Joint Tenancy and Estate Planning

Charles B. Stacey

JOINT TENANCY AND ESTATE PLANNING

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In many states both lawyers and laymen advise taking of title to property in joint tenancy[1] without sufficient knowledge of the legal incidents of this ancient common law estate. Due to the increasing use of this form of ownership, lawyers must learn both the advantages and disadvantages of joint tenancies.

Since joint tenancy involves the element of "survivorship," the taking of title to property in this form is usually a conscious act of estate planning. To the knowledgeable estate planner, however, joint tenancies are more often bothersome than useful. The planner is often faced with the problem of eliminating or otherwise allowing for "survivorship" property. There are few cases which justify the use of joint tenancy as a positive device of estate planning.

Clients often assume that attorneys have complete knowledge of all areas of the law. As we well know, human limitations make this assumption virtually impossible to meet. Therefore, this article is written to afford a summary outline and understanding of the somewhat complicated legal incidents of joint tenancies as they affect the estate planner and general legal counsel.

For these purposes, the non-tax incidents of joint tenancy can be summarized as follows:[2]

(1) During their lives, joint tenants own equal, undivided fractional property interests similar to those of tenants in common.

(2) Upon the death of one co-tenant, his interest passes to the surviving joint tenant under the deed or other instrument by which title was acquired. Therefore, a joint tenant has no power to dispose of his interest by will.

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[1] The term "joint tenancy" as used in this article means a joint estate in which the surviving co-owner takes the entire estate; the estate in property which may be created in Washington pursuant to Wash. Sess. Laws 1961, ch. 2, and which was known at common law as a joint tenancy. Although most references to joint tenancy in this article will assume that there are two co-owners, there may in fact be any number.

[2] For further detail, see the other articles in this issue of WASH. L. REV.; and see, *e.g.*, AMERICAN LAW OF PROPERTY § 6.1 *et seq.* (Casner ed. 1952).

(3) The element of survivorship may be destroyed as to both co-tenants by the voluntary conveyance by either co-tenant of his undivided interest.

(4) In most states the creditors of a joint tenant may reach his interest during his lifetime, but may not reach the interest of the non-debtor co-tenant. If the claims of the creditors do not "attach" to the interest of the debtor prior to his death, then the surviving co-tenant takes the whole property free of the claims of the decedent's creditors.[3] It is not possible, at this time, to predict the rights of creditors under the language of the Washington joint tenancy statute.

The inter-working of these basic rules of property law with the various state and federal death, gift and income tax laws provides a sometimes complicated set of "tax incidents" of joint tenancy. The lawyer must be familiar with the basic problems. They are presented here in quite general form, the purpose of this article being to point out the principle problems and ways to avoid them, rather than to discuss in detail the consequences of overlooking them. This latter aspect is sufficiently revealed in the reported decisions.

Gift Tax Problems Incident to Creation of Joint Tenancy

The general rule under both the federal and Washington gift tax laws is that a transfer of separate property to the transferor-owner and another as joint tenants results in a taxable gift to the other co-tenant equal to the value of a one-half undivided interest in the property.[4] This is essentially what the co-owner has received.[5]

If a husband transfers his separate property to himself and his wife as joint tenants with right of survivorship, he has (except as noted below) made a taxable gift for both federal and state purposes of one-half of the property. However, by utilizing the marital deduction under the federal gift tax,[6] the $30,000 specific exemption[7] and the $3,000 annual exclusion,[8] a husband can transfer substantial

[3] This is true only in a general sense, and varies from state to state. Some lawyers advise the use of joint tenancies for the partial protection they may give the wife from the husband's creditors, while others question the ethics of such a motive.

[4] INT. REV. CODE OF 1954, §§ 2511, 2523(d); Treas. Reg. § 25.2511-1(h)(5); RCW 83.56.030; Comm'r v. Logan, 109 F.2d 1014 (3d Cir. 1940); Comm'r v. Hart, 106 F.2d 269 (3d Cir. 1939); Lilly v. Smith, 96 F.2d 341 (7th Cir.), *cert. denied*, 305 U.S. 604 (1938); J. C. Gutman, 41 B.T.A. 816 (1940).

[5] Each of two co-tenants is entitled to receive one-half of the income, and either may dispose of his interest at any time, destroying the right of survivorship inherent in the original estate.

[6] INT. REV. CODE OF 1954, § 2523(a); Treas. Reg. § 25.2523(d)-1.

[7] INT. REV. CODE OF 1954, § 2521.

[8] INT. REV. CODE OF 1954, § 2503(b).

separate property to a marital joint tenancy without actually incurring any federal gift tax.[9] Note that gift tax returns must be filed in order to claim the lifetime exemption and the marital deduction.[10]

Purchase of joint tenancy property with the husband's separate funds is commonplace in most states which recognize joint tenancies. It has also been well-known for many years that in most such cases the donor neglects to file a gift tax return, primarily through ignorance of the requirements. Congress, recognizing this fact, provided in the Internal Revenue Code of 1954[11] that the purchase of *real property* in joint tenancy between husband and wife will not constitute a taxable gift unless an election is specifically made to have it taxed as a gift. This provision applies to all such purchases or "gifts" made after December 31, 1954. The election is made by filing a gift tax return and disclosing the gift on the return.

Before deciding whether to advise a client to use a joint tenancy for real property, and whether or not to elect to treat the purchase as a gift, a lawyer should think through the consequences of his advice in the particular case, and should read the Treasury Department regulations[12] applicable to this election.

When community property is transferred to husband and wife as joint tenants, there is no gift for gift tax purposes. Each spouse has entirely what he or she had before the transfer.

Gifts of personal property may be made with less formality than gifts of real property, so it is sometimes more difficult to tell when a gift has been made. Rights of ownership are also less clearly defined. Problems involving joint bank accounts and jointly held bonds are particularly common, and are the source of much litigation.[13]

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[9] If no part of the specific exemption has been used in prior years, $132,000 of separate property or funds may be transferred to a marital joint tenancy (or to community property status) without incurring a federal gift tax. The Washington gift tax provides a $10,000 exemption for gift to husband, wife or children (RCW 83.56.040) and an annual exclusion of $3,000 (RCW 83.56.050), so $26,000 of separate property may be transferred into a marital joint tenancy or into community property without tax.

[10] Int. Rev. Code of 1954, § 6019.

[11] Int. Rev. Code of 1954, § 2515.

[12] Treas. Reg. § 25.2515.

[13] The cases with respect to ownership of joint bank accounts are collected in numerous A.L.R. annotations, the most recent of which is at 149 A.L.R. 879 (1944). Cases involving gifts of U.S. Savings Bonds may be found at 40 A.L.R.2d 788 (1955). The practical gift tax rule is that no gift is made upon deposit of separate funds in a joint account; the gift is made upon withdrawal by the co-owner for his own purposes. Similarly, with respect to United States Savings Bonds registered in "*A* or *B*" form; if the bonds are purchased with *A*'s separate funds, there is a gift only when *B* cashes the bonds and retains the funds. Treas. Reg. § 25.2511-1(h)(4); Washington Gift Tax Regulations, Art. 7(d).

FEDERAL INCOME TAX

There are two income tax aspects of joint ownership: income and basis. Income from property held in joint tenancy belongs equally to the various co-tenants, and is taxable to them according to ownership.[14] Since enactment of the income splitting provisions in 1948, this has rarely been important to husband and wife co-tenants.

Problems of basis in determining gain or loss on disposition of joint tenancy property are somewhat more complicated. Ordinarily, property received by one person as the result of the death of another acquires a new basis for Federal income tax purposes equal to the fair market value at the date of the decedent's death.[15] However, prior to 1954, the general rule did not apply to property acquired by survivorship through rights under a joint tenancy. Property acquired by survivorship as the result of the death of a co-tenant prior to 1954 retains as its basis its original cost, adjusted by depreciation and other factors.[16]

This exception was changed by the Internal Revenue Code of 1954 as to joint tenants dying after December 13, 1953.[17] Joint tenancy property now acquires a new basis equal to the fair market value at the date of death of a co-tenant as to that portion of the property which is included in the decedent's gross estate for purposes of the federal estate tax. However, to the extent that the survivor acquired an interest in the property before the decedent's death (one-half in the case of two owners), the basis must be reduced by the survivor's share of depreciation, depletion, etc., allowed prior to the decedent's death.[18]

If the survivor contributed part of the purchase price, a proportionate part is excluded from the decedent's gross estate and receives no new basis.[19] Thus, in the case of joint tenancy property traceable to community property, one-half will acquire a new basis at the date of death of one spouse, being includable in his gross estate for estate tax purposes; the other half, excluded from the gross estate, does not acquire a new basis.

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[14] George K. Brennen, 4 T.C. 1260 (1945); 2 MERTENS, FEDERAL INCOME TAXATION, § 17.03.

[15] INT. REV. CODE OF 1954, § 1014(a).

[16] Lang v. Comm'r., 289 U.S. 109 (1933); Faraco v. Comm'r., 261 F.2d 387 (4th Cir. 1958).

[17] INT. REV. CODE OF 1954, § 1014(b)(9).

[18] *Ibid.;* Treas. Reg. § 1.1014-6(a) (2), (3), Ex. (2); Rev. Rul. 56-215, 1956-1 CUM. BULL. 324.

[19] Treas. Reg. § 1.1014-6(c) (1); Rev. Rul. 56-219, 1956-2 CUM. BULL. 123.

FEDERAL ESTATE TAX: INCLUSION IN GROSS ESTATE OF PROPERTY OWNED IN JOINT TENANCY AT DATE OF DEATH

It is often observed that the majority of estates are too small to be concerned with the federal estate tax, and that therefore the average lawyer can safely avoid any knowledge of the federal law. Apart from the general fallacy of this observation, a little knowledge of the federal estate tax as it deals with property held in joint tenancy will be helpful both in understanding income and gift tax matters and in dealing with the Washington inheritance tax.

The basic rule to remember is that property held in joint tenancy by the decedent and another at the date of death will be wholly includable in the decedent's gross estate for federal estate tax purposes, unless it can be proved that the surviving joint tenant contributed to the purchase of the property.[20] In a community property state this means that joint tenancy property purchased with the separate funds of the decedent will be entirely subject to the estate tax at his death.

On the other hand, such part of the property "as may be shown to have originally belonged to" the surviving joint tenant "and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth" will be excluded from the gross estate.[21] This means that a portion of the property will be excluded if it can be shown that the survivor actually contributed part of the purchase price of the property from his or her separate funds.

The fraction of the value of the property which will be excluded from the gross estate depends upon the portion of the original purchase price of the property which can be traced to the survivor. For instance, if the gross value of the joint tenancy property at the date of death is $20,000, and it can be proved that the survivor provided $5,000 out of an original purchase price of $10,000, or one-half of the purchase price, then $10,000, or one-half of the gross value of the property for estate tax purposes, will be excluded from the gross estate.[22]

This provision has been the source of much litigation. The cases teach two lessons. First, the burden is on the decedent's estate or the

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[20] INT. REV. CODE OF 1954, § 2040.
[21] *Ibid.*
[22] Treas. Reg. § 20.2040-1(a)(2).

survivor to prove that *any* amount was contributed by the survivor for the purchase of the property.[23] Second, the burden of proof is usually insurmountable.

Under the decisions, it is necessary to prove the *original* source of the fund with which the jointly held property was purchased.[24] Thus one is sometimes required to trace funds backward through time, through a series of purchases, sales, and exchanges, and through numerous bank accounts. After a lapse of many years, it is practically impossible in most cases to prove the source of the funds which were used to purchase the property.[25] The severity of the burden as applied by the courts has varied from case to case. For the estate planner, the principal lesson of the cases is that the source problem should be avoided if at all possible.

The use of community property or funds for the purchase of jointly-held property in the name of husband and wife presents a further problem. Although there is no direct authority on the point, it seems to be generally accepted that where community funds are used for the purchase of jointly-held property, the wife will be held to have contributed one-half.[26]

The same problems may arise in tracing funds to community sources as arise in tracing them to the separate property of the survivor. The presumption in favor of community status in Washington may be effective to shift the burden of proving the source of funds away from the decedent's estate. However, where the property is

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[23] Foster v. Comm'r., 303 U.S. 618 (1938).

[24] United States v. Jacobs, 306 U.S. 363 (1939). The language of Section 2040 is "...originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth...." In other words, money or property acquired by gift, or in exchange for money or property acquired by gift from the decedent, is not a contribution by the survivor.

[25] *Cf.*, Fox v. Rothensies, 115 F.2d 42 (3d Cir. 1940); and Estate of Joseph H. Heidt, 8 T.C. 969 (1947), *aff'd per curiam*, 170 F.2d 1021 (9th Cir. 1948), where the Tax Court commented as follows: "The question resolves itself into one of fact and the evidence before us is, in the most part, very unsatisfactory. This situation is due primarily to the fact that the principal witness was somewhat advanced in years and the transactions involved covered a period of almost fifty years, a situation which would tax the memory of any witness."

[26] In Estate of Paul M. Vandenhoeck, 4 T.C. 125 (1944), decided under pre-1942 law, the court commented as an alternative reason for holding for the taxpayer that since the joint tenancy property "was purchased with community funds, one-half of the consideration was furnished" by the surviving wife. MERTENS, FEDERAL GIFT & ESTATE TAXATION, § 15.07, takes the position that use of community funds constitutes a contribution by the surviving spouse. Between 1942 and 1948, however, community funds clearly did not qualify as a contribution by the spouse. Revenue Act of 1942, § 402(b); Estate of Joseph H. Heidt, 8 T.C. 969 (1947), *aff'd per curiam*, 170 F.2d 1021 (9th Cir. 1948); Steen v. United States, 195 F.2d 379 (9th Cir. 1952); Estate of Louis Richards, 20 T.C. 904 (1953), *aff'd per curiam*, 221 F.2d 808 (9th Cir. 1955).

held jointly by husband and wife, upon the husband's death it will make no difference in the amount of the federal estate tax whether the property is derived from the husband's separate property or community property, because of the marital deduction.

So much of the value of the property as is included in the gross estate will be deductible as part of the marital deduction (subject to the 50% limitation), if property acquired with the husband's separate funds is owned in joint tenancy between the decedent and his wife.[27] One-half of the joint tenancy property acquired with community funds will be included in the gross estate, but it will be completely excluded from the adjusted gross estate for computation of the maximum marital deduction, with the result that the *taxable* estate will be the same as if the property had been acquired with separate funds.[28] Because of the workings of the marital deduction, the estate tax will be less if the property is taken in common, in any case where the marital deduction is limited by the "fifty per cent of adjusted gross estate" rule.

A special rule governs the case where the joint tenants have acquired the property from a third party by gift, devise or bequest. An example of this is a devise of real estate by a father to his son and the son's wife as joint tenants. In such a case, upon the death of the first of the joint tenants to die, only one-half of the property will be includable in his gross estate.[29]

Such situations are not common. A very large proportion of joint tenancies are created by and between husband and wife, with their separate or combined funds. However, if a parent wishes to make a gift or devise to a child and the child's spouse, and the donees want

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[27] INT. REV. CODE OF 1954, § 2056(e)(5); Treas. Reg. § 20.2056(e)-1(a)(1). It follows that where the husband supplied the entire purchase price of the property from his separate funds, and he predeceases his wife, the estate tax will be the same, because of the marital deduction, whether the property is held in joint tenancy by husband and wife or in the husband's name alone; but the tax would be less if the property were held by tenants in common. On the other hand, if the wife dies first in this situation, the whole property may be taxable in her estate, if there is a tracing problem, for lack of proof that the funds derived from the husband.

[28] Although one-half of community property is includible in the gross estate, the entire amount of community property is excluded from the "adjusted gross estate" for the purpose of computing the 50% limitation on the marital deduction; property held in joint tenancy traceable to community funds is excluded from the adjusted gross estate for this purpose. INT REV. CODE OF 1954, § 2056(c) (2) (B). Thus, the maximum marital deduction remains the same, whether all or only one-half of joint tenancy property acquired with community funds is included in the gross estate, and in any case where the maximum marital deduction is utilized it is important that only one-half of the community property or joint tenancy property acquired with community funds be included in the gross estate.

[29] INT. REV. CODE OF 1954, § 2040.

to take title in joint tenancy, there may be both an estate and inheritance tax and a gift tax advantage in making the gift or devise in joint tenancy, as opposed to making it to the child alone, followed by a transfer to joint tenancy form.

To illustrate the rules discussed, let us assume that *H* purchases property in the name of himself and his wife, *W*, as joint tenants, with his separate funds. If the property is still held in this fashion at *H*'s death, the whole property will pass directly to *W* and will be includable in *H*'s estate for the purpose of federal estate tax; however, the whole property will likewise qualify for the estate tax marital deduction. If the property was purchased with community funds, then only one-half will be included in *H*'s gross estate, but no part will qualify for the marital deduction. These two situations are comparable, respectively, with *H*'s devising his separately owned property to *W*, and *H*'s devising his share of community owned property to *W*. For estate tax purposes, there is no difference.

If *F*, *H*'s father, had devised Blackacre to *H* and *W* as joint tenants, then at *H*'s death one-half of the property would be includable in *H*'s gross estate, and would qualify for the marital deduction.

However, if *H*, using his separate funds, purchased property in joint tenancy among three persons, *H*, *W*, and *S*, their son, at *H*'s death the whole property would be subject to the estate tax. It would not qualify for the marital deduction because *W*'s interest would be a "terminable interest"; that is, an interest in the whole property would pass from *H* to someone other than W.[30] If community funds had been used for the purchase, only one-half of the property would be taxed in *H*'s estate.

WASHINGTON INHERITANCE TAX

The Washington Inheritance Tax is similar to the federal law in dealing with joint tenancies. The entire amount of property held in joint tenancy by the decedent and another will be subject to the inheritance tax at the decedent's death, except such part as can be shown to have been contributed by the survivor.[31]

The language of the Washington statute is sufficiently close to the federal provision to place upon the survivor the same difficult burden of proof which is encountered under the federal law. If the survivor

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[30] INT. REV. CODE OF 1954, § 2056(b); S. REP. No. 1013, 80th Cong., 2d. Sess., reprinted at 1948-1 CUM. BULL. 285, 337.

[31] RCW 83.04.020.

cannot prove contribution, then the whole value of the property will be subject to tax.

Although the inheritance tax contains specific exemptions[32] for property passing to persons related to the decedent, there is no blanket marital deduction for property passing to the decedent's wife. So when the total value of property passing to the decedent's spouse exceeds the $10,000 exemption, the whole amount of property held in joint tenancy and purchased with the decedent's funds will be subject to the tax.

Where jointly-held property is purchased with the decedent's separate funds, the inheritance tax will be the same whether the property is purchased in the husband's name and devised to the wife, or in the names of the husband and wife as joint tenants. Assuming that the husband dies first, there will be an inheritance tax saving if the property is acquired in common or is converted to a tenancy in common or to community property.

Where community funds are used for the purchase of property, the tax will be the same whether the property is taken in joint tenancy or tenancy in common or as community property. If the joint tenancy form of ownership is used, a tracing problem may exist, subject to the presumption in favor of community status.

Liquidity and Other Problems

The lawyer planning an estate must keep in mind the necessity for liquidity of the probate estate, that is, the practical necessity for a fund of cash, or property which may be readily converted into cash, available for the payment of debts, funeral expenses, costs of administration and death taxes.

The decedent's ownership of property which will not pass into the probate estate may create problems of liquidity. Generally this will not be true where the property is the jointly-owned residence of the decedent and his wife, although there are cases where it can be anticipated that the residence should be sold upon the death of one spouse. The problem generally arises where bank accounts, bonds and stocks, usually the only sources of funds available to an estate besides life insurance, are held jointly with right of survivorship. Life insurance proceeds are commonly made payable to beneficiaries

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[32] RCW 83.08.020.

other than the estate to avoid inheritance taxes,[33] so they are not directly available to the executor.

The severity of the problem will depend, of course, upon the size of the estate, and upon whether the will contains a "tax clause."[34] The federal estate tax, if any, will ordinarily be payable by the executor, whether or not there is a tax clause.[35] The inheritance tax on non-probate property will not ordinarily be payable out of the assets subject to administration, in the absence of a tax clause, but the executor may nevertheless in many cases be expected to pay such taxes as a matter of convenience.[36]

In many cases the only way to avoid selling personal or real property of unique value is to have the widow or other beneficiaries advance funds to the estate, out of life insurance proceeds, joint bank accounts, or their own property.

In planning, therefore, the lawyer must consider the effect of joint tenancies not only in placing the property beyond the reach of the executor, but also as possibly adding to the cash needs of the estate while at the same time subtracting from its resources.

Another matter that should receive attention in estate planning is the actual ownership of property which will or may be subject to tax in the decedent's estate. We have already alluded to problems of determining whether a gift has been made in the case of personal property. Such problems become acute at the death of one of two or more joint tenants. Elimination of such potential problems in proper cases should be a standard part of the estate planning process.[37]

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[33] RCW 83.16.080 exempts from the inheritance tax life insurance up to $40,000 payable to beneficiaries other than the executor.

[34] "Tax clause" means a provision in a decedent's will directing where the burden of payment of estate and inheritance taxes shall fall. The tax clause may provide for payment of taxes out of the residuary estate, or for apportionment of taxes among the beneficiaries, or otherwise. In the absence of a tax clause, the incidence of death taxes depends upon state law. Some states have adopted estate tax apportionment acts providing for apportionment of the federal estate tax in the absence of a tax clause. In Washington, the federal estate tax is ordinarily payable out of the residuary estate. The burden of an *inheritance* tax, on the other hand, in the absence of a tax clause, is on the individual beneficiary of the property, though the tax may be payable by the executor in some instances.

[35] Federal law places primary liability for payment of the estate tax upon the executor. INT. REV. CODE OF 1954, §§ 2002, 2203-05. However, it also purports to give a right of reimbursement to the executor for a portion of the tax paid, against the recipients of certain property not coming into his hands, such as life insurance. INT. REV. CODE OF 1954, §§ 2206-07.

[36] RCW 83.04.010, 83.44.050 and 83.44.060 place liability for the inheritance tax on the recipient of the property the transfer of which is subject to the tax. However, the executor will probably pay the tax on the share of a beneficiary if he has in his hands funds or liquid property which also are bequeathed to that beneficiary.

[37] See note 13, *supra*. The inheritance tax cases on United States Savings Bonds in "*A* or *B*" form are collected in an annotation at 39 A.L.R.2d 698 (1955). An interest-

DISPOSING OF JOINT TENANCIES

The estate and inheritance tax problems caused by holding property in joint tenancy—difficult tracing problems, potential litigation and greater taxes—may be avoided if dealt with at the estate planning stage. If a client is to hold property in joint tenancy with his wife, it should be determined whether it is possible to trace the funds with which the property was acquired; the facts may be obtained while the decedent, who will ordinarily be in possession of the records (if any), is still living. If the opportunity arises at the time property is to be acquired in joint tenancy, the funds to be used may be clearly identified.

However, it should be clear from the foregoing discussion that from the standpoint of both the federal estate tax and the Washington inheritance tax there is no advantage in acquiring property in joint tenancy, and there may be serious disadvantages. As a part of the estate planning process, where the client already owns property in joint tenancy, the solution in a majority of cases will be to eliminate the joint tenancy and convert it to a tenancy in common, to community property, or to some other form of ownership. This may give rise to certain other gift and estate tax problems.

(1) Gift Tax. If jointly held property is transferred to either spouse or co-tenant as separate property, there will ordinarily be a gift from the spouse whose interest is terminated to the other spouse, equal to one-half of the property. Of course, where the property was transferred into a marital joint tenancy or purchased with separate funds after December 31, 1954, and where an election was not filed to treat it as a taxable gift for federal purposes, return of the property or of the proceeds of sale to the spouse who made the transfer will not constitute a gift, but may be necessary to eliminate a taxable gift if the property has been sold.[38]

If, on the other hand, property held in joint tenancy is "converted" into community property, each spouse has what he or she had before, and there is no taxable gift unless the original transfer into joint

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ing estate tax case is Estate of Harold W. Grant, 1 T.C. 731 (1943), where separate funds of the husband had been deposited in a joint bank account; immediately prior to the husband's death, while he was in a coma, the wife withdrew the balance and deposited the funds in her separate account; it was held that in the absence of any agreement to the contrary, the joint tenancy continued and the funds were wholly includible in the decedent's estate for federal estate tax purposes. Silverman v. McGinnes, 259 F.2d 731 (3d Cir. 1958), indicates the status of litigation on Savings Bonds.

[38] Treas. Reg. § 25.2515-1(d).

tenancy form was of separate property, after December 31, 1954, and an election to treat it as a taxable gift was not filed; in such case the later transaction would in effect constitute a transfer from one spouse of his or her separate funds to community property, and would constitute a gift of one-half to the other spouse,[39] qualifying, of course, for the gift tax marital deduction under federal law.

A gift of joint tenancy property by husband and wife to a third person (such as a child) constitutes a gift of one-half of the property by each spouse. This statement is again subject to the limitation that if the original acquisition of the joint tenancy property was with separate property funds and took place after December 31, 1954, and an election was not filed to treat it as a taxable gift, the later gift will be treated as a gift by only one spouse for purposes of the federal tax; it will, however, qualify for the marital deduction, the other spouse having the right to elect to treat the gift as one-half her or his own.[40] If the property was originally community property, the gift will be one-half attributable to each spouse.

It sometimes appears, upon investigation of a client's affairs, that without the filing of a single gift tax return the same property or successive properties have been transferred in and out of joint tenancies several times, resulting in as many taxable gifts as there have been transfers.

One should always attempt, in the process of planning an estate, to sort out the past gifts of his client and to make sure that appropriate gift tax returns are filed where required by law,[41] even though they may be delinquent returns. In this connection, it must be remembered that an election to treat a transfer of separate real property to husband and wife as joint tenants as a taxable gift must be made on a timely filed return, and cannot be made after the due date for filing the return has passed.[42]

(2) **Estate and Inheritance Taxes.** If it is concluded that property held in joint tenancy should be transferred to the joint tenants individually, or given to other family members in order to remove it from the decedent's estate, must any additional estate or inheritance tax problems be taken into consideration as a result of the proposed transfer?

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[39] *Ibid.*
[40] INT. REV. CODE OF 1954, § 2513.
[41] INT. REV. CODE OF 1954, §§ 6019, 6075(b); RCW 83.56.090.
[42] INT. REV. CODE OF 1954, § 2515(c).

If a joint tenancy is converted to a tenancy in common, the undivided one-half interest held by the decedent at the date of his death will clearly be includable in his gross estate for federal estate tax purposes and will be subject to inheritance tax. Where the transfer is made within three years of the decedent's death, it has been argued that the *whole* property is taxable as a transfer made in contemplation of death.[43]

When a joint tenancy is converted in contemplation of death to a tenancy in common, the only change in the rights of the parties is elimination of the survivorship feature of the estate. During his lifetime, the most the decedent could have disposed of, either under the joint tenancy or the tenancy in common, was an undivided half interest. His right to take the whole property if he survived would have value only if at the time of the conversion he had a greater chance of survival than his co-owner, and he had power not to give this value to another person, but only to surrender it.

The same principles apply when property held in joint tenancy by husband and wife is transferred to a third party in contemplation of death; the decedent has only an undivided one-half interest which is subject to transfer by him, and this is all that he can transfer.

The courts have generally agreed with this analysis of these situations and have included in the decedent's gross estate only one-half of the property.[44] The Internal Revenue Service, however, is apparently continuing to press its position that the whole amount of the property is includable in the husband's estate under these circumstances,[45] presumably because it does not like the fact that by a simple transfer without gift tax one can remove half of the value of

[43] INT. REV. CODE OF 1954, § 2035, provides that any gifts made by a decedent within three years of the date of his death shall be deemed to have been made in contemplation of death, and thus be includible in his gross estate, unless the contrary is shown.

[44] Conversion of joint tenancy to tenancy in common—one-half taxable: Sullivan's Estate v. Comm'r, 175 F.2d 657 (9th Cir. 1949); Steen v. United States, P-H FED. TAX SERV. ¶ 72542 (D.C. Cal. 1951), *aff'd without mention of this point*, 195 F.2d 379 (9th Cir.), *cert. den.*, 344 U.S. 822 (1952); Baltimore National Bank v. United States, 136 F. Supp. 642 (D.C. Md. 1955); English v. United States, 270 F.2d 876 (7th Cir. 1959) (apparently one-half, but opinion not clear); Estate of Edward Carnall, 25 T.C. 654 (1955), *Comm'r acq.*, 1956-1 CUM. BULL. 3. *Contra* (whole property taxable), Commonwealth Trust Co. v. Driscoll, 50 F. Supp. 949 (D.C. Pa.), *aff'd per curiam*, 137 F.2d 653 (3d Cir. 1943); Estate of Henry Wilson, 2 T.C. 1059 (1943); and Harris v. United States, 193 F. Supp. 736 (D.C. Neb. 1961), although the holding in the latter two cases is not clear. Gift of joint tenancy property to third person—one-half includible in gross estate: Sullivan's Estate v. Comm'r, *supra;* Brockway's Estate v. Comm'r, 219 F.2d 400 (9th Cir. 1954); English v. United States, *supra* (apparently holds one-half includible, but opinion not clear).

[45] The most recent case is Harris v. United States, 193 F. Supp. 736 (D.C. Neb. 1961).

property from his taxable estate.[46] The courts have generally recognized such transfers as a proper method of reducing death taxes.[47]

A somewhat different question is presented where the joint tenants make a gift of a remainder interest in the property, but retain an interest for their lives, either in the form of a joint life estate, or in trust. The decisions in this area are inconsistent.[48] They teach primarily that such transfers are to be avoided, since they lead to litigation.

CONCLUSION

Every lawyer who deals in joint tenancies is planning the disposition of his client's estate. He must know the consequences of his advice. Those who have the opportunity to examine a client's affairs and to plan the disposition of his estate will have to determine whether property should be held in joint tenancy or otherwise. The following matters should be considered:

(1) Property held in joint tenancy is not subject to disposition by will. The testator loses control over disposition of the property and sacrifices flexibility in planning his estate.

(2) Liability for gift taxes may inadvertently be incurred upon creation and destruction of joint tenancies.

(3) Use of joint tenancies may result in greater estate and inheritance taxes upon the estate, but this is not particularly important in joint estates between husband and wife.

(4) Joint tenancies have given rise to a considerable amount of litigation, both in determining ownership and disposition of property and in contesting tax liability.

(5) Liquidity of the decedent's estate is often a problem because of excessive use of joint and survivorship estates.

Finally, consider the universally accepted attitude of the experienced estate planner: joint tenancy is never an adequate substitute for a will.

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[46] One argument made by the Commissioner in Sullivan's Estate v. Comm'r, 175 F.2d 657 (9th Cir. 1949), was that any transfer in contemplation of death is taxable simply because it reduces the decedent's estate.

[47] See particularly Sullivan's Estate v. Comm'r, 175 F.2d 657 (9th Cir. 1949).

[48] One-half includible: Estate of A. Carl Borner, 25 T.C. 584 (1955); Estate of Glaser v. United States, 196 F. Supp. 47 (D.C. Ind. 1961). Whole property includible: Horner's Estate v. Comm'r, 130 F.2d 649 (3d Cir. 1942); Estate of Frank N. Derby, 20 T.C. 164 (1953); Rev. Rul. 57-448, 1957-2 CUM. BULL. 618.