



Legal Briefing

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Community Property with Right of Survivorship

by Candice L. Campbell

A new law went into effect in California on July 1, 2001, which provides a new option for married persons for holding title: community property with right of survivorship. Although many married persons with community property have used the old form of right of survivorship known as joint tenancy to own property, the use of the old form of joint tenancy with community property may create many problems. The new law is intended to solve those problems and give married persons additional choices in holding title to community property.

Prior Joint Tenancy Law

Traditionally, joint tenancy has been thought of as a convenient way for persons to hold title to property. In many cases it was used to avoid the necessity of making a Will. In joint tenancy, upon the death of one of the joint owners, the surviving joint tenant obtains title to all of the property in joint tenancy. No probate is needed to transfer the property. Only an Affidavit is filed with the County Recorder where the property is located to transfer the property. In general, even a Will giving the property to someone other than the surviving joint tenant will not take precedence over a joint tenancy deed. A problem arises, however, when the property placed in joint tenancy is community property.

Community Property

By definition in California, a joint interest must be half the separate property of each person. Using a joint tenancy deed for community property, therefore, creates problems. Unless a married couple enters into a "Transmutation Agreement" changing the community property to separate property, community property placed in joint tenancy remains community property even though the deed indicates joint tenancy with right of survivorship. If a dispute arises over the ownership of community property placed in joint tenancy, California law is unclear whether form of title will control or the nature of the property will control.

Tax Considerations

While ease of transfer is a major consideration when choosing to hold property in joint tenancy, tax considerations, and more specifically the tax basis of property, must also be considered. Tax basis is, in general, the amount used in computing whether there is gain or loss upon sale of property. If title to property is held as community property, when one spouse dies, the surviving spouse receives a "step up" in basis of the entire property. The step up is the value of the property at the death of the

first spouse. As a result, for tax purposes, any appreciation in the property from the original date of purchase by the couple to the death of the first spouse will not be recognized. If property is held as joint tenancy, when one joint tenant dies, the surviving joint tenant receives a step up in basis in one-half of the property, not the entire property.

Estate Planning

The new law creating community property with right of survivorship offers married persons the benefits and ease of joint tenancy ownership while maintaining the step up in basis for tax purposes. However, the new method of ownership may not be right for all people. Property ownership issues need to be considered in conjunction with each person's individual needs and in light of his or her entire estate plan.

Should you have any questions regarding community property with right of survivorship or any other questions regarding your estate plan, please contact Candice L. Campbell of Newmeyer & Dillion LLP at 949-854-7000.

Candice L. Campbell is a transactional attorney at Newmeyer & Dillion LLP with over 22 years of business, real estate, tax and estate planning experience.

Aas Questions? Ask the Firm That Won

by Gregory L. Dillion

Ever since the California Supreme Court limited the types of damages that are recoverable in construction defect lawsuits in *Aas v. Superior Court*, builders, lawyers, and insurers have struggled to understand how to apply that ruling in legal and business contexts. Confusion abounds, as homeowners and lawyers overstate their claims, insurers and subcontractors wrongfully refuse to pay, and builders question how to handle warranties, claims and customer service.

Having represented the builder in *Aas*, Newmeyer & Dillion LLP has the experience and expertise in these areas to cut through this confusion and to advise their clients how to minimize liabilities and maximize recoveries.

Gregory L. Dillion is a founding partner of Newmeyer & Dillion LLP, and represented The William Lyon Company in Aas v. Superior Court (2000) 24 Cal. 4th 627.



Rethinking Insurance Needs and Length of Warranty Periods

by Craig A. Callahan & Dwight C. Hirsh

California builders have lengthened express warranty periods and purchased ten-year “tail” policies for completed projects in the belief that construction defect lawsuits are absolutely “cut off” ten years after a homeowner’s purchase. However, two recent Court of Appeal decisions may make these builder business strategies outdated and ineffective.

Ten Years Doesn’t Necessarily Mean Ten Years

In *Lantzy v. Centex Homes* (2001) 89 Cal. App. 4th 1059, the California Court of Appeal held that the ten-year statute is subject to extension by “equitable tolling” during periods of repair by the builder. In other words, each time a builder goes out and performs repairs, the ten-year “clock” may be stopped during the time such repairs are investigated and made. According to *Lantzy*, the ten-year statute does **not** create an absolute outside limit on liability.

This decision directly contradicts another California Court of Appeal decision, which held that ten years was an absolute outside limit and was not subject to such equitable tolling. *Lantzy* is being appealed to the California Supreme Court to resolve the conflict of the Court of Appeal decisions.

Plaintiffs Can Bring “Warranty” Class Actions

In *Hicks v. Kaufman and Broad Home Corp.* (2001) 87 Cal. App. 4th 908, the California Court of Appeal held that a class action could be maintained for construction defect claims under breach of express and/or implied warranty theories. Again, this new case seems to conflict with earlier decisions holding that class actions cannot be main-

tained under such theories. This case is also being appealed to the California Supreme Court to resolve the conflicting lower court decisions.

Issues Raised by *Hicks* and *Lantzy*

These new cases could lead to the following results, which require new strategies and responses by builders whose warranty and insurance programs are based upon the traditional ten-year cut-off rule:

- Repairs made during the warranty period may extend the ten-year statute for the periods of investigation and/or repairs. Refusing to respond after ten years may no longer be an adequate or safe response. The longer the warranty period during which repairs are made, the longer such liability may be extended.
- A builder may be left without coverage under ten-year project-specific tail insurance policies if repairs during the warranty period toll the ten-year statute beyond the ten-year policy period.
- Homeowners may try to circumvent the ten-year statute for an entire project based upon “tolling” repairs to any one house in the project by bringing a class action for breach of warranty that covers all houses in the project regardless of age.

Although the law presently remains unclear and in conflict, builders need to analyze the pros and cons of the type and duration of warranties provided and insurance policies purchased in light of these new decisions.

Craig A. Callahan is a litigation partner at Newmeyer & Dillion LLP with 14 years experience representing developers in business litigation, insurance and construction defect matters. Dwight C. Hirsh is a transactional and appellate law associate at Newmeyer & Dillion LLP with over six years of general business, construction defect and insurance litigation background.

About Newmeyer & Dillion LLP

Newmeyer & Dillion LLP, originally formed in 1984, is comprised of creative, highly motivated business attorneys who possess outstanding credentials, training and experience in their respective fields of practice. The firm represents a wide variety of clients, which include national and local financial institutions, real estate development companies, manufacturers and service organizations, as well as individuals.

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- Environmental Issues
- Creditor's Rights
- Insurance Coverage and Bad Faith
- Lender Liability
- Unfair Competition/Trade Secret/Trademark
- Wrongful Termination
- Employment Discrimination
- Partnership Disputes
- Product Liability and Warranty
- Probate and Trust
- Appellate Practice

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- Coordination of Loan Transactions for Borrowers

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- 1031 Like-Kind Exchanges
- Master Planned Community Developments and Community Associations
- Department of Real Estate and Other Regulatory Filings
- Construction Related Matters

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- Formation, Structuring, Maintenance and Evaluation of Business Entities (Corporations, Limited Liability Companies, General Partnerships, Limited Partnerships, Joint Ventures)
- Shareholder, Partnership and Stock Option Plan Agreements
- Purchase and Sale of Businesses
- Business Dissolutions
- Employment and Independent Contractor Matters
- Licensing and Franchising Arrangements

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- Wills and Living Trusts
- Irrevocable Trusts
- Gifting Plans
- Family Limited Partnerships