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JOINT OWNERSHIP AND TAX PLANNING*

GEORGE J. LAIKIN**

A. JOINT TENANCY

Among the popular forms for holding title¹ to real estate and personal property are joint tenancy, tenancy by entirety and tenancy in common.² These forms are of ancient lineage but their current use is directly affected by state and federal tax laws.

I. BASIS FOR POPULARITY

Joint tenancy is the most popular of these forms. Its frequent use is based upon the conception that it eliminates probate costs, minimizes or avoids death taxes, frees property from the claims of creditors, and provides certainty as to the succession of ownership. These concepts are partly but not altogether true; some basic disadvantages are overlooked.

II. ELEMENTS OF JOINT TENANCY

To create a joint tenancy among two or more individuals,³ it has historically been necessary to meet four requirements — the traditional four unities: All parties must derive their title from one and the same conveyance; title must vest at the same time; the interest of one must be the same as that of each of the others; and each must have one and the same undivided possession.⁴ The absence of any one requirement, unless expressly excused by statute,⁵ would preclude the creation of a joint tenancy, or cause its termination if one already exists.

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¹ This paper only attempts to explain briefly the nature of these forms of co-ownership as a basis for the consideration of the tax problems involved. For greater detail, reference should be made to the statute and decisions of the respective states because of the great variance in state laws; also the standard text books.

² While joint tenancy and tenancy in common may be used in virtually all states, tenancies by the entirety are available in approximately twenty states, among which are: Maryland, Michigan, New York and North Carolina. Tenancy by the entirety has been abolished in Illinois. It does not exist in California.

³ There is no theoretical limit to the number of joint tenants. 48 C.J.S. *Joint Tenancy* §6 (1947). This is also true of tenancy in common. But not so with respect to tenancy by the entirety which is limited solely to husband and wife.

⁴ 48 C.J.S. *Joint Tenancy* §3 (1947).

⁵ E.g. WIS. STAT. §230.45 (1957); CAL. CIV. CODE §683 (1951); *Hill v. Donnelly*,

a. Intention as element

Modern law tends to support a fifth requirement for the creation of a joint tenancy — intention to do so.⁶ In the absence of clear intention, the presumption will be that a joint tenancy was not created.⁷ But this requirement is simple to meet. The instrument which conveys real estate or personal property need merely provide for conveyance to “John Jones and Alfred Jones, as joint tenants, and to the survivor of them.”⁸ In some states, a conveyance to “John Jones and Alfred Smith, as joint tenants” might be sufficient.⁹ In other states, like Wisconsin, a conveyance to a husband and wife — to “John Jones and Mary Jones, his wife” — without additional phraseology, would be sufficient to create a joint tenancy.¹⁰

b. Conveyance to self and another

Because one of the four traditional requirements or unities was that joint tenants receive title through one and the same conveyance, it was generally impossible for a husband to convey to himself and his wife, as joint tenants, property which he already owned — because title was already in his name. He would, therefore, convey title to a third party — a “straw man” — who would then reconvey title to him and his wife as joint tenants.¹¹ The same procedure has been followed where the joint tenants were to be individuals other than husband and wife. However, this situation has been altered by the statutes of some states which now permit the creation of a joint tenancy by a conveyance from an individual to himself and another.¹²

III. TERMINATION

An existing joint tenancy will be terminated whenever one of the four unities or elements is destroyed.¹³ In most states, a joint tenant has the right to sell, mortgage or give away his interest. If such right is exercised, the purchaser of the interest, or the joint tenant who has placed a mortgage thereon, would become a tenant in common with the

56 Cal. App. 2d 387, 132 P. 2d 687 (1942); *Conlee v. Conlee*, 222 Iowa 561, 269 N.W. 259 (1936); N.Y. REAL PROPERTY LAW §240 (b).

⁶ 48 C.J.S. *Joint Tenancy* §3 (1947).

⁷ *Ibid.*

⁸ The significant words are “and to the survivor of them.” Alternative phrases are equally acceptable; “with the right of survivorship,” or “. . . as joint tenants and not as tenants in common.” 4 POWELL, *THE LAW OF REAL PROPERTY* §616 (1954). The mere use of the words “jointly” or “joint tenants” may not give sufficient evidence of intention to create a joint tenancy in that such words could be construed to be consonant with an intention to create a tenancy in common. *Hass v. Hass*, 248 Wis. 212, 21 N.W.2d 398, 22 N.W.2d 151 (1945).

⁹ 48 C.J.S. *Joint Tenancy* §3 (1947).

¹⁰ WIS. STAT. §230.45 (1) (1957); *Hass v. Williams*, 218 Wis. 429, 261 N.W. 216 (1935); *Mosser v. Dolsay*, 132 N.J. Eq. 121, 27 A. 2d 155 (1942).

¹¹ 2 TIFFANY, *THE LAW OF REAL PROPERTY* §421 (3rd ed. 1920).

¹² *E.g.* WIS. STAT. §230.45 (1957); CAL. CIV. CODE §683 (1951); N.Y. REAL PROPERTY LAW §240 (b).

¹³ 48 C.J.S. *Joint Tenancy* §4 (1947).

other party. If there were three joint tenants, the other two would continue as joint tenants, but their combined interests would be in tenancy in common with the third party.¹⁴ Thus, tenancy in common and joint tenancy may exist with respect to the same property.

a. Termination by creditors

A creditor may also bring about the termination of a joint tenancy if he levies execution on a judgment obtained against one of the joint tenants.¹⁵ It should be noted, however, that the mere lien of a judgment is not sufficient to destroy the joint tenancy; execution must be levied.¹⁶ If the joint tenant with respect to whom there is a judgment lien should die before it is enforced, the creditor's lien against the property will be extinguished.¹⁷

IV. CONVERSION TO TENANCY IN COMMON

Joint tenants may, during lifetime, by appropriate conveyances, change to tenants in common,¹⁸ but not by an instrument, such as a will, which takes effect at death.¹⁹ This is because, upon the death of a joint tenant, his interest is extinguished, and the surviving joint tenant automatically continues as the owner of the property.²⁰ Automatic survivorship is a fundamental attribute of joint tenancy which usually cannot be changed at the death of one of the parties by an instrument executed by him intended to become operative at death.²¹

V. OWNERSHIP BY SURVIVOR

Because of this special survivorship feature, joint tenancy is frequently used to provide certainty that another individual, named as a joint tenant, will become the owner of the property.²² In most situations, this purpose will be realized, but not in all. One of the parties might destroy the joint tenancy. A judgment creditor might levy execution against his interest. There might be raised the problem presented in Illinois by *Kane v. Johnson*,²³ where a surviving joint tenant, a cousin, who made no contribution to the purchase price, was held to be a trustee for the decedent's heirs and was precluded from becoming the sole owner of the property. Or there might be presented the problem such as that raised in Wisconsin by *Will of Schaech*,²⁴ where the joint property was devised by will and the surviving joint tenant, the widow, was forced to elect whether she would take under the will and

¹⁴ 4 THOMPSON, REAL PROPERTY §1780 (Perm. ed. 1940).

¹⁵ 48 C.J.S. *Joint Tenancy* §4 (1947).

¹⁶ 14 AM. JUR. *Co-Tenancy* §107 (1938).

¹⁷ *Ibid.* See also *Musa v. Segelke and K. Co.*, 224 Wis. 432, 272 N.W. 657, 111 A.L.R. 168 (1937).

¹⁸ 48 C.J.S. *Joint Tenancy* §4 (1947).

¹⁹ *Ibid.*

²⁰ 14 AM. JUR. *Co-tenancy* §6 (1938).

²¹ 48 C.J.S. *Joint Tenancy* §1 (1947).

²² 14 AM. JUR. *Co-tenancy* §6 (1938).

²³ 397 Ill. 112, 73 N.E. 2d 321 (1947).

²⁴ 252 Wis. 229, 31 N.W. 2d 614 (1947).

relinquish her right of survivorship, or rely on the joint tenancy and not take under the will.²⁵ Moreover, since joint tenancy, by itself, cannot provide for the ultimate devolution of property in the event of the deaths of both joint tenants, it is not so effective a tool for estate planning purposes as an adequate will.

a. Illustrations

If Mr. and Mrs. Jones, who had no children, were in a common accident, and Mrs. Jones died intestate one day after her husband, the joint property would pass through her to her heirs—to her parents, brothers and sisters—to the exclusion of the members of her husband's family. The fact that Mrs. Jones paid nothing toward the purchase price of the property would have no bearing upon the result—her husband's family would not share in it. If Mr. and Mrs. Jones had left children surviving, there would still be missing the protection which a will and testamentary trust²⁶ could afford them and the property. The usual court guardianships do not afford protective possibilities equal to those of a trust. Thus, where joint tenancy exists, the parties must nevertheless fortify such program by appropriate wills which provide for the ultimate devolution and protection of the property upon the last death.

VI. PROBATE AND JOINT TENANCY

While in some instances joint tenancy may make probate proceedings unnecessary and reduce the cost of transmitting property at death, these considerations are often overemphasized. In many instances a deceased joint tenant also has assets which are not in joint tenancy and which do require probate proceedings. In most states some court proceedings are necessary for the purpose of establishing the fact of death and to confirm title to the property in the surviving joint tenant.²⁷ Also, some type of proceedings are usually necessary to determine state inheritance taxes,²⁸ and in large estates a federal estate tax return must be filed. If the decedent's assets are of small value and they consist largely of joint tenancy items, with perhaps a small amount of life insurance, the required proceedings may be at a minimum.²⁹ But, in situations involving more than a minimum of assets, the expense of probate is not sufficiently reduced by the presence of some joint property. Minor savings of executors' and attorneys' fees resulting from the presence of such property may not be important enough to warrant the use of joint tenancy as a means of transferring

²⁵ Cf. *Oglesby v. Springfield Marine Bank*, 395 Ill. 37, 69 N.E. 2d 269 (1946).

²⁶ For a discussion of the advantage of a testamentary trust see Ch. XIII of *BASIC ESTATE PLANNING* (1957).

²⁷ E.g. WIS. STAT. §230.47 (1955).

²⁸ 85 C.J.S. *Taxation* §111 (1947).

²⁹ Many states have simple probate proceedings which would enable summary handling of the probate in a "short form" rather than in the usual "long form."

title at death, as compared with sole ownership and transmission by will. Moreover, if the estate is subject to death taxes, the added amount of executors' and attorneys' fees is deductible, and hence the net burden thereof minimized.

VII. DEATH TAXES

The popular conception that joint tenancy will eliminate death taxes is also only partly true. Actually, under some circumstances, joint tenancy will increase the tax burden.

a. State inheritance taxes

The inheritance tax laws of most states provide that the portion of a surviving joint tenant is not subject to tax upon the death of the other, notwithstanding the fact that the survivor did not contribute toward the purchase price.³⁰ If a husband who paid for the property were the first to die, only his one-half interest would be subject to tax. Likewise, if his wife died first, her one-half interest would be subject to tax although she did not contribute to the purchase price of the property.³¹ If the husband had retained title in his own name and had provided by will that it pass to his wife upon his death, then, if she died first, inheritance taxes would not have to be paid.

b. Federal estate tax

In general, the federal estate tax law differs from the state inheritance tax laws. The Internal Revenue Code provides that there shall be included in the estate of a deceased joint tenant the entire value of the jointly held property ". . . except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth. . . ." ³² If the surviving joint tenant did furnish a part of the purchase price of the property, there will not be taxed in the estate of the decedent ". . . such part of the value of such property as is proportionate to the consideration furnished. . . ." ³³ However, if the joint tenants acquired the property by gift or inheritance, the estate tax applies only to the proportionate part of the value of the joint property determined by dividing such value by the number of joint tenants.³⁴

c. Presumption as to payment

At the death of a joint tenant, the entire value of the property is considered *prima facie* a part of his estate for federal estate tax purposes.³⁵ The burden of proving otherwise is upon his estate.³⁶ Unless

³⁰ 85 C.J.S. *Taxation* §1143 (1947).

³¹ *E.g.* WIS. STAT. §72.01 (6) (1955).

³² INT. REV. CODE OF 1954, §2040; Int. Rev. Code of 1939, §811 (c).

³³ *Ibid.*

³⁴ *Ibid.*

it is shown that the surviving joint tenant made a contribution toward the purchase price, the presumption will be that he made none.³⁷ This is true notwithstanding the fact that under state law there may be a presumption of equal contribution.³⁸

The rule that the first joint tenant to die is presumed to have paid the full purchase price of the property has been applied with "peculiar" results. If a husband makes an outright gift of property to his wife, and she subsequently, for reasons unrelated to the original gift, causes title to be placed in joint tenancy with her husband, the full value of the property will nevertheless be taxed in his estate if he is the first to die,³⁹ because he *originally* paid for the property. The use of a "straw man" by the wife when she reconveyed will not prevent this result.⁴⁰ Similarly, if a husband makes a gift of money to his wife and she, at a later date, uses such money to purchase property in their joint names, the full value of the property will be included in the husband's estate if he is the first to die.⁴¹ However, if a husband makes a gift to his wife of *income producing* property, and she accumulates her portion of the income and purchases another property therewith which she places in joint tenancy, she will be deemed to have purchased the property out of her own funds, and no part of the value of such property will be taxed in her husband's estate if he is the first to die.⁴² An analogous result obtains if a husband purchases income producing property in joint tenancy with his wife and all of the income therefrom is accumulated in a joint bank account. In such case, only one-half of the funds in the joint bank account will be taxed in the husband's estate if he dies first; the other one-half will be regarded as belonging to the wife. The joint tenancy attributes of the property will not be extended or applied to the income derived therefrom.⁴³ Only one-half of the amount in such account will be taxed in the estate of the husband if he is the first to die; the other half would be regarded as belonging to the wife.⁴⁴ Of course, there is always present the problem of tracing the ownership of funds in a joint bank account where each

³⁵ U.S. TREAS. REGS. 105, §81.22, Estate of B. F. McGrew v. Comm., 135 F. 2d 158 (6th Cir. 1943).

³⁶ Foster v. Comm., 90 F. 2d 486 (9th Cir. 1937), *aff'd per curiam*, 303 U.S. 618 (1938); Proposed Treas. Reg. §20.3040-1 (a).

³⁷ City Bank Farmers Trust Co., 23 B.T.A. 663 (1931).

³⁸ Robinson v. Comm., 63 F. 2d 652 (6th Cir. 1933).

³⁹ Dimock v. Corwin, 306 U.S. 363 (1939).

⁴⁰ Stuart v. Hassen, 41 F. Supp. 905 (D. Mass. 1941).

⁴¹ E. T. Kelly Estate, 22 B.T.A. 421 (1931).

⁴² Estate of Ralph O. Howard, 9 T.C. 1192 (1947).

⁴³ Similarly, if the proceeds of the sale of jointly held property are placed in a joint bank account, the survivor will be considered as having contributed to the bank account her portion of the gain realized on the sale of such property. Harvey v. U.S., 185 F. 2d 463 (7th Cir. 1950). The proposed regulations, however, indicate a contrary rule. Proposed Treas. Reg. §20.2040-1(a) (2).

⁴⁴ U.S. TREAS. REGS. 105, §81.22.

party made deposits therein from independent sources and also made withdrawals.

d. Personal services and marital rights

The question frequently arises whether the rendition of personal services by a wife, or the relinquishment of marital rights, constitutes valuable consideration to be regarded as a contribution toward the purchase price of property. While personal services and marital rights may constitute valuable consideration under the law of property,⁴⁵ this rule generally does not apply in federal tax situations. The receipt of property in exchange for personal services of a wife or relinquishment of marital rights is usually regarded as a gift.⁴⁶ Moreover, for estate tax purposes, the Internal Revenue Code expressly provides that ". . . a relinquishment . . . of dower or curtesy, . . . or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration in money or money's worth."⁴⁷ In any event, there is always the practical difficulty of proving that a wife made a contribution toward the purchase price notwithstanding the fact that she was a co-worker with her husband in a business venture.

e. Increase of tax through joint tenancy

Joint tenancy frequently causes a degree of double taxation because the property may again be subject to tax upon the death of the survivor although it had previously been taxed upon the death of the first to die. There are only two avenues of relief from the possibility of such double tax.

(1) Marital deduction

One area of relief is provided by the marital deduction.⁴⁸ Property held in joint tenancy by husband and wife qualifies for the marital deduction so that an amount of joint property not in excess of one-half of the value of the gross estate may pass free of federal estate tax.⁴⁹ In such event, however, the entire value of the property which passed by virtue of joint tenancy *and* which benefited from the marital deduction, will be taxed in the estate of the wife upon her death.

(2) Credit for previous taxes

Additional relief from the burden of double taxation is provided by way of a credit to the estate of the second decedent for estate taxes

⁴⁵ 41 C.J.S. *Husband and Wife* §136 (1947).

⁴⁶ In *Estate of Loveland*, 13 T.C. 5 (1949) the wife nursed her husband for 48 years and he agreed that she should have \$12.50 a week for her services. The court held that she did not provide consideration in money or money's worth. However, if the wife renders services in connection with the production of income she may be able to show that she has contributed thereby to the acquisition of the property. But apparently at least an informal agreement as to the sharing of the profits is required. *Ferry v. Rogan*, 154 F. 2d 974 (9th Cir. 1946); *Berkowitz v. Comm.*, 108 F. 2d 319 (3rd Cir. 1939).

⁴⁷ INT. REV. CODE OF 1954, §2043(b).

⁴⁸ INT. REV. CODE OF 1954, §2056. See ch. XV of BASIC ESTATE PLANNING (1957) for a detailed discussion of the marital deduction.

⁴⁹ INT. REV. CODE OF 1954, §2056(e) (5).

previously paid⁵⁰ by the estate of the first decedent with respect to property in the first estate not covered by the marital deduction. If one joint tenant dies within ten years of the other, and if the marital deduction did not apply, his estate will obtain a credit for estate taxes paid by the estate of the first to die. The credit ranges from twenty percent to one hundred percent of the amount of the tax attributable to the property in the first estate, and depends upon the number of years elapsing between the two deaths.⁵¹ Although the credit for property previously taxed is available between any joint tenants, whether or not they are husband and wife, the marital deduction is available only with respect to spouses.⁵²

VIII. GIFT TAXES AND JOINT TENANCY

The creation of a joint tenancy where one party provides the entire purchase price may constitute a gift which is subject to tax. If there are two joint tenants including the sole contributor, the value of the gift will be equal to one-half the value of the property. If there are three joint tenants including the sole contributor, each gift will be equal to one-third of the value.⁵³ A non-contributing joint tenant is deemed to have received a gift because he obtains an immediate interest in the property. Of course, if such joint tenant furnishes part of the consideration, but less than his proportionate amount, the difference will be regarded as a gift.⁵⁴ A "gift tax marital deduction" applies to gifts between spouses.⁵⁵

a. Husband and wife real estate

The Revenue Act of 1954 provided special rules with respect to joint tenancies between husband and wife involving real estate.⁵⁶ A husband may now elect whether or not he wishes to have the transfer of real estate to himself and his wife treated as a gift.⁵⁷ Accordingly, if a husband purchases real estate and takes title thereto jointly with his wife, there will not be a taxable event under the gift tax laws unless he elects to treat the transaction as a gift. If such real estate is subsequently sold and a portion of the proceeds is received by the wife, a gift will then be deemed to have been made to her—if there had been no election to treat the creation of the joint tenancy as a gift.⁵⁸

⁵⁰ INT. REV. CODE OF 1954, §2013. There is also provided a credit to a donor's estate for gift taxes paid on property which is included in the donor's estate notwithstanding the fact that the transfer constituted a gift for gift tax purposes.

INT. REV. CODE OF 1954, §2012.

⁵¹ INT. REV. CODE OF 1954, §2013.

⁵² INT. REV. CODE OF 1954, §2056(a).

⁵³ U.S. TREAS. REGS. 108, §86.2(a) (5). For a discussion of gifts and the federal gift tax see ch. XI of BASIC ESTATE PLANNING (1957).

⁵⁴ INT. REV. CODE OF 1954, §2512(b).

⁵⁵ INT. REV. CODE OF 1954, §2523(a).

⁵⁶ INT. REV. CODE OF 1954, §2515.

⁵⁷ INT. REV. CODE OF 1954, §2515(a).

⁵⁸ INT. REV. CODE OF 1954, §2515(b).

If a wife reconveys to her husband the interest in joint property which she originally received from him as a gift, the reconveyance will constitute a gift. However, if the original conveyance to the wife was not regarded as a gift, her reconveyance will also probably not constitute a gift.⁵⁹ Similarly, upon a sale, no gift tax will be due if the husband receives the full proceeds and had not elected to treat the creation of the joint tenancy as a gift.⁶⁰ If a wife who received her joint interest in a transaction not initially regarded as a gift conveys her interest to a third party, it is quite possible that a gift will then result. This is on the theory that the wife's voluntary severance or transfer of her interest matured a gift from her husband.⁶¹ Also, if such a joint tenancy were converted into a tenancy in common, the transaction would involve a gift.

b. Liability for gift taxes

Although a donor is primarily responsible for the payment of federal gift taxes, a donee is also personally liable for the tax if not paid by the donor.⁶² Thus, a surviving wife may be required to pay gift taxes owed by her husband resulting from the creation of the joint tenancy.

IX. INCOME TAXES AND JOINT TENANCY

Income attributable to property held in joint tenancy is apportioned equally among the parties for income tax purposes.⁶³ Similarly, expenses attributable to the production of income are allocated equally among the joint tenants.⁶⁴ This applies to interest on mortgages, real estate taxes, repairs, and maintenance, as well as other expenses.⁶⁵ Moreover, any joint tenant is permitted to deduct the full amount of interest and taxes with respect to non-income producing property which he himself, paid, notwithstanding the fact that he may have a right of contribution from his other co-tenants.⁶⁶

a. Basis

The problem of basis is important with respect to computing gain

⁵⁹ See discussion, *Discus, Some Implications of the 1954 Code for Estate Planning*, TAXES 942 (1954). But a contrary view is expressed by Ekman, *Tax Consequences of Tenancy by the Entireties and Joint Tenancies*, N.Y.U. 13TH INST. ON FED. TAX. 291 (1954).

⁶⁰ *Ibid.*

⁶¹ INT. REV. CODE OF 1954, §2515(b).

⁶² INT. REV. CODE OF 1954, §6324(b).

⁶³ I.T. 3754, 1945 CUM. BULL. 143; I.T. 3825, 1946-2 CUM. BULL. 51. In *Morgan v. Finnegan*, 182 F. 2d 649 (8th Cir 1950) where there was an agreement that the wife receive the entire income from jointly owned property, it was held that even under these circumstances, the income was taxable, one-half to the wife and one-half to the husband.

⁶⁴ *Oren C. White*, 18 T.C. 385 (1952); *Elsie S. Bour*, 23 T.C. 237 (1954).

⁶⁵ INT. REV. CODE OF 1954, §62.

⁶⁶ INT. REV. CODE OF 1954, §§163 and 164; I.T. 3785, 1946-1 CUM. BULL. 98; G.C.M. 15530, XIV-2 CUM. BULL. 107. In addition, if one co-tenant paid the full amount for repairs due to fire or other similar casualty he is entitled to the full casualty loss deduction. INT. REV. CODE OF 1954, §165(c)(3); I.T. 3304, 1939-2 CUM. BULL. 158.

or loss upon the sale of property presently or formerly held jointly. While all the joint tenants are living, the basis for the property is its cost less depreciation.⁶⁷ If a joint tenancy is converted into a tenancy in common, each of the parties receives his proportionate interest in the property, and the basis will be allocated equally among them. If joint property is sold, the gain or loss will be divided equally among the co-tenants.⁶⁸

b. Survivor's basis

With respect to deaths occurring prior to 1954, there was no change in the basis attributable to a decedent's interest when it inured to the benefit of a surviving joint tenant.⁶⁹ This was true notwithstanding the fact that the decedent's interest in the joint property, as of the date of his death, was taxed in his estate at market value.⁷⁰ Joint tenancy, therefore, often turned out to be an expensive method of holding title, particularly when property values had increased and a sale by the survivor took place at a high value. Since the survivor's basis was cost less depreciation and usually low⁷¹—the survivor's sale resulted in substantial gain and taxes. Moreover, an estate tax was probably also paid upon a high value. In such a case, it would have been less costly, tax-wise, for the individual who paid for the property to retain title in his sole name and pass it by will upon his death to the individual who would otherwise have been his joint tenant. The property would have received a new basis—the fair market value at the time of death—and gain on the subsequent sale would have been minimized.

The 1954 Revenue Code has changed this situation.⁷² Now, if a decedent's interest in joint property is included in his estate for tax purposes, such interest in the hands of the survivor will receive a new basis for income tax purposes, namely, the value to which the estate tax applied less any depreciation with respect to the decedent's interest that may have been taken by the decedent during his lifetime.⁷³ Thus,

⁶⁷ I.T. 3785, 1946-1 CUM. BULL. 98.

⁶⁸ Walter G. Morley, 3 T.C. 904 (1947); I.T. 3754, 1945 CUM. BULL. 143; and I.T. 3825, 1946-2 CUM. BULL. 51.

⁶⁹ Helen G. Carpenter, 27 B.T.A. 282 (1932); I.T. 3754, 1945 CUM. BULL. 143; and G.C.M. 677, VIII-2 CUM. BULL. 72. The tax law followed the rules of property law and did not regard the survivor as having acquired the decedent's interest in the joint property by bequest, devise or inheritance, and accordingly did not regard death as the occasion for change of basis.

⁷⁰ Elizabeth W. Boykin, 16 B.T.A. 477 (1929); Long v. Comm., 289 U.S. 109 (1933); Edward v. Schiesser, Executor, 28 B.T.A. 640 (1933).

⁷¹ Cases and rulings *supra* note 68.

⁷² INT. REV. CODE OF 1954, §1014.

⁷³ Rev. Rul. 56-215 (I.R.B. 1956-20, 13). Although the gross value of the deceased tenant's estate is under \$60,000 and accordingly no estate tax is required to be filed, the survivor's basis will be computed in the same manner as set forth in the text except that fair market value as of the death shall be applicable and the election permitted for estate tax purposes, to use fair market value as of the anniversary date is not available.

basis for the survivor with respect to land or securities, which are not depreciable, will be the value thereof as determined for estate tax purposes. On the other hand, basis with respect to a building, which is depreciable, will be the estate tax value less depreciation taken by the deceased joint tenant during his lifetime with respect to his interest.⁷⁴ It should be noted that this relief proffered by the 1954 Revenue Act is only partial in that the decedent's interest in the joint property is taxed in his estate at the full market value thereof, whereas basis, where depreciation is allowable, could be substantially less than fair market value.

Since the law now provides for a new basis — which in most cases will be a higher one — it may be that a surviving joint tenant will not be anxious to establish that he or she contributed toward the purchase price of the property, particularly where the contribution would be less than the new basis. It may actually be to the advantage of some surviving joint tenants to have the entire value of the joint property subjected to the estate tax in order to obtain a higher basis for income tax purposes. The higher basis will reduce the gain on a subsequent sale and minimize the taxes thereon. Moreover, the higher basis will afford greater depreciation benefits. Whereas under the old law it was in the government's interest to resist proof of contribution by a surviving joint tenant, it may now seek to establish that he did make a contribution.

X. JOINT BANK ACCOUNTS

Joint tenancy with respect to bank accounts presents problems. They stem from the difficulty of determining whether the account is or is not a true joint tenancy with the right of survivorship, as well as determining rights to the funds. The answer depends upon local statutes and court decisions, and varies from state to state. However, certain general rules may be enunciated: A bank account may be subject to the right of survivorship if such intention is clear from the instruments and facts surrounding the establishment of the account. Thus, if the account was for "John Jones or Mary Jones, his wife, with the right of survivorship," such right would generally be recognized. Also, if phraseology similar to the foregoing were used by parties who are not husband and wife, the probability is that the account would still be regarded as giving rise to survivorship. But, if the phraseology is not as full and clear as in the foregoing example, the intention of the parties would have to be ascertained from circumstances outside of the bank documents.

If the account read only "John Jones or Mary Jones" and Mary

⁷⁴ INT. REV. CODE OF 1954, §§1014(a) and (b) (9). Rev. Rul. 56-520 (I.R.B. 1956-43, 11) sets forth the computation of a surviving joint tenant's basis under a complex fact situation.

was John's wife, the account would probably be regarded as involving a survivorship whether or not it technically qualified as a joint tenancy. The law leans toward recognizing survivorship in the bank account of a husband and wife. But, if the account were for "John Jones or Richard Brown," inquiry would be made as to the intention and facts surrounding the opening of the account, and particularly whether one is merely an agent for the other with respect to the withdrawal of funds. Since Jones and Brown are not related, the presumption would be against the existence of survivorship. Whether the account names are separated by "and," or "or," or "either . . . or," the same rules would apply. Depending upon the facts and circumstances, their use might be consonant with survivorship,⁷⁵ or with an agency relationship without the right of survivorship. The substantial significance of "and" or "or" seems to relate more to withdrawal rights⁷⁶ rather than to rights of survivorship.

a. Gift taxes and joint accounts

There are gift tax implications with respect to "joint" bank accounts. If a party makes all of the deposits therein and also retains the right to withdraw all of the funds without the consent of the other, a gift does not take place when the funds are deposited. It will occur at the time when a withdrawal is made by the other party for individual purposes. The amount of the gift will be the sum withdrawn.⁷⁷

b. Estate taxes and joint accounts

The estate tax applies to joint bank accounts as it does to other joint property. Where only the decedent deposited funds, the entire amount in the account will be subject to tax in his estate. But, a problem frequently arises when the survivor contends that he or she also deposited funds in the account and that such funds are, therefore, not subject to tax in the decedent's estate. The difficulty relates not only to proof of the source of the deposits but also as to the amounts thereof which have not been withdrawn and remain in the account. Under state inheritance tax laws, usually only one-half of the amount in the account will be taxed, on the theory that the other half already belonged to the survivor.⁷⁸

XI. GOVERNMENT BONDS

Joint ownership of United States Savings Bonds gives rise to both gift and estate tax problems. The tax impact depends on the method of registration.⁷⁹ A gift does not take place when the bond is acquired

⁷⁵ Kepner, *The Joint and Survivorship Bank Account—A Concept Without a Name*, 41 CAL. L. REV. 596, 614 (1954).

⁷⁶ *Ibid.* See also annotation in 77 A.L.R. 799.

⁷⁷ U.S. TREAS. REGS. 108, §86.2(a)(4). Withdrawal from a joint account by a wife for household and living expenses does not constitute the receipt of a gift by her.

⁷⁸ See Estate of Hounsell, 252 Wis. 138, 31 N.W.2d 203 (1948).

⁷⁹ 31 CODE OF FEDERAL REGULATIONS, Part 315 provides for the forms and inci-

and registered in the two names; only when it is cashed by the party who did not provide the consideration. Thus if John Jones purchases a bond and registers it as "John Jones or Mary Jones," a gift does not take place unless and until, during the lifetime of John, Mary cashes it and retains the proceeds as her own. Similarly, a gift does not take place if John registers the bond in his own name, but designates Mary as the beneficiary to receive payment thereof upon his death. Under this form of registration, the value of the bond will be included in John's estate for estate tax purposes, but Mary will become the owner thereof upon his death. Of course, if John purchased a bond and registered it solely in the name of his wife, or in the name of his wife and his son, he will be deemed to have made a gift to them at the time the bond is purchased, because by not including his name in the registration thereof, he relinquished control over it. Until such time as a gift of the bond takes place within the framework of the foregoing rules, the income therefrom is taxable to the purchaser.⁸⁰

XII. JOINT SAFE DEPOSIT BOXES

The use of "joint names" with respect to safe deposit boxes⁸¹ has little effect upon the ownership of the contents. Ownership will generally be determined by the manner in which title to items in the box are registered rather than by their presence therein. In the absence of clear evidence as to title, resort will be made to surrounding facts and circumstances to determine the intention of the parties. Memoranda, letters, and envelopes with notations and names thereon may be of some evidentiary help. If the box contains jewelry, cash, bearer bonds or similar items, and if such items were acquired and paid for by the decedent but claimed by the surviving "joint" box owner, the latter's position will not be materially helped by the presence of "joint" names; he would have to establish the occurrence of a gift. A "joint" box is hardly a reliable method of transferring the contents at death.

Generally, two or more names are used with respect to a safe deposit box for convenience in obtaining access thereto. But this can also be accomplished very simply by placing title to the box in the name of the person who is the true owner of the contents, and designating others to act as agents for purposes of access.

a. Sealing of box at death

Special reference should be made to the general practice of sealing

dents of ownership of U.S. Government Bonds, including defense bonds, war bonds, victory bonds and "E" bonds. Under these regulations such bonds may be issued in only three ways: (1) in the name of a single individual; (2) in the name of two but not more than two individuals in the alternative as co-owners, for example, John Jones or Mary Jones; or (3) in the name of a single individual payable on his death to a named beneficiary.

⁸⁰ Rev. Rul. 54-143 (I.R.B. 1954-17, 7).

⁸¹ See 14 A.L.R. 2d 948 for a discussion of the substantive law with respect to joint safe deposit boxes.

a box immediately upon receipt of information by the safe deposit company or bank of the death of the person who is the owner. This is done under state inheritance tax law practice for the purpose of making an inventory of the contents.⁸² If the box is in "joint" names, it will be sealed at the death of either party notwithstanding the fact that the survivor is the true owner of the contents. After inventory, the box is released; but in the meantime considerable inconvenience may have been caused.

In this respect, it should also be noted that a "joint" bank account is "stopped" at death, until the amount thereof is reported to the state and a release obtained.⁸³

B. TENANCY BY THE ENTIRETY

I. BASIC ELEMENTS

Tenancy by the entirety is a form analogous to joint tenancy. It exists only between husband and wife, and usually only with respect to real estate.⁸⁴ The right of severance does not exist. This form of ownership has been abolished in many states⁸⁵ where, however, joint tenancy is still recognized.⁸⁶ Where tenancy by the entirety exists, joint tenancy between a husband and wife is also usually permissible.

II. ESTATE AND GIFT TAXES

Upon the death of a tenant by the entirety, the survivor becomes the sole owner of the property,⁸⁷ and the estate tax treatment will be the same as if he were a joint tenant. However, the determination of the gift tax upon the creation of a tenancy by the entirety is different, in that the value of the gift can be determined only with the aid of life expectancy tables.⁸⁸ Since each tenant by the entirety has only a life interest, without the right of severance which a joint tenant usually has, the value of his life interest can be determined only by also taking into consideration the life expectancy of the other party. Hence, the

⁸² *E.g.* WIS. STAT. §72.11 (1955).

⁸³ *Ibid.*

⁸⁴ 4 POWELL, THE LAW OF REAL PROPERTY, §§620-622 (1954).

⁸⁵ *E.g.* California: *Swan v. Walden*, 156 Cal. 195, 103 Pac. 931 (1909); Ohio: *Kipp v. Kipp*, 101 N.E.2d 872 (Ohio App. 1950); Virginia: *American Nat. Bank of Washington, D.C. v. Taylor*, 112 Va. 1, 70 S.E. 534 (1911); Wisconsin: *In re Estate of Richardson*, 229 Wis. 426, 282 N.W. 585 (1938).

⁸⁶ There are also several states which have abolished joint tenancy, or have limited its survivorship feature. POWELL, §602, *supra* note 84 lists Georgia, Florida, Alabama and Kentucky among these. In states recognizing tenancy by the entirety, a conveyance to "John Jones and Mary Jones, his wife" and which does not express a contrary intent will result in a tenancy by the entirety. 30 C.J.S. *Husband and Wife* §34 (1947).

⁸⁷ POWELL, §623, *supra* note 84.

⁸⁸ U.S. TREAS. REGS. 108, §86.19(h). "The value of the gift is the value of such property less the value of the right, if any, of the donor spouse to the income or other enjoyment of the property, or share thereof, during the joint lives of the spouses and the value of the right of the donor spouse to the whole of the property should he or she be the survivor of them." *Comm. v. Hart*, 106 F. 2d 269 (3rd Cir. 1939).

value of the interest of the party who has the longest life expectancy, and who would presumably become the ultimate owner of the property, would be greater than the value of the interest of the other.

III. INCOME TAXES

Income tax consequences are also similar to those relating to joint tenancy, except in states that follow the rule that all income derived from "entirety" property belongs to the husband.⁸⁹ This may, however, be of little importance under present income tax laws which permit the "splitting" of income between husband and wife. Basis problems under tenancy by the entirety, and the answers to them, are substantially the same as with respect to joint tenancy.

C. TENANCY IN COMMON

I. BASIC ELEMENTS

Tenancy in common is the simplest form of co-ownership. Under this form, two or more individuals may participate in the ownership of a single item of property, like real estate, or an automobile. Each party would own an undivided interest in the property, e.g., one-half, or a third, depending upon the number of co-owners. No party owns any specific portion thereof. Each has complete control over his interest, in that he may sell, mortgage, or give it away.⁹⁰ Upon his death, his interest will pass to his heirs under his will, or through intestacy. Automatic survivorship, the distinguishing feature of joint tenancy, does not exist under tenancy in common. In contrast to the requirements necessary to create a joint tenancy, tenants in common need not derive their title from the same person, nor by the same instrument, nor at the same time.⁹¹

If Jones, the owner of property, conveys to Smith "an undivided one-fourth interest," a tenancy in common will result between Jones and Smith. Jones will have an undivided three-fourths interest and Smith an undivided one-fourth interest. If Jones conveys the property to Smith and Johnson, they will be tenants in common, each holding an undivided one-half interest, unless the conveyance clearly indicated an intention that they be joint tenants. Legatees and heirs take undivided interests in property of a decedent as tenants in common, unless by specific provision of a will the legatees are to take title as joint tenants.

Tenancy in common is favored in the law over other forms of co-ownership. Therefore, wherever a conveyance is made to two or more people, and the intention to create a joint tenancy or a tenancy by the

⁸⁹ E. M. Godson, 1946 P-H. T.C. Memo. Dec. Para. 46, 182; I.T. 3873, 1947-2 CUM. BULL. 57; Massachusetts and South Carolina are among these states.

⁹⁰ TIFFANY, *THE LAW OF REAL PROPERTY* §426 (3rd ed. 1920).

⁹¹ 86 C.J.S. *Tenancy in Common* §1 (1947).

entirety is not clearly present, the law will presume that a tenancy in common was intended.⁹²

Tenants in common are each entitled to the use and possession of the property.⁹³ Income from the property belongs to each in proportion to his ownership.⁹⁴ Likewise, upon sale, each is entitled to his proportionate part of the proceeds.

II. TERMINATION

The parties can, by agreement, terminate a tenancy in common. In the event they cannot agree, any one of them may petition a court for a partition of the property. If the property is equitably and physically divisible, the court will usually order such a division. If division cannot be made, a sale will be directed and the proceeds divided among the co-owners.

III. CREDITORS

The interests of a tenant in common are subject to the claims of creditors. The death of a tenant in common does not extinguish a judgment lien against his interest in the property. Thus, the interests of a tenant in common are subject to both voluntary and involuntary disposition in the same manner as the whole property would be if the tenant owned the whole thereof.

IV. ESTATE AND GIFT TAXES

Upon the death of a co-tenant, the value of his interest in the property is included in his estate for death tax purposes. He is considered the owner thereof whether or not he received his interest as a gift or by purchase.⁹⁵ If one of the co-owners received his interest as a gift, the value thereof is subject to the gift tax.⁹⁶

V. BASIS

Each tenant in common has his own basis for his interest. If a tenant in common purchases his interest, his basis is his cost, less depreciation.⁹⁷ If he receives his interest by gift, he takes the donor's basis.⁹⁸ If he receives it from a decedent, his basis is the fair market value of the interest at the time of the death.⁹⁹ Conversely, if an owner of property conveys an undivided interest therein to another, as a tenant in common, the transferor's basis is divided proportionately between himself and the transferee.¹⁰⁰ In the case of a sale, gain or

⁹² 86 C.J.S. *Tenancy in Common* §7 (1947).

⁹³ 86 C.J.S. *Tenancy in Common* §25 (1947).

⁹⁴ 86 C.J.S. *Tenancy in Common* §47 (1947).

⁹⁵ *Harvey v. U.S.*, 185 F. 2d 463 (7th Cir. 1950).

⁹⁶ INT. REV. CODE OF 1954, §2512(a). A gift of property as a tenant in common is treated as a gift of any other asset. Engel, *Tax Consequences of Various Kinds of Real Property Ownership*, N.Y.U. 10TH INST. ON FED. TAX. 5 (1951).

⁹⁷ INT. REV. CODE OF 1954, §1012.

⁹⁸ INT. REV. CODE OF 1954, §1015(a).

⁹⁹ INT. REV. CODE OF 1954, §1014(a); M. C. Long, 35 B.T.A. 95 (1936).

¹⁰⁰ P. C. Mann, 8 B.T.A. 221 (1927).

loss is recognized predicated upon the basis determined pursuant to the foregoing general rules.

D. CONCLUSION

While joint tenancy and tenancy by the entirety have a definite place in the estate planning process, they should be used with circumspection and with due regard for the tax problems involved. They should not be regarded as a substitute for the transmission of property by will. In any event, joint tenants and tenants by the entirety should each have wills, coupled with testamentary trusts where appropriate, in order adequately to provide for the ultimate devolution and protection of the property.