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INTRODUCTION

For the estate planning counselor, knowledge of the law of co-ownership is indispensable. Family solidarity, common interest and feelings of mutual security often are promoted by including some form of co-ownership in the estate plan. Because of this, new devices in co-ownership are coming into increasing importance, suggesting new possibilities and problems for the up-to-date estate planner.

The purpose of this paper is to point out the problem areas in the field of co-ownership which beset the modern estate planner. A knowledge of the incidents and creation of the different forms of co-ownership provides the estate planner with different alternatives to best carry out the clients' needs and desires in an estate plan. Specific attention is paid to the problems presented by the relatively new forms of co-ownership which have come into increasing use in the past years: bank accounts, securities, government securities. As in all estate planning the tax consequences in these are important and will be examined.

Co-ownership of property may be a pitfall or a valuable tool for the estate planner. Both aspects will be discussed from the point of view of the practitioner, with emphasis on Indiana and federal law.

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I. *Joint Tenancies and Tenancies by the Entirety*

1. *Creation*

The Indiana Code provides that:

> [A]ll conveyances and devices (devises?) of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common and not in joint tenancy; unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy.[1]

The Code further provides that the "preceding sections shall not apply to mortgages, nor to conveyances in trust, nor when made to husband and wife; and every estate vested in executors, or trustees as such, shall be held by them in joint tenancy."[2]

The two sections emphasize two propositions: (1) That joint tenancies "must be held in disfavor and refused, except when forced by clear and unmistakable words";[3] and (2) that "the rule of the common law, as applicable to conveyances to husband and wife should remain undisturbed in this State."[4] It is fairly obvious that heirs do not inherit as joint tenants. But the Code provides, in dealing with intestate succession, that where pursuant to subsection c, "interests in real estate go to a husband and wife, the aggregate interests so descending shall be owned by them as tenants by the entireties. Interests in personal property so descending shall be owned as tenants in common."[5] The Commission Comments do not explain this provision. The clearest thing about it is that inheritance as tenants by entirety is permitted only as to real estate. Conceivably, remote collaterals, related to the intestate in the same degree, in case of two that are married to each other, could be referred to by this section. It could also apply where parents inherit, or where both paternal, or both maternal, grandparents inherit.

Some examples of conveyances that have been deemed to be sufficient, under the Indiana Code,[6] to create joint tenancies, are:

A conveyance to "Ray M. Richardson, W. Dale Richardson, Lavon Richardson and Lena Richardson, in equal proportions and in case of death of any one or more of said grantees, his or her interest in said land shall go to the other surviving grantees then living in equal proportions."[7]

A conveyance to "Samuel Gordon and Phoebe Gordon, his wife, in joint tenancy, their heirs and assigns forever."[8]

A conveyance to "Lydia Reese and John Reese jointly."[9] But, a conveyance to "David S. Kerr and Clara Kerr, his wife, jointly," has been held to create

1 IND. ANN. STAT. § 56-111 (1951).
2 IND. ANN. STAT. § 56-112 (1951).
3 Finney v. Grandon, 78 Ind. App. 450, 135 N.E. 10 (1922).
4 *Ibid.*
5 IND. ANN. STAT. § 6-201 (1953).
6 IND. ANN. STAT. § 56-111 (1951).
7 Richardson v. Richardson, 121 Ind. App. 523, 98 N.E.2d 190 (1951).
8 Wilken v. Young, 149 Ind. 1, 41 N.E. 68 (1895). This created a joint tenancy, not a tenancy by the entirety.
9 Case v. Owen, 139 Ind. 22, 38 N.E. 395 (1894).

an estate by entirety, the word "jointly" being regarded as surplusage.[10] The court, in the latter case, indicated that if instead of the term "jointly" the terms "in joint tenancy" had been used, the decision would have been in favor of a joint tenancy. And this was held where the conveyance was to "Daniel S. Wiggins and Laura Belle Wiggins, his wife, in joint tenancy."[11]

To create a joint tenancy under the above sections of the Indiana Code, between persons who are not husband and wife, it is necessary that the intention shall be expressly declared in the instrument, or it must manifestly appear from the tenor of the instrument. And to create a joint tenancy between executors or trustees, the deed must be made to them as such; that is, they must be described as executors or trustees, as the case may be. But the language is very different in reference to husband and wife. A conveyance to husband and wife is simply excepted from the "preceding section." As far as a tenancy by the entirety is concerned, the Indiana statutes are said to simply re-enact the common law.[12] Some caution is necessary as to this because in some areas there is a conflict as to the common law. For instance, in many jurisdictions recognizing the tenancy by the entirety, it may exist in personal as well as real property; in a chose in action as well as a chose in possession. But, in Indiana generally there can be no tenancy by the entirety in personal property, an exception being that the crops from, or proceeds from, land held by the entireties have the characteristics of a tenancy by the entirety.[13] Also, "it is a well-settled rule at common law, that the same form of words, which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by the entirety. The rule has been changed by our statute. . . . "[14] Husband and wife can be joint tenants, as well as tenants by the entirety, in Indiana, as far as real estate is concerned.

We might refer, at this point, to the conflict of judicial opinion as to the effect of legislation emancipating married women as to property rights upon the tenancy by the entirety. Such statutes do not affect the estate by entirety in Indiana.[15] In several states the emancipation statutes are said to abolish the tenancy by the entirety. There is another area of conflict as to the effect of the emancipation. At common law the husband has the right during coverture to the rents and profits and the usufruct of the land held by the entireties; but in some states the emancipation statutes do not aid the wife in this respect. In Indiana, however, she has a joint right with him to the use and enjoyment of the land held by the entireties during the existence of the marriage.[16] In Indiana, there is unity of estate, unity in conveying and encumbering it, unity of possession, and unity of control, as to a tenancy by the entirety.[17]

While the Indiana legislation states the manner in which a joint tenancy

10 Simons v. Bollinger, 154 Ind. 83, 56 N.E. 23 (1900).
11 Thornburg v. Wiggins, 135 Ind. 178, 34 N.E. 999 (1893).
12 *Ibid.*
13 Whitlock v. Public Serv. Co. of Indiana, 239 Ind. 680, 159 N.E.2d 280 (1959).
14 Chandler v. Cheney, 37 Ind. 391, 396 (1871).
15 See Thornburg v. Wiggins, 135 Ind. 178, 34 N.E. 999 (1893); Carver v. Smith, 90 Ind. 222 (1883).
16 Yarde v. Yarde, 117 Ind. App. 277, 71 N.E.2d 625 (1947).
17 *Ibid.*

in land may be created it contains no specification as to how a tenancy by the entirety shall be created. The method of creating this tenancy is stated as follows:

> It has been said by this court in some of the earlier decisions that no particular words are necessary. A conveyance which would make two persons joint tenants will make a husband and wife tenants of the entirety. It is not even necessary that they be described as such, or their marital relation referred to. (Citing several Indiana cases.) But the court has said that the general rule may be defeated by the expression of conditions, limitations, and stipulations in the conveyance which clearly indicate the creation of a different estate. . . . Where a contrary intention is clearly expressed in the deed, a different rule obtains. 'A husband and wife take real estate as joint tenants or tenants in common, if the instrument creating the title use apt words for the purpose.'[18]

It is clear, from this quotation, that a conveyance to two persons who are husband and wife, as a conveyance to "John Doe and Mary Doe," they being husband and wife, would create a tenancy by the entirety. It is better to describe them as such, or refer to the marital relation, as in a conveyance to "John Doe and Mary Doe, Husband and Wife."

It is clear, in Indiana, that by using apt terminology in a transfer to husband and wife, a tenancy in common may be created. Thus, where a conveyance to husband and wife recited that they had contributed equally to the purchase price and that the real estate should be "held by them in common, and not in joint tenancy," they were held to take as tenants in common.[19] So, if the conveyance excludes the rights of survivorship and is not sufficient to create a joint tenancy, a tenancy in common may be created where the conveyance was "to Isaac Cannon and Mary Cannon," who were husband and wife, but not described as such, and the deed recited:

> After the decease of said Isaac Cannon and Mary Cannon, the said property to be equally divided between the heirs of said Isaac Cannon and the heirs of Mary Cannon. If said Isaac Cannon shall die before his wife, she is to hold the said property until her death; and, provided Mary Cannon shall die first, then Isaac Cannon is to hold said property until his death, and; at the death of both, it is to be divided as above stated.[20]

The court said the grantees did not take as tenants by the entirety, as there was no right of survivorship. This opinion is questionable, from this standpoint. In a more recent decision, a similar conveyance was construed as creating a life estate in a husband and wife as tenants by the entirety.[21]

There are differences between a joint tenancy and an estate by the entirety, and there are similarities. A joint tenancy "must always arise by purchase, and cannot be created by descent,"[22] in Indiana. The Indiana Code, dealing with the creation of a joint tenancy in land, specifically refers to conveyances and devises.[23] On the other hand, an estate by the entirety "may be created by will,

18 Thornburg v. Wiggins, 135 Ind. 178, 34 N.E. 999 (1893).
19 Brown v. Brown, 133 Ind. 476, 32 N.E. 1128 (1893).
20 Hadlock v. Gray, 104 Ind. 596, 4 N.E. 167 (1886).
21 Graham v. Sinclair, 83 Ind. App. 58, 147 N.E. 634 (1925).
22 Thornburg v. Wiggins 135 Ind. 178, 34 N.E. 999 (1893).
23 IND. ANN. STAT. § 56-111 (1951).

by instrument of gift or purchase, and even by inheritance,"[24] in Indiana.

Joint tenancies may "be created in fee, for life, or years, or even in remainder."[25] A tenancy by the entirety may exist in lands, whether the estate be in fee, or for life, or for years, and whether the same be in possession, reversion, or remainder.[26]

A joint tenancy may be vested in any number of natural persons, more than one. A tenancy by the entirety can be vested only in husband and wife.

It is usual to refer to the right of survivorship as a distinguishing feature of each tenancy. But, correctly speaking, the surviving tenant by the entirety takes the whole estate, not by the jus accrescendi as in a joint tenancy, but upon the theory that the title to the whole estate vested in each of the tenants by the entirety at the time of the creation of the estate.[27]

The Indiana Code recognizes joint tenancies in personal property, with the right of survivorship.[28] But, apart from obligations of the United States Government, the statute requires the instrument creating the estate to clearly show an intent to create a joint tenancy with the right of survivorship.[29] Generally, in Indiana there is no recognition of a tenancy by the entirety in personal property. There are two apparent exceptions, namely, crops from or proceeds from the sale of land held by the entireties have the characteristic of a tenancy by the entireties.[30]

2. *Transferability (Voluntary and Involuntary); Severance*

Joint tenants take by moieties, and each is seised of an undivided moiety and of the whole (per my et per tout), while husband and wife each take the entirety (per tout). Joint tenants, accordingly, may individually alienate their respective interests. Tenants by entirety can do so only by acting jointly.[31] Neither tenant by entirety can sever the joint tenancy by his or her own act, as a joint tenant may do, but both tenants by entirety must unite in the deed to effect a conveyance or mortgage of the estate. A joint tenant can convey his interest absolutely; he can create an inter vivos trust of his interest. The transfer by a joint tenant severs the tenancy and destroys the right of survivorship as to his interest. A joint tenant can transfer his interest to the other tenant or tenants and thus sever the tenancy.

When a joint tenant transfers his interest to a third person he severs or destroys his relation with the other tenant or tenants. Thus, if there are two joint tenants and one conveys his interest in the estate to a third party, the latter holds with the other original tenant as a tenant in common. The right of survivorship in the estate is destroyed as to the part conveyed. If one of three joint tenants conveys to a third person or to a co-tenant, the purchaser be-

24 Thornburg v. Wiggins, 135 Ind. 178, 34 N.E. 999 (1893).
25 *Ibid.*
26 Davis v. Bass, 188 N.C. 200, 124 S.E. 566 (1924); 41 C.J.S. *Husband and Wife* § 34 (1955).
27 Sharp v. Baker, 51 Ind. App. 547, 96 N.E. 627 (1911).
28 IND. ANN. STAT. § 51-104 (1951).
29 See Hibbard v. Hibbard, 118 Ind. App. 292, 73 N.E.2d 181 (1947).
30 Whitlock v. Public Serv. Co. of Indiana, 135 Ind. 178, 34 N.E. 999 (1893).
31 Simons v. Bollinger, 154 Ind. 83, 56 N.E. 23 (1900).

comes a tenant in common as to the share purchased; if the purchaser is a co-tenant, he remains a joint tenant with the others as to their original interests and becomes a tenant in common as to the share purchased by him.[32]

A "joint tenant may mortgage his interest in the joint estate in like manner as though he were a tenant in common, and to the extent of the mortgage lien the right of the survivor will be destroyed or suspended, and the equity of redemption, at the death of the tenant, will be all that will fall to the surviving companion."[33]

The interest of a joint tenant in the joint estate is subject to sale upon execution.[34] Apparently, a judgment lien against a joint tenant's interest does not, per se, operate to sever the tenancy, though a sale upon execution would do so.[35]

An estate by the entirety is subject to sale on execution, issued upon a judgment rendered against both the husband and wife. Jointly they have complete ownership of the estate, and property is subject to sale on execution to satisfy a judgment against the owner. But the estate is not subject to sale to satisfy a judgment rendered against either tenant by entirety, as neither owns a severable interest therein.[36] The interest of a bankrupt in land in which he is a tenant by entirety with his wife, does not pass to his trustee in bankruptcy, unless the tenancy by the entirety was created while the debtor-husband was indebted and paid for wholly or partly with his funds; a debtor may not defraud his creditors by placing his assets in property by entireties.[37]

Neither tenant by the entirety can convey his or her interest in the estate so as to affect their joint use of the property during their joint lives, or defeat the right of survivorship upon the death of one of the co-tenants.[38] Either tenant should be able to convey his or her interest to the other, and thus sever the tenancy; there would be unity of action in such a case.

At common law the husband was entitled to the use and control of the estate by the entirety, and the wife had no control over it. He could lease, convey or mortgage it at his pleasure, and it might be taken on execution against him; but upon his death, leaving his wife surviving, it went to her unaffected by his acts.[39] While there seems to be no Indiana authority on the effect of the Married Women's Acts upon the husband's right to lease the estate held by the entirety, there is little authority anywhere else dealing with the right of either spouse to lease the estate.[40] Pennsylvania is the leading exponent of the view that either spouse has power to lease the estate held by the entireties and to receive the rents as they accrue and give acquittance for the money paid as rent.[41] Both in Indiana and Pennsylvania, the effect of the Married Women's Acts has not

32 Morgan v. Catherwood, 95 Ind. App. 266, 167 N.E. 618 (1929).
33 Wilken v. Young, 149 Ind. 1, 41 N.E. 68 (1895).
34 *Ibid.*
35 See Hammond v. McArthur, 30 Cal. App. 2d 512, 183 P.2d 1 (1947).
36 Sharp v. Baker, 51 Ind. App. 547, 96 N.E. 627 (1911).
37 Vonville v. Dexter, 118 Ind. App. 187, 76 N.E.2d 856 (1948).
38 Chandler v. Cheney, 37 Ind. 391, 396 (1871).
39 See Fogleman v. Shively, 4 Ind. App. 197, 30 N.E. 909 (1891).
40 Annot., 51 A.L.R.2d 388, 399-403 (1957).
41 Lohmiller v. Gotwals, 150 Pa. Super. 539, 29 A.2d 206 (1942).

been to abolish the tenancy by the entirety; rather, the effect is to destroy the husband's dominance and the wife's disabilities during coverture, which were incidents of the common-law marital status and not peculiarly incidents of tenancy by entireties. In both states there is unity of estate, unity in conveying, unity in encumbering the estate, unity of possession, and unity of control, with the exception that in Pennsylvania one spouse alone may execute a lease for the benefit of both.[42] If one spouse does lease the estate and/or receive the rents, there is a duty to account to the other spouse.[43] The lessee who has paid the rent to one of the spouses is not bound to pay again to the other spouse.[44] But the problem as to the lessee's right to possession remains.

There is little authority dealing with the effect of a lease by a joint tenant. It has been said that ordinarily the lessee does not take possession until he has a lease from all of the co-tenants.[45] Also, it has been said that the problem of whether a severance is effected by the lease of one joint tenant to a stranger is largely a matter of theoretical discussion.[46] Apparently, the lease of an undivided interest by a joint tenant is valid, but it is not clear as to whether the reversion is subject to survivorship; the better view is that severance is complete because of severance of the unity of interest.[47]

The Indiana Code provides that when a husband and wife become purchasers of real estate under a written contract, or the lessees of real estate under a written contract containing an option to purchase, the contract shall be construed as creating an estate by the entirety in the husband and wife.[48] In the event said husband and wife are divorced while said contract is in full force and effect, then they shall own said interest in said contract and the equity thereby created in equal shares.[49] The latter is a relatively recent statute; but it is logical, in view of the rule long held in Indiana and in most states, that upon an absolute divorce of tenants by the entirety they hold the estate as tenants in common.[50] In the divorce proceedings, the court has power to decree an equitable adjustment of interests in the estate by the entirety.[51]

Another section provides that when a husband and wife own any real estate as joint tenants, or as tenants by the entirety, and one is adjudged a person of unsound mind, by a court of competent jurisdiction, and when the insanity is probably permanent, they shall cease to be joint tenants or tenants by the entirety, and shall hold the property as tenants in common.[52]

"Partition at common law could not be enforced by joint tenants. . . ."[53] Section 3-2401 of the Indiana Code provides that a joint tenant may compel

42 Wallaesa v. Wallaesa, 174 Pa. Super. 192, 100 A.2d 149 (1953).
43 Annot., 51 A.L.R.2d 388, 399 (1957).
44 Lohmiller v. Gotwals, 150 Pa. Super. 539, 29 A.2d 206 (1942).
45 1959 U. Ill. L.F. 936.
46 *Ibid.*
47 1959 U. Ill. L.F. 936 citing 2 American Law of Property § 10 (Casner ed. 1952).
48 Ind. Ann. Stat. § 56-901 (1951).
49 Ind. Ann. Stat. § 56-902.
50 Lewis v. Romine, 128 Ind. App. 564, 151 N.E.2d 156 (1958).
51 Wallace v. Wallace, 123 Ind. App. 454, 111 N.E.2d 90 (1953).
52 Ind. Ann. Stat. § 56-402 (1951).
53 Wilken v. Young, 149 Ind. 1, 41 N.E. 68 (1895).

partition of the land held in joint tenancy.[54] At common law partition of joint tenancy could be made by the voluntary act of the tenants, but it could not be compelled by one against the will of the others. Legislation in England in the reign of Henry VIII changed this rule, by permitting a joint tenant to compel partition.[55] There is similar legislation in several jurisdictions in the United States.

At common law there is no partition, compulsory or voluntary, of a tenancy by the entirety, because that would imply a separate interest in each spouse in the estate.[56] The common-law rule has not been changed by statute in Indiana. A husband and wife cannot partition the estate by the entirety during the marriage.[57]

The death of a joint tenant or a tenant by the entirety does not constitute a severance of the tenancy in either case. If it did operate to sever the tenancy, it would destroy the incident of survivorship. Neither is there descent upon the death of a joint tenant or tenant by the entirety. Neither a joint tenant or a tenant by the entirety has testamentary power over his individual interest in the estate; the right of survivorship takes precedence. However, by contract, or by a contract-will combination, joint tenants or tenants by the entirety can control the ultimate destination of the estate in each instance. Also, under the doctrine of estoppel-election combination, the incident of survivorship can be controlled. For example, one of two joint tenants can execute a will purporting to dispose of the entire estate and, also, containing a gift to the other tenant who elects to take under the will; by so electing, he must accept the burdens as well as take the benefits. The same principle would apply to a tenancy by the entirety.

There appears to be no reason why a joint tenant cannot sell his expectancy of survivorship. Actual survivorship by the seller would be necessary to make the transfer effective. On the other hand, while an estate by the entirety continues it is not possible for either tenant to sell or assign or mortgage his or her interest therein, without the other joining. Neither is it possible to sell the expectancy of survivorship. Any alienation by one, the other not consenting, of any interest whatever in the estate, would be an abridgment of the rights of the other. Either spouse has a right to initiate a transfer. But, of what value is this right, if the other has stripped himself or herself of the power to assent to the transfer? Suppose, for instance, the husband sold his expectancy of survivorship to a third person; the husband would not be in a position to assent to a proposed sale by the wife, if his transfer was considered to be valid.[58]

A joint tenant may disclaim the right of survivorship. This right accrues upon the death of the other tenant or tenants.[59] On the other hand, the effect of death of one of the tenants by the entirety is to free the estate from participation by that spouse. The survivor takes by virtue of the original grant or devise. The right of the survivor to the whole is considered as arising not from

54 IND. ANN. STAT. § 3-2401 (1946).
55 NORTHRUP, REAL PROPERTY 110 (1919). The partition results in a severance of the joint tenancy.
56 *Id.* at 114.
57 Simons v. Bollinger, 154 Ind. 83, 56 N.E. 23 (1900).
58 See Beihl v. Martin, 236 Pa. 519, 84 Atl. 953 (1912).
59 See *In re* Krakoff's Estate, 179 N.E.2d 566 (P. Ct., Ohio, 1961).

a new estate but from a continuation of the old. So, disclaimer will not work; to divest himself or herself, the survivor must transfer. This distinction is of no significance, as far as the Indiana Inheritance Tax is concerned. It is important, in respect to the Federal Gift Tax Marital Deduction, as the property would pass to the surviving spouse by right of survivorship. Apparently, the property would pass to the surviving spouse, as defined by the Internal Revenue Code and the Regulations, and could qualify for the marital deduction, though the surviving spouse attempted disclaimer.

3. *Impact of Taxation*

Jointly owned securities and joint bank accounts will be considered in subsequent parts of this paper, including the incidents of taxation as especially applicable to such jointly owned property.

The State of Indiana levies an inheritance tax on the whole estate held in the joint names of two or more persons, upon the death of one of such co-owners; but the source of contribution is deemed to be material. The statute excepts therefrom "such part thereof (of the estate) as may be proved by the surviving joint owner or joint owners to have originally belonged to him or them and never to have belonged to the decedent."[60] The burden of proof, as to this, is on the survivor or survivors.

Real estate held in a tenancy by the entirety is exempt from the Inheritance Tax in Indiana. This recognizes a basic distinction between a tenancy by the entirety and a joint tenancy. Joint tenants hold per my et per tout — by the moiety, or half, and by the whole. They own individually and jointly. Upon the death of one joint tenant, the survivor or survivors take jus accrescendi — something accrues to them or him, upon the death of one. But tenants by the entirety hold per tout — by the whole, and not by the moiety or half. Upon the death of one of the tenants by the entirety, the survivor does not acquire a new interest, but takes under the original limitation the whole estate freed from participation by the other.

In Indiana the tenancy by the entirety attaches to the proceeds of an estate by the entirety when it is sold.[61] Yet, the doctrine of equitable conversion would seem to apply, and the proceeds could be treated as personal property and not as "real estate," under the Inheritance Tax exemption.

In relatively small estates, the Inheritance Tax is not generally a problem at all. Even if it is a factor in estate planning, it is of little significance to most clients. Other matters predominate.

Under Section 2040 of the *Internal Revenue Code* of 1954 a decedent's gross estate includes the value of property held in joint tenancy by decedent and another person, or as a tenancy by the entirety by the decedent and spouse, as follows:

1. If the estate was acquired by the decedent and the other co-owner, or co-owners, by gift, devise, bequest, or inheritance, only the decedent's fractional share is included;

60 Ind. Ann. Stat. § 7-2401 (1953).
61 Whitlock v. Public Serv. Co. of Indiana, 239 Ind. 680, 159 N.E.2d 280 (1959).

2. In all other cases the entire value of the property held jointly is included, unless the surviving joint owner or owners can prove the amount, if any, contributed towards acquisition of the estate, by the survivor or survivors. Thus, if the decedent furnished only a part of the purchase price, only a corresponding portion of the value of the property is included in his gross estate, for Estate Tax purposes; and, if he did not furnish any of the purchase price, no part of the value of the property is included in his gross estate.

The task of proving the amount of contribution towards the purchase of the joint estate is difficult, if not impossible, where insufficient records have been kept. The difficulty in tracing the source of contribution may mean that the entire value of the joint estate will be included in the estate of the first joint owner to die.

It is important to determine whether any, all, or what part of the value of the joint estate is to be included in the gross estate of the decedent tenant, if a spouse, because of the Estate Tax Marital Deduction. Section 2056 of the *Internal Revenue Code* of 1954 provides that interests in property that pass or have passed from decedent to his surviving spouse can qualify for the marital deduction. One of the situations listed by this Section is property which passes from the decedent to his surviving spouse by right of survivorship, as in case of a joint tenancy, tenancy by entirety, or joint bank account. But such property will qualify for the marital deduction only to the extent that it is included in determining the value of the decedent's gross estate. So, the general statement that such tenancies will qualify for the marital deduction must be accepted with qualification. It is conceivable, in case of a large estate, that the surviving spouse's contributions in establishing the tenancies, if more than one and large, would be subject to the estate tax on the decedent's estate and also lessen the extent of other property that could be used for the marital deduction, where the extent of such contributions could not be established by proof sufficient to satisfy the Commissioner. This could easily happen in the case of a large joint bank account, where each spouse has made numerous deposits and withdrawals.

It could also occur that so much of the assets of the husband and wife are held jointly with the right of survivorship that specific use of the marital deduction in a will or trust would have little if any value, or even become inoperative.

Gift Tax problems can and do arise where the joint tenants are man and wife or are tenants by the entirety. Section 2523 of the *Internal Revenue Code* of 1954 provides that where a donor who is a citizen or resident transfers during the calendar year by gift an interest in property to a donee who at the time of the gift is the donor's spouse, there shall be allowed as a deduction in computing taxable gifts for the calendar year an amount with respect to such interest equal to one-half of its value. To illustrate: Suppose John Doe makes one gift this year of $10,000 to his wife, Mary. The marital deduction is determined without regard to the $3,000 exclusion allowed in computing the total gifts to the donee spouse, and it would be $5,000. So, there will be allowed the exclusion and the marital deduction.

This same Section of the Code deals with joint interests. Subdivision (d) provides that if a property interest is transferred to the donee spouse as sole

joint tenant with the donor or as tenant by the entirety, the interest of the donor in the property which exists solely by reason of the possibility that the donor may survive the donee spouse, is not to be considered as an interest retained by the donor. The fact that the donor may, as surviving tenant, possess or enjoy the property after termination of the interest transferred to the donee spouse, does not preclude the allowance of the marital deduction with respect to the latter interest.[62]

Where a joint tenancy is created, the value of the gift is determined by the donee's proportionate interest in the property, except where joint bank accounts or government bonds are involved.[63] Thus, if A with his own funds purchases property and has the title conveyed to himself and B as joint owners, with right of survivorship, there is a gift to B in the amount of one-half of the value of the property. It is unnecessary to treat the *creation* of a tenancy by the entirety in *real property* as a gift under Section 2515 of the *Internal Revenue Code* of 1954. This provision includes joint tenancies, where the tenants are husband and wife. The creation will not be regarded as a gift unless the donor spouse so elects at the time of creation. If he does not so elect, no gift need be reported until the tenancy is terminated other than by death. There is a gift, in such cases, upon the termination of such a tenancy, other than by death of the spouse, if the proceeds received by the surviving spouse are larger than the proceeds allocable to the consideration furnished by that spouse.

The Regulations provide that if A creates a joint bank account for himself and B, there is a gift to B when B draws upon the account for his own benefit, to the extent of the amount drawn without any obligation to account for a part of the proceeds to A. Similarly, if A purchases a United States Savings Bond, registered as payable to "A or B," there is a gift to B when B surenders the bond for cash without any obligation to account for a part of the proceeds to A.[64]

Should the donor joint tenant or tenant by the entirety predecease the donee, his estate is given credit for gift taxes paid with regard to property included in his gross estate.[65] But if the donee spouse predeceases the donor, no gift tax credit is allowed to the donor's estate.[66] This might appear to be unjust. However, we have just observed that the donor does not have to elect to treat the transfer as a gift on creation of the tenancy. If the tenancy is terminated only by death of one of the tenants, the Estate Tax governs. If the donor has paid a Gift Tax, he has the $3,000 exclusion, an annual one, and the lifetime exemption of $30,000. This could ease the situation partially, if not entirely.

The Married Women's Property Acts have had the effect, in a tenancy by the entirety, of giving the wife a right to share equally with the husband in the rents and profits of the joint estate.[67] Each should report a half of the income from the estate, for Income Tax purposes. The Internal Revenue Code permits

62 26 C.F.R. § 25.2523(d)-1 (1961).
63 Treas. Reg. § 25.25-1 (h) (4), (5) (1960).
64 26 C.F.R. § 25.2511-1 (h) (4) (1961).
65 Lilly v. Smith, 96 F.2d 341 (7th Cir. 1938).
66 See Commissioner v. Hart, 106 F.2d 269 (3rd Cir. 1939).
67 Yarde v. Yarde, 117 Ind. App. 277, 71 N.E.2d 625 (1947).

husband and wife to file a joint return; this removes one advantage of co-ownership. In some states there is an advantage in splitting income, for income tax purposes.[68] The operating loss on property held by husband and wife as tenants by the entirety is a loss of the spouses equally, deductible one-half by the husband and one-half by the wife in their Federal Income Tax returns, where they make individual returns.[69]

In Income Tax Ruling 3301,[70]

> It was held that, where . . . savings bonds are registered in the names of two natural persons in the alternative as co-owners, for example, "Mr. John Jones or Mrs. Mary Jones," interest (increment in value) earned thereon is income, for Federal income tax purposes, of the co-owner whose funds were used to purchase the bonds; and that, if the purchase price was furnished in part by each, the interest is income of each in proportion to his or her respective contribution to the purchase price, provided, however, that co-owners who are husband and wife domiciled in a state having community property laws should ordinarily include one-half of the interest as each spouse's income if the bonds are held as community property.[71]

Income from land held by a husband and wife as tenants by the entirety is equally the property of the husband and wife. This appears to be so, even though the purchase price of the property was supplied from funds of the husband alone, or where the property originally belonged to the wife.[72] Each may report one-half of the income, for Federal Income Tax purposes. Also, where state law incorporates the principle that each joint tenant is entitled to his or her share of the rents and profits derived from the property held in joint tenancy, each may report one-half of the income of such property.[73]

Section 1014 (b) (9), of the *Internal Revenue Code* of 1954 provides a new cost basis to be used in case of a sale by the surviving joint tenant or tenant by the entirety of property acquired by the right of survivorship. The survivor's basis is the estate tax value placed upon such part of the joint estate as is required to be included in the decedent's gross estate. So, now the estate tax value is the basis for computing capital gain, under the Federal Income Tax Law, in case of a sale by the surviving joint owner. Under prior law, the basis was the same as though the surviving joint owner owned the property from the date it was acquired in joint ownership.[74]

II. *Joint Bank Accounts*

1. *Creation*

Two statutes in Indiana pertain to the creation of joint bank accounts, in so far as survivorship rights are concerned. The first provides that when a deposit is made in any bank or trust company, in the names of two persons, pay-

68 Effland, *Estate Planning: Co-Ownership,* 1958 WIS. L. REV. 507, 536 (1958).
69 Oren C. White, 18 B.T.A. 385 (1952).
70 1939-2 CUM. BULL. 75.
71 1954-1 CUM. BULL. 14.
72 George E. Reynolds, 26 T.C. 1225 (1956) (Florida law); Davis v. Clark, 26 Ind. 424 (1866).
73 1 C.C.H. 1959 STAND. FED. TAX. REP. § 303.48; I.T. 3898, 1941-1 CUM. BULL. 55. (Indiana law).
74 CCH (1959) MASTER TAX GUIDE ¶ 432.

able to either, or payable to either or the survivor, such deposit, or any part thereof, or any interest thereon may be paid to either of such persons, whether the other be living or not.[75]

The second provides that except as to obligations of the United States Government, held jointly or on which there appears the name of a surviving co-owner, the survivor of persons holding personal property in joint tenancy shall have the same rights only as the survivor of tenants in common, unless otherwise expressed in the instrument.[76] Also, that the survivor of persons holding obligations of the United States Government either jointly or as co-owner, shall become the sole owner of such obligations upon the death of the joint owner and/or co-owner.

Some bankers are not aware of this double protection in paying the balance of a deposit to the surviving depositor. As far as creation is concerned, there are two methods by which to obtain survivorship rights in bank accounts, though we are apt to think, generally, only of the joint tenancy, and the statute requires this to be clearly indicated in the instrument manifesting the tenancy.[77]

2. *Incidents*

Joint bank accounts are important to persons having small estates. By using a joint bank account, the depositor, or depositors, can obtain the advantage of a testamentary disposition without incurring the expense of will drafting and the delay that might occur in probate and administration. Accordingly, it has been called the "poor man's will."[78] It is possible for the "poor man" to reduce all of his assets to cash and deposit the proceeds in a joint bank account and avoid the expense and incidents of probate and administration. With bank interest rate of payment increasing and approaching, if not surpassing, the usual trust rate of income, it is not improbable that this can happen, in case of small estates.

When a joint depositor dies, he leaves no interest in the deposit to pay his debts.[79] If he did not create the joint account to defraud his creditors, they cannot reach the fund.[80]

Apparently, the general principle requiring fair dealing applies to joint depositors, and a withdrawal by one, of the entire fund, where all joint depositors have the right of withdrawal, for the purpose of defeating the codepositor's right of survivorship, is a violation of the understanding between the parties, as evidenced by the deposit agreement.[81] This principle would seem to be particularly applicable to husband and wife as joint depositors, where the husband supplied the funds to create the deposit.

It has been said to be settled law that the surviving spouse cannot reach

75 IND. ANN. STAT. § 18-2001 (1950).
76 IND. ANN. STAT. § 51-104 (1951).
77 See Harvey's Estate v. Huffer, 125 Ind. App. 478, 126 N.E.2d 784 (1955).
78 53 COLUM. L. REV. 103 (1953).
79 Thornburg v. Wiggins, 135 Ind. 178, 34 N.E. 999 (1893).
80 ATKINSON, WILLS 171 (2nd Ed. 1953).
81 State v. Gralewski's Estate, 159 P.2d 211 (Ore. 1945); Steinmetz v. Steinmetz, 130 N.J.Eq. 176, 21 A.2d 743 (1941).

joint bank accounts.[82] Thus, it is posible for a husband to create a joint bank account in his name and that of a person other than his wife, and thus defeat or lessen her marital rights in his property. This can be significant in case of small estates. But this problem is not as well-settled as it might seem to be. The codepositor's right of survivorship may be sustained on either of three theories, namely, contract, gift, or trust. Under the gift theory, it may be possible to subject the funds to the surviving spouse's rights (statutory share and widow's allowance), by proving that the gift was incomplete. Under the contract theory, the right of survivorship has precedence over the rights of the surviving wife, even if the joint account was created to defeat such rights, in states wherein the absolute transfer of personalty by one spouse is effective for this purpose. As far as the trust theory is concerned, the principles applicable to revocatory and illusory trusts apply; but here the law is in a state of considerable flux, and no well-defined course of action is indicated.

A joint tenancy may be created in personal property, as a general rule. In many states a tenancy by the entirety may be created in personal property, including bank accounts; but, not so in Indiana. As to a joint tenancy in a bank account, or a tenancy by the entirety, there would be no true tenancy in either case if either spouse, where tenants, has the right of withdrawal of the entire fund. In case of a true joint tenancy in the account, either spouse as joint tenant, can withdraw only his or her share of the account.[83] In either case, an interest accrues to the survivor which he or she did not have during the lives of both tenants.[84]

3. *Impact of Taxation*

In Indiana a bank account held jointly in the name of two persons, payable to either or to the survivor, creates survivorship rights.[85] Section 2040, of the *Internal Revenue Code* of 1954 requires the entire account at the death of one of the depositors to be included in his gross estate, for Federal Estate Tax purposes, unless it can be shown that part or all of the account originally belonged to the survivor and was not acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth.[86]

If A creates a joint bank account for himself and B, "there is a gift to B when B draws upon the account for his own benefit, to the extent of the amount drawn without any obligation to account for a part of the proceeds to A." Section 25.2511-1, Gift Tax Regulations. If B never withdraws any part of the account while A lives, there would be no Federal Gift Tax to pay. Even if B did draw upon the account while A lived, the amount could be so small as not to involve any Gift Tax liability.

Under the Indiana Code, in case of a joint bank account in the names of two or more persons payable to either or the survivor, upon the death of

82 53 COLUM. L. REV. 103, 115 (1953).
83 Marble v. Jackson, 245 Mass. 504, 139 N.E. 442 (1923).
84 McLaughlin v. Cooper's Estate, 128 Conn. 557, 24 A.2d 502 (1942); Marble v. Jackson, *supra* note 83.
85 IND. ANN. STAT. § 18-2001 (1950).
86 See Estate of T.R. Tennant, 18 T.C.M. 49 (1949).

one of such persons the exercise of the right of survivorship by the survivor or survivors is a taxable transfer, subject to the State Inheritance Tax, excepting therefrom such part of the account as may be proved by the survivor or survivors to have originally belonged to him or them.[87] This part of the Indiana Code deals with property held jointly and with joint deposits; it provides that property held jointly shall not be taken to include real estate held by the entireties. This exemption applies only to real estate. In Indiana there can be no tenancy by the entirety in a bank account, though there can be in some other states.

The joint bank account is subject to the Inheritance Tax "freeze" in Indiana and other states. It is provided that, in substance, the bank shall not deliver or transfer the account to the surviving joint owner or owners without the consent of the State Board of Tax Commissioners expressed in writing; but this Board has power to consent to the transfer prior to the payment of the Inheritance Tax, if the Board deems such transfer may be made without prejudice to the rights of the State.[88] If the estate of the deceased tenant, where a husband of the surviving tenant, is insolvent or if he is heavily indebted, this could be difficult for the surviving wife if she has no property in her name. This points up the importance of the wife having some property in her name, especially a separate bank account. However, if the estate of the deceased husband is solvent, there is no difficulty here.

III. *Co-Ownership of Securities*

1. *Methods of Indicating co-ownership*

United States Savings Bonds are issued only in registered form, and the form of registration used must express the actual ownership of and interest in the bond in each case. The Regulations provide that a bond may be registered in the name of a single owner (as "John Doe or Mrs. John Doe") or in the beneficiary form (as "John Doe payable on death to Mrs. John Doe," or "John Doe P. O. D. Mrs. John Doe").[89]

In several cases where certificates of stock are issued in the names of a husband and wife, or assigned to them as co-owners, the question has arisen as to whether they hold as tenants by the entirety. In one case shares of stock were assigned to a husband and wife and a new certificate was issued to them in this form: "Alice D. and John Hewlett jointly."[90] They were held to acquire the stock as tenants by entirety. In another case husband and wife purchased corporate stock and took the certificate in the names, "Joseph P. Raible and Margaret M. Raible." It was held that they took ownership by the entirety, though the instrument did not designate them as husband and wife.[91] The common law rule is that the words which, in a conveyance to unmarried persons, constitute a joint tenancy, will create, if the grantees are husband and

87 IND. ANN. STAT. § 7-2401 (1953).
88 IND. ANN. STAT. § 7-2418 (1953).
89 31 C.F.R. §§ 315.5, 315.7 (1959).
90 Yates v. Richmond Trust Co., 220 S.W. 692 (Mo. App. 1920).
91 *In re* Raible's Estate, 10 Pa. D. & C. 747 (1928). *Accord, In re* Giant Portland Cement Co., 26 Del. Ch. 32, 21 A.2d 697 (1941).

wife, a tenancy by entirety.[92] The same trend of construction has been applied in cases in jurisdictions other than Indiana wherein husband and wife take title to securities (personal property) as co-owners. There is no reason prohibiting two persons, other than husband and wife, from taking title to securities as joint tenants. The Indiana statutes[93] dealing with joint tenancy ownership of personal property, has been construed to allow husband and wife to be co-owners of shares of stock as joint tenants, where the shares were standing in the names of a decedent and his wife "as joint tenants and not as tenants in common."[94]

The Rules of the Stock Transfer Association (formerly, the New York Stock Transfer Association)[95] state that the proper form of inscription to indicate joint tenancy is: "John Doe and Mary Doe as joint tenants with right of survivorship and not as tenants in common." This form would comply with the requirements of the Indiana Statute.[96] The Association Rules do not permit this form of registration in the alternative: "John Doe or Richard Roe."[97] The prescribed form for registered securities to create a tenancy by entirety is: "John Doe and Mary Doe, tenants by entirety."[98] The latter is practically of no benefit to Indiana securities holders, where the law as to ownership of personal property as a tenancy by entirety has recently been summarized as follows: "Although there can normally be no tenancy by the entireties in personal property, Indiana holds that the crops from or the proceeds from the land held by the entireties have likewise the characteristic of a tenancy by entireties."[99]

2. *Transferability*

Savings Bonds of the United States are not transferable and are payable only to the owner or owners named therein, except that they may be pledged as security provided that certain restrictions are complied with, and they may be paid or reissued on the request of the donee in a gift causa mortis.[100] No judicial determination will be recognized which would give effect to an attempted voluntary transfer inter vivos that would impair survivorship rights. But a decree of divorce ratifying or confirming a property settlement agreement or otherwise settling the respective interests of the parties in a Bond will be regarded as a proceeding giving effect to a voluntary transfer; reissuance of the Bond will be made to make the ownership conform to the terms of the settlement, where, of course the co-owners are spouses.[101] It has been held that the mere registration of United States Savings Bonds in the names of the purchaser and another person does not constitute a gift. Thus, if John Doe pur-

92 *In re* Bramberry's Estate, 156 Pa. 628, 27 Atl. 405 (1893).
93 IND. ANN. STAT. § 51-104 (1951).
94 Estate of Thomas R. Tennant, P-H TAX CT. MEM. No. 49,040 (1949).
95 2 CHRISTY, TRANSFER OF STOCK A:243 (3rd ed. 1962).
96 IND. ANN. STAT., § 51-104 (1951).
97 2 CHRISTY, TRANSFER OF STOCK, *op. cit. supra* note 95.
98 *Id.* at A:276.
99 Whitlock v. Public Serv. Co. of Indiana, 239 Ind. 680, 159 N.E.2d 280 (1959).
100 31 C.F.R. §§ 315.15, 315.33 (1959).
101 31 C.F.R. §§ 315.20, 315.22 (1959).

chases some of such bonds and has them registered in the names of "John Doe or Richard Roe," there is no gift. But, apparently, if John Doe delivers the bonds to Richard Roe, there would be a gift.[102]

As to transfer of interest by a co-owner of shares of stock, basically the same rules apply as in case of co-ownership of realty. A new certificate, or new certificates, of ownership would have to be issued. The Stock Transfer Association Rules require assignments of securities registered in joint names, such as "John Doe and Mary Doe," to bear the signatures of both tenants.[103] When shares of stock are recorded in the names of two or more joint tenants with right of survivorship and one tenant dies, it is not necessary, upon a transfer of the shares, to have a release of the shares by the estate fiduciary, unless state law requires.[104] But inheritance tax waivers should be required for the estate of the decedent co-owner, in addition to evidence of death and such other evidence as may be required by statute.[105] In case of jointly owned shares that are registered, where one co-owner dies, the transfer agent may insist upon probate of the estate, regardless of size, or he may accept either a statement of facts guaranteed by a reputable bank or an order of court, and the usual waivers.[106] Thus, in case of registered shares of co-owners, the Stock Transfer Association Rules present restrictions on transfers, regardless of the jointly owned shares being probate assets.

Investigation reveals that co-ownership of securities is quite common; also, that in many instances the co-owners are not aware of the problems connected with this form of ownership.

3. *The Impact of Taxation*

If the co-owners of a United States Savings Bond die as the result of a common disaster or accident, and it cannot be established by presumption of law or otherwise as to which died first, the "bond will be considered as belonging to the estates of both equally, and payment or reissue will be made accordingly."[107] Thus, as far as the Federal Estate Tax is concerned, the gross estate of each co-owner, in such a case, would contain one-half of the amount of the bond. In other cases, where the bond is payable to either co-owner or the survivor, Section 2040 of the *Internal Revenue Code* of 1954 would govern. Thus, if a Savings Bond is payable to "John Doe or Mrs. John Doe," and John Doe dies first, his estate would include the value of the bond, less such part thereof as may be shown to have originally belonged to Mrs. John Doe and never to have been received or acquired by her from him for less than an adequate and full consideration in money or money's worth.

United States Savings Bonds are not exempt from state inheritance taxation, as this tax is upon taking by inheritance or under a will. A Savings Bond registered in the names of "John Doe or Mrs. John Doe," or "John

102 *In re* Guardianship of Sachs, 181 N.E.2d 464 (Ohio 1962).
103 2 CHRISTY, TRANSFER OF STOCK *op. cit. supra* note 95, at A:245.
104 *Id.* at A:254.
105 *Id.* at A:246.
106 *Ibid.*
107 31 C.F.R. § 315.62 (1959).

Doe P. O. D. Mrs. John Doe," is considered for the purpose of assessing the state inheritance tax as if owned in joint tenancy. Under the Indiana Statute, the exercise of the right of the surviving co-owner to the immediate ownership or possession and enjoyment of the property is deemed a taxable transfer, in the same manner as if the whole property had belonged absolutely to the deceased joint owner and had been devised or bequested to the surviving co-owner by the decedent co-owner, excepting such part as may be proved to have originally belonged to the survivor and never to have belonged to the decedent.[108]

This section of the Indiana Code (7-2401) is very brief. It makes no reference to simultaneous deaths of co-owners, or to United States Savings Bonds.[109] Under the Uniform Simultaneous Death Act, as adopted in Indiana, if the co-owners, say two, of a security are joint tenants and die simultaneously the distribution mandated is one-half as if one had survived and one-half as if the other had survived. So also as to tenants by the entirety.[110] Suppose, for instance, that the security is jointly owned by a husband and wife, and they die simultaneously and intestate, survived only by children of the union? There is no difficulty here in assessing the inheritance tax, in so far as shares are concerned. But, suppose they leave three sets of children, each having been married twice? Or, suppose they do not leave any children? Section 7-2401 does not deal with such contingencies. The Uniform Simultaneous Death Act should govern as to shares taken and as to assessment of the tax, as it determines the right to inherit and the shares taken. The same should be said as to the section of the Code of Federal Regulations governing distribution in case of simultaneous deaths of co-owners of a Savings Bond.[111]

4. Voting Securities Jointly Owned

There is some authority as to the method of voting securities by co-owners. In Delaware, where shares of stock may be held by husband and wife, but neither alone are stockholders in and members of the corporate family and enjoy jointly, but not otherwise, all of the usual rights and powers incident to stock ownership, including the right to vote in person or by proxy.[112] If they vote by proxy, the separate signatures of each on the proxy instrument are necessary to validate the proxy, where the stock is registered in their joint names. If the proxy bears both names, though in the same handwriting, this is enough to validate the proxy; anyone challenging validity of the proxy has the burden of proving that one was not authorized to sign for both.[113]

The unity in voting, required of tenants by the entirety, is not required of joint tenants of stock. One of the joint tenants may vote the stock, in the absence of protest by the other or others co-owning it. In case of disagreement, the voting will not be accepted.[114]

108 IND. ANN. STAT. § 7-240; (1953).
109 *Ibid.*
110 IND. ANN. STAT. § 6-253 (1951).
111 31 C.F.R., § 315.62 (1959).
112 *In re* Giant Portland Cement Co., 26 Del. Ch. 32, 21 A.2d 697 (1941).
113 Investment Associates v. Standard Power & Light Co., 48 A.2d 501 (Del. Ch. 1946).
114 Matter of Pioneer Paper Co., 36 How. Pr. 111 (1865).

IV. *Co-ownership of Automobiles*

1. *Form*

The Indiana Regulations concerning the registration and transfer or encumbering of motor vehicles, where the title is registered in the names of two people are as follows:

> Where ownership is a *joint tenancy, with right of survivorship,* the owners' names on the title shall be shown as follows:
>
> John Doe and Mary Doe, with right of survivorship.
>
> To transfer ownership of the vehicle or to encumber the vehicle, signatures of both parties are required if both are living; if one of the parties is deceased, proof of death of the deceased and signature of the surviving party. Where ownership is a *tenancy in common,* the owners' names are shown on the title as follows:
>
> John Doe and Mary Doe.
>
> To transfer ownership of the vehicle or to encumber the vehicle, signatures of both parties are required if both be living; if one of the parties is deceased, the signature of the surviving party and the signature of the heir, or heirs, of the decedent. Where the ownership is a joint tenancy, with an expressed intent that either of the owners shall have full authority to transfer ownership of the vehicle or to encumber the same, the owners' names shall be shown on the title as follows:
>
> John Doe and/or Mary Doe
>
> or John Doe or Mary Doe.
>
> To transfer ownership of the vehicle or to encumber the vehicle, signature of either party is accepted. *Where there has been an administration on the estate of the deceased vehicle owner:* Title in deceased person's name properly assigned by Administrator or Executor. *Where there has been no administration on the estate of the deceased vehicle owner:* Title in deceased person's name properly assigned by Sole Heir, or Attorney-in-fact for surviving heirs.[115]

2. *Incidents*

Few people realize the significance of co-ownership of automobiles. Even where two persons, as husband and wife, contemplate taking title to an automobile, or other motor vehicle, as co-owners, they do not, in most cases, seek competent legal advice as to the impact of this form of ownership, or weigh the incidents thereof as against individual ownership. In many instances, the only reason for taking title in this form is simply the habit of husband and wife owning property jointly and the feeling of mutual trust and confidence.

A surviving co-owner of a motor vehicle does not have to do more in Indiana than the Regulations require, upon the death of the other co-owner, to obtain a new registration of the title.

The single owner type of registration occasions difficulty in transferring title upon the death of the owner, especially where there is no bequest of the vehicle. A court order, based upon a petition, is necessary to transfer, or ob-

115 POLK, INDIANA MOTOR REGISTRATION MANUAL 2 (1962).

tain a new registration of title in favor of the sole heir. If there are several heirs, and if the vehicle is not sold in administration proceedings, additional effort and expense are necessary; if the vehicle is to go to one of the heirs, waiver by the others is necessary.

Either the "joint tenancy, with right of survivorship," or the "'joint tenancy," form of registration of title should take the vehicle out of probate assets. This could be important in a small estate where all other property is jointly owned, and the tenants are spouses.

The individual form of ownership is important in Indiana, if the vehicle should be damaged, or destroyed, in a collision or impact with a vehicle owned by a third person, where the former vehicle is owned by one spouse and the other spouse is driving at the time, on a mission of his or her own. Indiana appears to have rejected the family purpose doctrine.[116] So the owner-spouse might be able to recover damages, notwithstanding the doctrine of imputed contributory negligence.

V. *Practical Implications of Co-ownership in Estate Planning*

It is the duty of the estate planning counselor to point out to the client the advantages and disadvantages of joint ownership — the incidents of such ownership — where the client is a joint owner or inquires as to such ownership. Any attorney who fails to do this fails in respect to a very important obligation. He must remember, of course, that the client is the final arbiter. Experience does not indicate any formula as an answer for all estates, or even for most estates.

The deciding factor may be, and often is, a personal one, where the joint owners are husband and wife, where the problem is either to hold on to a joint estate or to acquire property in joint ownership. The spouses may be in the habit of jointly owning property. This springs from a strong bond of unity. It gives a feeling of assurance in sharing in building the family fortune, such as it is. It tends to promote harmony between the spouses by providing a common financial interest and a feeling of mutual security.[117]

It is reasonable to assume that even in large estates there will be either a joint tenancy (of property held by husband and wife). Or a tenancy by the entirety, or both holdings, and probably a joint bank account. As far as the Federal Estate Tax is concerned, then so far as the decedent's contribution to acquisition price is established with reasonable certainty, a corresponding proportion of the joint property is included in his or her gross estate. Not only does such property go into the decedent tenant's estate but it may also be deducted, under the marital deduction. It is an "in and out" rule.

The Indiana Inheritance Tax does not apply to real estate held by the entireties. It does apply to joint tenancies; the surviving tenant must prove the amount of contribution towards the acquisition of the estate, or else the whole

116 Fisher v. Fletcher, 191 Ind. 529, 138 N.E. 834 (1922); Smith v. Weaver, 73 Ind. App. 350, 124 N.E. 503 (1919).

117 EFFLAND, ESTATE PLANNING: CO-OWNERSHIP, 1958 WIS. L. REV. 507, 539, 540 (1958).

value of the joint estate is subject to the tax and is to be considered as a transfer to the surviving joint tenant. However, the rates of this Tax range from 1% on transfers not exceeding $25,000 to 10% on transfers over $1,500,000 in value. It is doubtful as to whether this Tax would have much, if any, important relation to most estate plans for large estates; and in case of small estates there is less reason to consider it to be of any significance.

Problems connected with the "liquidity" of joint estates loom as the most important factors, apart from personal considerations, in dealing with joint estates. Joint tenants may severally alienate their interests. Tenants by the entirety can alienate their joint estate only by acting jointly. Joint tenants may sever and continue to hold their estates. The estate by the entirety is inseverable while owned by the spouses. Joint tenants may have partition. Tenants by the entirety cannot, during the marriage. There is the right of survivorship in each tenancy. Neither a tenant by the entirety nor a joint tenant has individual testamentary power of disposition over his interest. But, in either case, by a contract, or by a contract-will combination, the tenants can control the ultimate disposition of the property. However, a joint tenant or a tenant by the entirety can by will dispose of the whole of the tenancy, and at the same time make a testamentary gift to the surviving tenant; if the latter accepts the testamentary provision, he or she must abide by the testamentary disposition of the joint estate, under the principles of election estoppel. It is not safe, however, to rely upon such an estate plan, and it is not to be recommended.

Where husband and wife are joint owners of property, there is the possibility of dissension. This could affect the transferability of the property. If it results in divorce, the court has power to make a fair and equitable adjustment of all of the property rights of the parties, and in this connection it will take into consideration the amount each contributed towards acquisition of any joint estate.[118]

There is also the possibility of court intervention in case of unsoundness of mind of one of the spouses, who is a joint owner with the other.[119]

A joint bank account, in the names of a husband and wife with power of withdrawal in each, creates a risk. One may secretly withdraw all, or most, of the funds. If so, are any rights of the other violated? If a joint tenancy, in the correct sense of the term, exists in the account, neither can withdraw more than his or her share of the account.[120] If there is a tenancy by the entirety in the account, in states sanctioning such a tenancy in personal property, withdrawal would have to be by the joint action of the spouses. But, apparently, even if there is a tenancy by the entirety in the account, it can still be made payable to either spouse.[121] In such a case, if one spouse secretly withdraws the entire account, the bank is protected, if acting in good faith; but not those receiving the funds, if acting with knowledge of the tenancy.[122] The other

118 See Wallace v. Wallace, 123 Ind. App. 454, 111 N.E.2d 91 (1953).
119 See IND. ANN. STAT. § 56-402 (1951).
120 Marble v. Jackson, 245 Mass. 504, 139 N.E. 442 (1923).
121 Madden v. Gosztony Savings & Trust Co., 331 Pa. 476, 200 Atl. 624 (1938).
122 *Ibid.*

tenant would have a right or recovery, at least as to his share. This would be true as to joint tenancy in the bank account.[123]

Suppose a husband converts all of his personal property into cash and places it in a joint account with another person, maybe a child, with the intent to defeat the rights of his surviving wife, in case he should predecease her? Is he entitled to do this? There is no definite answer anywhere.

Suppose a husband and wife have reduced much, if not all, of their property to joint holdings, and have no other estate plan? Most states, including Indiana, have adopted the Uniform Simultaneous Death Act. Accordingly, if both spouses die as the result of a common disaster or calamity, and there is no satisfactory proof as to which died first, one-half is distributed as if the husband had survived and the other half is distributed as if the wife had survived. This rule applies as to any other two persons who are joint tenants. In case of more than two joint tenants, a proportionate share is distributed as if each had survived. This may not be what tenants would prefer. If the joint owners are husband and wife and are survived by children, the distribution provided by the Statute may be what they prefer. But, there may be preferences. Or, the children may be very young, indicating the need of a trust and selection of a guardian. So, some estate plan, other than the joint ownership, may be indicated. In case the spouses die childless, the distribution provided by the statute is very unlikely to be preferred, as one-half of the property would go to one group of collateral heirs and the other half would go to the other group of collateral heirs. Either a change of title, or a contractual arrangement, or a contract-will combination, is indicated.

In the absence of fraud on creditors in creation, any estate by the entireties is not a part of the probate assets. Individual creditors of the first spouse to die cannot reach the property. The surviving joint tenant becomes the absolute owner of the jointly held property, upon the death of the cotenant, free of the claims of the heirs or creditors of the deceased. The estate of the deceased joint tenant takes nothing, his heirs take nothing, and his creditors take nothing; the surviving joint tenant takes everything.[124] A decedent's interest as a joint tenant is not a probate asset.

Where there is no fraud as to creditors in creating either tenancy, or in representation of title, there is no need for administration proceedings, on the death of one tenant, as far as creditors are concerned. The tenancy by the entirety is exempt from the Inheritance Tax in Indiana; but it might be advisable to administer for the purpose of having a record, as to such estate. Any real estate owned in joint tenancy is subject to this Tax in Indiana. Even if there is no necessity to administer, as far as creditors of the deceased tenant are concerned, it is advisable to have the short administration for this purpose, to clear the title to the realty. This is a relatively inexpensive procedure; and if the estate is not large enough to be subject to the Federal Estate Tax, the expenses in ordinary administration can be avoided by either form of tenancy.

123 State v. Gralewski's Estate 159 P.2d 211 (Ore. 1945).
124 Irvine v. Helvering, 99 F.2d 265 (1938).