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Charles P. Sacher

ESTATE PLANNING AND JOINT TENANCY WITH RIGHT OF SURVIVORSHIP

*Charles P. Sacher**

I. Introduction

A. *General Discussion*

Property ownership encompassing the feature of survivorship has become a popular form of property ownership in the United States. Such ownership includes the family residence, which is almost uniformly owned in noncommunity property states[1] by husband and wife as a tenancy by the entireties. The family automobile, checking accounts, savings accounts and securities are generally owned by the spouses as joint tenants with the right of survivorship.[2] For purposes of this article, the term "joint ownership" or "joint owner" applies to any form of ownership which incorporates the right of survivorship upon the death of the joint owner or owners.[3]

The increased use of jointly owned property requires that the estate planner be aware of the proper utilization and termination of joint ownership, including both property and tax law consequences. On innumerable occasions, ill-advised or ill-conceived employment of joint ownership has harmed the client. Properly utilized, however, joint ownership can completely fulfill a client's wishes and needs. Accordingly, it is essential to understand both the advantages and disadvantages of joint property.

This article will consider those forms of coownership in which the survivor or survivors will, by operation of law, upon the death of a coowner, own property formerly owned jointly. The right of survivorship means that the property cannot pass under the deceased joint owner's will and is not subject to the laws of descent and distribution.[4] The English common law established joint ownership with the

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* Partner in the firm of Walton, Lantaff, Schroeder, Carson & Wahl, Miami, Florida.

1 All references in this article will be to common law jurisdictions. This article will not discuss the aspects of property or tax law applicable to the community property law States of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.

2 No attempt has been made to determine the motivation for utilizing this form of ownership. Presumably the desire to "avoid probate" and thereby minimize the delays and cost of the administration of property upon the death of either spouse is the principal reason for such ownership. However, as will be discussed, the possible savings gleaned at the death of the first spouse may exact a dear cost in the form of substantial estate taxes in the estate of the surviving spouse.

3 For the purposes of this article, no attempt will be made to distinguish between common law joint tenancy, tenancy by the entireties, statutory provisions for survivorship or contractual provisions for survivorship. However, because the tax consequences are dependent upon the underlying state property law concepts, basic property concepts will be analyzed. The following authorities illustrate the role of state law in determining tax consequences: Krakoff v. United States, 439 F.2d 1023 (6th Cir. 1971) (effect of purported disclaimer of survivorship property under Ohio law); Sullivan's Estate v. Comm'r, 175 F.2d 657 (9th Cir. 1949) (nature of joint owners' interest in jointly owned property determined under state law); Rev. Rul. 69-577, 1969-2 CUM. BULL. 173 (state law determines right to income of owners of joint property).

4 There are situations in which jointly owned property may become part of the probate estate through appropriate action taken by a personal representative or heir or beneficiary of an estate. Any such inclusion in the deceased joint owner's probate estate is considered to be without the right of survivorship.

right of survivorship. These property law concepts will be briefly discussed but not analyzed in detail since statutory modifications have almost completely abolished the original property law concept of joint ownership with the right of survivorship. These statutory changes have reversed the presumption of survivorship so that, in the absence of express language to the contrary, a gift or devise to coowners is presumed to create a tenancy in common.

B. *Illustrative Problems*

Joint ownership may give rise to numerous problems. Problem areas include both frustrated intentions and excessive taxes.[5] A surviving joint owner may not obtain the jointly owned property due to a successful assertion that the form of ownership was an invalid testamentary substitute. Similarly, the creation of joint ownership in bank accounts and United States bonds creates the possibility of alienation or withdrawal by the coowner. The coowner's creditors may assert an enforceable claim against a portion of the jointly owned property.

Tax problems include the question of who should report income from jointly owned property and the amount to be reported. The possible assessment of a gift tax deficiency because the creation or termination of joint ownership may constitute a taxable gift is a very real problem. Joint ownership between spouses may result in overqualification of property passing to the spouse for purposes of the estate tax marital deduction. A related problem is whether the value of jointly owned property should be included in a general, nonexclusionary, formula marital bequest.[6] Excessive estate taxes may result from inclusion of the full value

5 Intentions are frustrated when the joint tenancy is regarded as a matter of convenience solely to enable the coowner to make withdrawals. The contributing joint tenant believes that the joint tenancy property will pass under his will or to his heirs. Such disposition is not always what transpires.

Excessive taxes arise in situations in which the joint tenants are husband and wife. The form of ownership presents an effective division of the joint tenancy property upon the death of the first joint tenant to die. Accordingly, the entire joint tenancy property belongs to the survivor even though the marital deduction in the estate of the first joint tenant to die may be limited to fifty percent. The situation of the surviving spouse receiving property worth more than the maximum marital deduction is referred to as "overqualification for the marital deduction."

6 The optimum estate planning result for a husband and wife is to provide a formula marital bequest in which property passing to the wife is limited to the maximum amount available for a deduction in the estate of the first to die. The balance of the estate of the first to die is generally made available to the survivor in a trust which will not be includable in the survivor's taxable estate. This optimum result is obtained by providing a marital bequest, either a pecuniary bequest or a residuary bequest, which provides for a bequest of "one-half of my adjusted gross estate as finally determined in federal estate tax proceedings under applicable law, reduced by the value of my interest in property, if any, that passes or shall have passed to my spouse under the provisions of any other paragraph of this will or otherwise and under the provisions of this will, but only to the extent that the property shall be includable in determining my gross taxable estate and qualifies for the marital deduction."

As indicated above, the best drawn will will not be effective if the property which passes to the spouse other than under the will exceeds the maximum amount of the marital deduction in the deceased spouse's estate. This, as indicated above, is referred to as "overqualification for the marital deduction."

Problems can arise, however, if any form of joint tenancy property or other property which you will pass outside the will is owned, if the potential effect of such property on the testamentary disposition is not considered. For example, the court in *In re* Rogers' Estate, 180 So.2d 167 (Fla. App. 1965) was asked to interpret the following testamentary language:

> All the rest and remainder of my Estate of every kind and character, wherever located, whether real, personal or mixed, I direct shall be divided into two parts and bequeathed as follows:

of jointly owned property in the estate of the first joint tenant to die. Alternatively, administrative expenses may be increased in an attempt to exclude the value of jointly owned property from the decedent's taxable estate. Finally, problems arise in connection with the apportionment of estate taxes.

II. Property Law Concepts

A. *In General*

Estate planning for owners of concurrent interests requires an awareness of the legal consequences of various forms of property ownership. Property law in the United States is basically statutory. Since these statutes either reestablish, modify, or reverse common law property concepts, these concepts will be briefly considered.[7]

This article will focus on the three basic forms of concurrent ownership: joint tenancy, tenancy in common, and tenancy by the entireties. The legal consequences of each will be considered as they relate to the severance of the form of ownership during the lifetime of the concurrent owners and the legal effect of the death of any one concurrent owner.[8]

> I give, devise and bequeath to my beloved wife, Mable Irene Rogers, a full undivided one-half (½) of all of my residuary estate, computing that so she will have that full proportion of my estate that will entitle said estate to the full marital deduction. It being my intention that the watch and ring and stock which are specifically bequeathed to my daughter shall be computed in my gross residuary estate before the amount provided herein to go to my wife shall be calculated.

Id. at 169. In this case the net probate estate was $98,908.63 and the adjusted gross estate for federal estate tax purposes was $145,190.74 with $46,282.11 passing to the widow pursuant to the survivorship in jointly owned property. The Court determined that the maximum marital deduction was $72,595.37 (50% of the adjusted gross estate) and since the widow received $46,282.11 outside the will, she was entitled to receive a bequest of $26,313.26.

A contrary result was reached by the Surrogate's Court, Westchester County, New York, in the case of *In re* Reben's Will, 115 N.Y.S.2d 228 (Sur. Ct. 1952). In this case the court interpreted the following testamentary provision:

> A. To *Madeline W. Reben,* my beloved wife, fifty percent (50%) of the gross estate after deducting all items allowed by the Federal Tax Department as deductions so that the amount which is hereby devised to her shall equal in value to the maximum amount of the allowable marital deduction of which my estate may be entitled . . . .

Id. at 232. The sole question for the court whether the amount of the general legacy determined by the use of the formula quoted above must be diminished by the value of the property passing to the widow outside of the will, which property is included in the federal estate tax return and which qualifies for the marital deduction. The court held that the bequest to the widow would not be reduced by the value of the property passing outside of the will. If the testator had so desired, proper provision to reduce the testamentary gift by the value of the property passing to his wife, independent of the will, could have been added. A court may read a will in the light of relevant surrounding circumstances and give such meaning to words used as will be consistent with a setting, but may not read into a will an intent that is neither expressed nor necessarily implied. Accordingly, the general legacy bequest to the widow is to be determined in accordance with the prescribed formula without diminution by reason of the fact that property or property interests qualifying for the marital deduction and required to be included in the federal estate tax return have passed or may pass to the widow dehors the will.

7 This article does not purport to be a survey of the law of property of the several states. No effort has been made to determine a majority or minority position. Statutory references are merely illustrative and are not intended to indicate that a particular statute exists in a majority of the states. The property concepts are discussed as a predicate for a consideration of the tax consequences.

8 No attempt will be made to cover any other aspects of joint ownership such as the rights of the joint owners between themselves or the rights of creditors of either joint owner to the jointly owned property.

B. *Common Law Property Law*

The English common law recognized the following forms of ownership: severalty, joint tenancy, tenancy in common, tenancy by the entireties, and coparceny.[9] Only the tenancy in severalty involved one owner; all the remaining common law forms of ownership included multiple owners. Each form of common law concurrent ownership will be discussed in detail except for coparceny.[10]

In the common law joint tenancy, each concurrent owner shared equally in the enjoyment of, and income from, the property. If the joint ownership was not otherwise terminated, upon the death of any joint owner his share vested in the remaining joint owner or owners until only one survivor remained, who then owned the property in severalty.[11] The common law joint tenancy came into existence and continued to exist only when each of the following four unities was present: (1) Unity of interest (requiring each joint owner to have an equal interest in the property); (2) unity of title (requiring ownership to come from one and the same conveyance); (3) unity of time (requiring the ownership to start at the same time); and (4) unity of possession (requiring the joint owners to share equal and undivided possession).[12] Any conveyance in which the above four unities existed created a survivorship situation, regardless of the intention of the parties, in the absence of appropriate words of limitation. This presumption of survivorship may have been appropriate in a feudal society but has not been followed in the United States.

Tenancy in common is that form of ownership in which two or more persons share the same right to real or personal property. Each tenant has undivided possession but there are separate interests.[13] The single attribute linking a common law joint tenancy with a tenancy in common is possession. The other three unities essential to a common law joint tenancy are not present in a tenancy in common. Accordingly, the tenant in common holds his interest independently of his cotenants. Any cotenant can transfer, devise, or encumber his interest without the consent of others.[14] The most important difference between a common law joint tenancy and a tenancy in common is that the latter has no survivorship feature. On the death of a cotenant, his interest in the property passes under his will or to his heirs.[15] In a common law joint tenancy the interest of the deceased joint tenant passes to the surviving joint tenant or tenants.

A tenancy by the entireties is a common law form of ownership which exists between husband and wife only. It arose from any conveyance to a married couple unless limiting language was included. This form of ownership is similar to the common law joint tenancy except that neither tenant could

9 4 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1772 (repl. ed. 1961).
10 *Id.* at § 1774. Tenancy by coparceny referred to that form of ownership in which individuals held land by descent from the same ancestor. Due to the right of primogeniture, the estate in coparceny was usually restricted to daughters inheriting from their parents when there were no male heirs.
11 *Id.* at § 1776.
12 *Id.* at § 1777.
13 *Id.* at §§ 1793-95.
14 *Id.* at § 1793.
15 Kern v. Weber, 155 So. 2d 619 (Fla. Ct. App. 1963).

voluntarily terminate the tenancy or convey his or her interest without the consent of the other.[16]

C. *Current Property Law*

While the common law presumption of joint tenancy[17] has been reversed by statute[18] or judicial decision[19] in almost every state, most statutes and decisions still permit the creation of joint tenancies. The principles applicable to the termination of a common law joint tenancy determine the effectiveness of a severance of a joint tenancy. Thus, the elements of the common law joint tenancy must be considered to determine the means of severing a joint tenancy.

Public policy presently disfavors the feudal concept of survivorship among joint tenants. However, that same policy recognizes that individuals should be able to arrange their affairs to permit the surviving joint tenant or tenants to acquire the interest of the deceased joint tenant with no interest passing to the heirs or beneficiaries of the deceased joint tenant. If the parties express their intention to create a joint tenancy, courts will recognize the right of the surviving joint tenant or tenants to take the property. Even if a particular state does not recognize a joint tenancy, the same result can be reached through recognition of a tenancy in common with the right of survivorship.[20] The rationale behind permitting the tenancy in common with right of survivorship is that the surviving concurrent owner acquires his interest through the express contractual language of the instrument as distinguished from the legal incidents of the form of ownership.[21]

Joint tenancies, tenancies in common, and tenancies by the entireties are

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16 4 G. THOMPSON, *supra* note 9, at § 1784.

17 The terms "joint tenancy" and "joint tenant" include any form of concurrent ownership, whether common law joint tenancy, tenancy by the entireties, joint tenancy with the right of survivorship or tenancy in common with the right of survivorship.

18 *See, e.g.*, Fla. Stat. Ann. § 689.15 (1969):

> The doctrine of the right of survivorship in cases of real estate and personal property held by joint tenants shall not prevail in this state; that is to say, except in cases of estates by entirety, a devise, transfer or conveyance heretofore or hereafter made to two or more shall create a tenancy in common, unless the instrument creating the estate shall expressly provide for the right of survivorship; and in cases of estates by entirety, the tenants, upon divorce, shall become tenants in common.

This statute is typical of legislation modifying, limiting or abolishing the common law joint tenancy with its attendant right of survivorship. Annot., 46 A.L.R.2d 523 (1956). The exemption of a tenancy by the entireties from the statute abrogating survivorship without a specific expression of intention is also fairly typical. Wilson v. Frost, 186 Mo. 311, 85 S.W. 375 (1905); Johnston v. Johnston, 173 Mo. 91, 73 S.W. 202 (1903); Fiedler v. Howard, 99 Wis. 388, 75 N.W. 163 (1898); Annot., 32 A.L.R.3d 570 (1970).

19 *In re* Coe, 77 N.J. Super. 181, 185 A.2d 696 (1962); Hart v. Hart, 201 Mich. 207, 167 N.W. 337 (1918); Johnston v. Johnston, 173 Mo. 91, 73 S.W.202 (1903). *See generally* Annot., 46 A.L.R.2d 523 (1956).

20 4 G. THOMPSON, *supra* note 9, § 1796 at 124:

> The strong trend against the joint tenancy and the tenancy by the entireties which has caused judicial and legislative positions destroying much of the efficiency of these two legal concepts in transmitting property after death has led to a countercurrent endeavoring to revive the survivorship result. This is done by creating a tenancy in common with the right of survivorship by express agreement.

21 *Id.*:

> While a survivorship can be created in a tenancy in common it arises by virtue of the agreement of the parties and not as an incident of the property law. Its basis is in contract and its existence is subject to contract principles.

all recognized in modern real property law. Joint tenancies and tenancies in common can exist in almost every kind of personal property, tangible or intangible.[22] Specific statutory provisions cover joint ownership in bank accounts and savings and loan association deposits. Joint ownership in United States bonds is subject to administrative regulations promulgated by the Treasury Department.

D. *Creation of a Joint Tenancy*

The creation of a joint tenancy requires a written conveyance and does not arise by operation of law.[23] Joint bank accounts are normally based on a contract with the depository. Joint tenancy in United States bonds is governed by Treasury Department regulations.[24]

An individual owning property in severalty may attempt to create a joint tenancy by conveying the property to himself and another. Clearly, under the common law such a conveyance would not create a joint tenancy because of the failure of the four unities.[25] In order to accomplish this result within the test of the four unities, it was necessary to convey the property to a "straw man" who would convey it back to the original owner and the proposed joint owner.[26] Judicial decisions have recognized the validity of such a conveyance when the intention to create a joint tenancy is clearly expressed.[27] In fact, the right of an owner of corporate stock to create a joint tenancy by executing an assignment of the certificate to himself and another has been upheld even though new certificates were not issued.[28]

The language which will demonstrate the requisite intention to create a joint tenancy is subject to broad judicial interpretation. The mere use of the phrase "jointly" may not be sufficient to create a survivorship situation. As in all cases of ascertaining intention, the entire instrument must be construed. Language included in a form deed providing for survivorship will receive greater weight than those portions of the printed form containing a reference to "heirs," "devisees," or the like.[29]

For purposes of this article, it will be assumed that the instrument convey-

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22 Johnston v. Johnston, 173 Mo. 91, 73 S.W. 202 (1903) (goods, wares and merchandise); Farr v. Trustees of Grand Lodge, A.O.U.W., 83 Wis. 446, 53 N.W. 738 (1892) (insurance policies); Estate of Awtry v. Comm'r, 221 F.2d 749 (8th Cir. 1955) (United States government bonds); Frey v. Wubbena, 26 Ill. 2d 62, 185 N.E.2d 850 (1962) (corporate securities); O'Neill v. O'Malley, 75 Cal. App. 2d 821, 171 P.2d 907 (1946) (vendee's equitable interests under real estate contract of purchase).

23 Deslauriers v. Senesac, 331 Ill. 437, 163 N.E. 327 (1928); Frey v. Wubbena, 26 Ill. 2d 62, 185 N.E.2d 850 (1962).

24 Treas. Reg. §§ 315.60-.61 (1964).

25 See text accompanying note 12 *supra.*

26 Strout v. Burgess, 144 Me. 263, 68 A.2d 241 (1949).

27 O'Neill v. O'Malley, 75 Cal. App. 2d 821, 171 P.2d 907 (1946); Curtis v. Smithers, 20 Conn. Supp. 321, 134 A.2d 576 (Super. Ct. 1957); Florida Nat'l Bank v. Gann, 101 So. 2d 579 (Fla. Dist. Ct. 1958); *see generally* Annot., 44 A.L.R.2d 595, 605 (1955).

28 Petri v. Rhein, 257 F.2d 268 (7th Cir. 1958).

29 *See generally* Annot., 46 A.L.R.2d 523 (1956). In order to avoid any question the following language is suggested: "To A and B as joint tenants with the right of survivorship and not as tenants in common."

ing the property effectively creates a form of joint ownership with the right of survivorship.[30]

E. *Joint Bank Accounts*

Accounts established in banks, savings and loan associations, and building and loan associations in multiple names may create a tenancy in common or a joint tenancy. Under the modern rule, the requisite expression of intention by the depositors will establish a survivorship account. However, the usual situation involves no such expression of intention and the account contract is the only written evidence of the parties' intention.

The typical joint account contract is drafted by the depository for its own protection pursuant to state law[31] and permits the depository to pay over the account to either joint owner during their lives and to pay the balance to the survivor. The depository is protected against either a suit by the other joint owner or the heirs or beneficiaries of the deceased joint owner. The survivorship feature exists notwithstanding the enactment of a statute abolishing the common law presumption of joint tenancy.[32]

F. *United States Bonds*

Registration of United States bonds must express the actual ownership of and interest in such bonds and is conclusive of such ownership and interest.[33] The only permitted form of concurrent ownership in United States bonds is effectuated by registration in the name of two persons in the alternative as coowners.[34] The government will not recognize any judicial determination giving effect to a

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30 *In re* Baker's Estate, 247 Iowa 1380, 78 N.W.2d 863 (1956) supports this assumption in that the court held that the common law requirement of the coexistence of the four unities was not applicable and the intention of the parties should prevail in determining whether a joint tenancy has been created. *See also* Berberick v. Courtade, 137 Ohio St. 297, 28 N.E.2d 636 (1940). *See generally* Annot., 64 A.L.R.2d 918, 922 (1959).

31 *See, e.g.,* ILL. ANN. STAT. ch. 32, § 770 (Smith-Hurd 1970), which protects the depository in making payment to either joint owner or to the survivor. The making of a deposit in a joint account in Illinois has been held to create a presumption that the depositors intended to create a joint tenancy, which could only be overcome by clear and convincing evidence. Estate of Roth v. Roth, 96 Ill. App. 2d 292, 238 N.E.2d 607 (1968); *In re* Marx, 11 Ill. App. 3d 727, 297 N.E.2d 637 (1973). N.Y. BANKING LAW § 675 (McKinney 1971) both protects the depository and, in the absence of fraud or undue influence, establishes prima facie evidence in any action or proceeding to which the depository or surviving depositor is a party, of the intention of both depositors to create a joint tenancy and to vest title in the depositor and additions and accruals thereto in such survivor. The law further provides that the burden of proof in refuting this prima facie evidence is upon the party challenging the survivor's title.

32 Adams v. Jones, 258 S.W.2d 401 (Tex. Civ. App. 1953). However, the absence of specific statutory authority for survivorship in bank accounts has defeated the survivorship feature because of the abolition of the common law joint tenancy. *In re* Iver's Estate, 4 Wash. 2d 477, 104 P.2d 467 (1940). *See also* Bilek v. Ryan, 19 Ill. App. 3d 1027, 313 N.E.2d 178 (1974), in which the court found that there was a presumption of donative intent when the joint bank account was opened and only clear and convincing evidence could rebut the presumption. The burden of proof is on the deceased joint tenant's estate. *Contra,* Clabbey v. First Nat'l Bank, 320 S.W.2d 738 (Mo. Ct. App. 1959), in which the court held that a bank deposit in joint names is presumed to be for convenience only and does not create a survivorship situation.

33 Treas. Reg. § 315.5 (1964).

34 Treas. Reg. § 315.7 (1964).

voluntary inter vivos transfer of a bond[35] except through reregistration and reissuance.

A United States bond registered in the alternative coownership form will be paid to either coowner upon his separate request, and upon payment the other coowner ceases to have any interest in the bond. If both coowners request payment jointly, payment is made by check payable to the coowners jointly, e.g., "John A. Jones and Mrs. Mary C. Jones."[36]

There are substantial restrictions on the reissuance of coownership bonds during the lifetime of the coowners. Reissuance generally requires both the surrender of the bond and the request of the coowners under the following conditions:

> (1) If one of the coowners marries, or if they are divorced or legally separated from each other, or their marriage to each other is annulled after issue of the bond, the bond may be reissued in the name of either coowner alone, or with a new coowner or beneficiary.
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> (2) If the coowners are related as: husband, wife; parent, child (including stepchild); brother, sister (including the half blood, stepbrother, stepsister, or brother or sister through adoption); grandparent, grandchild; great-grandparent, great-grandchild; uncle, aunt, nephew, niece (including a child of a brother or sister of the present spouse); granduncle, grandaunt, grandnephew, grandniece; father-in-law, mother-in-law, son-in-law, daughter-in-law; brother-in-law, sister-in-law—the bond may be reissued in the name of
> (i) either coowner alone, or with a new coowner or beneficiary;
> (ii) a third person related to either coowner in any of the foregoing degrees of relationship, with coowner or beneficiary if so desired;
> (iii) the trustee of (*a*) a personal trust estate created by either of them, or (*b*) a personal trust estate created by some other person provided (*1*) either coowner is a beneficiary of the trust, or (*2*) a beneficiary of the trust is related to either coowner of the trust in any of the foregoing degrees of relationship.[37]

Special rules apply if either coowner is incompetent or a minor.[38]

Upon the death of either coowner while the bond is still outstanding, the survivor is recognized as the sole and absolute owner. Payment or reissuance will be made as though the bond were registered in the name of the surviving coowner alone.[39]

The Treasury regulations do not establish the rights of the coowners between themselves.[40] However, they are conclusive with respect to actions involving the United States government, particularly in federal estate tax proceedings.[41]

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35 Treas. Reg. § 315.20(a) (1964).
36 Treas. Reg. § 315.60 (1964).
37 Treas. Reg. § 315.61(a) (1964).
38 Treas. Reg. § 315.61(b)-(c) (1964).
39 Treas. Reg. § 315.62 (1964).
40 Treas. Reg. § 315.20 (1964).
41 United States v. Chandler, 410 U.S. 257 (1973).

G. *Termination of a Joint Tenancy*

A common law joint tenancy could be terminated either through alienation by one of the joint tenants during his lifetime or upon the death of one of two joint tenants. In the event of alienation, the joint tenancy became a tenancy in common. Upon the death of a joint tenant, the sole surviving joint tenant owned the entire property. A joint tenant could alienate or convey his interest in the joint property to defeat the right of the surviving joint tenant.[42] Similarly, a conveyance from one joint tenant to another terminated the joint tenancy.[43] The preceding rules did not apply to a tenancy by the entireties because neither tenant, acting alone, could terminate the tenancy.[44]

Under modern law, a subsequent reconveyance from one joint tenant to the original conveying joint tenant does not reestablish a common law joint tenancy but it can establish a joint tenancy with the right of survivorship if appropriate language is included in the instrument of conveyance.

Special rules apply, however, to the termination of a joint tenancy in United States bonds and bank accounts. The Treasury regulations permit either coowner to surrender the bond for payment but normally require joint action for reissuance. Almost all joint bank account contracts permit either joint owner to withdraw the entire balance. Such redemption or withdrawal may result in a claim against the withdrawing joint tenant but does not prevent severance of the joint tenancy.

A joint tenancy may also be terminated by a contract to convey jointly owned property. The effect of such a contract entered into by all of the joint tenants is unclear. If the doctrine of equitable conversion applies, the joint tenancy will be terminated; if not, the joint tenancy will be recognized.[45] Similarly, there is a conflict as to whether the proceeds of joint tenancy property are also jointly owned property. If the proceeds have not yet been disbursed, there is authority for holding that the joint tenancy aspect attaches.[46]

Severance through conveyance by a joint tenant requires a legally effective deed. For example, if the deed of a joint tenant is not delivered with intent that it shall take effect in the joint tenant's lifetime, no severance occurs.[47] Conveyance by a joint tenant to a trust created for his own benefit severs the joint tenancy.[48]

If more than two joint tenants are involved, conveyance by one joint tenant will not destroy all incidents of survivorship. The conveyance only

42 4 G. THOMPSON, *supra* note 9, § 1780 and cases cited note 45 *infra*.
43 4 G. THOMPSON, *supra* note 9, § 1780.
44 *Id.* at § 1784.
45 Annot., 64 A.L.R.2d 918, 937 (1959).
46 Fish v. Security-First Nat'l Bank, 31 Cal. 2d 378, 189 P.2d 10 (1948); Lawrence v. Andrews, 84 R.I. 133, 122 A.2d 132 (1956). *Contra,* Illinois Pub. Aid Comm'n v. Stille, 14 Ill. 2d 344, 153 N.E.2d 59 (1958). *See generally* Annot., 64 A.L.R.2d 918, 953 (1959). *See also* Register of Wills v. Madine, 242 Md. 437, 219 A.2d 245 (1966); Smith v. Tang, 100 Ariz. 196, 412 P.2d 697 (1966). In the light of current statutory changes, it is good practice to include the requisite language regarding survivorship in any purchase money mortgage which is taken back, because in the absence of such language the specific statutory requirements may be held to defeat any right of survivorship.
47 Klajbor v. Klajbor, 406 Ill. 513, 94 N.E.2d 502 (1950).
48 Reiss v. Reiss, 45 Cal. App. 2d 740, 114 P.2d 718 (1941).

terminates survivorship with respect to the conveying joint tenant's interest. The remaining joint tenants possess the right of survivorship as to all property except that conveyed by the joint tenant. The new owner takes his interest as a tenant in common.[49]

Conveying less than the joint tenant's entire interest will not sever the joint tenancy as to the remainder. For example, conveyance of a life estate with the joint tenant retaining the remainder will not terminate the joint tenancy.[50]

A joint tenancy may also be terminated by a judicial partition suit, a division, or a proceeding on demand for division. The partition action must extend to the entire property.[51] Parole partition will suffice only if some action has been taken to effectuate the partition.[52] Finally, a joint tenancy can be terminated by agreement among the joint tenants or by appropriate election or notice.[53]

H. *Probate Problems*

If the joint tenancy has not been effectively terminated prior to death, the surviving joint tenant or tenants continue to own the property. If the joint tenancy has been severed, the heirs or beneficiaries of the deceased joint tenant will inherit his proportionate interest. Even if there has been no termination, however, simultaneous death of the joint tenants may cause problems. In the absence of statutory provisions to the contrary, the property in such cases passes to the heirs or devisees of each tenant in the proportion that each contributed to the acquisition of the property out of his or her separate funds or earnings.[54] An analogous result obtains in the event of the simultaneous death of coowners of United States bonds. If the order of death cannot be determined, the bond belongs to the estates of both equally, and payment or reissue is made accordingly.[55]

The right of survivorship depends upon an effective joint tenancy. If the joint tenancy was created for convenience only,[56] or if it is merely a formal or

49 Fleming v. Fleming, 194 Iowa 71, 174 N.W. 946 (1919); Annot., 64 A.L.R.2d 918, 927 (1959).

50 Hammond v. McArthur, 30 Cal. 2d 512, 183 P.2d 1 (1947).

51 Gwinn v. Comm'r, 287 U.S. 224 (1932).

52 Lagar v. Erickson, 13 Cal. App. 2d 365, 56 P.2d 1287 (1936); Annot., 64 A.L.R.2d 918, 956 (1959).

53 Annot., 64 A.L.R.2d 918, 941 (1959).

54 4 G. THOMPSON, *supra* note 9, § 1779 and cases cited note 45 *supra*. Section 3 of the Uniform Simultaneous Death Act provides in part:

> Where there is not sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously, the property so held shall be distributed one half as if one had survived and one half as if the other had survived. Where more than two joint tenants have died and there is no sufficient evidence that they died otherwise than simultaneously, the property so held shall be divided into as many equal shares as there were joint tenants and the share allocable to each shall be distributed as if he survived all the others.

Notwithstanding the provisions of § 3 of the Act, § 6 permits the deceased joint tenant to provide a different method of distribution: "This law shall not apply in the case of wills, living trusts, deeds or contracts of insurance wherein provision has been made for distribution of property different from the provisions of this law."

55 Treas. Reg. § 315.63 (1964).

56 Clabbey v. First Nat'l Bank, 320 S.W.2d 738 (Mo. Ct. App. 1959).

nominal ownership,[57] or if it is illusory or made with fraudulent intent,[58] there will be no survivorship feature and the property will belong to the estate of the original owner. This article presumes an effective joint tenancy and an enforceable right of survivorship.

III. Taxation

A. *Generally*

The modern estate planner is concerned primarily with the federal gift and estate tax consequences of joint tenancies. Substantial and frequently unanticipated gift tax consequences can attach to the creation and termination of such forms of ownership. Additionally, there is a substantial body of law dealing with the numerous estate tax consequences of owning property as joint tenants. Before considering the gift and estate tax consequences of joint tenancies, it is necessary to consider briefly the income tax consequences of joint ownership.

B. *Income Taxes*

Joint tenants should report their ratable share of the income, both ordinary and capital gain, from such property in accordance with their interest as determined under applicable state law.[59] If the joint tenants are husband and wife who file a joint income tax return, there is generally no income tax problem. However, if the joint tenants are not husband and wife or if they do not file a joint return, income tax problems may arise. The failure to report income from jointly held property will be regarded as an indication that the joint tenant not reporting the income was merely a nominal owner not intended to have a beneficial interest in the jointly owned property during the lifetime of the other joint tenant,[60] at least in the absence of a specific agreement permitting one joint tenant to retain the entire income.[61]

A related income tax problem for jointly owned property is the tax basis. If the joint tenancy is the result of a gift, the basis is that which the property had in the hands of the donor; however, this basis cannot exceed the fair market value of the property at the time of the gift.[62] The basis can be further increased for any gift taxes which are paid incident to the creation of the joint

57 Jezo v. Jezo, 23 Wis. 2d 399, 129 N.W.2d 195 (1964).
58 Gunsaulis v. Tingler, —Iowa—, 218 N.W.2d 575 (1974), in which the court held that the creation of a joint bank account was neither illusory nor fraudulent and denied the joint tenant's widow dower in such account.
59 George K. Brennen, 4 T.C. 1260 (1945).
60 Harley A. Wilson, 56 T.C. 579 (1971).
61 Lipsitz v. Comm'r, 220 F.2d 871 (4th Cir. 1955); Lannan v. Kelm, 221 F.2d 725 (8th Cir. 1955). The entire income from property owned in joint tenancy will be taxed to the original owner/joint tenant because of the retention of the right to reacquire sole ownership. Rev. Rul. 54-143, 1954-1 CUM. BULL. 12 (incremental income on United States Series E savings bonds is taxed to the concurrent owners in proportion to the amount of the purchase price contributed by each). Rev. Rul. 57-452, 1957-2 CUM. BULL. 302 (interest on noninterest bearing growth savings certificates is taxed in the same manner as incremental income on United States Series E savings bonds).
62 INT. REV. CODE OF 1954, § 1015.

tenancy, but not above the fair market value as of the date of the gift.[63] If the joint tenancy was created by devise or bequest, the basis is the fair market value of the property at the date of the decedent's death or the alternate valuation date elected by the decedent's estate.[64]

The question of basis also applies to the undivided ownership which a surviving joint tenant acquires. The basis will be the fair market value of the property at the date of the death of the joint tenant, or the alternate valuation date, for property owned by decedents dying after December 31, 1953.[65]

Treasury regulations[66] apparently provide for an increase in basis for any property acquired through survivorship. The estate of the deceased joint tenant need not file an estate tax return and no estate taxes need be paid to utilize the fair market value. Property acquired prior to the death of the deceased joint tenant which is includable in the decedent's gross estate, such as property transferred by a decedent in contemplation of death and property held by a taxpayer and the decedent as joint tenants or as tenants by the entireties, will take the fair market value. However, the Tax Court has held that the requirement of inclusion in the decedent's gross estate to qualify for an increase in basis is not satisfied by the mere failure of the executor to rebut the presumption that all jointly owned property is includable in the taxable estate of the first joint tenant to die.[67]

Assuming utilization of fair market value, a further adjustment may be required if the joint tenancy property is or was income producing. The adjustment in basis reflects the tax benefits that accrued to the surviving joint tenant because of the transfer of property prior to the death of the first joint tenant. Such tax benefits include deductions for exhaustion, wear and tear, obsolescence, amortization, and depletion for the period the surviving joint tenant held the property prior to the decedent's death. As in almost all other areas of taxation for joint tenancies, the rights of the concurrent owners under applicable state law are determinative. For example, if under applicable state law concurrent owners are entitled to their pro rata share of the income from the property, the fair market value of the property will be reduced by the surviving joint tenant's share of the deductions taken prior to the death of the deceased joint owner. However, if under local law all income from the property was allocated to the deceased joint tenant, no adjustment would be required and the surviving joint tenant's basis for the property would be the fair market value at the applicable valuation date.[68]

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63 *Id.* at § 1015(d).
64 *Id.* at § 1014(a).
65 *Id.* at § 1014(b)(9).
66 Treas. Reg. § 1.1014-2(b)(2) (1957).
67 Richard V. Madden, 52 T.C. 845 (1969). This decision seemed to be a defeat for taxpayers seeking an increase in basis upon the death of a noncontributing joint tenant. However, with the current depressed condition of securities values, the use of current values rather than cost may result in the loss of substantial amounts of tax basis.
68 Treas. Reg. § 1.1014-6 (1957).

C. *Gift Tax Consequences*

1. Generally

Except for special statutory provisions relating to the acquisition of real property by husband and wife,[69] there are no specific statutory provisions dealing with the gift tax consequences of the creation or termination of joint tenancies. The actual gift tax consequences depend upon the type of property involved and, in some cases, the relationship of the joint tenants. A gift may be imposed on any form of transfer, whether in trust or otherwise, whether by direct or indirect gift, and whether the property is real or personal, tangible or intangible.[70]

2. Creation of Joint Tenancies

By administrative interpretation, the general gift tax statute extends to gifts of undivided ownership. A gift of less than an entire interest in property, such as an undivided half interest, is subject to the gift tax law.[71] These administrative regulations differentiate between bank accounts and United States bonds on one hand, and all other forms of property, exclusive of real property owned by a husband and wife, on the other hand. Opening a joint bank account with the donor and another is not a gift. The gift, if any, is considered to be made when the other joint owner draws upon the account for his own benefit, to the extent of the amount withdrawn without any obligation to account to the donor. Similarly, the purchase of a United States savings bond registered as payable to the donor or another is not a gift. The actual gift occurs when the other joint owner surrenders the bond for payment without any obligation to account to the donor.[72] However, if a donor purchases any other property with his own funds and has the title conveyed to himself and another as joint tenants, there is a gift of half the value of the property to the other joint tenant.[73]

The gift tax consequences of a joint brokerage account have been the subject of both a decision by the Tax Court and a revenue ruling. In *Marie D. Bouchard,*[74] the Tax Court held that an individual's transfer of securities to a joint brokerage account in which the coowner had the right to deal was a gift of a joint interest, even though the donor dealt with the account. The Internal Revenue Service reached a contrary conclusion in Revenue Ruling 69-148[75] upon substantially the same facts. Two individuals had entered into a standard form of agreement with a stock brokerage firm creating a joint account with the right of survivorship and providing that either individual could deal with the firm on behalf of the account as though he were the sole owner. Upon the direction of either coowner, the firm would sell the securities and remit the proceeds to

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69 INT. REV. CODE OF 1954, § 2515.
70 *Id.* at § 2511.
71 Treas. Reg. § 25.2511-1(e) (1958). Rev. Rul. 68-269, 1968-1 CUM. BULL. 399 (gift tax consequences of the purchase of United States bonds as joint tenants).
72 Treas. Reg. § 25.2511-1(h)(4) (1958).
73 Treas. Reg. § 25.2511-1 (1958).
74 34 T.C. 646 (1960), *rev'd on other grounds,* 285 F.2d 556 (1st Cir. 1961).
75 1969-1 CUM. BULL. 226.

either joint owner in his individual capacity. One of the coowners, using his separate property and without consideration, provided all funds for the purchases made on behalf of the account; the securities were issued in the name of a nominee of the firm (street name). The Internal Revenue Service analogized this form of ownership to a joint bank account which does not give rise to a gift until the noncontributing owner draws upon the account for his own benefit without any obligation to account for a part of the proceeds:

> Where the securities held in a joint brokerage account are registered in the name of a nominee of the firm rather than in the names of the owners of the account, the property more closely resembles a general cash fund than specific jointly owned securities. In such a case, the sole contributor to the joint brokerage account has not parted with dominion and control over the funds to any greater degree than in the case of a joint bank account.[76]

Congress has enacted specific legislation dealing with the acquisition of real property by a husband and wife.[77] The creation of a tenancy by the entireties in real property, either by one spouse alone or by both spouses, as well as additions to the value of such property, are not transfers of property for purposes of the gift tax law. No gift will result regardless of the proportion of the consideration furnished by each spouse unless the contributing coowner elects to have the creation of a tenancy by the entireties treated as a gift. A joint tenancy between husband and wife with right of survivorship is considered to be equivalent to a "tenancy by the entireties."[78] The contributing spouse can elect, however, to have the acquisition of this real property, and any additions thereto, treated as a gift by filing a gift tax return for the calendar quarter in which the tenancy was created or the additions made. The gift tax return should be filed, though, within the prescribed time and should appropriately exercise the election to treat the acquisition as a gift. The gift tax return must be filed irrespective of whether the gift exceeds $3,000 dollars.[79]

3. Termination of Joint Tenancy

Just as the creation of a joint tenancy may give rise to unanticipated gift tax consequences, so can the termination of such ownership, other than by the death of the joint tenant. For example, if a joint bank account created by one joint depositor out of his separate funds is closed and the proceeds paid in any manner other than to the sole contributing owner, there will be a gift from the contributing to the noncontributing owner of the money retained by the noncontributing owner. A similar rule applies to the redemption of United States bonds and to joint brokerage accounts. With respect to any other property, except for real

76 *Id.*
77 INT. REV. CODE OF 1954, § 2515.
78 *Id.* at § 2515(d). This statute covers those forms of ownership essentially equivalent to a joint tenancy between husband and wife with the right of survivorship or any other tenancy which accords with the spouse's rights equivalent to a joint tenancy with the right of survivorship, regardless of the term by which such tenancy is described in local property law. Treas. Reg. § 25.2515-1(a) (1958).
79 INT. REV. CODE OF 1954, § 2515(c).

property owned by husband and wife as tenants by the entireties, a gift is made at the time the property is taken as a joint tenancy. If the property or its proceeds are divided in any manner other than in proportion to the ownership of the respective joint tenants, a gift will be made by the joint tenant who receives less than his proportionate interest to the joint tenant who receives more than his proportionate share. The transfer to a joint interest trust may be an excellent way to terminate a joint tenancy without further gift tax consequences.

The gift tax consequences of the termination of any form of real property joint ownership by a husband and wife depend upon whether the creation was treated as a gift. If the creation was not treated as a gift, its termination, other than by the death of a spouse, will result in a gift by the spouse who receives a smaller share of the proceeds of the termination than the share of the proceeds attributable to the total consideration furnished by him or her,[80] whether received in cash, property, or interests in property. If one spouse furnished the entire consideration, he or she makes a gift to the extent that the other receives any portion of the proceeds on termination. A gift may also result even though the original acquisition was treated as a gift through the filing of an appropriate gift tax return. If the entire consideration for the creation of the tenancy was treated as a gift, the determination of the amount, if any, of the gift made at the termination of the tenancy will depend upon how the proceeds are divided. When a spouse surrenders a property interest in a tenancy, the creation of which was treated as a gift, and in return receives an amount less than the value of the property interest surrendered, that spouse has made a gift equal to the difference between the value at the time of termination of the property interest surrendered and the amount received in exchange.[81] The valuation of the respective interests will depend upon the rights of the spouses under applicable local law. For example, if under the applicable local law either spouse acting alone can effect a severence of his or her interest in the property, the value of each spouse's interest is 50 percent of the property value. However, if under applicable local law each spouse may share in the income or other enjoyment of the property but neither spouse may defeat the right of the survivor to the whole of the property, the value of the respective interests depends upon the retained interest of each spouse. This is determined by the appropriate actuarial factors for the spouses at the time the transaction is effected.[82]

D. *Estate Tax Consequences*

1 Generally

The estate tax consequences of joint tenancies offer some of the more interesting and complex problems confronting estate planners. The applicable statutory provision covering jointly held property is deceptively simple,[83]

80 Treas. Reg. § 25.2515-3(a) (1958).
81 Treas. Reg. § 25.2515-4 (1958).
82 Treas. Reg. § 25.2515-2 (1958). Regardless of any gift tax consequences, the division of jointly owned property, whether by voluntary act or through partition, does not give rise to a taxable exchange for income tax purposes. Rev. Rul. 56-437, 1956-2 Cum. Bull. 507.
83 Int. Rev. Code of 1954, § 2040.

and the administrative interpretation of this provision is almost as brief as the statute itself. The regulations speak of "property held jointly at the time of the decedent's death by the decedent and another person or persons with the right of survivorship." Such property is included in the gross taxable estate of the decedent as follows:

> (1) If the property was acquired by the decedent and the other joint owner or owners by gift, devise, bequest, or inheritance, the decedent's fractional share of the property;
>
> (2) In all other cases, the entire value of the property is included except such part of the entire value attributable to the amount of the consideration in money or money's worth furnished by the other joint owner or owners based upon the portion of the entire value of the property at the applicable valuation date which the consideration in money or money's worth furnished by the other joint owner or owners bears to the total cost of acquisition and capital additions. There shall not be included the value of any contributions to the acquisition cost which is attributable to money or other property acquired by the other joint owner or owners from the decedent for less than a full and adequate consideration in money or money's worth.[84]

Jointly owned property includes property "held jointly by the decedent and any other person or persons," "property held by the decedent and spouse as tenants by the entireties," and "a deposit of money, or a bond or other instrument, in the name of the decedent and any other person and payable to either or the survivor." Under the regulations, however, property held by the decedent and any other person or persons as tenants in common is specifically excluded.[85] The full value of all jointly held property is presumed to be includable in the gross estate of the first joint tenant to die. The executor has the opportunity, however, to submit facts to rebut this presumption.

2. Proof of Survivor's Contribution

The executor of a deceased joint owner can prevent the inclusion of the entire value of the jointly owned property by showing that the jointly held property was either not acquired with consideration furnished solely by the decedent or acquired by the decedent and the other joint owner or owners by gift, bequest, devise, or inheritance.

A difficult probative situation arises when the joint tenancy property has been acquired by contributions from both joint tenants but the contribution from one joint tenant was originally furnished by the deceased joint owner. Clearly, property originally acquired from the deceased joint tenant by gift is acquired "for less than an adequate and full consideration in money or money's worth" and cannot be excluded from the deceased joint owner's taxable estate. Apart from this clear example, however, courts have dealt with a wide variety of situations in

84 Treas. Reg. § 20.2040-1(a) (1958).
85 Treas. Reg. § 20.2040-1(b) (1958).

determining what portion, if any, of the value of jointly held property is attributable to the surviving joint tenant.

Although the value of the property originally given cannot qualify as a contribution by a donee/joint tenant to the joint tenancy, the income[86] and realized gain[87] on such gift property is the donee's separate property. Since the donor/joint tenant never owned this income or gain, it cannot be attributed to him. Courts have distinguished between cash dividends which are considered to be the donee's property and stock dividends which are treated as part of the original gift, attributable to the donor.[88] Stock dividends, which represent merely the capitalization of corporate profits earned prior to the gift of the stock, are part of the original gift and thus attributable to the donor.

Although realized gain on separately owned property will be treated as property of the donee, gain realized on jointly owned property will not.[89] Income, profits, appreciation, or gain on property given outright by one joint tenant to the other is distinguishable from income or gain from property continued to be held jointly. If the gift is outright, the income, profit, appreciation, or gain is attributed to the donee. However, if the property was merely placed in joint names and never became the separate property of the surviving joint tenant, the appreciation, whether realized or unrealized, does not belong to the surviving concurrent owner. Changing the character of the property but not the character of the ownership will not and should not permit an escape from taxation.

Many cases, all dependent upon both their particular facts and the applicable state law, have considered the question of whether there was consideration for a transfer of property into joint names. For instance, it has been determined that contributions by a spouse to the matrimonial estate did not, under Pennsylvania law, support an implied agreement that the transfers of separate property were in consideration of the husband's conveying any interest in the jointly held matrimonial residence to the wife.[90] However, proof establishing the existence of an agreement, whether of a family partnership[91] or merely a contract by the joint owners that all property and accumulations would be jointly owned, will establish the contribution by the surviving joint tenant and will permit exclusion of a portion of the jointly owned property from the estate of the deceased joint tenant.[92] The contribution of both money and services, from time to time, to the accumulation of a fund invested in real estate and in turn sold with the proceeds invested in other real estate has been held sufficient to prove

86 Harvey v. United States, 185 F.2d 463 (7th Cir. 1950) (cash dividends, rentals, interest and capital gains); Estate of Ralph Owen Howard, 9 T.C. 1192 (1947) (cash dividends).

87 First Nat'l Bank v. United States, 223 F. Supp. 963 (W.D. Mo. 1963) (realized capital gains deemed separate property of donee/joint tenant even though original gift was not based on an altruistic motive but was solely motivated by an intention to save taxes).

88 Tuck v. United States, 282 F.2d 405 (9th Cir. 1960); English v. United States, 270 F.2d 876 (7th Cir. 1959). *Contra*, McGehee v. Comm'r, 260 F.2d 818 (5th Cir. 1958), in which stock dividends capitalizing earnings realized after the date of the gift were held to have originally belonged to the donee.

89 Endicott Trust Co. v. United States, 305 F. Supp. 943 (N.D.N.Y. 1969).

90 Fox v. Rothensies, 115 F.2d 42 (3d Cir. 1940).

91 Singer v. Shaughnessey, 198 F.2d 178 (2d Cir. 1952).

92 Richardson v. Helvering, 80 F.2d 548 (D.C. Cir. 1935).

the surviving joint tenant's contribution. The court determined that the property, both in law and equity, belonged to the joint tenants equally.

Both the statute requiring the inclusion of jointly owned property in the estate of the first joint tenant to die and the regulations promulgated thereunder have been interpreted broadly, to prevent evasion of estate taxes, and narrowly, to permit a portion of the value of jointly held property to be excluded from the deceased joint tenant's taxable estate.[93] A nominal joint tenancy has been held sufficient to warrant an exclusion of the jointly owned property from the taxable estate of the nominal joint owner.[94]

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93 Swartz v. United States, 182 F. Supp. 540 (D. Mass. 1960). This case illustrates the tracing problems which confront an executor seeking to exclude a portion of the value of jointly owned property. The deceased joint tenant had given the other joint tenant 300 shares of stock, which subsequently increased through stock dividends and stock splits to 15,000 shares. The donee/joint tenant then sold 7,500 shares and reinvested the proceeds in government bonds purchased jointly with the donor. The court analyzed the applicable statute and the following examples contained in the Treasury regulations:

> (4) If the decedent, before the acquisition of the property by himself and the other joint owner gave the latter a sum of money or other property which thereafter became the other joint owner's entire contribution to the purchase price, then the value of the entire property is so included, notwithstanding the fact that the other property may have appreciated in value due to market conditions between the time of the gift and the time of the acquisition of the jointly held property.
>
> (5) If the decedent, before the acquisition of the property by himself and the other joint owner, transferred to the latter for less than an adequate and full consideration in money or money's worth other income-producing property, the income from which belonged to and became the joint owner's entire contribution to the purchase price, then the value of the jointly held property less that portion attributable to the income which the other joint owner did furnish is included in the decedent's gross estate.

The gift property had appreciated in value during the time that it was held by the donee and this appreciation as distinguished from the value at the time of the gift, never belonged to the donor. This is particularly true where the appreciation occurring during the donee's ownership, and taken by him in the form of a realized gain, becomes taxable to the donee. There was includable in the deceased joint tenant's gross estate only the value which 50 percent of the original stock had when the deceased joint tenant gave it to the surviving joint tenant. This decision did not follow completely example (4) cited above; the court noted that this example did not deal with a situation in which the gift property not only appreciated in value, but was converted into other property and the conversion resulted in a realized profit taxable to the donee. Where the appreciation or increase in value is realized, the donee who contributes a realized profit is as surely contributing his own money as if he contributed dividends which he had received on the property while he was its sole owner.

94 Estate of Chrysler v. Comm'r, 361 F.2d 508 (7th Cir. 1966), *reversing* 44 T.C. 55 (1965). The decedent's interest as a joint tenant was purely nominal. The joint tenancy was simply a device for making completed gifts to minors without employing the cumbersome machinery of guardianships or formal trusts. Some of the facts upon which the court relied were: (1) the decedent never used any of the funds in the joint account, nor the proceeds from any of the sales of securities registered in joint names, for his own benefit, (2) the transactions were all recorded in a ledger maintained by the decedent solely in the name of the other joint owner, (3) income tax returns with respect to the income from all of the jointly owned property were filed for the joint owner and the taxes, if any, were paid out of the jointly held property, and (4) the decedent filed a gift tax return reporting the full value of the transfers to the joint accounts.

The Tax Court reached a contrary result in a case in which the decedent apparently retained beneficial ownership in a joint account. The decedent opened a joint account in the name of his son; gave the son possession of the passbook which was kept in a desk in the son's bedroom in the decedent's home; the decedent knew of the location of the passbook and had free access to it; the decedent never gave any reason for depositing money in the joint bank account and the son considered the funds to be his and assumed he could do anything he wanted with the funds "so long as it was not contrary to anything that the decedent may have thought." The court concluded that there was never a completed gift whereby the decedent divested himself of all interest in the joint account. Accordingly, the bank account was included in the deceased's taxable estate as joint tenancy property. Estate of Michael A. Doyle, 32 T.C. 1209 (1959).

Joint tenancy property becoming the sole property of a surviving spouse qualifies for the marital deduction if included in the deceased spouse's taxable estate. Property interests devolving upon any person as a surviving coowner with the decedent under any form of joint ownership with the right of survivorship are considered as having passed from the decedent to such person.[95]

E. *Termination of Joint Tenancies*

1. Death of Joint Tenant

The death of a joint tenant terminates the joint tenancy as to the decedent. Assuming that the ownership was neither merely nominal nor subject to any of the restrictions previously discussed, the surviving joint tenant or tenants own the property in its entirety. Jointly owned property passes by operation of law and not by will. Thus, the most artfully drafted marital deduction bequest will not operate unless there are sufficient assets subject to disposition under the will to effectuate the formula provision. Assuming that the majority of the property is owned jointly, the estate planner confronts the classical case of "overqualification" for the marital deduction. This overqualification may be remedied, however, by postmortem estate planning in the form of an effective disclaimer.

The first thing to consider in such instances is whether disclaimers will be given effect under state law. An effective disclaimer of survivorship property avoids treatment of such property as a gift for gift tax purposes as well as its inclusion in the disclaimant's taxable estate as a gift in contemplation of death[96] or, if only a partial disclaimer, as a taxable retained interest.[97]

Administrative interpretation of the gift tax law establishes general criteria for an effective disclaimer:

> The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interest are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. . . . Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next of kin a right to completely and unequivocally refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocal and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next of kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next of kin. In any case where a refusal is purported to relate to only a part of the property, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all the facts and circumstances in each particular case, taking into account

95 Treas. Reg. § 20.2056(e)-1(a)(1) (1958); Rev. Rul. 66-60, 1966-1 Cum. Bull. 221.
96 Int. Rev. Code of 1954, § 2035.
97 *Id.* at § 2036.

> the recognition and effectiveness of such a purported refusal under the local law.[98]

The possibility of such an effective disclaimer of survivorship property has been expressly recognized.[99]

2. Simultaneous Death

The possibility of the simultaneous death of the joint tenants must be considered when recommending the creation or continuance of a joint tenancy. The Uniform Simultaneous Death Act provides for the disposition of property in the event of a common disaster if insufficient evidence exists to determine the order of deaths and also establishes presumptions of survivorship under wills, living trusts, deeds, or contracts of insurance. Section 3 of the Act provides:

> Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously, the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them have so died, the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants.

The Internal Revenue Service has considered the estate tax consequences of the simultaneous death of joint tenants[100] where a husband and wife owning property as tenants by the entireties were killed under circumstances in which the order of their deaths could not be determined. The husband furnished the entire consideration for the purchase of this property. There was no statutory presumption of survivorship although the applicable state law included the Uniform Simultaneous Death Act. The entire value of the joint property was included in the deceased husband's gross estate. Because the wife's estate receives a one-half interest in the property under the Uniform Simultaneous Death Act, one-half of the value of the joint property was includable in the wife's estate as property owned at the moment of death. The Service contended that provisions of the Uniform Simultaneous Death Act by which one-half of the joint property passed to the wife created a "presumption of survivorship" in the wife as to 50 percent of the property, citing with approval the Florida Supreme Court decision of *Miami Beach First National Bank v. Miami Beach First National Bank.*[101] Since the wife was presumed to have survived her husband as to 50 percent of the property and since property passing by operation of law qualifies for the

98 Treas. Reg. § 25.2511-1(c) (1958).

99 Krakoff v. United States, 313 F. Supp. 1089 (S.D. Ohio 1970), *aff'd*, 439 F.2d 1023 (6th Cir. 1971). The court observed that statutory authority permitting the disclaiming of intestate property had been adopted subsequent to the date of the purported disclaimer. The absence of either statutory provision or judicial precedent under Ohio law permitting the disclaimer of intestate property at the time of the purported disclaimer precluded an effective disclaimer of survivorship property. However, it is clear that if the disclaimer had been permitted by either the statutory or common law of Ohio, it would have been recognized as effective to avoid any gift tax consequences to the disclaimant.

100 Rev. Rul. 66-60, 1966-1 Cum. Bull. 221.

101 52 So. 2d 893 (Fla. 1951).

marital deduction, the husband's estate was entitled to a marital deduction in an amount equal to 50 percent of the value of the joint property.

In this situation, it was held that half the property passed to the wife and the other half did not. Thus, the possibility of credit for death taxes paid in the husband's estate was not available to the wife's estate.[102] However, if more than 50 percent of the property had been included in the husband's estate, the entire credit for the tax on prior transfers would have been available.

3. Inter Vivos Severance of Joint Tenancies

The estate planner may recommend severance of a joint tenancy to avoid either or both the inclusion of the entire value of the jointly owned property in the estate of the first joint tenant to die or the overqualification for the marital deduction. This severance may be simply the division of the property between the joint tenants. It may also take the form of a reconveyance of the jointly owned property to the original contributor. In either case, it is vital to consider the possible gift tax consequences and the appropriate formalities of transfer. If the original creation of the joint tenancy was not a gift for gift tax purposes, the severance of the joint concurrent ownership will not result in a second gift. The possibility of a second taxable gift does exist if the original conveyance was a gift and the property is then reconveyed to the original owner. However, if the joint tenancy property was a bank account, a savings and loan association account, a joint brokerage account, or a United States bond, the creation would not have been a taxable gift. Accordingly, removal of the noncontributing co-owner's name is not a taxable gift. Similarly, if the joint ownership is of real property held by husband and wife and the election to treat the ownership as a gift was not made, the termination of this form of ownership by reconveyance to the original owner is not a taxable gift.

The transfer of the underlying securities back to the individual concurrent owners in a tenancy by the entireties terminates the joint tenancy and eliminates 50 percent of the value of the jointly owned property from the decedent's gross estate, the reregistration of the securities being considered sufficient to terminate the joint tenancy aspect and avoid taxation as joint tenancy property.[103]

Alternatively, the joint tenancy may be severed through a gift of one joint tenant's interest to the other or by the joint tenants giving the property to a third person. If one joint tenant makes a gift to the other, it is appropriate and will minimize litigation if the property is reregistered in the sole name of the remaining joint tenant. This is essential with respect to United States bonds. Regardless, any such gift will qualify for the $3,000 per year per donee exclusion[104] and the $30,000 lifetime exemption.[105] If the gift is between spouses, it will qualify for the gift tax marital deduction as well.[106]

A great deal of litigation has arisen concerning the gift of United States

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102 INT. REV. CODE OF 1954, § 2013.
103 Estate of Edward Carnall, 25 T.C. 654 (1955).
104 INT. REV. CODE OF 1954, § 2503.
105 *Id.* at § 2521.
106 *Id.* at § 2523.

bonds by one coowner to the other. The Treasury regulations provide that a United States bond registered in coownership form will be paid to either coowner upon his separate request, and upon payment to him the other has no further interest in the bond.[107] The regulations also provide that a bond registered in coownership form may be reissued upon its presentation and surrender during the lifetime and competency of both coowners upon the request of both.[108] Attempts have been made to effectuate a gift of United States bonds by inter vivos delivery to the joint owners with reregistration.[109] However, these transfers are ineffective without reregistration. Jointly owned United States bonds will not be considered effectively gifted unless there is compliance with the applicable Treasury regulations.[110] Physical delivery of a United States bond to the other registered coowner, with the intent to effectuate a gift but without reissuance of the bond, is not a divestiture by the coowner of the incidents of ownership sufficient to preclude inclusion in the deceased joint owner's taxable estate.[111]

The effective inter vivos gift of joint tenancy property will bring into play the contemplation of death provisions of the Internal Revenue Code,[112] which provide for inclusion in the value of the gross estate all property to the extent of "any interest therein" of which the decedent had 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, in contemplation of death. For three years prior to the decedent's death, any gratuitous transfer is presumed to have been made in contemplation of death unless the contrary is demonstrated. However, any transfer made before the three-year period is conclusively presumed not to have been made in contemplation of death. The contemplation of death provisions apply to transfers, effective under state law, from one joint tenant to the other.[113] The provision also applies to a transfer by a joint tenant of his interest in the jointly owned property to a third person.[114]

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107 Treas. Reg. § 315.60 (1964).
108 Treas. Reg. § 315.61 (1964).
109 Estate of Curry v. United States, 409 F.2d 671 (6th Cir. 1969) (upholding the validity of the Treasury regulations and denying the effectiveness of the gift); Chambless v. United States, 25 Am. Fed. Tax R.2d ¶ 147,448 (D.S.C. 1966) (disallowing the purported transfer although valid under South Carolina law); Estate of Mae Elliott, 57 T.C. 152 (1971) (disallowing the purported gift of coowned United States bonds which were invalid under both the Treasury regulations and the applicable Texas law). *Contra,* Silverman v. McGinnes, 259 F.2d 731 (3d Cir. 1958), in which a gift of United States savings bonds was upheld notwithstanding the failure to comply with applicable Treasury regulations.
110 United States v. Chandler, 410 U.S. 257 (1973).
111 *See* cases cited noted 109 *supra.* The Treasury regulations restricting the inter vivos transfer of bonds were authorized by Congress; the regulations were clearly and properly promulgated; the regulations were not an undue or improper restriction on the transfer rights to the bonds; and the decedent, having obtained the original issuance of the bonds under the applicable regulations, "was obligated to play the game according to the rules." Thus, in accordance with the Treasury regulations, a decedent, at the time of her death "retained the right to redeem each of the bonds in question, the right to succeed to the proceeds if she survived the putative donee, and the right to join or veto any attempt to have the bond reissued." United States v. Chandler, 410 U.S. 257, 261 (1973).
112 *Supra* note 96.
113 Estate of Nathalie Koussevitsky, 5 T.C. 650 (1945).
114 Estate of Edward Carnall, 25 T.C. 654 (1955). The deceased joint tenant's interest under applicable state law was 50 percent and this was the interest to be included under the provisions of the predecessor to § 2035. *Cf.* Sullivan's Estate v. Comm'r, 175 F.2d 657 (9th Cir. 1949), in which the court applied California law and determined that one joint tenant

A joint tenancy may be terminated through the joint tenant or tenants conveying their interest to a third person and reserving an income interest in the transferred property. Such a conveyance effectively terminates the joint tenancy. The reserved income interest results in the inclusion of the value of the property in which the income interest was reserved in the taxable estate of the former joint tenant.[115] However, the transfer of jointly owned property with a retained joint and survivor life income interest will result in the inclusion of only 50 percent of the value of the former jointly owned property, even if such property was acquired entirely from the deceased former joint tenant's own funds, because the law taxing joint property does not apply if the property is transferred before either joint tenant dies. Thus, any such transfer effectively terminates the joint tenancy, leaving the decedent with his interest in 50 percent of the property as determined under applicable state law.[116] So, too, the conveyance by a husband and wife to their children of jointly owned property reserving a joint and survivor income interest terminates the joint tenancy and results in the inclusion of 50 percent of the property's value in the deceased husband's estate.[117] This result obtained even though the decedent supplied the entire consideration, took title individually, and then created the joint tenancy through the use of a straw man. The wife was the first to die and the husband was therefore receiving the entire income from the property at the time of his death. The tax law relating to a joint tenancy did not apply because the joint owners destroyed the joint tenancy by transferring the property. Each of the former joint tenants had individually conveyed some interest in the property to the donees. Even though the wife died first, she had a 50 percent interest in the property under California law. Having such an interest, she was deemed to have transferred it and the husband could not also have transferred it. Thus, even though the wife died first and the husband enjoyed the full income interest in the property, he was not deemed to have made a transfer of more than 50 percent of the interest under the law taxing retained income interests.

The transfer of joint tenancy property to a trust with a reservation of a joint and survivor income interest has essentially the same tax consequences as the legal life estate. Thus, where a husband without consideration transferred property to himself and his wife as tenants by the entireties, and this property was subsequently conveyed to a trustee of an irrevocable trust with the transferors reserving a joint and survivor income interest, the joint tenancy law was held

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cannot dispose of anything more than his own interest in the jointly held property and held that the predecessor of § 2035 would apply only to the deceased former joint tenant's 50 percent interest in the property and could not extend to the 50 percent interest deemed owned by the other joint tenant.

115 INT. REV. CODE OF 1954, § 2036.

116 Glaser v. United States, 306 F.2d 57 (7th Cir. 1962). The court rejected the government's contention that the statute pertaining to retained income interests and the joint tenancy statute should be read together to include the entire value of the previously jointly owned property. The law requiring the inclusion of jointly owned property was restricted to "the value of property held jointly at the *time* of decedent's death." *Id.* at 60. The government's contention that the decedent had retained a taxable contingent life interest was also rejected. The decedent, in originally acquiring the property as a tenant by the entireties, had given up a 50 percent interest in the property to his wife and the interest transferred with the retention of an income interest was only his 50 percent interest in the property.

117 United States v. Heasty, 370 F.2d 525 (10th Cir. 1966).

inapplicable and the law pertaining to the taxation of property with a retained income interest was followed. The wife, being the first former joint tenant to die, had included in her gross estate 50 percent of the value of the trust.[118] The estate of the deceased wife argued that no portion of the value of the trust should be so included because the entire property was supplied by the surviving husband. Consistent with prior decisions, however, the joint tenancy law was not applied and 50 percent of the value of the trust was taxed based on a finding that the decedent had a 50 percent interest in the property in which she retained an income interest.

The Internal Revenue Service has conceded that the joint tenancy rules do not apply where property held in tenancy by the entireties is transferred to a trust under which each spouse reserves a joint and survivor life estate.[119] This ruling, relying on *United States v. Heasty*,[120] held that if under local law each spouse is entitled to 50 percent of the income from the property, the tenants' interest in the property is essentially the same as that of a joint tenancy. Under such circumstances, only 50 percent of the value of the property is includable in each cotenant's gross estate under the retained income provisions of the Code.

4. Utilization of the Joint Interest Trust

One of the most effective estate planning devices for terminating an unwanted joint tenancy may be the transfer to an inter vivos trust with the retention of a joint and survivor income interest. In order to minimize the gift tax consequences, the joint tenants should retain either the right of revocation or a limited power of appointment over their respective shares. This form of trust: (1) terminates the joint tenancy,[121] (2) effectively eliminates the other joint owner's interest from taxation in the estate of the joint tenant who supplied the consideration,[122] even though the joint tenancy was effected through a straw man[123] and even though the sole contributor was enjoying all of the income from the transferred property at the time of his death,[124] and (3) permits the splitting of joint tenancy so that the noncontributing joint tenant's interest may be taxed in his estate[125] and not in the surviving former joint tenant's estate.[126]

5. Suggested Language for the Joint Interest Trust

The following language is suggested to describe and limit the trustee's activities in a joint interest trust:

> This Trust has been created jointly by the Settlors for the purpose of having a receptacle to which property which the Settlors own as

118 Miller v. United States, 325 F. Supp. 1287 (E.D. Pa. 1971).
119 Rev. Rul. 69-577, 1969-2 Cum. Bull. 173, *revoking* Rev. Rul. 57-448, 1957-2 Cum. Bull. 618.
120 *Supra* note 117.
121 *Supra* notes 117-18.
122 *Supra* notes 117, 119.
123 *Supra* note 117.
124 *Id.*
125 *Supra* note 118.
126 *Supra* note 117.

> joint tenants with right of survivorship and/or as tenants by the entireties may be transferred. These transfers are made in contemplation of Revenue Ruling 69-577 and this Trust shall be interpreted and administered so as to come within the scope and effect of Revenue Ruling 69-577. To this end, each Settlor reserves an interest in one-half (½) of the net income and one-half (½) of the principal of this Trust during their joint lives (each Settlor's one-half (½) interest is herein called "Settlor's Share").
>
> Trustee shall hold and administer the assets of the trust under this Indenture in accordance with the provisions of this Indenture, and shall manage, invest and reinvest such assets, collect all of the income and profits therefrom and deduct all proper expenses of administration and distribute the net income and principal as provided in the Paragraphs of this Indenture.
>
> Separate books and records shall be kept for each Settlor's Share of the Trust. However, it shall not be necessary that physical division of the assets be made as to each Settlor's Share. It is not the Settlor's intention to establish separate trusts, but it will be necessary because of the provisions of this Indenture to maintain separate accounting records for the purpose of determining the principal of each Settlor's Share, particularly after the death of the first Settlor to die.

The following language provides for the distribution of income and principal during the lives of both settlors:

> During the life of Settlors, Trustee shall pay to each of the Settlors, or for their benefit, the net income from each Settlor's Share of the Trust Estate in convenient installments at least quarterly. Trustee shall follow any reasonable written directions that Settlor may furnish to him regarding the frequency or method of such payments.
>
> Each Settlor shall have the right to be paid such Settlor's Share of the principal and undistributed income of the Trust Estate at such times and in such manner as he shall request in writing.

This language could be modified to remove the right to invade principal and, in effect, make the trust irrevocable. In such a case, any gift tax consequences can be avoided at the establishment of the trust through the retention of a limited testamentary power of appointment.[127]

The following language provides for the disposition of income and principal during the life of the surviving settlor:

> Upon the death of the first Settlor to die, such deceased Settlor's Share of this Trust shall become irrevocable, and the surviving Settlor shall still retain the powers reserved by such surviving Settlor in accordance with the provisions of Paragraph ———— hereof over such

127 Treas. Reg. § 25.2511-2(b) (1958).

surviving Settlor's Share, and Trustee shall continue to hold and administer the Trust Estate upon the uses, trusts and purposes hereinafter set forth:

A. During the Surviving Settlor's lifetime, Trustee shall pay to or expend for the Surviving Settlor the net income of the DOE JOINT INTEREST TRUST in convenient installments. Additionally, Trustee shall pay to or expend for the Surviving Settlor so much of the principal of the DOE JOINT INTEREST TRUST as Trustee shall from time to time determine to be necessary or desirable to provide for the health and maintenance of the Surviving Settlor in the manner to which he has accustomed himself. Trustee shall charge any such principal invasions to the Surviving Settlor's Share of the DOE JOINT INTEREST TRUST to the extent that such Surviving Settlor's Share of the DOE JOINT INTEREST TRUST is sufficient and only upon the exhaustion of the Surviving Settlor's Share of the DOE JOINT INTEREST TRUST shall any such withdrawals be charged to the deceased Settlor's Share.

B. Upon the death of the Surviving Settlor, the DOE JOINT INTEREST TRUST shall be distributed by the Trustee, either outright and free of trust, or in further trust, to or among Settlors Children and their issue then surviving in such manner as the Surviving Settlor may direct or appoint by his Last Will and Testament making express reference to this power, excluding the right in Surviving Settlor to appoint such property to himself, his estate, his creditors, or the creditors of his estate. If the Surviving Settlor shall fail to exercise such limited power of appointment, the then principal and any undistributed income of the DOE JOINT INTEREST TRUST shall be held and administered or distributed in accordance with the provisions of Paragraph ——— hereof.

This language does not provide for any portion of the Doe Joint Interest Trust to qualify for the marital deduction.[128] This form of trust would be used if either the couple's entire property is held jointly and the creation of the trust divides the property equally, or the will or property passing outside the trust is sufficient to obtain the maximum marital deduction. If, because of the size of each separate share, obtaining the marital deduction is important even though it results in potentially increasing the surviving spouse's estate, a marital deduction provision can be inserted in the joint interest trust whereby the estate of the first settlor to die would obtain the marital deduction and a portion of the deceased settlor's separate share would be held for the benefit of the surviving settlor in a power of appointment trust[129] or an estate trust.[130]

128 INT. REV. CODE OF 1954, § 2056.
129 *Id.* at § 2056(b)(5).
130 Treas. Reg. §§ 20.2056(a)-1 *et seq.* (1958).

6. Apportionment of Estate Taxes

The value of property owned as joint tenants may be included in a decedent's taxable estate and there may be some estate tax liability. In that event the question arises as to whether the surviving joint tenant should be obligated to reimburse the estate for the amount of taxes imposed on the estate by virtue of the inclusion of the jointly owned assets.

Most states recognize that the estate should be reimbursed for the amount of estate taxes equitably apportioned to such joint property.[131] Such statutes generally impose an affirmative obligation on the personal representative to recover the amount of the equitably apportioned taxes from the surviving joint tenant. This affirmative requirement may be modified by appropriate testamentary language.

The modification of the general rule for the equitable apportionment of estate taxes through testamentary direction should be an item specifically covered by an estate planner in drafting any will. First, the existence of jointly owned assets must be determined. Second, the potential tax liability should be calculated and the amount of the taxes equitably apportionable to the joint property and the possible cost to the residuary estate should be determined. The testator should be advised of the effect on the residuary beneficiaries and the alternatives.

The type of language required to change the equitable apportionment statutes is a matter of dispute.[132] In any event, the estate planner should be aware of the tax problem generated by the existence of jointly owned property, should discuss this problem with the testator and should employ appropriate language to effectuate the testator's desires.

IV. Conclusion

Joint tenancies can have unintended and unanticipated property and tax consequences. The estate planner should be aware of such problems and the means to avoid or alleviate them. In appropriate situations, recommending and implementing a joint interest trust may be the best possible means of doing so, since it provides a convenient and inexpensive resolution of many of the probate and tax problems of the ownership of property in joint tenancy.

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131 Commissioner v. Ellis, 252 F.2d 109 (3d Cir. 1958); Rev. Rul. 68-554, 1968-2 Cum. Bull. 412.
132 *See, e.g.,* Fla. Stat. Ann. § 734.041 (1964).