

# Wisconsin Income Taxation - Husband and Wife Partnership

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## NOTES

### Wisconsin Income Taxation—Husband and Wife Partnership:<sup>1</sup>

A family partnership has always been a popular means of reducing the total income tax liability imposed on a sole proprietor and his family. Rather than have the total income of the business taxed entirely to himself, he will often endeavor to divert a portion of the business income to other members of the family, who would be taxed at lower rates. Attempting to accomplish this by making the family members employees of the business is of limited effectiveness since business deductions for wage and salary payments are allowed only if they are "reasonable" in relation to services rendered.<sup>2</sup> Therefore the owner may try to give the members an "interest" in the business and thereby effect a greater diversion of the business income to them because of the business interest. One way to create and transfer this "interest" is to establish a family partnership.

Prior to the Revenue Act of 1948, which introduced the "income splitting" provision for a husband and wife,<sup>3</sup> there was a federal tax incentive for a sole proprietor to form a partnership with his wife. The validity of such a partnership was often in issue; and the courts declared that they would not be duped by a mere allegation but would require the taxpayers to prove its reality.<sup>4</sup> The U.S. Supreme Court in *Commissioner v. Tower*<sup>5</sup> and in *Commissioner v. Culbertson*<sup>6</sup> made two major attempts to set forth clear guidelines for the lower courts to follow when passing on the validity of a family partnership. However the lower federal courts continued to vary greatly among themselves as to the requirements and many refused to sustain the partnership if its formation was tax motivated. As a result of this confusion, Congress in 1951 adopted what is now section 704(e) of the Internal Revenue Code in order to sustain a family partnership regardless of how, or from whom, the alleged partner acquired the interest and regardless of whether the transfer was motivated by tax reasons.<sup>7</sup> Section 704(e) does not purport to cover every family partnership; rather it is limited to the more usual situation in which the family member is alleged to be a partner because he, or she, owns a capital interest in a business in which capital is a material income-producing factor.<sup>5</sup>

<sup>1</sup> This article has been limited to a family partnership involving a husband and wife. However, much of what is said in this regard will have relevance to any family partnership situation.

<sup>2</sup> INT. REV. CODE of 1954, §162(a)(1); TREAS. REG. § 1.62(a) (1956).

<sup>3</sup> INT. REV. CODE of 1954, §2(a), added by 62 STAT. 114 (1948). The split is accomplished by a joint return with the tax figured on half the combined taxable income and then multiplied by two. After this provision was adopted, a husband and wife could obtain the same tax savings by filing a joint return as they could by forming a partnership.

<sup>4</sup> *Commissioner v. Culbertson*, 337 U.S. 733, 752 (1949).

<sup>5</sup> *Commissioner v. Tower*, 327 U.S. 280, 290 (1946).

<sup>6</sup> Note 4, *supra*.

Although the inducement to form a partnership in order to reduce income taxes may no longer exist for a husband and wife under federal law,<sup>9</sup> such an inducement continues to exist for a husband and wife subject to Wisconsin income taxes since Wisconsin has not adopted an "income splitting" provision. When the Wisconsin legislature in 1965 "federalized" its income tax laws so that, in general, Wisconsin income taxes are now determined under the provisions of the Internal Revenue Code of 1954 and subsequent amendments,<sup>10</sup> it did not adopt the federal "income splitting" provision; and a husband and wife must still report separately the income that each actually earned.<sup>11</sup> Therefore, if a husband and wife in Wisconsin wish to obtain the total tax advantages similar to those resulting from the federal "income splitting" provision, they must form a partnership.

Since the Internal Revenue Code covers partnerships in general and has a specific section on family partnerships and since Wisconsin income taxes will now be determined under the Code, the validity of a Wisconsin husband and wife partnership, in which capital is a material income-producing factor, will depend on the Code and specifically on section 704(e).<sup>12</sup> Federal case law<sup>13</sup> and the Federal Income Tax Regulations will provide valuable guidelines since these supplement and interpret the Code.

<sup>7</sup> 1951-2 CUM. BULL. 458, 485-486, S. Rep. No. 781, 82nd Cong., 1st Sess. 737 (1951).

<sup>8</sup> If the operation is a personal service business, i.e., one in which capital is not a material income-producing factor, the wife may not be recognized as a partner unless she performs vital additional services. But *Poggetto v. United States*, 306 F.2d 76, 79 (9th Cir. 1962), intimates that she could still be held as a partner if the taxpayers in good faith intended to join together as partners and that the test is still that laid down by *Culbertson*:

"the question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the *Tower* case, but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purpose for which it is used, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise."

However the problems in the area of a personal service partnership are beyond the scope of this article.

<sup>9</sup> Note 3, *supra*.

<sup>10</sup> This was achieved by equating Wisconsin definitional terms with those of the federal government as set forth in the 1954 Code and subsequent amendments. WIS. STAT. §71.02(2) (1965).

<sup>11</sup> Wisconsin does allow a husband and wife to divide the total amount of itemized deductions between themselves as they choose, if they elect to itemize. WIS. STAT. §71.05(3)(d) (1965). This right applies to itemized deductions but not to "above the line" deductions taken before arriving at federal adjusted gross income. WIS. STAT. §71.02(2)(f) (1965).

<sup>12</sup> Wisconsin case law on the validity of a family partnership is limited to one supreme court case, *Thomas v. Department of Taxation*, 250 Wis. 8, 26 N.W.2d 310 (1947), which relied in part on the *Tower* decision, and to various decisions of the State of Wisconsin Tax Appeals Commission (formerly

Consideration of the federal law on family partnerships may be divided into two main areas. The first is the requirements for a valid family partnership. Assuming a valid partnership, the second is the circumstances under which the tax department will reallocate the partnership income for income tax purposes.

One of the requirements is to qualify under the Code's general definition of a partnership:

The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; . . .<sup>14</sup>

Whenever the term is used in the Internal Revenue Code, the above definition will control even though under state law a partnership might be distinguished, for example, from a joint venture.

Assuming that the business is one in which capital is a material income-producing factor,<sup>15</sup> the basic question under section 704(e) is whether the wife actually owns her capital interest.<sup>16</sup> Prior to the 1951 amendment, the ultimate inquiry was whether the husband and wife had a bona fide intent,<sup>17</sup> which was often interpreted as requiring non-tax reasons for forming the partnership. Although Congress was dissatisfied with the above approach and enacted section 704(e) to shift the emphasis to the actual ownership aspect,<sup>18</sup> the Treasury Regulations

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known as the Wisconsin Board of Tax Appeals). The more recent decisions of the Commission do not cite *Thomas* as authority; and since the majority of these decisions include only Findings of Fact and Conclusions of Law, it is impossible to ascertain what standards or tests are being applied. However, this is now a moot question for any tax years of a family partnership after the 1965 "federalization."

<sup>13</sup> e.g., Harry S. Reddig, 30 T.C. 1382 (1958); Jack Smith, 32 T.C. 1261 (1959).

<sup>14</sup> INT. REV. CODE OF 1954 §7701(a) (2).

<sup>15</sup> TREAS. REG. §1.704-1(e) (1) (iv) (1956). ". . . the determination as to whether capital is a material income-producing factor must be made by reference to all the facts of each case. Capital is a material income-producing factor if a substantial portion of the gross income of the business is attributable to the employment of capital in the business conducted by the partnership. In general capital is not a material income-producing factor where the income of the business consists principally of fees, commissions, or other compensation for personal services performed by members or employees of the partnership. On the other hand, capital is ordinarily a material income-producing factor if the operation of the business requires substantial inventories or a substantial investment in plant, machinery, or other equipment."

An example of a business in which capital would not be a material income-producing factor would exist where the wife owns the office building from which her husband operates as an insurance agent. The services of the husband represent the material income-producing factor in this business.

<sup>16</sup> TREAS. REG. §1.704-1(e) (1) (v) (1956). ". . . a capital interest in a partnership means an interest in the assets of the partnership, which is distributable to the owner of the capital interest upon his withdrawal from the partnership or upon liquidation of the partnership. The mere right to participate in the earnings and profits of a partnership is not a capital interest in the partnership."

<sup>17</sup> Note 4, *supra*.

<sup>18</sup> Note 7, *supra*.

indicate that tax avoidance or evasion purposes will still have an influence on whether the transaction is bona fide.<sup>19</sup>

The elements necessary to prove actual ownership by the wife over her interest will depend to a great extent on how she acquired it from her husband. Section 704(e) (3) provides:

For the purposes of this section, an interest purchased by one member of a family from another shall be considered to be created by gift from the seller and the fair market value of the purchased interest shall be considered to be donated capital.

Although this section, if strictly construed, would treat a purchased interest as one created by gift, the Treasury Regulations<sup>20</sup> set forth separate standards for the two situations and clearly imply<sup>21</sup> that if the tests for a purchased interest are met, the wife will be treated as the actual owner of her interest without being required to meet the tests for a donated interest.

A purchased interest, whether acquired "directly"<sup>22</sup> or by means of a loan or credit extended by a member of the family, will be recognized as bona fide if either of the following can be shown:

(1) that the transaction has the usual characteristics of an arm's-length transaction as manifested by all relevant factors, including the terms of the purchase agreement (as to price, due date of payment, rate of interest, and security, if any), the terms of any collateral loan or credit agreement, the credit standing of the purchaser, and capacity of the purchaser to make a legally binding obligation;<sup>23</sup> or

(2) that the purchase was genuinely intended to promote the business either by securing the participation of the purchaser or by adding his, or her, credit to that of the other participants.<sup>24</sup>

If the alleged purchase price has not been paid, or otherwise discharged, the elements of (1) and (2) will be considered only as an aid in determining whether the transaction was bona fide.<sup>25</sup> Failure of the transaction to meet these requirements will compel the husband and wife to meet the tests applicable to a transfer of a partnership interest by gift.

Actual ownership by the wife, as donee of a capital interest in the partnership, will be determined from all the facts and circumstances,

<sup>19</sup> TREAS. REG. §1.704-1(e)(1)(iii) (1956); TREAS. REG. §1.704-1(e)(2)(x) (1956).

<sup>20</sup> TREAS. REG. §1.704(e)(2) & (4) (1956).

<sup>21</sup> TREAS. REG. §1.704(e)(4)(i) (1956). "If a purported purchase of a capital interest in a partnership does not meet the requirements of subdivision (ii) of this subparagraph, the ownership by the transferee of such capital interest will be recognized only if it qualifies under the requirements applicable to a transfer of a partnership interest by gifts."

<sup>22</sup> In the context of this section of the Regulations, "directly" seems to refer to a cash purchase.

<sup>23</sup> TREAS. REG. §1.704-1(e)(4)(ii)(a) (1956).

<sup>24</sup> TREAS. REG. §1.704-1(e)(4)(ii)(b) (1956).

<sup>25</sup> TREAS. REG. §1.704-1(e)(4)(ii) (1956).

not only at the time of the purported transfer but also during the period preceding and following it.<sup>26</sup> One important factor in determining whether the wife is the actual owner of the donated interest is the extent to which the donor has retained incidents of ownership over the donated capital interest. Some of these incidents of ownership are control over distribution of income or restriction on the distribution (other than amounts retained to meet the reasonable needs of the business), control over capital withdrawals, control of assets essential to the business, and exercise of management powers inconsistent with normal relationships among partners.<sup>27</sup> Such controls may be legitimately exercised by the husband, as donor, if he acts as a general manager or as a general partner in a limited partnership. In these circumstances, the donor exercises the controls in a fiduciary capacity and in no way infringes on the donee's rights of ownership. It often will be a question of degree concerning whether the donor's controls are normal or whether they are so great as to substantially inhibit the donee's ownership rights.

Other important indicia for determining the donee's real ownership in the donated capital interest are: (1) substantial participation by the donee in the control and management of the business (which presupposes a sufficient maturity and experience to deal with business problems);<sup>28</sup> (2) actual distribution of income to the donee for his, or her, sole benefit and use;<sup>29</sup> (3) compliance with local partnership, fictitious names, and business regulation statutes; (4) control of the business bank account; (5) existence of a written agreement, records, or memorandum on the nature of the partnership agreement and the rights and liabilities of the partners; (6) filing of partnership tax returns as required by law; (7) donee being held out to the public as a partner, as to customers, creditors, and other sources of financing; (8) recognition by the public of the donee's rights in the distribution of partnership income and capital;<sup>30</sup> and (9) presence or absence of tax avoidance motive.<sup>31</sup>

Although the above factors are important, compliance or non-compliance with them does not conclusively establish the existence or non-existence of actual ownership by the wife over her capital interest. The Treasury Regulations have followed the spirit of the *Culbertson* decision in rejecting any particular objective test as conclusive and instead require a consideration of all the facts and circumstances of the particular case.<sup>32</sup>

While the preceding requirements relate to the situation of a transfer

<sup>26</sup> TREAS. REG. §1.704-1(e)(1)(iii) (1956).

<sup>27</sup> TREAS. REG. §1.704-1(e)(2)(ii) (1956).

<sup>28</sup> TREAS. REG. §1.704-1(e)(2)(iv) (1956).

<sup>29</sup> TREAS. REG. §1.704-1(e)(2)(v) (1956).

<sup>30</sup> TREAS. REG. §1.704-1(e)(2)(vi) (1956).

<sup>31</sup> TREAS. REG. §1.704-1(e)(2)(x) (1956).

<sup>32</sup> Note 25, *supra*.

from the husband to the wife by purchase or by gift, the Treasury Regulations do not indicate whether the above requirements would also apply to a transfer from a third party, by purchase or by gift, to the wife with a subsequent contribution by the wife toward the formation of a partnership with the husband. The mere fact that the wife acquired her interest through a third party would seem to indicate that she is the actual owner of it and that the subsequent contribution resulted in a bona fide partnership. However all the facts and circumstances would still be considered, and the elements set forth in the Treasury Regulations would be important in making the determination.

Although the taxpayers may have succeeded in establishing the existence of a partnership, the federal tax department may disagree with the allocation of income between the partners. If the wife's interest was created by gift from the husband, section 704(e)(1) permits the department to reallocate the income if the donee's "share is determined without allowance of reasonable compensation for services rendered to the partnership by the donor" and if "the portion of such share attributable to donated capital is proportionately greater than the share of the donor attributable to the donor's capital." If the wife acquired her interest by a bona fide purchase from her husband, the Treasury Regulations imply that the tax department may not be allowed to make a reallocation even though section 704(e)(3) expressly equates an interest purchased from a family member as one created by gift from the seller. However if the transfer has any of the substantial characteristics of a gift, a reallocation could be made.<sup>33</sup>

The procedure for making the reallocation is set forth by the Regulations. The department first determines the reasonable allowance for services rendered by the husband and for those by the wife, if any. This determination would be made after consideration is given to all the facts and circumstances of the business, including the fact that one of the partners may have greater managerial responsibility than the other, and the amount that would reasonably be paid to obtain comparable services by a person not having an interest in the partnership.<sup>34</sup> Once the allowance is determined and deducted, the balance is reallocated between the donor and donee in accordance with the capital interest each actually owns.<sup>35</sup> Therefore, it would seem that the department could

<sup>33</sup> TREAS. REG. §1.704-1(e)(3)(ii)(b) (1956). "The alternative rules set forth in Section 704(e) and subdivision (i) of this subparagraph apply in any case in which the transfer or creation of the partnership interest has any of the substantial characteristics of a gift. Thus allocation may be required where transfer of a partnership interest is made between members of a family (including collaterals) under a purported purchase agreement, if the characteristics of a gift are ascertained from the terms of the purchase agreement, the terms of any loan or credit arrangement made to finance the purchase, or from other relevant data."

<sup>34</sup> TREAS. REG. §1.704-1(e)(3)(i) (1956).

<sup>35</sup> TREAS. REG. §1.704-1(e)(3)(i)(b) (1956).

conclude that the donee has ownership over some capital but less than that alleged.

The State of Wisconsin Tax Appeals Commission in *Fenske v. Wisconsin Department of Taxation*<sup>36</sup> dealt with a typical husband and wife partnership and decided against its validity. Since the case involved tax years from 1961-1964, the commission did not consider the impact of "federalization" and instead decided the case under pre-1965 Wisconsin law. We will now consider an application of the federal tax requirements to the facts of that case.

Since the Fenskes' business consisted of the operation of a family farm on which both performed services, it would easily qualify under the Code's general definition of a partnership;<sup>37</sup> and farming would be a business in which capital, consisting of land, livestock, and machinery, is a material income-producing factor. Therefore, the basic question is whether the wife actually owns her interest as a partner.

The facts that the taxpayers were still in the process of buying the farm lands as joint tenants on a land contract, all proceeds from the farm were deposited into a joint account on which both could draw, and all liabilities were paid from this account, which presumably included payments on the land contract, would present a strong argument for the taxpayers that the wife was acquiring her capital interest from a third party with her independent funds.

This argument would depend on whether or not the checking account constituted a true joint tenancy. The husband and wife would assert that it did and that when payments were made from the account on the land contract, the wife was thereby exercising her right over her share of the income. She was therefore the actual owner of her capital interest.

The tax department's position could be that: (1) the joint account was not a true joint tenancy,<sup>38</sup> *i.e.* the husband intended the wife to only have a survivorship interest in the account and thus avoid probate;<sup>39</sup> (2) the wife did not have a right to withdraw from the account and thus had no right of control over the income as deposited in the account; (3) therefore, when payments were made on the land contract, no part of the payments was attributable to the wife; (4) any interest the wife acquired because of such payments was acquired by gift from the husband; and (5) although the wife had a donated interest in the farm lands, she was not a partner because the husband, having absolute control over the joint account, had similar control over the distribution of the farm income and made no distribution.

<sup>36</sup> BTA I-2271, P. H. State and Local Taxes-Wis., par. 14,059 (1967).

<sup>37</sup> Note 14, *supra*.

<sup>38</sup> Zander v. Holly, 1 Wis.2d 300, 313 & 314, 84 N.W.2d 87, 95 (1957).

<sup>39</sup> Gillett v. Wis. Department of Taxation, CH Wis. State Tax Rep., par. 200-171 (1964).

Whether the Fenskes' and the department would make the above arguments, the fact that such positions could be equally well taken indicates that the taxpayers have not sustained their burden of proof. Considering no other facts but the facts of the joint checking account in which the proceeds from the farm were deposited and from which payments were made on the land contract, it is impossible to determine: (1) whether the wife's interest was acquired by purchase from a third person with her independent funds or by gift from her husband; (2) what rights the wife has in the joint account; or (3) whether any portion of the deposited income was considered as distributed to the wife. Although the burden of proof has not yet been met, other facts of the case could still indicate that the taxpayers had a bona fide intent to form a partnership.

In the *Fenske* case, the purchasing of machinery, the billing of farm expenses, and the receipt of farm proceeds were all done solely in the husband's own name. This indicates that, in relation to the public, the husband conducted the business as its sole owner and not as a partnership. Although it could be explained by contending that they had formed a limited partnership, the facts of the case do not show that a limited partnership agreement was made or, if made, that the partnership was organized and conducted as required by state law, which is a *sine qua non* for a limited partnership.<sup>40</sup>

The commission found that the wife did not pay self-employment Social Security taxes, which tends to indicate that the wife did not regard herself as a partner.

Other facts indicate that the Fenskes' failed to comply with certain formalities. No separate drawing accounts were provided for the husband and wife in the farm business books. Keeping partnership books and business records in the husband's name alone<sup>41</sup> or having no records at all<sup>42</sup> weighs against the contention of a partnership. The taxpayers also failed to execute a written agreement evidencing a partnership. Although a writing is not required, lack of a written agreement places a greater burden on the taxpayers to prove the existence of a partnership agreement.

From the survey of the facts as presented in the case, it must be concluded that under federal tax law requirements the taxpayers have not sustained their burden of proving a bona fide intent to form a partnership. Although the wife may own an interest in the farm lands as a joint tenant, she does not own it as a partner.

From October of 1964 to the *Fenske* case in March of 1967, there have been nine cases before the State of Wisconsin Tax Appeals Com-

<sup>40</sup> TREAS. REG. §1.704-1(e)(2)(ix) (1956).

<sup>41</sup> Kasper v. Baron, 207 F.2d 744, 748 (8th Cir. 1953).

<sup>42</sup> Wright v. Celebrezze, 262 F. Supp. 615 (D.C. N.D. N.Y. 1965).

mission which involved the validity of a family partnership; all but one of these concerned farmers, and all but one involved a husband and wife.<sup>43</sup> The tax years covered ranged from 1956 to 1964. The great similarity among these cases and the number of cases in a relatively short period indicates a continuing problem among members of the farm community concerning knowledge of the proper way to execute a bona fide partnership in order to gain tax advantages. The best advice that could be given to such persons would be to consult an attorney before they attempt anything or at least before they file their tax returns.

As for the Fenskes', there are three general areas in which steps should have been taken to insure their claim of a bona fide partnership.

The first relates to their joint bank account. As pointed out above, one bank account, serving both family and business needs, creates an ambiguous situation which makes it impossible to determine whether, and in what proportion, if any, the account represents partnership or individually owned funds. Maintaining separate accounts for the partnership and for the individual members may be desirable in order to show a bona fide intent to carry on the business as a partnership<sup>44</sup> but may be undesirable in that it could be too inconvenient. If one account is used, the taxpayers should keep accurate and up-to-date records to indicate the distributive share of partnership earnings allocable to the husband and wife.

However since an actual distribution to the wife of the entire amount or a major portion of her distributive share of the business income for her sole benefit and use<sup>45</sup> is substantial evidence of the reality of her interest,<sup>46</sup> and since a single account would not indicate what portion of the account represented the wife's actual "distributed" share, as distinguished from her "distributive"<sup>47</sup> share, an individual bank account for the wife into which her actual distributed share would be deposited would seem mandatory. A separate account would also avoid the problems presented by Treasury Regulation 1.704-1(e)(2)(v) :

<sup>43</sup> Gillett v. Wis. Department of Taxation, Note 39, *supra*; Harmsen v. Wis. Department of Taxation, CCH Wis. State Tax Rep., par. 200-222 (1965); Harmsen v. Wis. Department of Taxation, CCH Wis. State Tax Rep., par. 200-224 (1965); Buwalda v. Wis. Department of Taxation, CCH Wis. State Tax Rep., par. 200-264 (1965); Mueller v. Wis. Department of Taxation, CCH Wis. State Tax Rep., par. 200-273 (1966); Grams v. Wis. Department of Taxation, CCH Wis. State Tax Rep., par. 200-274 (1966); Nelson v. Wis. Department of Taxation, CCH Wis. State Tax Rep., par. 200-278 (1966); Mortenson v. Wis. Department of Taxation, CCH Wis. State Tax Rep., par. 200-268 (1966); Fenske v. Wis. Department of Taxation, P.H. State and Local Taxes-Wis., par. 14,059 (1967).

<sup>44</sup> Note 42, *supra*.

<sup>45</sup> "[S]ole benefit and use" would seem to indicate that the wife could not use her share for necessary family expenditures for which the husband was legally responsible.

<sup>46</sup> TREAS. REG. §1.704-1(e)(2)(v) (1956).

<sup>47</sup> INT. REV. CODE of 1954, §702(a).

. . . Amounts distributed are not considered to be used for the donee's sole benefit if, for example, they are deposited, loaned, or invested in such manner that the donor controls or *can* control the use of enjoyment of such funds. (emphasis added)

The first problem would be interpreting the phrase "can control," and the second would be whether the holding in *Schley*<sup>48</sup> would have any effect on the application of this section to a joint account. Therefore a separate account for the wife not only avoids these problems but would itself be an indicium that the wife acted as a partner, since she would have sole control over her distributed share of the income.<sup>49</sup>

The second general area in which the Fenskes' could have acted in order to insure a holding that partnership status existed, concerns the taxpayers' relationship to the public. In this regard they should have at all times represented themselves as a partnership, especially to creditors, customers, and lending institutions.

The final area relates to certain formalities which should have been followed. A written agreement, evidencing the rights and liabilities of the partners, and partnership records would be additional evidence of a bona fide intent. Other important formalities with which the taxpayers should have complied are set forth in Treasury Regulations section 1.704-1 (e) (2) (vi) (1956).

Therefore, if the taxpayers had: (1) established a separate account for the wife, (2) kept accurate and up-to-date partnership records, (3) represented the business as a partnership to third parties, (4) executed a written partnership agreement, and (5) complied with other formalities, their allegation of a partnership, would have been sustained under federal tax law requirements.

Since the Regulations seem to have perpetuated the subjective requirement of a bona fide intent as first introduced by the *Culbertson* decision, the courts are still free to inquire into the intangible element of a bona fide intent. However, it is difficult to imagine what more the courts could consider other than the elements in the Regulations in deciding the validity of a family partnership. Therefore, it would seem that if the guidelines set forth in the Treasury Regulations are followed, a husband and wife would be reasonably safe in forming a family partnership for the purpose of saving state income taxes.

RICHARD L. STILES

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<sup>48</sup> In re Estate of Schley, 271 Wis. 74, 72 N.W.2d 767 (1955) held that if a husband and wife have created a true joint tenancy in a certificate of deposit (similar to a checking account), each one has an absolute one half interest in the account regardless of who deposits the money; and while one joint tenant could withdraw the entire amount, he would not destroy the one half interest of the other if the latter could trace the one half interest.

<sup>49</sup> *Nicolas v. Davis*, 204 F.2d 200, 201-202 (10th Cir. 1953); TREAS. REG. §1.704-1(e) (2) (v) (1956).