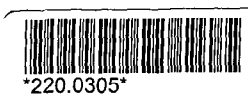
State of California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Memorandum

To: Mr. Verne Walton

Date: January 19, 1994

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Division of Assessment Standards
SACRAMENTO

From: Luma Serrano

Subject: **Agreement That Joint Tenancy Property is Actually Community Property**

This is in response to your memorandum of October 4, 1993, to Mr. Richard Ochsner wherein you requested the Legal Staff's opinion regarding a recorded document which specifies that "husband and wife agree that any property presently held by them as joint tenants, whether the same be real or personal, shall henceforth be deemed to be community property with each entitled to leave his or her one-half (1/2) interest by will." In addition, the document specifies that "husband and wife further agree that any property acquired by them as joint tenants after the date of this agreement shall also be deemed to be community property unless the parties sign an agreement specifically referring to this agreement and specifically stating that it shall not be applicable to such property acquired by the parties in joint tenancy."

The issue presented in this matter is whether in cases where a son or daughter of the couple owns the property in joint tenancy with the couple, such recorded document "breaks" the joint tenancy, thus resulting in a change in ownership and requiring the filing of a Proposition 58 exclusion. We will assume, for purposes of rendering an opinion in this matter, that the Daniels hold real property in joint tenancy with one of their children and that the Daniels (but not the child) are original transferors of the subject property. Our conclusion, based on the analysis set forth below, is that the Daniels' recorded document has the effect of ending the joint tenancy between all three parties, which transforms the Daniels' son's or daughter's interest into a tenancy in common. Such transformation constitutes a change in ownership under current law and, therefore, to avoid reappraisal, the parties will have to qualify the transfer under the parent/child exclusion.

LEGAL ANALYSIS

Civil Code Section 5110.710 specifies that:

> Subject to Sections 5110.710 to 5110.740, inclusive, married persons may, by agreement or transfer, with or without consideration, do any of the following:
>
> (a) Transmute community property to separate property of either spouse.
>
> (b) Transmute separate property of either spouse to community property.
>
> (c) Transmute separate property of one spouse to separate property of the other spouse.

Civil Code Section 682 states that the ownership of property by several persons is either:

1. Of joint interests;
2. Of partnership interests;
3. Of interests in common;
4. Of community interests of husband and wife.

JOINT TENANCY

The basic concept of a joint tenancy is that it is one estate which is taken jointly. Under Section 683 of the Civil Code, "a joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer..." The distinguishing feature of joint tenancy is the right of survivorship. The title of each tenant extends to the whole estate. Hence, upon the death of the tenant, the entire estate survives to the others to the exclusion of the heirs of the decedent. (Witkin, Summary of California Law, Real Property, (1987) 9th Edition, §257).

Under the common law, four unities were essential to the creation and existence of an estate in joint tenancy: interest, (all the parties have equal interests) time, (all the parties acquired ownership at the same time) title, (all the parties cquired ownership by the same conveying instrument) and possession (all the parties have equal right to possession). (Riddle v. Harmon (1980) 102 Cal.App.3d 526; Tenhet v. Boswell (1976) 18 Cal.3d 150, 155.) If one of the unities was

destroyed, a tenancy in common remained. (Ibid) Severance of the joint tenancy extinguishes the principal feature of the estate, i.e., the right of survivorship. This "right" is a mere expectancy that arises "only upon success in the ultimate gamble - survival - and then only if the unity of the estate has not theretofore been destroyed by voluntary conveyance..., by partition proceedings..., by involuntary alienation under an execution..., or by any other action which operates to sever the joint tenancy." (Ibid)

TERMINATION OF JOINT TENANCY

A joint tenancy is terminated where one of the tenants transfers his interest to the other. Joint tenants may also, by a simple contract without any conveyance, agree to eliminate the right of survivorship; the effect will be to terminate the joint tenancy and create a tenancy in common. (Witkin, Summary of California Law, Real Property, (1987) 9th Edition, § 276). In Riddle v. Harmon (1980) 102 Cal.App.3d 524, the court, citing Clark v. Carter (1968) 265 Cal.App.2d 291, repudiated the rule that a conveyance without a dummy is ineffective to terminate a joint tenancy:

> "We discard the archaic rule that one cannot enfeoff oneself which, if applied, would defeat the clear intention of the grantor. There is no question but that the decedent here could have accomplished her objective - termination of the joint tenancy - by one of a variety of circuituous processes. We reject the rationale of the Clark case because it rests on a common law notion whose reason for existence vanished about the time that grant deeds and title companies replaced colorful dirt clod ceremonies as the way to transfer title to real property. One joint tenant may unilaterally sever the joint tenancy without the use of an intermediary device." (Riddle 102 Cal.App.3d 531; see also Estate of Grigsby (1982) 134 Cal.App.3d 611, 617, and Estate of Carpenter (1983) 140 Cal.App.3d 709, 712).

Civil Code Section 683.2 codified the Riddle rule in 1984. Section 683.2 provides in relevant part as follows:

> (a) Subject to the limitations and requirements of this section, in addition to any other means by which a joint tenancy may be severed, a joint tenant may sever a joint tenancy in real property as to the joint tenant's interest without the joinder or consent of the other joint tenants by any of the following means:

(1) Execution and delivery of a deed that conveys legal title to the joint tenant's interest to a third person, whether or not pursuant to an agreement that requires the third person to reconvey legal title to the joint tenant.

(2) Execution of a written instrument that evidences the intent to sever the joint tenancy, including a deed that names the joint tenant as transferee, or of a written declaration that, as to the interest of the joint tenant, the joint tenancy is severed.

In the present case, the recorded document filed by the Daniels destroys the essential common law unities of interest and possession since the parties will no longer have equal interests in the property involved and will no longer have equal right to possession of such property. The document creating the community property interest, therefore, extinguishes the principal feature of the estate, which is the right of survivorship. This is manifested in the provision which permits husband and wife to each transfer their one-half community property interest by will.

Section 687 of the Civil Code defines community property as "property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either." Under this definition, property can only be characterized as community property if it is acquired by husband and wife during their marriage. Therefore, a son or daughter of the Daniels cannot take title to property as community property since he or she is not part of the marital community.

Assuming that all the four unities were satisfied when the parties created the joint tenancy, the Daniels' child no longer has a mere expectancy which would materialize only if he or she survived the Daniels. The child now has a tenancy in common interest in the property with the Daniels. Thus, the child now has a present interest.

CHANGE IN OWNERSHIP

Section 60 of the Revenue and Taxation Code defines "change in ownership" as follows:

> A "change in ownership" means a transfer of a present interest in real property, including the beneficial use

thereof, the value of which is substantially equal to the value of the fee interest.

Section 61, subdivision (d), deals with the transfer or termination of joint tenancy interests and states that change in ownership includes:

(d) The creation, transfer, or termination of any joint tenancy interest, except as provided in subdivision (f) of Section 62, Section 63 and in Section 65.

Section 65 deals with the transfer or termination of joint tenancy interests and states, in pertinent part:

(a) The creation, transfer, or termination of any joint tenancy is a change in ownership except as provided in this section, Section 62, and Section 63. Upon a change in ownership of a joint tenancy interest only the interest or portion which is thereby transferred from one owner to another owner shall be reappraised.

(b) There shall be no change in ownership upon the creation or transfer of a joint tenancy interest if the transferor or transferors, after such creation or transfer, are among the joint tenants. Upon the creation of a joint tenancy interest described in this subdivision, the transferor or transferors shall be the "original transferor or transferors" for purposes of determining the property to be reappraised on subsequent transfers. The spouses of original transferors shall also be considered original transferors within the meaning of this section.

(c) Upon the termination of an interest in any joint tenancy described in subdivision (b), the entire portion of the property held by the original transferor or transferors prior to the creation of the joint tenancy shall be reappraised unless it vests, in whole or in part, in any remaining original transferor, in which case there shall be no reappraisal. Upon the termination of the interest of the last surviving original transferor, there shall be a reappraisal of the interest then transferred and all other interests in the properties held by all original transferors which were previously excluded from reappraisal pursuant to this section.

(d) Upon the termination of an interest held by other than the original transferor in any joint tenancy described in subdivision (b), there shall be no reappraisal if the entire interest is transferred either to an original transferor or to all remaining joint tenants, provided that one of the remaining joint tenants is an original transferor.

The statutory provisions have been interpreted by subdivision (c) of Property Tax Rule 462 (18 California Code of Regulations, Section 462). That rule provides, in pertinent part:

(1) Except as is otherwise provided in subdivision (2), the creation, transfer, or termination of a joint tenancy interest is a change in ownership of the interest transferred.

(2) Exclusions:

(A) The transfer creates or transfers any joint tenancy interest and after such creation or transfer, the transferor(s)is one of the joint tenants.....

Example: C and D, as joint tenants, transfer to C,D,E, and F as joint tenants. No change in ownership because C and D, the transferors, are included among the transferees and are, therefore, "original transferors". (E and F are "other than original transferors".)

(B) The transfer terminates an original transferor's interest in a joint tenancy described in (A) and the interest vests in whole or in part in the remaining original transferor(s). For the 1980-81 assessment year and thereafter, any original transferor's interest which was previously reappraised under Section 65(a)(1) of the Revenue and Taxation Code in effect prior to September 26, 1980, shall be reversed if it does not constitute a change in ownership in accordance with this subdivision.

Example: Following the example set forth in (A) (above), C dies or grants his interest to the remaining joint tenants, D, E, and F. No change in ownership because D, an original transferor, remains as a joint tenant.

> Upon the termination of the interest of the last surviving original transferor, there shall be a reappraisal of the interest then transferred and all other interests in the property held by all transferors.

As indicated, the recorded document under which the Daniels agreed that any property held by husband and wife as joint tenants shall be deemed to be community property from the date of the document terminates the joint tenancy between the Daniels and between the Daniels and any other joint tenants, which in this case is one of their children. Under subdivision (c)(1) of Rule 462, the termination of the joint tenancy and, hence, the joint tenancy interests, is a change in ownership of the interests transferred, unless the interests are otherwise exempt. As the Daniels are original transferors of the property, and as they retain interests in the property as community property, subdivision (c)(2) of Rule 462 excludes those interests from change in ownership. There is no Rule 462 exclusion for the interest transferred to their child, however. Thus, the termination of the joint tenancy results in a change in ownership as to that one-third interest. As that transfer is a transfer between parents and a child, the parent/child exclusion would be available. As with any parent/child transfer, a claim for the exclusion will be necessary and all the requirements for the exclusion will have to be met.

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Attachment

cc: Mr. John Hagerty, MIC:63
Mr. Arnold Fong, MIC:64