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JOINT TENANCY: ESTATE AND GIFT TAX PROBLEMS

INTRODUCTION

The purposes of this article are to examine some of the more significant estate and gift tax consequences of joint tenancies in Wisconsin real estate and in personal property owned by Wisconsin residents and to consider the effect of recent judicial decisions on the effectiveness of termination of joint tenancies as an estate planning device. The application of the tax principles to Wisconsin real estate and personal property owned by Wisconsin residents will also be considered.

Under Section 2040 of the Internal Revenue Code, the entire value of property held jointly by the decedent and another person or persons, with the right of survivorship at the time of decedent's death, is included in the decedent's gross estate for federal estate tax purposes, except to the extent that it can be shown that the value is attributable to consideration furnished by the surviving joint tenant or tenants or unless the jointly held property was acquired by the decedent and the other joint tenant(s) as a gift, devise, bequest, or inheritance.¹ Therefore, if the executor is unable to rebut the presumption that the decedent furnished the entire consideration, the entire value of the property will be subject to federal estate tax on the death of the decedent and again be subject to federal estate tax on the death of the surviving joint tenant. Although some relief is afforded under section 2013 as a credit against federal estate tax if the surviving joint tenant dies within ten years of the decedent, the prospect of "double taxation" of the entire value of the property may make the joint tenancy an unnecessarily expensive method of property ownership for persons whose estates are subject to federal estate taxation.² Of course, if the joint tenants are husband and wife, the property qualifies for the marital deduction.³ For Wisconsin inheritance tax purposes, one-half the value of the property is generally taxed on the death of either joint tenant.⁴

¹ Treas. Reg. §20.2040-1(a) (1958).

² For a consideration of the advantages and other disadvantages of ownership in joint tenancy, see ECKHARDT, WORKBOOK FOR WISCONSIN ESTATE PLANNERS, Ch. 7 (1961).

³ INT. REV. CODE OF 1954, §2056(e) (5).

⁴ WIS. STAT. §72.01(6) (1963). Even though the surviving joint tenant supplied all of the considerations for the property, he will be liable for an inheritance tax on one-half the value of the property. Estate of Hounsell, 252 Wis. 138, 31 N.W. 2d 203 (1948); Estate of Atkinson, 261 Wis. 481, 53 N.W. 2d 185 (1952). Similarly, even though the surviving joint tenant supplied none of the consideration for the property, only one-half the value of the property is subject to the inheritance tax. Estate of Simonson, 11 Wis. 2d 84, 104 N.W. 2d 134 (1960). However, transfers into joint tenancy without an adequate and full consideration in money or money's worth, made within two years of the transferor's death are presumed to be in contemplation of death under Wis. STAT. §72.01(3)(a) (1963). Estate of Simonson, *supra*.

Before considering the effect of terminating joint tenancies as a device to reduce federal estate taxes, the gift tax liabilities incurred on the creation of the joint tenancy and the nature of the "interests" held by the joint tenants should be considered.⁵

I. CREATION OF JOINT TENANCIES—GIFT TAXES

At common law, in order to create a joint tenancy in property, the four unities of time, title, interest, and possession were required.⁶ Section 230.45 of the Wisconsin Statutes eliminates the requirement of these unities in the case of a transfer between husband and wife of real or personal property when the instrument evinces an intent to create a joint tenancy.⁷ Also, subsection (3) of section 230.45 eliminates these requirements in the case of real property, even though the grantor is also one of the named grantees, when the deed evinces an intent to create a joint tenancy.⁸ Creation of joint tenancies in bank accounts and corporate stock raise special problems which will be discussed later.

Assuming then, that a joint tenancy in property has been created, the question is whether the creation constitutes a gift for federal and Wisconsin gift tax purposes. For federal gift tax purposes the regulations provide that:

If A with his own funds purchases property and has the title conveyed to himself and B as joint owners, with rights of survivorship . . . but which rights may be defeated by either party severing his interest, there is a gift to B in the amount of half the value of the property.⁹

To this general rule, section 2515 creates an exception in the case of a joint tenancy in real property created between spouses during the calendar year 1955 or thereafter. Such a transfer will not be treated as a gift, regardless of the contributions of each spouse, unless the donor elects to treat the transfer as a gift by filing a gift

⁵ For convenience it is assumed that there are only two joint tenants involved and that the donor and the donee are residents of Wisconsin.

⁶ Estate of Gabler, 265 Wis. 126, 60 N.W. 2d 720 (1953).

⁷ Wis. STAT. §230.45(2) (1963):

"Any deed, transfer or assignment of real or personal property from husband to wife or from wife to husband which conveys an interest in the grantor's lands or personal property and by its terms evinces an intent on the part of the grantor to create a joint tenancy between grantor and grantee shall be held and construed to create such joint tenancy, and any husband and wife who are grantor and grantee in any such deed, transfer or assignment heretofore given shall hold the property described in such deed, transfer or assignment as joint tenants."

⁸ Wis. STAT. §230.45(3) (1963):

"Any deed to 2 or more grantees, including any deed in which the grantor is also one of the grantees, which, by the method of describing such grantees or by the language of the granting or habendum clause therein evinces an intent to create a joint tenancy in grantees shall be held and construed to create such joint tenancy."

⁹ Treas. Reg. §25.2511-1(h) (5) (1958).

tax return for the calendar year in which the gift was created.¹⁰ If the donor elects to treat the transfer as a gift, the return must be filed, even though no gift tax may be due.¹¹

For Wisconsin gift tax purposes the creation of a joint tenancy in real property between spouses is subject to gift tax when one spouse furnishes in excess of one-half the consideration for the property.¹² Unlike the federal provisions, the donor spouse has no election as to whether the transfer will or will not constitute a gift.

In the case of joint bank accounts, federal and state law are in accord in that the creation of such an account does not constitute a gift:

If A creates a joint bank account for himself and B (or a similar type of ownership by which A can regain the entire fund without B's consent), there is a gift to B when B draws upon the account for his own benefit, to the extent of the amount drawn without any obligation to account for a part of the proceeds to A.¹³

The Wisconsin Supreme Court reached the same result when construing section 72.76(7) of the Wisconsin Statutes¹⁴ in *Dept. of Taxation v. Berry*.¹⁵

Similarly, United States savings bonds registered to "A or B" are taxable for federal gift tax purposes when the donee-payee surrenders the bond for payment without obligation to account for the proceeds.¹⁶ It would appear that the result would be the same for Wisconsin gift tax purposes under section 72.76(7).

The next question to be considered is the valuation of the gift for tax purposes. Generally, the amount of the gift for federal tax purposes at the creation of the tenancy is the difference between the joint tenant's contribution to the tenancy and his "retained interest" therein. The regulations provide that the "retained interest" is dependent upon whether either party may unilaterally sever the tenancy.¹⁷ The rule applies for real and personal property (ex-

¹⁰ Treas. Reg. §25.2515-1(b) (1958).

¹¹ Treas. Reg. §25.2515-2(a) (1958).

¹² WIS. STAT. §72.75 (1963). See Forms 6 and 7, State of Wisconsin, Wisconsin Department of Taxation:

"Taxable Transfers Or Gifts Include The Following:

12. Where A purchases property and has the title thereto conveyed to himself and wife as joint tenants, or where A conveys property to a third person and causes it to be reconveyed to himself and wife as joint tenants there is a gift to the wife in the amount of half the value of the property."

¹³ Treas. Reg. §25.2511-1(h) (4) (1958).

¹⁴ WIS. STAT. §72.76(7) (1963):

"A gift shall be complete for tax purposes when the donor has divested himself of all beneficial interest in the property transferred and has no power to revest any such interest in himself or his estate."

¹⁵ 258 Wis. 544, 46 N.W. 2d 757 (1951).

¹⁶ See note 13 *supra*.

¹⁷ Treas. Reg. §25.2515-2(b) (1958).

"(1) If under the law of the jurisdiction governing the rights of the spouses,

cept bank accounts and savings bonds) whether or not the joint tenants are husband and wife.¹⁸ In Wisconsin, if either spouse transfers into joint tenancy property which is used as the homestead, under the provisions of section 235.01(2) of the statutes it has been suggested that the value of such spouse's retained interest would be based on life expectancy.¹⁹ Since, as between husband and wife, the husband has the right to select and the power to abandon the property as his homestead²⁰ it is submitted that the actuarial factors do not apply since the husband could unilaterally sever the tenancy. In all cases involving real or personal property other than homestead, there is no doubt that the actuarial factors would not apply, since either party may sever the homestead.²¹

Once it has been determined that a joint tenancy has been created and that the creation has resulted in a gift, and the value of the gift has been arrived at, the tax liability may be completely eliminated (depending on the particular facts) for both federal and state gift tax purposes by application of the various deductions and exclusions.²²

The regulations set forth the procedure for filing gift tax returns, as does Section 72.81 of the Wisconsin Statutes. By the federal rules, the donor is required to file a federal gift tax return for any transfers or transfers by gift to any one donee in excess of \$3000 made within the calendar year. The return is required even though tax liability is eliminated by use of the marital deduction and the specific exception.²³ The practitioner is obliged to advise his client to file any returns which are required for transfers made in previous years and when filing such a return, Section 6601 of the Internal Revenue Code requires payment of interest on the tax due of six percent per annum.²⁴ Returns due for mortgage payments or improvements to the property should not be overlooked.²⁵

II. THE INTEREST PROBLEM

Assuming that death taxes or other considerations have led to a

either spouse, acting alone, can bring about a severance of his or her interest in the property, the value of the donor's retained interest is one-half the value of the property.

(2) If . . . neither, acting alone, may defeat the right of the survivor of them to the whole of the property, the amount of retained interest of the donor is determined by use of the appropriate actuarial factors for the spouses at their respective attained ages at the time the transaction is effected.

¹⁸ Treas. Reg. §25.2511-1(h) (1958).

¹⁹ ECKHARDT, *WORKBOOK FOR WISCONSIN ESTATE PLANNERS*, §7DO.6 (1961).

²⁰ *Radtke v. Radtke*, 247 Wis. 330, 19 N.W. 2d 169 (1945).

²¹ Wis. STAT. §276.01 (1963).

²² See INT. REV. CODE OF 1954, §§2503(b), 2521, and 2523(a); Wis. STAT. §72.80 (1963).

²³ Treas. Reg. §25.6019-1 (1958).

²⁴ See INT. REV. CODE OF 1954, §6651, and Treas. Reg. §301.6651-1 (1957) for penalties imposed for failure to file a return "without reasonable cause."

²⁵ Treas. Reg. §25.2515-1(b) (1958).

decision that joint tenants should transfer their property into other forms of property ownership, the ultimate success in reducing death taxes may depend upon the determination of the exact property interest held by each joint tenant at the time of the transfer. For federal tax purposes the interest in property held by a person within a state is determined by applicable state law.²⁶ It is necessary therefore, to consider the nature of the property "interests" of joint tenants in Wisconsin.

Real Estate

Joint tenants possess equal rights to enjoy the estate during their lives, each having an undivided one half interest in the property.²⁷ This rule was repeated in *Jezo v. Jezo*,²⁸ an action for partition of jointly owned real and personal property in which the husband alleged that he had contributed eighty percent toward the acquisition of the assets. The husband appealed from the lower court's judgment dividing the proceeds equally. The case was remanded to redetermine the respective contributions of the joint tenants, the Supreme Court pointing out that:

. . . the *interests of joint tenants being equal during their lives*, a presumption arises that upon dissolution of the joint tenancy during the lives of the cotenants, each is entitled to an equal share of the proceeds. This presumption is subject to rebuttal, however, and does not prevent proof from being introduced that *the respective holdings and interests of the parties are unequal*. The presumption may be rebutted by evidence showing the source of the actual cash outlay at the time of acquisition, the intent of the cotenant creating the joint tenancy to make a gift of the half interest to the other cotenant . . . or other inferences contrary to the idea of equal interest in the joint estate. (Emphasis added.)²⁹

The statement of the court that 'proof may be introduced that the respective holdings and interests of the parties are unequal' may cause problems for the estate planner. If joint tenancies are terminated, and converted into tenancies in common for planning purposes, it is the respective interests of the joint tenants which will determine whether the severance constitutes a gift for gift tax purposes, and whether the transfer is for a full and adequate consideration if the transfer is attacked as being made in contemplation of death. For example, if each party owns an undivided one-half interest in property held in joint tenancy and the parties decide to sever the tenancy to create a tenancy in common, the transfer is made for

²⁶ *Sullivan's Estate v. Comm'r*, 175 F. 2d 657 (9th Cir. 1949).

²⁷ *Farr v. Grand Lodge, A.O.U.W.*, 83 Wis. 446, 53 N.W. 738 (1892); *Bassler v. Rewodlinski*, 130 Wis. 26, 109 N.W. 1032 (1906).

²⁸ 23 Wis. 2d 399, 127 N.W. 2d 246, noted at 48 MARQ. L. REV. 277 (1964).

²⁹ 23 Wis. 2d at 406, 127 N.W. 2d at 250.

a full and adequate consideration since each holds a one-half interest both before and after the transfer. However, if it can be shown that the interests of the "joint tenants" were unequal because of varying contributions, e.g. seventy-five percent and twenty-five percent, the transfer into the tenancy in common is made for less than a full and adequate consideration since one joint tenant transfers a three-fourths interest in the joint tenancy in return for a one-half interest in the tenancy in common. Also, a gift of one-quarter interest would result.

It would appear that in a "true joint tenancy" the interests of the parties are equal, but that a "joint tenancy in form" is not necessarily a "joint tenancy in fact" or a "true joint tenancy." The court indicates that the presumption that the interests of the joint tenants are equal may be rebutted by evidence showing an intent on the part of the cotenant creating the tenancy to make a gift to the other cotenant. If the cotenant creating the tenancy has an election under Section 2515 of the Internal Revenue Code to treat the creation as a gift for federal gift tax purposes and elects not to, it would appear that this evidence could be introduced to rebut the presumption that each spouse had an undivided one-half interest in the tenancy. It is submitted that most joint tenancies are created as will substitutes with no specific intent on the part of the donee-spouse regarding gifts, and the election to treat the creation of the tenancy as a gift is not made to avoid or postpone gift taxes.

Personal Property

Bank Accounts

In general, the interest of joint tenants in joint bank accounts created entirely from the funds of one of the parties will depend upon the intention of the donor depositor.³⁰ When the issue before the court involves the right of survivorship, the Wisconsin Supreme Court has said that a rebuttable presumption arises that the donor depositor intended that all of the usual incidents of jointly owned property, including survivorship, shall attach to the account. To support a different intention the evidence must be *clear and satisfactory*³¹ or *clear and convincing*.³²

For planning purposes it is necessary to determine the interests of the joint depositors during their lifetime. As previously mentioned, *Dept. of Taxation v. Berry*,³³ establishes that a transfer of funds in a joint bank account does not constitute a gift for Wisconsin gift tax purposes when the depositor retains the right to withdraw the

³⁰ Estate of Pfeifer, 1 Wis. 2d 609, 85 N.W. 2d 370 (1957).

³¹ *Id.* at 613, 85 N.W. 2d at 372.

³² Estate of Michaels, 26 Wis. 2d 382, 391, 132 N.W. 2d 557, 561 (1964).

³³ Note 15 *supra*.

entire account. Whether or not the donor depositor has created a revocable account again depends upon the depositors intent when creating the account, and the mere form of the deposit in the records of the bank does not determine the rights of the parties.³⁴ When the depositors or joint owners are husband and wife, section 230.45 (2)³⁵ raises a presumption that the transferor intends a true joint tenancy and each party has an equal interest therein, and neither may deprive the other of his one-half interest in the account.³⁶

Although the court was dealing with the question of survivorship, *Estate of Pfeifer*³⁷ supports the proposition that the creation of a joint tenancy in personal property raises the presumption that the interests of the parties are equal even though they are not husband and wife since an equal interest is a usual incident of jointly owned property.

An account may be created in which the donee depositor has no present interest nor right of survivorship if the evidence establishes that the form of the account was merely for the convenience of the donor depositor.³⁸ Recently, the court has expressly recognized an account with no present rights in the donee depositor but with the right of survivorship.³⁹

It is apparent therefore, that the exact nature of the property interests held by joint depositors in joint bank accounts will vary depending upon the intention of the donor depositor at the time the account is created.

Even though the practitioner is able to establish that a true joint tenancy exists in a joint bank account, each party having an equal interest therein, if the contributions to the account were unequal and the account is terminated for planning purposes with each party receiving one-half thereof, the transfer will constitute a gift for gift tax purposes regardless of the intention of the donor-depositor when creating the account. However, if the donor-depositor dies within three years of the transfer and the transfer is deemed to be in contemplation of death, it is suggested that it was made for a full and adequate consideration, since each party held an equal interest therein.

Securities

According to the Rules of the Stock Transfer Association, the proper form of registration for listed securities to indicate joint tenancy where abbreviations are not defined on the security is

³⁴ *Zander v. Holly*, 1 Wis. 2d 300, 84 N.W. 2d 87 (1957).

³⁵ Note 7 *supra*.

³⁶ *Estate of Schley*, 271 Wis. 74, 72 N.W. 2d 767 (1955); *Estate of Grey*, 27 Wis. 2d 204, 133 N.W. 2d 816 (1964).

³⁷ Note 30 *supra*.

³⁸ *Plainse v. Engle*, 262 Wis. 506, 56 N.W. 2d 89 (1952).

³⁹ Note 32 *supra*.

"John Doe & Mary Doe Jt. Ten."⁴⁰ In practice, the transfer agent may be even more specific and register the stock in the name of "John Doe and Mary Doe As Joint Tenants With Right of Survivorship and Not As Tenants In Common." With such specific language, generally there can be no question as to the rights of the parties or the actual form of ownership. However, if A originally holds the stock in his own name and sends the certificate to the transfer agent to be re-registered in the names of A and B as indicated above, according to *Zander v. Holly*⁴¹ the parties hold as tenants in common with a "type of survivorship or indestructible remainder."⁴² There is no joint tenancy because unity of title and time are absent. Despite the language appearing on the face of the certificate, a valid argument exists that the entire value of the stock should not be taxed under section 2040 if the sole contributing joint owner died first. If the party who established the co-ownership retained possession of the certificate, could the remaining half be taxed under another provision of the estate tax?⁴³ It is submitted that since either co-owner could force partition and obtain possession under the provisions of Chapter 277 and Section 331.06 of the Wisconsin Statutes,⁴⁴ the remaining one-half should not be taxed. If the donee-co-owner authorizes the stock transfer agent to issue the dividend checks to the donor-co-owner the transfer would be taxed as a retained life estate.⁴⁵

When the question involves the rights of joint owners of unlisted stock, the Wisconsin Supreme Court has indicated⁴⁶ that the following language will create a joint tenancy: "Registered in the

⁴⁰ RULES OF THE STOCK TRANSFER ASSOCIATION, Rule 14.02.

⁴¹ Note 34 *supra*.

⁴² 1 Wis. 2d at 316, 84 N.W. 2d at 96.

⁴³ INT. REV. CODE OF 1954, §2037:

"(a) General Rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has . . . made a transfer (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, if—

(1) *possession* or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent, and

(2) the decedent has retained a reversionary interest . . ." (Emphasis added.)

⁴⁴ WIS. STAT. §277.01 (1963):

"Complaint; trial, how had. When any of the owners of personal property in common shall desire to have a division and they are unable to agree upon the same an action may be commenced for that purpose . . ."

WIS. STAT. §331.06 (1963):

"Recovery of divisible personalty. When personal property is divisible and owned by tenants in common and one tenant in common shall claim and hold possession of more than his share or proportion thereof his cotenant, after making a demand in writing, may sue for and recover his share or the value thereof . . ."

⁴⁵ INT. REV. CODE OF 1954, §2036.

⁴⁶ *Central Wisconsin Trust Co. v. Schumacher*, 230 Wis. 591, 597-98, 284 N.W. 562, 565 (1939).

name of Mr. & Mrs. _____ or survivor;" "Registered in the name of A and B or either;" "Issued to Mr. & Mrs. _____," "Payable to A and B;" "Payable to A or wife."

Therefore, it may be necessary to look behind the form of the registration of stock certificates to ascertain the exact value of the interest held by the joint owners. Apparently, the safest form would be: "John Doe and Mary Doe, As Joint Tenants With Right of Survivorship, and Each an Equal One-Half Interest Herein and Not As Tenants in Common."

III. IMPACT OF RECENT FEDERAL TAX CASES

A termination of a joint tenancy may be advisable in order to reduce death taxes. However, the effect of a termination has been clouded by recent federal cases. The federal government has succeeded in extending the principles of section 2036, *Transfers with Retained Life Estate*, and section 2035, *Transfers in Contemplation of Death*, so as to include joint tenancy interests which apparently had been terminated.

Retained Life Estates

If a husband holds a considerable amount of property in joint tenancy with his wife, one approach may be to transfer a portion of the assets to the wife to be held by her as sole owner. In this case the interest which the husband transfers will constitute a gift for gift tax purposes.⁴⁷ However, if the property is income producing, the transfer will not reduce death taxes if the husband retains the right to the income.⁴⁸ Further, if the property transferred is the residence of the joint owners and continues to be used as the residence there is a possibility that the transfer will not free the property from death taxes because of his "implied" retained life estate. The reasoning follows from a review of recent cases interpreting section 2036.

In *Union Planters Nat'l Bank v. United States*,⁴⁹ the decedent and his wife held their residence as tenants by the entirety. Decedent deeded his interest to his wife as a gift and resided there with his

⁴⁷ If the joint tenancy was created after 1955 and the election to treat the creation as a gift was not made, Treas. Reg. §25.2515-1(b) (1958) provides:

"... there is a gift upon the termination of such a tenancy, other than by the death of a spouse, if the proceeds received by one spouse on termination of the tenancy are larger than the proceeds allocable to the consideration furnished by that spouse to the tenancy...."

⁴⁸ INT. REV. CODE OF 1954, §2036:

"(a) General Rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life...

(1) the possession of enjoyment of, or the right to the income from, the property...."

⁴⁹ 238 F. Supp. 883 (W.D. Tenn. 1964).

wife until his death. The government contended that the facts established an implied agreement between decedent and his wife that he should have a right to live there and that such an agreement is a proper basis for including the property in decedent's gross estate as a retained life estate. In the alternative, the government contended, the mere fact that he continued to live there is a sufficient basis to include the property in his gross estate under section 2036. The court held that the mere fact that the decedent lived in the residence after the transfer and until his death is not, in and of itself, sufficient basis upon which to include the residence in his gross estate. However, if there was an agreement between the decedent and his wife, express or implied, even though unenforceable, that he should have the right to continue to live in the residence, this would be a sufficient basis to include the residence in his gross estate.⁵⁰ It was for the jury to determine whether an agreement existed.

A case decided shortly after the *Union Planters* case, *Stephenson v. United States*⁵¹ involved a similar fact situation. Decedent purchased the house in which he and his wife had been living and had it conveyed to her. He remained there until his death. The court followed the decision of *Union Planters*, and on the basis of the wife's deposition found that no agreement, express or implied, existed between decedent and his wife as to the retention of any possession or enjoyment by the husband.⁵² A determination by the Internal Revenue Service that an implied agreement or understanding existed was presumed to be correct and the burden was on the executor to show by the greater weight or clear preponderance of the evidence that no such implied agreement or understanding existed.

The Wisconsin Inheritance Tax Act provides for a state tax on transfers of this nature.⁵³ In *Estate of Ogden*,⁵⁴ a gift of realty made with the understanding that the donor was to have the income during his lifetime was held subject to the inheritance tax. There was no question of an implied agreement since the understanding as to retention of income was set out in a letter written to the donor

⁵⁰ *Id.* at 884-85.

⁵¹ 238 F. Supp. 660 (W.D. Va. 1965).

⁵² The wife deposed that her husband had said that she could even "put him out" if she so desired. *Id.* at 662 n. 2.

⁵³ WIS. STAT. §72.01 (1963).

"Subjects liable. A tax shall be and is hereby imposed upon any transfer of property . . . in the following cases . . . :

(3)(b) When a transfer is of property, made without an adequate and full consideration in money or money's worth . . . intended to take effect in possession or enjoyment at or after the death of the grantor, . . . including any transfer where the transferor has retained for his life or for any period not ending before his death: (1) the possession or enjoyment of, or the right to the income, or to economic benefit from, the property . . ."

⁵⁴ 209 Wis. 162, 244 N.W. 571 (1932).

by the donee. It would appear that an implied agreement of the kind discussed above, which is sufficient to include a residence in decedent's gross estate for estate tax purposes would by analogy, be sufficient to subject the residence to the Wisconsin inheritance tax.

Therefore, if the husband transfers his interest in the jointly held residence to his wife and continues to reside there, the wife may incur unexpected legal expenses establishing that no agreement existed between her and her husband regarding the husband's right to live there. This writer suggests that a severance of the joint tenancy and a transfer into a tenancy in common would eliminate the retained life estate problem, since the transfer would be made for a full and adequate consideration, and would remove one-half of the value of the jointly owned property from the husband's estate. It is assumed, of course, that the interest of the joint tenants are equal, that is, a joint tenancy in fact exists.

Contemplation of Death

Except to the extent that a transfer is for a full and adequate consideration, transfers made within three years of decedent's death are deemed to be made in contemplation of death within the meaning of section 2035 and are included in decedent's gross estate unless the executor proves otherwise.⁵⁵ This section and section 2040 have been applied together in cases of termination of joint tenancies.

The Ninth Circuit Court of Appeals was faced with the following question in *Sullivan's Estate v. Comm'r*:⁵⁶ "Where two joint tenants agree to terminate a joint tenancy and henceforth hold the property as tenants in common and transfer each to the other the interest held by each, and this is done in contemplation of death by the decedent, is the entire amount of the property to be included in the gross estate of the deceased joint tenant under . . . [section (2040)]?"⁵⁷ The court held that "if . . . the contract [terminating the joint tenancy] be construed to involve a transfer, it was a bona fide transfer for money's worth because the younger wife's joint interest transferred to the older husband is worth at least as much as the husband's interest transferred to her."⁵⁸ The property was held not included in decedent's gross estate under section 2040 because the joint tenancy was terminated before his death and, as to the joint tenancy, the deceased had no "interest therein . . . at the time of his death."⁵⁹

⁵⁵ Treas. Reg. §20.2035-1(a) & (c) (1958).

⁵⁶ 175 F.2d 657 (9th Cir. 1949).

⁵⁷ *Id.* at 658.

⁵⁸ *Id.* at 659.

⁵⁹ *Id.* at 650.

Unfortunately, not all courts follow the reasoning of the *Sullivan* case. In *United States v. Allen*,⁶⁰ decedent created an irrevocable trust in which she reserved three-fifths of the income for her life. When she was seventy-eight years old, the actuarial value of his retained life estate was approximately \$135,000 and her attributable share of the corpus was valued at \$900,000. She sold her interest to a remainderman for \$140,000. The Internal Revenue Service contended that three-fifths of the corpus, less \$140,000, should be included in decedent's gross estate because the sale was made for less than a full and adequate consideration and in contemplation of death. The court refused to follow the *Sullivan* decision and held that there must be an adequate and full consideration paid for the interest which would otherwise be included in the gross estate and not merely a full and adequate consideration for the interest transferred by the decedent.⁶¹

Of particular interest to Wisconsin attorneys is a recent decision of the Court of Appeals for the Seventh Circuit. In *Glaser v. United States*,⁶² decedent, an Indiana resident, furnished the consideration for several parcels of real estate to which he and his wife took title as tenants by the entireties. They conveyed their parcels to their children, reserving a life estate to themselves and to the survivor of them. The district court, following the *Sullivan* case, ruled that one-half the value of the parcels should be included in the decedent's gross estate, since he held a one-half interest in the parcels at the time of the conveyance. The government contended that sections 2036 and 2040 should be read together to include the full value of the property in decedent's gross estate. It was the position of the government that had decedent died before the conveyance the full value would have been included under section 2040; that, in effect, after the conveyance the decedent retained the same interest for federal estate tax purposes that he had before the conveyance. The court held that "since the properties had been transferred before the decedent's death, section 2040 has no application. Under this section it is only 'the value of property held jointly at the time of decedent's death' that is includable. Treas Reg., Section 20.2040-1."⁶³ The circuit court agreed with the district court that the *Sullivan* case states the applicable law in that each joint tenant had "an equal interest, under Indiana Law, in the properties, and neither tenant could convey or make a transfer of a greater interest than he or she owned or had a right to transfer, namely, a one-half interest."⁶⁴

⁶⁰ 293 F. 2d 916 (10th Cir. 1961).

⁶¹ *Id.* at 918.

⁶² 196 F. Supp. 47 (N.D. Ind.), *aff'd in part*, 306 F. 2d 57 (7th Cir. 1962).

⁶³ 306 F. 2d at 60.

⁶⁴ *Id.* at 59.

It is submitted that this reasoning may be applied by analogy to Wisconsin residents, each having an undivided one-half interest in a true joint tenancy, who sever the tenancy to create a tenancy in common. The transaction could not be attacked as being made in contemplation of death, since the transfers are made for a full and adequate consideration.

CONCLUSION

It appears that if, for general estate planning purposes, it is decided that the joint tenancy should be terminated, there is nothing to lose from an estate tax standpoint. If the property is left in joint tenancy, unless the executor can prove that the surviving joint tenant supplied all or a portion of the consideration, the entire value of the property will be included in the decedent's gross estate for federal purposes. Unless the entire value of the property is included in decedent's gross estate as a retained life estate, if the transfer is made and the party who supplied the consideration for the creation of the tenancy survives for a period of at least three years, section 2035 will not apply. If the party does not survive the transfer by three years, the executor may be able to overcome the presumption that the transfer was in contemplation of death. However, assuming the transfer is held to be in contemplation of death, the executor will still have the authority of the *Sullivan* decision to support his contentions that: *first*, section 2040 has no application since there was no jointly held property "at the time of decedent's death;" *second*, and "adequate and full consideration" within the meaning of section 2035 refers to the property interest transferred and not to the interest which would be taxed but for the transfer. Unfortunately, the second contention is subject to an attack based on the holding of the *Jezo*⁶⁵ case that the transferor had more than a one-half interest in the jointly owned property. It would appear that the government would be able to introduce evidence that the interests of the joint tenants were unequal, and the executor would be faced with the burden of showing what portion of the consideration for the property was supplied by the surviving joint tenant.

ROGER J. MUELLER

⁶⁵ Note 28 *supra*.