and your proposed solution. I will not attend the meeting on September 22 for several reasons. However, I can say what I think about the staff proposal in very few words.

Insofar as I am concerned, the adoption of a title presumption is a complete capitulation to the title companies and real estate interests in California, is totally inconsistent with the preference for community property ownership between husband and wife, and virtually assures the IRS will attack a so-called double stepped up basis for assets held in either joint tenancy or tenancy in common. The burden of proof required to overcome the title presumption, coupled with the presumption the IRS determination is correct, will be almost impossible to overcome, particularly when one of the parties is dead.

Incidently, I am interested in your comment the IRS does not seem to be pursuing this issue, since I was asked to consult in a case involving a dispute with the IRS on just this issue several months ago, and was personally advised by an IRS representative that he was looking for the right case to attack the basis step up.

I would much rather deal with the mess we have then the one this statute would create.

Sincerely,

Jerry A. Kasner

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REPLY TO SANTA MONICA

August 24, 1994

Mr. Nat Sterling
Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306-4739

Subject: Joint tenancy title to marital property - Memorandum 94-40

Gentlemen:

In general I agree with the proposed legislation except the optional provisions in proposed §863(c).

During my 30 years of practice I have had sufficient experience with married clients to know that nearly all of them don't understand the legal incidents involved in the different forms of holding title.

I would require every attorney, real estate licensee, escrow agent, securities broker, dealer, or transfer agent, or other person involved in titling property or advising persons concerning title, to provide a copy of the statutory form to every person known to them to be married involved in a transaction in which the manner of taking title is an element.

However, I would go along with the commission in not imposing liability, or else the bill would never pass over the opposition of the title companies and bankers.

My version of subdivision (c) is as follows:

(c) Every attorney, real estate licensee, escrow agent, securities broker, dealer, or transfer agent, or other person involved in titling property or advising persons concerning title, hereinafter referred to as "title person", shall provide a copy of the statutory form as set forth in subdivision (a) to each client or customer known to the title person to be married involved in a transaction in which the form of title is an element. Nevertheless, a title person is not liable for any injury resulting from providing or failing to provide a copy of such form. Nothing in this subdivision is intended to relieve a title person from liability relating to advice given or an obligation to advise a married person concerning title.

Very truly yours,

Andrew Landay

Andrew Landay, J.D.

AL:mac
cc: Robert E. Temmerman, Jr., Esq.

JEFFREY A. DENNIS-STRATHMEYER
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August 27, 1994

California Law Revision Commission
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Re: Study F/L-521.1. Memorandum 94-40.
Effect of Joint Tenancy Title on Marital Property

Sirs:

I have reviewed the August 10th memorandum and the attached letters. The latter reveal three significant concerns: 1) The desire to preserve community property tax benefits (even in cases where it is rather dubious whether the client has any legitimate claim to those benefits); 2) The absence of any clear procedure for severing a joint tenancy interest in some types of personal property; and 3) The possibility of litigation whenever the surviving joint tenant is not the person entitled to the property under a will or the law of intestate succession.

The only one of these topics which seems to be producing much genuine disagreement is the last one, and I will address the balance of this letter to it.

In a nutshell, I think it comes down to this:

What should be the basis for determining who gets Blackacre when a joint tenancy title conflicts with the residuary clause of a will or the law of intestate succession?

It is usually necessary to resolve this question under circumstances in which the actual intent of the decedent is unknown (notwithstanding the claims and convenient memories of the parties and their attorneys).

My own view of this issue is that by and large the joint tenancy title is the best indicator of intent available, with this point being particularly obvious when the decedent dies without a will. There may also be a public policy reason to favor the surviving spouse in this situation: Particularly when we are talking about people who cannot afford legal advice, it is probably beneficial to the people of California not to adopt assumptions which would increase the likelihood of an older generation member not being self sufficient.

In contrast, the previously proposed legislation in this area reflects the view, intended or otherwise, that the decedent's intent is best determined by tracing the source of the property. With all due respect, this seems a dubious proposition. Do people who buy IBM stock with 50-50 separate property have a different understanding of the laws of joint tenancy, wills, and

succession than people who buy IBM stock with community property? Is there really a logical connection between the rules of property division on divorce and creditor rights and the question of whether or not John Doe wanted his wife to have the house?

I recognize the concern that not every joint tenant understands that a will does not override a joint tenancy (although I think most of them do except when such knowledge becomes inconvenient and most of their lawyers do), but how does tracing clarify any of this? And doesn't enacting a law which destroys the right of survivorship in most instances virtually guarantee more citizen misunderstanding than we have already? If you want people to sign a form at the title company, why don't you have the prospective joint tenants sign a short form that says,

> "I understand that if a joint tenant dies without severing a joint tenancy, the surviving joint tenant become the owner of the property regardless of a contrary provision in the deceased joint tenants will. This result can be changed before death by "severing the joint tenancy" in the manner provided by law. Persons desiring to sever a joint tenancy should consult an attorney."

That said, I would request reconsideration of some form of "community property with right of survivorship" or maybe "anything property with right of survivorship. The staff proposal belittles this as a quick fix which does not advance goals of public understanding and having "title mean what it says". On the contrary, I think this approach would result in a tenancy which is more consistent with the expectations of our citizens than true joint tenancy. I also favor the approach of adapting the law to meet the needs of the citizens. The previous proposal attempted to just the opposite.

Very truly yours,

Jeffrey A. Dennis-Strathmeyer