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## JOINT AND MUTUAL WILLS AND THE MARITAL DEDUCTION

Under some circumstances the Internal Revenue Code allows a marital deduction for estate tax purposes for an interest in property which passes from the decedent to the surviving spouse.<sup>1</sup> The interest given must be included in determining the value of the decedent's gross estate<sup>2</sup> and must not be deductible under any other Code section.<sup>3</sup> The deduction is then allowed only to the extent of 50% of the adjusted gross estate<sup>4</sup> and only if the interest received by the surviving spouse is not objectionable as a terminable interest.<sup>5</sup> The Code provides several exceptions to the terminable interest rule. Thus, if the surviving spouse is entitled to all of the income from the property and in addition is given a power to appoint the property to herself or her estate either by will or during life a marital deduction will be allowed, provided the power is exercisable by her alone and in all events.<sup>6</sup> It is the purpose of this paper to determine whether the interest given to a surviving spouse by a joint or mutual will would qualify for the marital deduction.

The terms "joint will" and "mutual will" have been used to describe several types of documents but as used in this paper they will be given their most commonly accepted meaning. The term "joint will" is used herein to describe two or more wills containing a common plan of disposition. A joint and mutual will then is a single document executed as the will of two or more persons and containing a common plan of disposition.<sup>7</sup> Such a will is effective as a testamentary disposition of property if its provisions can be carried out separately, but the will must be probated after the death of each testator.<sup>8</sup> These three types of wills in themselves raise no peculiar estate tax problems, but very often such wills are based on a contract. It is, of course, possible to have a joint or mutual will that is not based on a contract, but this paper is concerned only with joint or mutual wills that are executed pursuant to an enforceable contract. The contract will not be determined from the existence of a joint and mutual will alone, but very little other evidence is needed. The will may expressly affirm or negate the existence of a contract. In the absence of an expressed provision a contract may be found from the phraseology or terms of the will.

<sup>1</sup> Int. Rev. Code of 1954, §2056. This section is applicable whether the husband or the wife is the survivor, however in this paper it will be assumed that the wife is the survivor unless the context indicates differently.

<sup>2</sup> *Id.* at §2056(a).

<sup>3</sup> *Id.* at §2056(c)(2)(A).

<sup>4</sup> *Id.* at §2056(c)(1).

<sup>5</sup> *Id.* at §2056(b)(1).

<sup>6</sup> *Id.* at §2056(b)(5).

<sup>7</sup> For other definitions see 27 WORDS & PHRASES 961.

<sup>8</sup> 1 Page, Wills §107 (3d ed. 1941).

In *Doyle v. Fisher*<sup>9</sup> the husband provided for some of his children while the wife provided for the others in their joint and mutual will. This was all that was necessary for the court to determine that the wills were executed pursuant to a contract.<sup>10</sup> The will can be revoked at any time even though it is executed pursuant to a contract (the contract does not change the nature of a will) but after one of the parties has died with the will in effect the survivor can no longer rescind the contract. Sometimes it is said that the contract becomes irrevocable only after the survivor has accepted the benefits of the will but most of the cases involve situations in which the survivor actually has accepted the benefits of the will before an attempt to avoid the contract is made, so the question is not squarely presented. This may be the law in those jurisdictions where the wife cannot waive her right of election while her husband is alive.<sup>11</sup> There is dicta to the effect that either party can rescind the contract while both are alive by giving notice to the other,<sup>12</sup> presumably because the other party can then change his will and suffer no damages. In Wisconsin it is possible that the parties cannot rescind the contract at any time after it is executed because of the peculiar third party beneficiary rule,<sup>13</sup> but no case has ever decided the point.

The third party beneficiary can enforce the contract in equity<sup>14</sup> and even if land is involved the statute of frauds is no bar because the first party to die has fully performed his part of the contract.<sup>15</sup>

## I

### JOINT AND MUTUAL WILLS BY WHICH THE FIRST TO DIE GIVES A TERMINABLE INTEREST TO THE SURVIVOR AND THE SURVIVOR GIVES ALL OF HIS PROPERTY TO A THIRD PARTY.

#### Property Passing Under the Will:

Once it is determined that the will is based on a contract a question arises as to the type of interest which passes to the survivor. If the will gives the survivor a terminable interest, usually a life estate with power to invade for support and comfort, no marital deduction can be claimed for the property which passes under the will.<sup>16</sup> The problem then is to determine what property passes under the will.

<sup>9</sup> 183 Wis. 599, 198 N.W. 763 (1924).

<sup>10</sup> In *Doyle v. Fisher, Id.*, the court was dealing with a joint will. If the will is not joint but merely mutual the contract must be proved by express language on the face of the will. Wis. Stat. §238.19 (1957).

<sup>11</sup> See *Shirley v. Shirley*, 181 Tenn. 364, 181 S.W. 2d 346 (1944).

<sup>12</sup> 57 Am. Jur. *Wills* §706 (1948).

<sup>13</sup> *Tweeddale v. Tweeddale*, 116 Wis. 517, 93 N.W. 440 (1903).

<sup>14</sup> *Doyle v. Fisher*, *supra* note 9.

<sup>15</sup> *Ibid.*

<sup>16</sup> Int. Rev. Code of 1954, §2056(b)(1). See also Federal Court cases cited at note 47 *infra*.

### Property Not Passing Under the Will:

Joint tenancy property, to the extent that the consideration with which it was purchased came from the decedent, is included in determining the value of his gross estate<sup>17</sup> and is considered to have passed from the decedent for purposes of determining the marital deduction.<sup>18</sup> If the jointly owned property passes to the survivor under the terms of the will her interest will be limited to a terminable interest by the terms of the will and no marital deduction will be allowed. Whether joint tenancy property passes under the will or not is determined by state property law and not the federal tax law.<sup>19</sup>

As a general rule, property held in joint tenancy passes by right of survivorship which is the peculiar incident of an estate in joint tenancy. The survivor takes his interest by purchase and not by succession.<sup>20</sup> As a result of the right of survivorship, an attempted devise or bequest of an interest in joint tenancy property is normally ineffective. But the problem is complicated by a contractual will. A joint tenancy can be severed by mutual agreement.<sup>21</sup> Thus, if the parties agree that each will devise his interest in the joint property they have in effect agreed that their rights in the property will be those of tenants in common rather than joint tenants. This agreement is effective to sever the joint tenancy, making the former joint tenants tenants in common,<sup>22</sup> with the result that the undivided half interest of the first to die will devolve by the terms of his will.

If the agreement of the parties does not have the effect of severing the joint tenancy the property may nevertheless pass under the will by application of the doctrine of election. This doctrine is well expressed in *Page on Wills*.

A tenant in common, joint tenant or tenant by the entirety, who devises the whole of such real estate to some one other than the other tenant, and then gives to such other tenant other property by will, puts such other to an election between retaining his original interest in such real estate or accepting the benefits of the will.<sup>23</sup>

If the testator intends to devise or bequeath only his undivided half

<sup>17</sup> *Id.* at §2040.

<sup>18</sup> *Id.* at §2056(e) (5).

<sup>19</sup> See *Helvering v. Stuart*, 317 U.S. 154 (1942).

<sup>20</sup> *In re Will of Mechler*, 246 Wis. 45, 16 N.W. 2d 373 (1944); *Estate of Staver*, 218 Wis. 114, 260 N.W. 655 (1935); *Bassler v. Rewodinski*, 130 Wis. 26, 109 N.W. 1032 (1906); *Echardt v. Osborne*, 338 Ill. 611, 170 N.E. 744 (1930); 3 Am. L. Prop. §14.17, at 637 (1952); 14 AM. JUR. Cotenancy §6 (1938).

<sup>21</sup> 48 C.J.S. *Joint Tenancy* §4 (1947).

<sup>22</sup> *Berry v. Berry's Estate*, 168 Kan. 253, 212 P. 2d 283 (1949); *McDonald v. Morley*, 15 Cal. 2d 409, 101 P. 2d 690 (1940); 48 C.J.S. *Joint tenancy* §4 (1947); 129 A.L.R. 810 (1940).

<sup>23</sup> 4 PAGE, *WILLS* §VCER at 26-27 (3d ed. 1941). Quoted with approval in *Will of Schaech*, 252 Wis. 299, at 305, 31 N.W. 2d 614 (1948).

interest in the property the survivor is put to a similar election.<sup>24</sup> This doctrine becomes even more important in view of the fact that a surviving joint tenant probably can not elect against a joint and mutual will because of the contract obligation. In *Estate of Charles Elson*,<sup>25</sup> the widow elected to take her statutory dower right, which was an absolute interest, in lieu of the provisions made for her in a joint and mutual will which she and her husband had executed pursuant to a contract and which gave her a terminable interest. Her son, who was the decedent's sole heir and beneficiary of the remainder interest in the will, agreed to the widow's election. The court did not consider itself bound by what was essentially a consent decree in the probate court and held that the widow could not make any claim inconsistent with the will after the death of her husband and disallowed the marital deduction. A clause in the will giving either party the right to revoke the will at any time was considered to be merely a restatement of the case law that a joint and mutual will can be revoked at any time while both parties are alive.<sup>26</sup>

An interesting recent decision<sup>27</sup> in the Seventh Circuit involved a will that apparently combined an agreement severing a joint tenancy with the doctrine of election. A husband and wife executed a joint and mutual will giving the survivor a life interest in real estate which they owned in joint tenancy and devising the remainder interest to their son. In construing the will the county court held that upon the death of the wife the husband's joint tenancy interest changed to a life estate with the remainder in the son. After the death of the husband the U.S. District Court<sup>28</sup> was confronted with the problem of determining what interest was includible in the husband's estate for estate tax purposes. The court held that the joint and mutual will evidenced a contract severing the joint tenancy, and apparently that the husband had elected to take the life estate in the wife's half interest devised to him by the will and was therefore required to transfer the remainder of his half interest in the property to the son, to whom the wife's will attempted to devise it.<sup>29</sup>

<sup>24</sup> *Ibid.* In *Estate of Cobeen*, 270 Wis. 545, 72 N.W. 2d 324 (1955) the language of the will is not clearly restricted to a  $\frac{1}{2}$  interest but the court limited the effect of the widow's election to  $\frac{1}{2}$  of the property.

<sup>25</sup> 28 T.C. 442 (1957).

<sup>26</sup> But see *Shirley v. Shirley*, *supra* note 11.

<sup>27</sup> *Olson v. Reisimer*, 271 F. 2d 623 (7th Cir. 1959) overruling 170 F. Supp. 541 (E.D. Wis. 1959) on another point.

<sup>28</sup> *Ibid.*

<sup>29</sup> The county court decree said that the joint tenancy was severed at the time of the wife's death. This may not be the law of Wisconsin. A severance of a joint tenancy to be effective must occur during the lifetime of the joint tenants. *Bassler v. Rewodinski*, *supra* note 20. No doubt the agreement could be interpreted to have effected a severance during the life of the parties so the decision is justified.

If the joint tenancy property does pass to the surviving spouse by right of survivorship rather than through the will the marital deduction has been allowed even though the survivor's contract prohibits her from changing her will. The contract obligation is said to be a restraint which she voluntarily placed on her own property (the former joint tenancy property) and does not limit her absolute interest to a terminable interest.<sup>30</sup> A similar problem was presented in *Lindsey v. U.S.*<sup>31</sup> The widow had contracted with her husband to convey to a trust to be established in his will all of their entirety property, which she would acquire in fee by right of survivorship at his death. The marital deduction was denied because of the restriction which the surviving spouse had placed on her interest by her contract with her husband. The decision gave effect to the "substance of the transactions rather than their form."<sup>32</sup> The contract in that case was somewhat different than the contract involved in a joint and mutual will. Because the contract required the wife to convey immediately after her husband's death, there was no economic substance to the transaction whereas, in the case of a contract to devise or bequeath whatever is left of the property at death, the surviving spouse has a real economic interest in the property. The *Lindsey* case was discussed in a subsequent case<sup>33</sup> involving a joint and mutual will but the court thought that it was not in point. In *Awtry's Estate v. Commissioner*<sup>34</sup> after the court decided that the survivor acquired the joint tenancy property by right of survivorship and not by will the question remained as to whether or not the contract aspects of their joint and mutual will limited the surviving spouse's interest in the former joint tenancy property to a terminable interest. The court held that the restraint was voluntarily placed on the property by the surviving spouse and allowed the marital deduction.

## II

### A JOINT AND MUTUAL WILL BY WHICH THE FIRST TO DIE GIVES AN ABSOLUTE INTEREST TO THE SURVIVOR AND THE SURVIVOR GIVES ALL OF HER PROPERTY TO A THIRD PARTY.

#### Property Not Passing Under the Will:

In determining whether a marital deduction should be allowed for an interest in property which passes to the surviving spouse by right of survivorship it should make no difference what interest the joint and mutual will gives to her. The contract obligation is the same in

<sup>30</sup> *Awtry's Estate v. Commissioner*, 221 F. 2d 749 (8th Cir. 1955); *Estate of Peterson v. Commissioner*, 229 F. 2d 741 (8th Cir. 1955).

<sup>31</sup> 167 F. Supp. 136 (D. Md. 1958).

<sup>32</sup> *Id.* at 138.

<sup>33</sup> *Schildmeier v. United States*, 171 F. Supp. 328 (S.D. Ind. 1959).

<sup>34</sup> *Supra* note 30.

any case. The *Awtry*<sup>35</sup> case indicated that the contract was a restriction voluntarily placed on her own property regardless of the terms of the joint and mutual will, but indicated that the rule might be different with regard to property which the survivor acquired through the will, for as to that property the contract restraint attended the creation of the estate. Several subsequent cases in which the survivor acquired property through a joint and mutual will have ignored this distinction and granted the marital deduction, citing the *Awtry* case as authority.<sup>36</sup>

#### Property Passing Under the Will:

These cases usually hold that the survivor takes an absolute interest under a joint and mutual will which purports to give the survivor a fee,<sup>37</sup> but the rights in the property seem somewhat less than absolute. The label which the state property law puts on an interest in property is not controlling in federal tax cases. There the inquiry is concerned with the incidents of ownership which the surviving spouse has and not the name which the state law gives to her collection of rights in the property.<sup>38</sup>

It is not clear just what interest the surviving spouse takes in the property even though the will purports to give her a fee. She is still bound by her contract to make a will. There is no general agreement as to what interest a promisor has left in his property after contracting to make a will.<sup>39</sup> *Page on Wills*<sup>40</sup> gives as a general rule that the promisor can make gifts of the property if reasonable in amount and not made to evade the contract. Some states seem to allow gifts as long as they are made in good faith and make no mention of the reasonableness of the amount.<sup>41</sup> Others allow the promisor to give all the property away.<sup>42</sup> In Texas it was held that the survivor of a contractual will took a conditional fee, the condition of defeasance being that the survivor die seized of any of the property. His inter vivos gift of all of the property to his second wife was valid even though he retained an absolute life estate in it.<sup>43</sup> But in *Sample v. Butler University*<sup>44</sup> the contract clearly provided that the survivor would devise real estate which came to him by right of survivorship and *which he owned at*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Newman v. United States*, 176 F. Supp. 364 (S.D. Ill. 1959); *Schildmeier v. United States*, *supra* note 33.

<sup>37</sup> *Ibid.*

<sup>38</sup> See *Helvering v. Stuart*, *supra* note 19.

<sup>39</sup> See Annot. 108 A.L.R. 867 (1937) for a collection of cases dealing with the right of a party to a contractual joint and mutual will to dispose of property, during life, and Sparks, *Legal Effect of a Contract to Devise or Bequeath Prior to the Death of the Promisor*, 53 Mich. L. Rev. 1 (1954).

<sup>40</sup> 4 PAGE, WILLS, §1729, at 882 (3d ed. 1941).

<sup>41</sup> *Powell v. McBlain*, 222 Iowa 799, 269 N.W. 883 (1936).

<sup>42</sup> *Harrell v. Hickman*, 147 Tex. 396, 215 S.W. 2d 876 (1948).

<sup>43</sup> *Ibid.*

<sup>44</sup> 211 Ind. 122, 4 N.E. 2d 545 (1936), modified 211 Ind. 139, 5 N.E. 2d 888 (1937).

*the time of his death.* He gave all the real estate away during his life and owned nothing at death for the will to operate on. The court allowed the remaindermen to recover the property because the gift defeated the purpose of the contract even though the survivor complied with the letter of the contract.

If the survivor can give away property only if reasonable in amount or only if not done for the purpose of avoiding the contract she certainly does not have a sufficient power of appointment to bring her within the exception to the terminable interest rule.<sup>45</sup> But even if the surviving spouse can make gifts of the entire property during her life her interest is still limited in that she can not dispose of it by will to anyone she wishes, which is one of the rights of absolute ownership. In most jurisdictions the ultimate taker acquires his interest through the wife's will so she does dispose of the property testamentarily in a technical sense but only in a manner which the contract allows.<sup>46</sup> It cannot be said as to property which she has received through the joint or mutual will that she has voluntarily given up the right of testamentary disposition for over that property she never had such a right.

INTEREST PASSING UNDER CONTRACTUAL WILL AS EQUIVALENT  
TO LIFE ESTATE WITH UNLIMITED POWER TO INVADE:

If the surviving spouse can make lifetime gifts of the entire property, then what she was given by the will and received as consideration in the contract was the right to do what she would with the property except dispose of it by intestacy or will, except in a manner prescribed by the contract. That is the substance of her estate if not the form. The interest which the surviving spouse has in such a case is equivalent to a life estate with an unlimited power to invade. This is something different than a power to use or consume; if the power is unlimited the surviving spouse can make gifts and thus dissipate the whole estate during her life, while a power to consume gives the survivor only the right to use the property herself.<sup>47</sup> The holder of a life estate with an unlimited power to invade and one who holds an estate under a joint or mutual will, which under local law does not restrict her right to make gifts, have the same rights to deal with the property. They can both use the property or make gifts out of it, but in both instances the devolution of the property is determined at the time of

<sup>45</sup> Int. Rev. Code of 1954, §2056(b)(5).

<sup>46</sup> This would seem to be the rule since the will must be probated after the death of each of the parties who signed the will. 57 AM. JUR., *Wills* §682 (1948).

<sup>47</sup> Will of Zweifel, 194 Wis. 428, 216 N.W. 840 (1927); Estate of Cobeen, *supra* note 24. For examples of wills that have been construed to give the survivor only a limited right to invade see, *In re Tarver's Estate* 255 F. 2d 913 (4th Cir. 1958); *Dexter v. United States*, 163 F. Supp. 442 (D. Mass. 1958); *Matte-son v. United States*, 147 F. Supp. 535 (N.D. 1956); *Commissioner v. Estate of Ellis*, 252 F. 2d 109 (3d Cir. 1958).



the creation of the estate. The technical property law differs of course. If the property is held by virtue of a joint and mutual will the ultimate taker gets title by virtue of the survivor's will in most jurisdictions,<sup>48</sup> whereas the ultimate taker of property held in a life estate with an unlimited power to invade gets his title through the deceased spouse's will. The only practical difference that this makes is that the latter prevents lapse. Another possible difference between the two is that in the former the wife has agreed to the ultimate taker by her contract while in the latter she has not. However, neither of these differences affects the substance of the survivor's interest in the property, and the tax laws are more interested in the substance than the form.<sup>49</sup>

WHETHER THE MARITAL DEDUCTION IS ALLOWED FOR  
LIFE ESTATE WITH UNLIMITED POWER TO INVADE:

If the widow's interest is equivalent to a life estate with an unlimited power to invade it is questionable whether the marital deduction will be allowed. A deduction for such an estate was denied in *Pipe's Estate v. C.I.R.*<sup>50</sup> In that case the surviving spouse had the right to use and dispose of the property during her life, including the right to give the property away. If any property were sold, under the local law the traceable proceeds were held the same as the original property. At the death of the surviving spouse all that was left of the property was to go to legatees named in the deceased spouse's will. The case was decided under the 1939 Code which allowed a deduction for an equivalent power over property held in trust.<sup>51</sup> This was considered a trust under New York law, but the court decided that if an unrestricted power to invade were equivalent to a power to appoint it would not in any event bring the estate within the exception to the terminable interest rule. The court reasoned that if this were a regular trust the surviving spouse could appoint to herself free of the trust and thus make the property subject to her will. But with the interest that the surviving wife was given under her deceased husband's will there was no possibility of disposing of the property by her will even though it was considered a trust under local property law.

The 1954 Code removed the requirement of a trust,<sup>52</sup> but the Code still requires that the surviving spouse have the power to appoint "in favor of such surviving spouse, or the estate of such surviving spouse, or in favor of either. . . ."<sup>53</sup> The power may be exercisable during life or

<sup>48</sup> See note 46 *supra*.

<sup>49</sup> *Lehman v. Commissioner*, 109 F. 2d 99 (2d Cir. 1940), *cert. denied* 310 U.S. 637 (1940).

<sup>50</sup> 241 F. 2d 210 (2d Cir. 1957), *affirming* 23 T. C. 99.

<sup>51</sup> Int. Rev. Code of 1939, §812(e).

<sup>52</sup> §2056(b) (5) of the Int. Rev. Code of 1954 replaced §812(e) of the 1939 Code.

<sup>53</sup> Int. Rev. Code of 1954, §2056(b) (5) (B).

by will.<sup>54</sup> But as the court pointed out in *Pipe's Estate*, if the surviving spouse is given an unlimited power to invade and a limitation over of all that remains at her death is added, the extent of her interest in the property will depend on whether the property is in trust or not. If the property is in trust she can invade the trust, and thus having made the property her own she can dispose of it by will. Whereas, if the property is held by her directly there is no way for her to defeat the gift over. Even if it is in some way possible for her to make a gift to herself of what she already has, the limitation would still be effective since she would own the property at her death. All that is left to appoint is the remainder. When the surviving spouse exercises her power to invade a life estate by making a gift she in effect appoints the remainder interest as well as her present interest but the appointment is to another, not to herself or her estate as the Code requires. Perhaps this is a technical distinction, but it is not devoid of practical significance, and since tax deductions are a matter of legislative grace, one who claims a deduction must bring himself clearly within the terms of the statute.<sup>55</sup>

This question was before the Fifth Circuit in *McGehee v. Commissioner*.<sup>56</sup> The interest given to the surviving spouse was the same as that given in *Pipe's Estate*. The deduction was denied in the original opinion which was decided under the 1939 Code for the reason that the property was not in trust. Rehearing was granted after the enactment of the Technical Amendments Act of 1958<sup>57</sup> which changed the marital deduction requirements of the 1939 Code to the substantial equivalent of the 1954 Code. The court then granted the marital deduction, simply stating that it was no longer necessary for the property to be in trust, and did not consider the extent of the power. The extent of the power was not objected to in the original decision. The only objection was the obvious one that the property was not in trust as the Code then required. But as has been shown above, an unlimited power to invade property held in a life estate with a limitation over is not as extensive as the same power over property held in trust.

The House Committee Report accompanying the 1954 Code indicates the intention of Congress. The report states that:

. . . present law requires in such cases that the property be placed in "trust" and because of doubt under the law of the various States as to what constitutes a "trust" it is not clear when a legal life estate will qualify as a "trust." . . .

The bill makes it clear that property in a legal life estate

<sup>54</sup> 72 C.J.S. *Powers* §49 (1951).

<sup>55</sup> *New Colonial Ice Co., Inc. v. Helvering*, 292 U.S. 435 (1934).

<sup>56</sup> 260 F. 2d 818 (5th Cir. 1958).

<sup>57</sup> P.L. 85-866, 85th Cong. 72 Stat. 1668 §93 (1958).

as well as property in trust qualifies for the marital deduction. . . .<sup>58</sup>

For example, under the new provisions a transfer to the spouse of a legal life estate with an unlimited power to invade would qualify for the marital deduction *if all the other provisions of this section are met*. (Emphases added.)<sup>59</sup>

One of the "other provisions of this section" is that the surviving spouse have the power to appoint to herself or her estate, which it seems cannot be done by one having just an unlimited power to invade a life estate with a limitation over. It seems that the committee was merely pointing out that a life estate will qualify under the new Code as well as a trust if the proper powers are given. A life estate with an unlimited power to invade and with a power to appoint by will with a limitation over if the power is not exercised would no doubt qualify under this section because the surviving spouse could then appoint to her estate even though she could not appoint to herself.<sup>60</sup>

The reason given in the Report for changing the law does not indicate an intention of Congress to grant the marital deduction for any lesser interest in property than the previous law allowed, but only to avoid the necessity of determining whether the property over which the surviving spouse has the required power is considered to be in trust under local law.

### III CONCLUSION

A marital deduction may be allowed for an interest in joint tenancy property which passes by right of survivorship regardless of the terms of a joint and mutual will. However, if the contractual aspects of the will are interrupted to effect a severance of the joint tenancy one half of the former joint tenancy property will pass under the will. If a severance is not effected, half or all of the joint tenancy property may still pass under the will by application of the doctrine of election.

In either event the right to a marital deduction will depend on whether the will gives an absolute or a terminable interest to the survivor. As has been shown above, it is doubtful that a mere right to use and consume or even to dispose of the property during life will be considered an absolute interest.

It may be that the *McGehee*<sup>61</sup> decision will be followed in other circuits, but *Pipe's Estate*<sup>62</sup> is still applicable under the new Code and could very easily be applied to an estate limited by a joint or mutual

<sup>58</sup> H.R. Rep. No. 1337, 83rd Cong. 2d Sess.

<sup>59</sup> *Ibid.*

<sup>60</sup> There may be a question as to the validity of the limitation over, under local property law. See *Will of Zweifel* 194 Wis. 428, 216 N.W. 840 (1927). But see *Estate of Holmes*, 233 Wis. 274, 289 N.W. 638 (1940).

<sup>61</sup> *Supra* note 56.

<sup>62</sup> *Supra* note 50.

will. This, along with the caveat in *Awtry's Appeal*<sup>63</sup> that the marital deduction may not be allowed as to property which passes under a joint or mutual will raises some doubt as to the advisability of using a joint or mutual will for an estate large enough to make the federal estate tax a consideration. In order to qualify for the marital deduction the power given to the surviving spouse must be so extensive that the contractual aspects of a joint or mutual will are almost a nullity. This is in accord with the original intention of Congress in allowing the marital deduction, i.e., to equalize the application of the estate tax in community property and common law States.<sup>64</sup> In community property states the deceased spouse can not limit his surviving spouse's power over her share of the community property<sup>65</sup> and the marital deduction was intended to be allowed for a substantially equivalent interest in property given to a surviving spouse in common law States.<sup>66</sup>

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<sup>63</sup> *Supra* note 30.

<sup>64</sup> S. Rep. No. 1013, 80th Cong., 2d Sess. (1948) ; See also *Pitts v. Hamrick*, 228 F. 2d 486 (4th Cir. 1955).

<sup>65</sup> I PAGE, WILLS §203 (3d ed. 1941).

<sup>66</sup> See note 64 *supra*.