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Foreword

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FOREWORD

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The enactment of Initiative 208[1] in the 1960 election authorizes creation of joint tenancies in real and personal property in Washington generally. Many of the potential problems which may confront Washington lawyers because of the general availability of the joint tenancy device are discussed in this symposium. An orderly presentation of the arguments and identification of the particulars to be resolved will be fostered by the effort of the Review editors in assembling the material in this issue. I am sure that members of the Washington bar will agree that we owe a substantial debt to the authors.

The discussions which follow reveal expectable differences between the tasks of the counselor, the advocate and the title insurer. To the extent that the informed lawyer is allowed to participate in a joint tenancy transaction at its inception he will be able to meet many of the requirements of the title insurer and minimize the likelihood of litigation, but until answers are provided either by decision or legislation no joint tenancy transaction will be much insulated from litigation, and at least two circumstances suggest that a substantial number of unexpected court proceedings will develop in this area. The first is the practical circumstance that many, if not most, of the joint tenancies will be created without adequate, reliable information. The second is, in a sense, the reverse: an apparently rather widely held belief by laymen that the passage of the Initiative converted ownerships into joint tenancies automatically. This belief appears to be applicable to husband-wife ownerships, and administration of intestate estates and controversies about successions may be more numerous in the future because of the misapprehension.

The two Comments have a probable utility somewhat out of the ordinary. Mrs. Lyness' discussion makes the important points that

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[1] Wash. Sess. Laws 1961, ch. 2; RCW 64.28. The text is quoted in n.1 of Mr. Tully's article, *infra* at page 7.

Washington's new "208" joint tenancy act should not affect the joint "bank" account rules, and that in addition, the joint tenancy concepts in common law form should not have controlling force in moulding the multi-party account law. The article by Professor Kepner to which Mrs. Lyness refers points out that in most jurisdictions the law of these accounts has gone through several stages, finally settling into its own pattern, borrowing from, perhaps, but not controlled by technical concepts developed in a different context. The Washington cases reflect fragments of a similar pattern. If the multi-party account device is to be a useful one, this writer believes the controlling rules should be "tailor-made" for the device and hopes that future cases will reveal a developing pattern of "joint-and-survivor account" rules.[2]

Mr. Kremer's summary of the inter vivos relationships of co-owners assembles information usually widely scattered. With a probable increase in the number of co-ownerships in which these problems develop,[3] Washington lawyers will probably have much more occasion than formerly to consider the points in this useful discussion.

Creation of a joint tenancy under the new law apparently will require a writing of some sort.[4] In the case of real property transactions the Statute of Frauds already forces use of documents and the new law merely adds the complexities of getting the intended form of ownership. Mr. Tully analyzes the positions the title insurers plan to take and, of course, indicates indirectly the difference between the tasks of the counselor and the advocate. The "straw-man" conveyance procedure ought to, and probably will, assure creation of the joint tenancy when the initial transferor is one of the resulting joint tenants, but it can be hoped that either legislation or decision (or both) will make possible direct conversion into joint tenancy ownership without "detouring" the title through the straw man. The presumption of a community property ownership could apply to the straw man's temporary and technical title and the draftsman will need to insert phrasing that can immunize the transaction from the presumption. A similar problem exists with respect to creditors of the straw man. These possibilities among others indicate the desirability of permitting the direct conversion into a joint tenancy. The New Hampshire case

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[2] See also NILES & WALSH, 2 AMERICAN LAW OF PROPERTY § 6.4 at 17 (Casner ed. 1952).

[3] Probable, on the assumption that California's experience with the use of joint tenancy rather than community property form for husband-wife ownership may be repeated in Washington. See Mr. Griffith's article *infra* at Page 30.

[4] Wash. Sess. Laws 1961, ch. 2, § 1; RCW 64.28.010.

Mr. Tully mentions does, as he says, have all the best of it, and there appears to be nothing in the language of "208" which necessitates adoption of common law procedures in the creation process. No doubt the reader will identify many other points in this article at which the tasks of the counselor and the advocate, and their positions, will differ.

As regards personal property the requirement of a writing will probably, as a practical matter, present more difficulty. Initially the possibility of using a "tracing" argument arises. For example, if an automobile owned in joint tenancy (with appropriate documentary evidence thereof) is sold, are the proceeds held in joint tenancy? Must there be some written "transfer" document to establish that the proceeds were acquired by the sellers in joint tenancy, or is a tracing to the source sufficient?[5] Or, assuming for this purpose that there would be a technical joint tenancy in a bank account, suppose money is withdrawn from a joint tenancy bank account and used to pay for furniture. Is the furniture held in joint tenancy? There might be a purpose on the part of the acquirers to continue the joint tenancy despite the change in form of the asset, but the provision of the new law may and perhaps does frustrate that purpose through the requirements in section one, that "Joint tenancy may be created by [a writing] when expressly declared therein to be a joint tenancy" and in section two, that every multi-party interest created is something other than a joint tenancy "unless declared in its creation to be a joint tenancy, as provided in section 1." In California tracing will control, but all depends upon the intention of the parties and no writing requirement exists.[6] In Illinois where there is a writing requirement, tracing does not appear to furnish any answer.[7]

Careful handling of the transaction would lead to preparation of appropriate writings, but suppose the argument is over the offspring of cattle owned in joint tenancy,[8] or the crops from land (or the proceeds of sale of the crops) so owned. It may be that adequate provision to control the character of ownership of the offspring or crops could be made in the document of acquisition of the source asset. There does not seem to be any other document that could do

[5] The existence of a document to meet the writing requirement is more likely in the land transaction even as to the transferor, and the "preservation" of the document by recording, for example, is also more likely.

[6] See, *e.g.*, Fish v. Security-First Nat. Bank, 31 Cal.2d 378, 189 P.2d 10 (1948).

[7] Illinois Public Aid Comm'n v. Stille, 14 Ill.2d 344, 153 N.E.2d 59 (1958).

[8] *In re* Ebdon, 98 N.Y.S.2d 697 (1950); Kauffman v. Stenger, 151 Pa. Super. 313, 30 A.2d 239 (1943); Note, 36 IOWA L. REV. 712 (1951).

the task ordinarily; but the likelihood of the problem being faced in this fashion is probably small.

The avoidance of "probate" which the proponents of the initiative sought can require that all assets be held in joint tenancy. Is it possible to accomplish this by some sort of a "blanket" instrument covering existing and subsequently acquired assets?[9] The problem is primarily of importance to husbands and wives. Washington lawyers are familiar with the possibility of controlling the community or separate property character of assets, both present and future.[10] This control rests upon recognition of the contracting power of the two persons; it would at first blush appear to reach the joint tenancy character problem too, but section two of the act precludes such a result—any multi-party holding is something other unless joint tenancy is created, as required by section one, by a writing which declares it. Even as to separate property the preference under section two is for a tenancy in common.

Probably then, it will be only in the "poor man's will" area that the survivorship feature of joint tenancy can accomplish much saving in the event of death of one of the owners. In addition some convenience may exist in getting joint tenancy corporate shares transferred. If, however, the suggestions of the preceding paragraph are sound, the house-car-bank account estates may be about the only ones likely to be put outside of "probate" by joint tenancies, and even here, what about the furniture?

Joint tenancy estates that get into the death tax area may have both more problems and more expenses than necessary, as Mr. Stacey's article demonstrates. There seem to be almost innumerable articles on the joint tenancy complications to estate planning and as to taxes generally. Mr. Stacey's article will be a valuable guide and check list for the Washington lawyer. A potential local quirk, brought to mind by his discussion of gift tax complications, is the application to the creation of a joint tenancy of the 1% real estate excise tax required by the terms of RCW 28.45, the so-called real estate sales tax. The definition of "sale" in that law is so broad that it is surprising what

[9] This ought to be possible with respect to existing assets. Cunningham v. Norwegian Lutheran Church, 28 Wn.2d 953, 184 P.2d 834 (1947) (all of my property in Snohomish county); Rennie v. Washington Trust Co., 140 Wash. 472, 249 Pac. 992 (1926) (gift of all I own).

[10] *E.g.*, Piles v. Bovee, 168 Wash. 538, 12 P.2d 914 (1932); *In re* Brown's Estate, 29 Wn.2d 20, 185 P.2d 125 (1947); Kolmorgan v. Schaller, 51 Wn.2d 94, 316 P.2d 111, 67 A.L.R.2d 704 (1957). As a partial antidote to the last cited case, see 33 WASH. L. REV. 112 (1958).

transactions are included, but at least the donative creation (through the straw man detour) of a joint tenancy between the transferor widow and her son has been declared by the attorney general not to be taxable.[11] The opinion cautiously states that it is not intended to be applied to the situation where community property is transferred into joint tenancy; it would appear that the analysis should be the same.[12]

If Washington citizens use the joint tenancy device as commonly as is apparently the case in California, for example,[13] the puzzlers identified by Messrs. Treadwell and Shulkin for Creditor-Debtor Relations will probably require solution. Their discussion should prove invaluable in fostering reasonable and purposeful solutions to the "ordinary" joint tenancy credit problems. The new law poses, as they point out, its own nasty little problem in the proviso to section one: "That such transfer shall not derogate from the rights of creditors." These authors and Mr. Tully point out that the meaning of the proviso is not certain. A technical twist on the interpretation of initiatives may complicate the matter further. There is at least a suggestion as to the meaning intended by the draftsmen of the Initiative in the title of the act, and perhaps in the literature which promoted its passage, but can this suggestion be considered? There is authority[14] that the title is no part of the enactment; and notice that it does not appear in the codification in RCW 64.28.

The creditor problems depend also on the separate or community property character of the husband-wife ownerships. Washington's recognition of separate and community debts, with appropriate differences in the scope of liability, obviously makes the character of the inter vivos ownership important whatever may be the possibilities of ownership after the death of one spouse. If no complications develop until one spouse dies it probably doesn't make any difference what the two-party property relationship was previously. If complications do develop, the differences in voluntary and involuntary manipulative power over community property and separate property, and the usual power of one joint tenant to act independently, compel a determination that joint tenancy is not a form of community property ownership.

At the death of one spouse problems of immunity of the survivor

[11] OPS. ATT'Y. GEN. 86 (Wash. 1961-62).

[12] This does not suggest any immunity to gift tax liability.

[13] See note 22 of Mr. Griffith's article and the accompanying discussion *infra* at Page 34.

[14] Senior Citizens League, Inc. v. Dep't of Social Security, 38 Wn.2d 142, 172-73, 228 P.2d 478, 494-95 (1951). See also, State *ex rel.* O'Connell v. Meyers, 51 Wn.2d 454, 478, 319 P.2d 828, 839 (1957). (Weaver, J., dissenting.)

from obligations not incurred by the survivor, full ownership of the assets in the survivor, and testamentary power of the decedent must be resolved. Making the large assumption that the writing requirements will not preclude showing an intention to have some community property attributes and some joint tenancy attributes so that there may be community property in joint tenancy form, as Mr. Griffith suggests has become possible in California,[15] the question arises whether there is a sufficient utility in distorting concepts, as this writer sees it, to achieve a shift of ownership possibility at death which may lead to a "deluge of cases" as Mr. Griffith points out has occurred in California. It is possible that the current studies of the state bar committee considering the probate code will lead to legislation largely meeting the "poor man's will" problem by affording some more inexpensive way to settle small estates. It is also possible that "community property in joint tenancy form" may be rationalized as a specialized form of the community property agreement[16] under RCW 26.16.120 so that the surviving spouse will by this specialized statutory agreement become sole owner, but subject to the ordinary community property obligations. Even California's confused development apparently does not preclude testamentary disposition or immunize the assets in the survivor's hand from creditors who could reach the asset were both owners still alive. This possible development in Washington will be interesting to watch. It is the writer's hope that it will be nipped in the bud, else the Washington citizens may harvest an unusual crop of litigation. The very limited extent to which there is *any* effect given to the joint tenancy aspect of the hybrid ownership Mr. Griffith identifies, is revealed in his study which appears in the STANFORD LAW REVIEW,[17] and the usefulness of its importation into Washington would depend, in part, upon a similarity of rules in the two states as to matters to which the new concept would apply. That similarity does not exist.

In a sense, the total discussion of this foreword, the articles and the comments of this symposium only hint at the problems which probably will arise in the development of the joint tenancy law for Washington. Even so, this issue of the *Review* will probably be unusually well-thumbed as time passes.

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[15] Discussed particularly in Griffith, *Community Property in Joint Tenancy Form*, 14 STAN. L. REV. 87 (1961).

[16] The community property agreement has no counterpart in other community property states.

[17] Griffith, *Community Property in Joint Tenancy Form*, 14 STAN. L. REV. 87 (1961).