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TAX CONSEQUENCES OF JOINT OWNERSHIP OF PROPERTY

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THE almost overwhelming trend in recent years toward the use of various forms of joint ownership[1] of property, particularly by husband and wife, is indicative of a widespread failure to realize all the implications of such title-holding devices. A companion article[2] has outlined the general legal attributes of the common forms of joint ownership. However, because the growth in the use of joint tenancy and its kindred has coincided with an increase in the impact of income and death taxes,[3] it has become important also to understand the results of employing these devices in the context of taxation. It is the purpose of this article to point out some of the problems which arise under the federal gift, estate and income taxes, and under the West Virginia inheritance and transfer tax as a result of the use of joint estates in real and personal property.

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1 The terms "joint estates" and "joint ownership" as used in this article are intended to include all forms of ownership by which two or more persons possess concurrent interests in property. As employed in this article, the term "joint tenancy" will often be used to include tenancy by the entirety, but is ordinarily used in the common law sense to describe a joint estate in which the surviving co-owner takes the whole estate.

2 Merricks, *Joint Estates in Real Property in West Virginia*, 61 W. VA. L. REV. 101 (1959).

3 Not only have the rates of these taxes remained relatively fixed for some years, but the basic exemptions have not been increased despite continued inflation; as a result income, estate, inheritance and gift taxes have become important to many individuals who would not have been materially affected by them twenty years ago.

I. Federal Gift Tax

The federal gift tax[4] applies generally to all transfers of property by gift. Its principal purpose is to curtail avoidance of the federal estate tax by the making of substantial lifetime gifts of property.[5] The law provides for an exclusion of the first $3,000 in value of gifts to each donee in any calendar year, and an overall lifetime exemption of $30,000 for gifts in excess of annual exclusions.[6]

A. Application to joint estates

Until the enactment of the Internal Revenue Code of 1954, there was no specific mention in the law of the applicability of the gift tax to the creation of joint estates of various kinds.[7] However, it was contended from the first that the tax applied to the creation of all joint estates where the co-owner received an interest in property without adequate consideration.[8]

Basic principles in this area have been settled in judicial controversies arising out of the creation of tenancies by the entirety. Immediately upon the enactment of the new gift tax, the government attempted to impose the tax upon the conveyance of property to husband and wife as tenants by the entirety, where the entire consideration was paid by or the property originally belonged to the husband. At first the Board of Tax Appeals accepted the taxpayers' argument that there was not a sufficient transfer of rights in the property to the wife to sustain imposition of the tax, in the absence of a clear indication of congressional intent.[9] However, these decisions were quickly reversed, and the courts have long agreed unanimously that there is a sufficient transfer of rights to support the tax.[10]

Another argument advanced on behalf of the taxpayer and rejected in these cases, equally applicable to joint tenancies, was that as the whole property was includable in the husband's estate

[4] INT. REV. CODE OF 1954, §§ 2501-2524.

[5] PAUL, FEDERAL ESTATE AND GIFT TAXATION § 15.05 (1942).

[6] INT. REV. CODE OF 1954, §§ 2503(b), 2521; the exclusion does not apply to a gift of a "future interest," generally an interest which does not begin in enjoyment until a future time.

[7] The federal gift tax was first introduced in 1924 (Revenue Act of 1924, §§ 319-324), and abandoned in 1926 (Revenue Act of 1926, § 1200(a)); it was reenacted in 1932 (Revenue Act of 1932, §§ 501-532).

[8] Inclusion was contended for under the broad language imposing the tax upon "the transfer . . . of property by gift." Revenue Act of 1932, § 501(a); INT. REV. CODE OF 1939, § 1000(a).

[9] See, for instance, William H. Hart, 36 B.T.A. 1207 (1937).

[10] Lilly v. Smith, 96 F.2d 341 (7th Cir. 1938), *cert. denied*, 305 U.S. 604 (1938); Commissioner v. Hart, 106 F.2d 269 (3d Cir. 1939); Commissioner v. Logan, 109 F.2d 1014 (3d Cir. 1940); J. C. Gutman, 41 B.T.A. 816 (1940).

at his death, for federal estate tax purposes,[11] Congress should not be assumed to have intended the gift tax to apply to the creation of the tenancy. But the courts have not accepted the argument for mutual consistency between the estate and gift taxes, and it has been noted in rejecting this argument that the estate tax provides a credit for gift taxes paid with regard to property included in the taxable estate.[12]

B. *Value of gift*

Upon the creation of a tenancy in common between *A* and *B*, where the entire consideration is paid by *A*, there is clearly a gift from *A* to *B* of a fractional undivided interest in the property; that this constitutes a taxable gift has apparently never been questioned.[13] Similarly, upon the transfer by *A* of property to *A* and *B* as joint tenants, *A* has made a taxable gift of one-half the value of the property to *B*,[14] as the joint tenancy gives *B* an effective half interest subject only to *A*'s right of survivorship, which may be destroyed by *B*.

The value of the gift made as the result of the creation of a tenancy by the entirety depends upon the respective rights of the co-owners under state law.[15] Ordinarily, neither the husband nor the wife can convey his or her interest separately or destroy the right of survivorship; thus the total value of the rights of either will depend upon the life expectancy of each co-owner and the

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[11] *Infra*, Part II of this article.

[12] Lilly v. Smith, 96 F.2d 341 (7th Cir. 1938), *cert. denied*, 305 U.S. 604 (1938); J. C. Gutman, 41 B.T.A. 816 (1940). In Commissioner v. Hart, 106 F.2d 269 (3d Cir. 1939), the court took note of the fact that if the wife died first there would be no credit. Another argument advanced by the taxpayers in the *Lilly* and *Gutman* cases, and rejected, was that no gift was intended, but that the husband was merely fulfilling his obligation to furnish a residence for his family.

[13] See, for instance, Treas. Reg. § 25.2511-1(e) (1958): "If a donor transfers by gift less than his entire interest in property, the gift tax is applicable to the interest transferred. The tax is applicable, for example, to the transfer of an undivided half interest in property . . . ."

[14] Under the usual rules governing the rights of joint tenants, each of two cotenants is entitled to receive one-half the income, and either may dispose of his interest at any time and may destroy the right of survivorship inherent in the original estate. Accordingly, if *A* purchases property in the names of *A* and *B* as joint tenants, he makes a gift to *B* equal to one-half the value of the property. Treas. Reg. § 25.2511-1(h)(5) (1958); Treas. Reg. 108, § 86.2(a)(5) (1949).

[15] In Hopkins v. Magruder, 122 F.2d 693 (4th Cir. 1941), property belonging to the husband was conveyed to husband and wife as tenants by the entirety; the husband argued that the value for gift tax purposes should be reduced by the wife's prior dower interest in the property, but the court held that on the facts no dower interest existed. It has been held generally for gift tax purposes that the inchoate dower or curtesy of a spouse will not be recognized. Correlia Mason Thompson, 37 B.T.A. 793 (1938).

chance that each will survive the other.[16] The Treasury Department has long taken the position that these rights are capable of valuation for gift tax purposes under accepted actuarial principles. Although in an individual case the value thus computed will not be accurate, because dependent on tables based on average life expectancy, actuarial valuation for gift tax purposes in cases of tenancies by the entirety has been accepted by the courts.[17]

Other types of joint interests, such as joint life estates, are also valued on actuarial principles.[18]

C. *Joint tenancy of husband and wife in real property under Internal Revenue Code of 1954*

Any transfer of property to joint tenants or tenants by the entirety prior to January 1, 1955, resulted in a gift subject to the gift tax. In considering revision of the law in 1954, Congress recognized the widespread ignorance of this fact, and, presumably, the impracticability of enforcing the tax in the majority of cases.[19] The 1954 Code[20] provides that in the case of a creation of a tenancy by the entirety or a joint tenancy between husband and wife in real property[21] no taxable gift shall be considered to be made unless the donor elects to have the transaction subjected to the gift tax.

The election is made by filing a timely gift tax return for the calendar year in which the gift is made. The return must be filed in order to make the election effective regardless of whether there will be any tax due.[22] In the common case of a residence purchased in installments by the husband in the name of himself and his wife as joint tenants or as tenants by the entirety, an election will be open to the husband for each year in which payments are made,

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[16] Value will depend also on the income during their joint lives. In most states where the estate is recognized, the income belongs half to each; however, in some states the husband is entitled to receive all the income. See Part III, *infra;* Treas. Reg. § 25.2515-2(c) (1958).

[17] Commissioner v. Hart, 106 F.2d 269 (3d Cir. 1939); J. C. Gutman, 41 B.T.A. 816 (1940); the measure of the tax is "the value of such property less the present worth of the right of the husband to the income or other enjoyment of the property, or share thereof, during the joint lives of the spouses, and the present worth of his right to the whole of the property should he survive his wife." ACTUARIAL VALUES FOR ESTATE AND GIFT TAX, I.R.S. Publication No. 11 (1955), 24; Treas. Reg. § 25.2515-2 (1958); Treas. Reg. 108, § 86.19(h) (1949).

[18] Treas. Reg. § 25.2512-5(e) (1958).

[19] H.R. REP. No. 1337, 83d Cong., 2d Sess. 94, A323 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 128, 480 (1954).

[20] INT. REV. CODE OF 1954, § 2515.

[21] The provision does not apply to personal property.

[22] INT. REV. CODE OF 1954, § 2515(c).

and a gift tax return will have to be filed for each year if the husband wishes to elect to make a gift each time.[23]

The Code provides that if an election is not made, then a gift will be deemed to be made at the "termination" of the tenancy, "to the extent that the proportion of the total consideration furnished by each spouse multiplied by the proceeds of such termination (whether in the form of cash, property, or interests in property) exceeds the value of such proceeds of termination received by such spouse."[24] There is no "termination" for this purpose upon the death of a spouse. The Code is otherwise silent as to what shall constitute a "termination".

One of the situations which has been of particular concern since the enactment of the new law is that of the sale by the husband and wife of their jointly owned residence, and reinvestment of the proceeds in another property. The Treasury Department regulations answer this problem by assuming no gift if the proceeds of sale of the old property are not divided, but are reinvested in another property within a reasonable time.[25] Another problem involves a determination of the proceeds "received" by each spouse upon termination by sale.[26] Other questions may be anticipated under this new provision, some of which are dealt with by the regulations.

D. *Joint estates in personal property*

The rules outlined above apply equally to real and personal property. However, additional problems arise in some instances in connection with devices for joint ownership of personal property, because of the nature of the property or the relatively informal methods of dealing with it.

For instance, the deposit of funds by *A* to the account of "*A* or *B*" offers no objective test of ownership of the funds. Whether this creates a "joint tenancy", with all the implications of that term, or whether different rights of some kind, or no rights at all accrue to *B*, as against *A*, as the result of such a deposit has been the source

[23] Treas. Reg. § 25.2515-2 (1958).

[24] INT. REV. CODE OF 1954, § 2515(b).

[25] Treas. Reg. § 25.2515-1(d)(2) (1958), requires that there be no division of the proceeds, that the spouses enter into a contract to purchase other property on or before the due date of the gift tax return for the year in which the old property is sold, and that within a reasonable time thereafter they purchase such other property and hold it in a tenancy identical to that in which they held the original property.

[26] See Treas. Reg. § 25.2515-1(d)(3) (1958).

of a considerable amount of litigation.[27] The Treasury Department's position with regard to joint accounts has been that a gift occurs when the depositor, *A*, allows *B* to withdraw the funds for his own benefit.[28]

Likewise, bonds purchased by *A* in "*A* or *B*" form are considered subject to the gift tax only when *B* is allowed to redeem them and retain the proceeds.[29] Actual ownership of bonds and other securities may in some instances, however, be in one other than the registered owner or owners.[30]

E. *Gift tax marital deduction*

For the purpose of computing the amount of gifts subject to the gift tax, a deduction is allowed in the amount of one-half the value of property given to the donor's spouse.[31] The deduction is not allowed where the interest transferred to the spouse "will terminate or fail" under certain conditions, and ordinarily is not available where, as in the case of joint tenancies, the property will revert to the husband or to some other person if the wife predeceases him.[32] However, it is provided that in the case of creation of a joint tenancy or tenancy by the entirety, where there are no other co-owners except husband and wife, the deduction will be allowed.[33] Thus a husband may create a joint tenancy with his wife in property

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[27] See Annot., 149 A.L.R. 879 (1944), supplementing numerous prior annotations. Lett v. Twentieth Street Bank, 138 W. Va. 759, 77 S.E.2d 813 (1953), held that by reason of W. VA. CODE c. 31, art. 8, § 23 (Michie 1955), a "joint tenancy" exists in an account in "or" form.

[28] Treas. Reg. 108, § 86.2(a)(4) (1949); Treas. Reg. § 25.2511-1(h)(4) (1958).

[29] Min. 5202, 1941-2 CUM. BULL. 241; Treas. Reg. § 25.2511-1(h)(4) (1958). Pursuant to Min. 5202, purchase by *A* of bonds in name of "*A* payable on death to *B*" does not constitute a taxable gift.

[30] The Treasury Department has taken the position that government regulations with regard to savings bonds and the registration of such bonds are controlling on the question of ownership. For cases on savings bonds, see Annot., 40 A.L.R.2d 788 (1955); and see Silverman v. McGinnes, 259 F.2d 731 (3d Cir. 1958). An illustration of the problems of donative intent and actual ownership of securities is Charles Guzy, 8 CCH TAX CT. MEM. 681 (1949), where the husband bought securities for himself and his wife by the entireties, sold them, deposited the proceeds in a joint account, then transferred them to a separate account. It was held that the purchase of the securities resulted in a taxable gift to the wife.

[31] INT. REV. CODE OF 1954, § 2523(a), as limited by § 2524.

[32] *Id.* § 2523(b).

[33] *Id.* § 2523(d); Treas. Reg. § 25.2523(d)-1 (1958), provides that the deduction shall be one-half the value of the interest in property passing to the donee spouse. Of course, if *A* transfers property to *A*, *B* and *C* as joint tenants, the interest of *B* (*A*'s wife) will be terminated by her death prior to either *A* or *C*, and the marital deduction is not allowed. Rev. Rul. 54-410, 1954-2 CUM. BULL. 321, provides that the deduction will not be allowed where *A* purchases bonds in the name of "*B*, payable on death to *A*."

worth up to $12,000 without utilizing any part of his $30,000 lifetime exemption, and, using the full amount of the lifetime exemption, may create a joint tenancy with his wife in property worth up to $132,000 without payment of any gift tax. However, a gift tax return must be filed for any year in which the gross value of gifts to any person exceeds $3,000, regardless of the marital deduction and lifetime exemption, and regardless of whether any tax is due.[34]

II. Federal Estate Tax

The federal estate tax[35] is imposed upon the "gross estate," as defined for estate tax purposes,[36] of a decedent, at rates varying from 3% to 77% of the "taxable estate."[37] In the computation of the taxable estate deductions are allowed for debts of the decedent, funeral expenses and costs of administration of the estate.[38] A specific exemption is allowed to all estates in the amount of $60,000,[39] so that if the gross estate does not exceed that figure, plus the debts and expenses, there will be no tax, although a return must be filed if the gross estate exceeds the $60,000 figure.[40] A deduction is allowed up to one-half of the "adjusted gross estate"[41] for property included in the gross estate which passes to the decedent's spouse.

The application of the estate tax to each of the various types of joint ownership in property depends upon the nature of the property interests involved and upon specific provisions of law. Fractional undivided interests in property held in common are includable in the gross estate of a decedent under the general provisions of law.[42] Other types of ownership, such as joint life estates or joint interests in trusts, are discussed hereinafter.[43]

The federal estate tax provisions have since 1916 contained a specific reference to the inclusion of property held jointly with right of survivorship.[44] The present section of the law,[45] which has remained substantially unchanged for many years, states the general rule that the *whole* value of the property, and not just a

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34 Int. Rev. Code of 1954, § 6019.
35 *Id.* §§ 2001-2106.
36 *Id.* § 2031.
37 *Id.* § 2001.
38 *Id.* §§ 2051-2056.
39 *Id.* § 2052.
40 *Id.* § 6018.
41 In the usual case, the gross estate less debts, funeral expenses and costs of administration; Int. Rev. Code of 1954, § 2156(c).
42 *Id.* § 2033; Harvey v. United States, 185 F.2d 463 (7th Cir. 1950).
43 Part IIB of this article, *infra*.
44 Revenue Act of 1916, § 202(c).
45 Int. Rev. Code of 1954, § 2040.

fractional part, will be included in the estate of the co-owner who dies first, except to the extent that it can be proved that the survivor contributed to the purchase price of the property. This rule does not apply, of course, where the property was acquired by the decedent and his co-owner by gift, devise or inheritance from some other person, in which case only the decedent's fractional interest in the property will be included in his estate for estate tax purposes, as in the case of property owned in common.[46]

The validity of the inclusion in the measure of the estate tax of the entire property, where the decedent has, according to rules of property law, a lesser interest, was attacked by taxpayers on constitutional grounds at an early date, but the courts have found a sufficient transfer of property rights by reason of the death of a co-owner to justify the imposition of the tax.[47] It is also settled that the whole property is includable in the gross estate without regard to when it was acquired or when the joint estate was created, as against the contention of taxpayers that the provision is unconstitutionally retroactive when applied to joint estates created prior to the enactment of the law.[48]

A. *Problems where survivor has provided part of consideration for purchase of property*

1. *Computation of amount includable where there is a contribution by the survivor.* Where it has been shown that the survivor contributed a portion of the purchase price of property held in joint tenancy out of his own funds, the amount includable in the estate of the decedent is that proportion of the value of the whole property which the amount of the decedent's contribution bears to the total purchase price of the property.[49] For instance, if it can be shown

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[46] *Ibid.*

[47] Tyler v. United States, 281 U.S. 497, 503-504 (1930): "Before the death of the husband . . . the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; but her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other."

[48] Gwinn v. Commissioner, 287 U.S. 224 (1932); Griswold v. Helvering, 290 U.S. 56 (1933); United States v. Jacobs, 306 U.S. 363 (1938).

[49] INT. REV. CODE OF 1954, § 2020, states the proportion in terms of the part of the total value of the property which is to be *excluded* from the decedent's estate; the stated interpretation is apparently universally agreed upon, in spite of the possible alternative construction.

that the survivor furnished $5,000 out of a total of $20,000 paid for property with a total value for estate tax purposes of $30,000, $7,500 would be included in the decedent's gross estate.

2. *Original source of funds.* The statute contains a specific requirement that one must look further than the transaction in which the particular property owned at the decedent's death was purchased, in order to determine whether the survivor has contributed to the purchase price.[50] To satisfy this requirement, the original source of the funds used to purchase property held in joint tenancy at the death of the decedent must be determined to have been someone other than the decedent. For example, where a wife contributes half the purchase price of the property out of cash or the proceeds of sale of other property previously given her by her husband, the whole of the property is includable in the husband's estate for estate tax purposes, because the original source of the funds contributed by the wife in connection with the transaction was the husband.[51]

3. *Proof of contribution by survivor.* The burden of proof is on the decedent's estate to show that the survivor contributed any part of the purchase price of property held in joint tenancy.[52] This burden in many cases presents insurmountable obstacles to the decedent's executor, and it may be offered as one of the principal objections to the use of the joint tenancy device in any case where more than one co-owner contributes to the purchase price of joint property.

One question on which the decisions are divided is whether it is necessary to "trace" specific funds through bank accounts and other properties in order to identify them as contributions of the

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[50] *Id.* § 2040: ". . . 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 or full consideration in money or money's worth . . . ."

[51] United States v. Jacobs, 306 U.S. 363 (1938); Stuart v. Hasset, 41 F. Supp. 905 (D.C. Mass. 1941); Estate of Edward T. Kelley, 22 B.T.A. 421 (1931), *acq.*, X-2 CUM. BULL. 37 (1931); Elizabeth F. Bowditch, 23 B.T.A. 1266 (1931); Treas. Reg. § 20.2040-1(c)(4) (1958); McCrady v. Heiner, 19 F. Supp. 575 (D.C. Pa. 1937), *contra*, before the decision in *Jacobs, supra.*

[52] Foster v. Commissioner, 303 U.S. 618 (1938); Fox v. Rothensies, 115 F.2d 42 (3d Cir. 1940); McGrew's Estate v. Commissioner, 135 F.2d 158 (6th Cir. 1943); Bushman v. United States, 8 F. Supp. 694 (Ct. Cl. 1934); Henry M. Butzel, 21 B.T.A. 188 (1930); City Bank Farmers Trust Co., 41 B.T.A. 1 (1940); Estate of Jesse E. Rogers, 1941 P-H B.T.A. MEM. DEC. ¶ 41,077; Estate of Elwood Mead, 1942 P-H B.T.A. MEM. DEC. ¶ 42,236; Estate of Henry Wilson, 2 T.C. 1059 (1943); Estate of Joseph H. Heidt, 8 T.C. 969 (1947), *aff'd per curiam*, 170 F.2d 1021 (9th Cir. 1948); Estate of Harold Loveland, 13 T.C. 5 (1949); Estate of Thomas R. Tennant, 8 CCH TAX CT. MEM. 143 (1949); Estate of Arthur J. Brandt, 8 CCH TAX CT. MEM. 820 (1949); Estate of Joseph J. Mulconroy, T.C. Mem. 1956-170, 15 CCH TAX CT. MEM. 887 (1956).

survivor, or whether the burden of proof is satisfied by evidence that a certain amount of money was derived from the survivor's separate property or was received by the survivor as a bequest or inheritance, and that the parties intended to apply or considered that they were applying such funds to the purchase of jointly held property. Some courts have taken the position that funds originally belonging to the survivor must be traced with some degree of certainty through joint and separate bank accounts and properties held in various names, in order to support the burden of proving contributions by the survivor.[53] Other courts have held that exact tracing is not necessary and have made an estimate of the survivor's contribution from all the evidence, where satisfied that some part of the consideration has derived from the survivor.[54] The litigated cases show in many instances the impossibility of proving the original source of funds used to purchase joint tenancy property where such proof involves a series of purchases and sales and deposits and withdrawals over a period of years.[55]

4. *What constitutes consideration.* The common sources from which wives provide consideration for the purchase of jointly held property are inheritances, gifts and bequests from parents, and

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[53] Bushman v. United States, 8 F. Supp. 694 (Ct. Cl. 1934) (wife originally made contribution to purchase, but disposition of proceeds of sale not shown); Estate of Elwood Mead, *supra* note 52 (amounts deposited in joint account by wife, but no proof of disposition); Estate of Joseph H. Heidt, *supra* note 52 (original contribution by wife, but not traced); Estate of Thomas R. Tennant, *supra* note 52 (wife had inherited income producing property, but no proof of disposition of separate income deposited in joint account). *Cf.* Estate of Arthur J. Brandt, *supra* note 52 (where the court analyzed deposits and withdrawals from a joint account for a period of six months before the decedent's death to determine the portion of the account includable in the husband's estate, assuming for lack of evidence to the contrary that the balance at the beginning of the period was all the husband's).

[54] Richardson v. Helvering, 80 F.2d 548 (D.C. Cir. 1935) (exact tracing not necessary and one-half held contributed by wife); Estate of Louis Bendet, 5 CCH TAX CT. MEM. 302 (1946); Estate of Ralph Owen Howard, 9 T.C. 1192 (1947) (analysis of joint accounts for deposits, but no precise analysis required of withdrawals); Estate of William E. Thompson, 7 CCH TAX CT. MEM. 142 (1948) (*Cohan* rule applied where total deposits by each spouse in separate accounts of husband shown); Estate of Mary Louise Selecman, 9 CCH TAX CT. MEM. 997 (1950) (*Cohan* rule applied to determine contributions by wife where husband was survivor).

[55] *Cf.* Fox v. Rothensies, 115 F.2d 42 (3d Cir. 1940), *and* Estate of Joseph H. Heidt, 8 T.C. 969 (1947), 170 F.2d 1021 (9th Cir. 1948), where the 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 50 years, a situation which would tax the memory of any witness." The wisdom of depositing income from separate or jointly owned income producing property in a separate account should be obvious. See Drummond's Estate v. Paschal, 75 F. Supp. 46 (D.C. Ark. 1947); Estate of Henry Wilson, 2 T.C. 1059 (1943).

separately earned income. In such cases the problem is usually one of proof.

In a number of litigated cases the surviving wife has successfully contended that only one-half of the property held in joint tenancy by herself and her husband was includable in the husband's estate because of a prior agreement between them that they would conduct their affairs on the basis of an equal partnership; that they would share the profits from the family business; or that all earnings and separately owned property of both would be owned jointly.[56] However, where no such prior agreement is proved, or where the services of the wife are of the sort usually rendered in a marriage, no consideration has been found passing from the wife, and the whole value of joint tenancy property has been included in the husband's estate.[57]

Presumptions or rules under state law may also be important in determining property ownership or contribution by a wife.[58]

A common situation is the purchase of property as joint tenants partly through payment of a mortgage out of the income from either the same or other jointly owned property. Under the laws of most

[56] Richardson v. Helvering, 80 F.2d 548 (D.C. Cir. 1935); Berkowitz v. Commissioner, 108 F.2d 319 (3d Cir. 1939); Rogan v. Kammerdiner, 140 F.2d 569 (9th Cir. 1944); Singer v. Shaughnessy, 198 F.2d 178 (2d Cir. 1952); United States v. Neel, 235 F.2d 395 (10th Cir. 1956); Estate of Joseph G. Giuliani, 11 CCC TAX CT. MEM. 673 (1952); Estate of Charles A. Trafton, 27 T.C. 610 (1956), *acq.*, 1957-2 CUM. BULL. 7.

[57] Bushman v. United States, 8 F. Supp. 694 (Ct. Cl. 1934); Estate of Jesse E. Rogers, 1941 P-H B.T.A. MEM. DEC. ¶ 41,077; Estate of Joseph A. Brudermann, 10 T.C. 560 (1948); Estate of Harold Loveland, 13 T.C. 5 (1949). A property settlement in which the wife agreed to continue the marriage and to relinquish her marital rights in the husband's estate in return for transfer of certain property of the husband to husband and wife as joint tenants, was found not to be consideration for estate tax purposes, and the whole property was included in the husband's estate, in Sheets v. Commissioner, 95 F.2d 727 (8th Cir. 1938).

[58] *Cf.* Bushman v. United States, *supra* note 57; Fox v. Rothensies, 115 F. 2d 42 (3d Cir. 1940) (payment by the wife out of her separate property of family expenses would not be presumed to be a loan under state law (Pa.) so as to characterize a later transfer of property by the husband to a joint tenancy as repayment for consideration); Henry M. Butzel, 21 B.T.A. 188 (1930) (executor argued without success that under Michigan law tenants by the entirety were presumed to have contributed equally to the purchase, it being held that a rule of state property law was not sufficient to satisfy the burden of proof with regard to consideration for purposes of the federal estate tax. Community property rules do not have the effect of attributing half the consideration to the wife); Steen v. United States, 195 F.2d 379 (9th Cir. 1952), *cert. denied*, 344 U.S. 822 (1952); Brockway's Estate v. Commissioner, 219 F.2d 400 (9th Cir. 1954). In City Bank Farmer's Trust Co., 41 B.T.A. 1 (1940), husband and wife died in a common disaster, and the husband's executor argued for inclusion of only one-half of jointly held property in the husband's estate because of the New York law providing that in such a situation one-half should descend as property of each co-owner; however, this was held not to control for estate tax purposes, and the whole property was included in the husband's estate for lack of proof.

states income from jointly owned property belongs equally to the co-tenants.[59] Therefore, if it can be shown that real estate rentals from jointly owned property were in fact applied to the payment of a mortgage on such property, then one-half of such rentals so applied will be attributable to each of two co-tenants, despite the fact that the original consideration for the purchase of the property came from the husband.[60]

A similar question arises when one joint tenant dies after a series of transactions in which jointly owned property is purchased, sold at a profit, and the proceeds reinvested in other property held in joint tenancy. Does one-half of the gain inure to each of the two joint tenants and does the one who made no original contribution thereafter get credit for contribution to the extent of one-half of the gain? The answer to this question should be affirmative, if the parties have in fact treated the proceeds of sale as belonging one-half to each, and the funds can be traced adequately; the decisions which have considered the matter agree that the noncontributing owner gets credit for these gains.[61]

A more difficult problem is whether the existence at the death of one co-owner of a mortgage on jointly held property on which both co-owners are liable constitutes a "contribution" by the survivor. Oddly, there appears to be little authority on this question. The single decision[62] is confused, apparently allowing not only an exclusion for a proportion of the value of the property based on the wife's liability on the mortgage, but also allowing the whole mortgage as a debt deduction to the estate. It has been suggested that a reasonable solution to this problem would be to attribute to the wife that portion of the value of the property which her proportionate liability at the husband's death bears to the total purchase price of

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59 But *cf.* Part III of this article, *infra.*

60 Harvey v. United States, 185 F.2d 463 (7th Cir. 1950); Drummond's Estate v. Paschal, 75 F. Supp. 46 (D.C. Ark. 1947); Estate of Mary Louise Selecman, 9 CCH TAX CT. MEM. 997 (1950). But see Hornor's Estate v. Commissioner, 130 F.2d 649 (3d Cir. 1942), suggesting a contrary rule; Estate of Nathalie Koussevitsky, 5 T.C. 650 (1945), *acq.*, 1945 CUM. BULL. 4, where this question was apparently ignored, to the taxpayer's benefit. Treas. Reg. § 20.2040-1(c)(5) (1958), indicates that income from the survivor's property applied to the purchase of joint property will be considered a contribution by the survivor despite a prior transfer of the income producing property from the decedent to the survivor, but avoids specific mention of joint income producing property.

61 Harvey v. United States, *supra* note 60; Estate of Mary Louise Selecman, *supra* note 60; but *cf.* the suggestion to the contrary in Treas. Reg. § 20.2040-1(c)(4) (1958), speaking in terms of contribution of appreciated property without reference to recognition or nonrecognition of the appreciation.

62 Bremer v. Luff, 7 F. Supp. 148 (D.C.N.Y. 1933), noted in 48 HARV L. REV. 340 (1934), 44 YALE L.J. 687 (1935).

the property, and to allow as a debt deduction only the proportionate liability of the husband.[63] Where the cost of the property and the value at date of death are the same, this formula is acceptable, as the estate should at least be allowed the total amount of the debt either as a deduction or partly as an exclusion and partly as a deduction.[64] However, where the estate tax value exceeds the cost, conceptual problems are raised as to when the wife's contribution was made. On the one hand it is inequitable to include the whole value of the property in the husband's estate and allow only one-half the debt as a deduction; on the other hand, it also seems inequitable to allow one-half the debt as a deduction and an even larger exclusion based on the ratio of the wife's liability to a value at date of death which exceeds cost, where prior to the husband's death the wife has actually contributed nothing.

5. *Ownership.* A final problem, which in practice merits first consideration in this area, is the question of who is the real owner of the property. The fact that record title is in the decedent and another as joint tenants or tenants by the entirety may not be determinative of the real ownership of the property, and the courts have been willing to accept proof of such real ownership as governing the estate tax results.[65] Likewise, it may be shown that property ostensibly owned by one spouse is really jointly owned.[66] Of course, in

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[63] This is apparently the view expressed in Rudick, *Property Owned in Joint Tenancy and Tenancy by the Entirety*, in LASSER, ESTATE TAX TECHNIQUES 190 (1955), although the alternatives raised by an estate tax value different from the purchase price are not considered; 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 8.05 (1942), apparently criticizes the allowance of any contribution by the wife in this situation as tax avoidance; see case notes cited in note 62 *supra*. See also on this point Annot., 1 A.L.R.2d 1101, 1141 (1948).

[64] A joint obligation is either deductible to the extent of one-half, or it is fully deductible and the deduction is offset to the extent of one-half by including the right of contribution or reimbursement against the co-obligor as an asset of the estate. Parrott v. Commissioner, 30 F.2d 792 (9th Cir. 1929), *cert. denied*, 279 U.S. 870 (1929).

[65] Estate of Elwood Mead, 1942 P-H B.T.A. MEM. DEC. ¶ 42,236; Silverman v. McGinnes, 259 F.2d 731 (3d Cir. 1958) (government regulations on issuance and payment of bonds held not to be determinative of true ownership).

[66] Brockway's Estate v. Commissioner, 219 F.2d 400 (9th Cir. 1954) (property held in name of wife was subject to a written agreement that it was owned jointly with right of survivorship, so that it was includable in husband's estate except to the extent of proved contributions by wife). In Old Colony Trust Co., 39 B.T.A. 871 (1939), *acq.*, 1939-2 CUM. BULL. 27, the wife deeded to her husband property inherited from her parents, and it was later deeded to husband and wife as tenants by the entirety; the court held it to be her separate property, not includable in the husband's estate, upon evidence that they had always intended to convey the property to themselves as joint tenants. In Estate of Harold W. Grant, 1 T.C. 731 (1943), funds belonging to the husband were deposited in a joint account, and were withdrawn by the wife just prior to his death, while he was in a coma; it was held that in the absence of any agreement between the parties as to the disposition of these funds, the joint tenancy continued and the whole amount was includable in the husband's estate.

determining the actual ownership of property, it will be nece⁻⁻ary to refer to rules or presumptions of state law, and such local law will in an appropriate case govern the tax results.[67]

As stated above with regard to the federal gift tax, questions of ownership are more likely to arise in connection with personal than with real property, primarily because of the formalities usually observed in dealing with real property. Reference has already been made to the frequency with which questions arise regarding ownership of funds in joint bank accounts.[68] Government bonds and other securities are also susceptible to equivocal treatment by decedents, and actual ownership may always be questioned.[69]

B. Estate tax problems arising from termination of joint tenancy; other joint interests in property

An interesting set of problems is presented where property held in joint tenancy, for which one co-owner has supplied all the consideration, is transferred to the other owner, by both of them by gift to others, or to a trust for their joint benefit. Assuming the usual case where the parties are husband and wife and the former dies first, if the joint tenancy were not terminated the whole property would be taxed in the estate of the husband, as provided by law. If just prior to the death of the husband, in an atmosphere implying a contemplation-of-death motive, the parties terminate the tenancy, altering in some respects their legal rights in the property, how much, if any, of the property is includable in the husband's estate? The simplest case involves conversion of the joint tenancy to a tenancy in common between the husband and wife; although here there is no statutory authority for inclusion of the whole property in the hus-

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[67] *Cf.* Walter J. Reese, 25 B.T.A. 38 (1931), where husband and wife entered into contracts for the sale of property held as tenants by the entireties, and on the husband's death the Commissioner sought to include the whole of the contracts in his estate; the court held that in the absence of proof to the contrary, the presumption under state law (Michigan), to the effect that a contract of sale of property held as tenants by the entireties, or the proceeds of sale thereof, were held in the same manner, controlled; Merry M. Dennis, 26 B.T.A. 1120 (1932), *acq.*, XII-1 CUM. BULL. 4 (1933), where the presumption of New York law was applied, and mortgage bonds payable to the husband and wife, received in exchange for property held by the entireties, were held to be owned in common, and only one-half included in the husband's estate; McCollum v. United States, 2 Am. Fed. Tax R.2d 6170 (D.C. Okla. 1958), where one-half was included in the husband's estate upon proof that property held in joint tenancy was really community property.

[68] Note 27 *supra;* Estate of Harold W. Grant, 1 T.C. 731 (1943).

[69] In Estate of John H. Boogher, 22 T.C. 1167 (1954), United States savings bonds which had been purchased by the decedent in his name and those of various co-owners, in "or" form, were held to be includable in the decedent's estate for estate tax purposes in spite of the fact that all the bonds had been delivered to the co-owners by the decedent. With regard to government bonds, see Annot., 39 A.L.R.2d 698, 706 (1955).

band's estate, the government has in several cases contended that the whole property is includable under the section of the law taxing transfers in contemplation of death.[70] The courts have uniformly held in this situation, however, that only one-half of the value of the property is taxable in the husband's estate, either because he owned only that portion of the property at his death, or because he could have transferred no more than one-half in contemplation of death.[71] The courts have taken a similar position where the husband and wife make a joint gift of jointly held property to their children, where the gift was made in contemplation of the husband's death.[72] A transfer of joint tenancy property to the wife should presumably bring about the same result, but the few decisions bearing on the point are to the contrary.[73]

A more complex question is presented where property held in joint tenancy or tenancy by the entirety is transferred to a trust for

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[70] INT. REV. CODE OF 1954, § 2035.

[71] Sullivan's Estate v. Commissioner, 175 F.2d 657 (9th Cir. 1949); Steen v. United States, 1951 P-H FED. TAX SERV. ¶ 72,542 (D.C. Cal. 1951), *aff'd without reference to this point,* 195 F.2d 379 (9th Cir. 1952), *cert. denied,* 344 U.S. 822 (1952); Baltimore National Bank v. United States, 136 F. Supp. 642 (D.C. Md. 1955); Estate of Edward Carnall, 25 T.C. 654 (1955) *acq.,* 1956-1 CUM. BULL. 3. The *Sullivan* case contains the only extensive discussion of the question, noting that if, on the one hand, the joint estate was merely terminated, there was no transfer, so there could be no "transfer in contemplation of death"; and, on the other hand, if the transaction involved a transfer, it was a bona fide transfer for money's worth because the younger wife's joint interest transferred to the husband was worth at least as much as the husband's interest transferred to her. In *Baltimore National Bank* and *Carnall, supra,* the terminated interests were tenancies by the entirety; if the husbands in these cases were older than the wives, then on actuarial principles they gained by the transaction.

[72] Sullivan's Estate v. Commissioner, *supra* note 71; Brockway's Estate v. Commissioner, 219 F.2d 400 (9th Cir. 1954).

[73] Commonwealth Trust Co. v. Driscoll, 50 F. Supp. 949 (D.C. Pa. 1943), *aff'd per curiam,* 137 F.2d 653 (3d Cir. 1943); Estate of Henry Wilson, 2 T.C. 1059 (1943). In the former case the husband in 1924 transferred title to the family residence from his name to his wife and himself as tenants by the entirety, in 1932 transferred it to his wife alone; the 1932 transfer was held to be in contemplation of death and the whole property was included in the husband's estate. In *Wilson,* the transfer of the balance in a joint bank account to a separate account in the wife's name, just prior to the husband's death, was held to be a transfer in contemplation of death, and the entire account was apparently included in the husband's estate. There is, however, a distinction between bank deposits and other property in this respect, it being generally considered that no gift is made of funds deposited in a joint account until the funds are withdrawn by the co-owner (see Part I, *supra*). On the basis of this distinction, if funds deposited by one of two co-owners of a joint account were transferred by either to a third person in contemplation of the death of either, the whole amount transferred should be included in the estate of the decedent. An interesting case in this connection is Estate of Nathalie Koussevitsky, 5 T.C. 650 (1945), *acq.,* 1945 CUM. BULL. 4, where over a period of time property derived from the husband was transferred to the wife, and subsequently, in 1941, to the wife and husband as joint tenants; the wife died, and the Commissioner sought to include the property in her estate on the ground that it was transferred to the joint tenancy by her in contemplation of death, but the court held that the transfer was not made in contemplation of death.

the joint lives of the co-owners. The interests in property which are transferred or created in such transactions may be includable in the estate of a co-owner under the joint tenancy section of the law, under the contemplation of death section, or as a transfer with retained life estate, a transfer taking effect at death or a revocable transfer, depending upon the circumstances and the interests transferred or created.

In two cases a transfer of property held in tenancy by the entirety to a revocable trust for the joint lives of the grantors has been held not to affect materially the interests of the co-owners, and the whole property has been included in the husband's estate under the joint tenancy provision.[74] However, in a similar case involving an irrevocable trust, the Tax Court included only one-half of the property, holding it taxable both as a transfer in contemplation of death and as a transfer with a retained life estate.[75] The internal revenue service has taken the position that under these circumstances only the life estate of the survivor in one-half of the property may be excluded from the decedent's estate.[76]

C. *Marital Deduction*

As noted above, a deduction is allowed, within limits, for property included in the gross estate which passes to the decedent's spouse. As in the case of the gift tax, the deduction is not available where the interest in property passing to the spouse is a "terminable interest". An ordinary joint tenancy or tenancy by the entirety between husband and wife will qualify for the marital deduction because at the death of one the whole property passes to the survivor.[77] However, if *A*, the husband, owns property in joint tenancy

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[74] Hornor's Estate v. Commissioner, 130 F.2d 649 (3d Cir. 1942); Estate of Frank N. Derby, 20 T.C. 164 (1953).

[75] Estate of A. Carl Borner, 25 T.C. 584 (1955), *acq.*, 1957-2 CUM. BULL. 4 (*acq.* limited; see Rev. Rul. 57-448, 1957-2 CUM. BULL. 618). Another approach to this question in the case of a tenancy by the entirety might be to include in the husband's estate the actuarially computed value of his interest transferred to the trust, if in contemplation of death, or a value based on his share of the income, if the retained life estate rationale is used.

[76] Rev. Rul. 57-448, *supra* note 75; the Ruling does not specify whether it applies to both revocable and irrevocable trusts. An early case, Safe Deposit & Trust Co. v. Tait, 295 Fed. 429 (D.C. Md. 1923), held that separate transfers by husband and wife to a joint irrevocable trust did not create a tenancy by the entirety (then not taxable), but included the trust in the husband's estate none the less.

[77] INT. REV. CODE OF 1954, § 2056(e)(5), provides that survivorship property shall be considered as "passing from the decedent" to the spouse within the requirements of the law, and presumably the interest passing which so qualifies is limited to the part of the property includable in the decedent's estate for estate tax purposes.

with *B*, his wife, and *C*, then no part of the property will qualify for the deduction in *A*'s estate because *B*'s interest will terminate if *C* survives her. Likewise, if *A* devises property to his wife and another as joint tenants, the interest passing to the wife will not qualify because it may terminate if she predeceases the other owner.[78]

III. FEDERAL INCOME TAX.

A. *Taxation of income*

The taxation of income from jointly held property depends upon who is entitled to such income under appropriate state law. Generally, income from property held either as tenants in common, joint tenants or tenants by the entirety belongs equally to each co-owner. In some states, however, the husband has the right to receive all the income from property held by the entirety and is, accordingly, taxable on the whole of such income.[79]

Under the income splitting provision in effect since 1948[80] it usually makes no difference whether the husband or the wife receives the income for income tax purposes. Thus if the joint owners of income producing property are husband and wife, taxation of the income only becomes important if they wish to file separate returns.

B. *Basis problems*

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 death of the decedent.[81] However, under the law in effect prior to 1954 this applied only to property acquired by bequest, devise or inheritance, and did not apply to property acquired, *inter alia*, by deed or contract creating a joint tenancy or tenancy by the entirety. Thus, although jointly held property was wholly included in the measure of the estate tax, as now, except to the extent the survivor could prove contribution to the purchase, no portion of the property acquired a new basis by reason of the transfer at death.[82] This rule is still in force with regard to property acquired by survivorship where the co-

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78 S. REP. No. 1013 (Part 2), 80th Cong., 2d Sess., 1948-1 CUM. BULL. 337.

79 See 2 MERTENS, LAW OF FEDERAL INCOME TAXATION § 17.04 (1955); I.T. 3878, 1947-2 CUM. BULL. 57. Problems of ownership of property or income may be important here also. *Cf.* George K. Brennen, 4 T.C. 1260 (1945), *acq.*, 1945 CUM. BULL. 2.

80 INT. REV. CODE OF 1954, § 2.

81 *Id.* § 1014.

82 Lang v. Commissioner, 289 U.S. 109 (1933).

owner died prior to January 1, 1954.[83] Accordingly, as to such property, the basis for purposes of computing gain or depreciation is the original cost to the co-owners at the time of acquisition, adjusted by depreciation and other factors; no part of such property acquires a new basis by reason of the death of a co-owner prior to January 1, 1954, no matter how much either party contributed to the purchase.

This rule is changed with regard to joint tenancy property included in the estate of a co-owner dying after December 31, 1953.[84] Such property acquires a new basis to the extent that it is included in the gross estate of a co-owner for purposes of the federal estate tax. However, this new basis may not be the fair market value at the date of death. To the extent that the survivor acquired an interest in the property before the death of the decedent, the basis must be reduced by the survivor's share of depreciation, depletion, etc., allowed prior to the decedent's death.[85]

For instance, if the husband supplied all the consideration for the purchose of income producing property taken as joint tenants, the whole property will be included in his estate, and the whole property will acquire a new basis, the fair market value at his death; however, the wife acquired a one-half interest in the property from her husband prior to his death, and the new basis must be reduced by her one-half share of any depreciation and other deductions allowed for income tax purposes up to the date of the husband's death.

If the wife has supplied part of the consideration for purchase of the property and a proportionate part of the property is excluded from the husband's estate, the part excluded does not receive a new basis as a result of the husband's death, and the wife continues to use her original cost less depreciation with regard to such portion. As for the portion of the property acquired by the wife by reason of the death of the husband, she gets a new unadjusted basis, and as to any portion acquired from the husband prior to his death, a new basis adjusted for an allocable proportion of depreciation, as stated above.[86]

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[83] INT. REV. CODE OF 1954, § 1014(b)(9); Faraco v. Commissioner, 261 F.2d 387 (4th Cir. 1958).

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

[85] Treas. Reg. § 1.1014-6(a)(2) and (3), Ex. (2) (1957); Rev. Rul. 56-215, 1956-1 CUM. BULL. 324, states that this rule applies even though no estate tax return is required to be filed or no tax due, but that where no return is required, the optional valuation date may not be elected.

[86] See Treas. Reg. 1.1014-6(c)(1) (1957); Rev. Rul. 56-519, 1956-2 CUM. BULL. 123.

IV. Federal Tax Liens

This article is not an appropriate place for an extensive discussion of federal tax liens.[87] It is sufficient to say here that the lien of the federal government for taxes due it is extensive and enjoys high priority. It attaches generally to any property interest of the taxpayer. Whether the lien will attach to jointly held property in which the taxpayer has an interest depends upon the nature of the taxpayer's interest in the property.

As the interest which each co-owner has in property held in joint tenancy or tenancy in common amounts to his fractional undivided interest therein, the federal tax lien will reach this undivided interest, but does not reach the interests of the other co-owners.[88] However, it has generally been held that where, under state law, property held in tenancy by the entirety is not subject to the separate debts of either spouse, a federal lien for taxes owed separately by either spouse will not attach to the property at all.[89]

It has been held that jointly owned property passing by survivorship to the cotenant cannot be subjected to the payment of taxes owed by the decedent where the assessment is not made until after his death, as he no longer has any interest in the property.[90]

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[87] INT. REV. CODE OF 1954, §§ 6321-6326. For discussion of federal tax liens, see for instance, Plumb, *Federal Tax Collection and Lien Problems,* 13 TAX L. REV. 247, 459 (1958).

[88] United States v. Beggerly, 44 Am. Fed. Tax R. 1149 (D.C. Cal. 1952). If the undivided interest of the debtor is sold to satisfy the tax claim, such sale will, of course, destroy the right of survivorship between the debtor and the remaining cotenants, and the purchaser of such interest becomes a tenant in common with the others.

[89] United States v. Hutcherson, 188 F.2d 326 (8th Cir. 1951); Shaw v. United States, 94 F. Supp. 245 (D.C. Mich. 1939); United States v. Nathanson, 60 F. Supp. 193 (D.C. Mich. 1945); Sulli v. United States, 1 Am. Fed. Tax R.2d 1685 (D.C. Fla. 1958). In Schwartz v. United States, 191 F.2d 618 (4th Cir. 1951), although the deed recited that the property was held by the entirety, it was found that the husband and wife were not legally married, the estate of tenancy by the entirety was therefore not created by the deed, and the husband's one-half interest was subject to the lien. In United States v. American National Bank, 255 F.2d 504 (5th Cir. 1958), *cert. denied,* Oct. 13, 1958, 3 L. Ed. 2d 72, the wife died and the entire estate held by the entireties, having passed to the husband, was held subject to the tax lien. *Cf.* Bernstein v. United States, 106 F. Supp. 233 (D.C. Mo. 1952), to the effect that the lien may nevertheless attach to the separate income of the debtor from property held by the entirety. If the liability for taxes is a joint liability of husband and wife, there is no reason why the lien cannot reach property so held. Bernstein v United States, *supra.*

[90] Irvine v. Helvering, 99 F.2d 265 (8th Cir. 1938); Fecarotta v. United States, 154 F. Supp. 592 (D.C. Ariz. 1956). Property owned either in joint tenancy or as tenants by the entirety is, however, subject to the lien for federal estate taxes on the estate of a deceased co-owner, but the extent to which the lien will apply is not clear. INT. REV. CODE OF 1954, § 6324(a)(2); Rev. Rul. 56-144, 1956-1 CUM. BULL. 563.

V. West Virginia Inheritance Tax

The West Virginia inheritance and transfer tax is imposed upon transfers of property by will or by laws regulating descent and distribution, and upon certain other transfers set out in the statute.[91] The tax is computed separately upon the value of property passing to each beneficiary or transferee.[92] The law provides an exemption of $15,000 for property passing to the spouse of a decedent, and smaller exemptions for other close relatives.[93]

Undivided interests in property held in common are subject to the tax just as other interests in property passing by will or descent.[94]

Property held jointly, with right of survivorship, is the subject of a special subsection of the law.[95] This provision, expressed in incredibly tortured form, is susceptible of a variety of interpretations. The state tax commissioner has in fact over the years interpreted it in a number of different ways in applying it to the taxation of property held in joint tenancy. It is possible to argue that the whole, one-half or no part of such property is subjected to tax under this section. However, it is the current attitude of the tax commissioner that the provision is similar in import to the federal law; that is, that property held in joint tenancy is wholly includable in the estate of the first co-owner to die, except to the extent that the survivor contributed to the purchase price. There is language in the section which may be read to support the exclusion of a proportionate part of the property where the survivor has contributed to its purchase, and it may be argued that the burden of proving contributions by the survivor is not on the taxpayer here,[96] as it is under the federal tax.

[91] W. Va. Code ch. 11, art. 11, § 1 (Michie 1955).

[92] *Id.* ch. 11, art. 11, §§ 2-4. The tax, as implied by its title, is an *inheritance* tax, as opposed to an *estate* tax; the latter is generally levied upon the total value of all property passing from a decedent, whereas the former is measured by the value of property passing to each beneficiary or transferee.

[93] *Id.* ch. 11, art. 11, § 4. At the time this article goes to press (February, 1959), bills are pending in both the Senate (Senate Bill No. 89) and House of Delegates (House Bill No. 99) of the West Virginia Legislature to increase these exemptions.

[94] There is no court decision on the point, and the State Tax Commissioner has never issued regulations interpreting the inheritance tax; however, there is no substantial question about the taxation of undivided interests in property.

[95] W. Va. Code, ch. 11, art. 11, § 1 (Michie 1955): "A tax . . . shall be imposed upon the transfer, in trust, or otherwise, of any property, or interest therein . . . if such transfer be . . . (d) by any person who shall transfer any property which he owns, or shall cause any property to which he is absolutely entitled to be transferred to or vested in himself and any other person jointly, with the right of survivorship, in whole or in part, in such other person, a transfer shall be deemed to occur and to be taxable under the provisions of this article upon the vesting of such title in the survivor; . . . ."

[96] *Cf.* Central Trust Co. v. State Tax Comm'r, 116 W. Va. 37, 178 S.E. 520 (1935); Ops. W. Va. Att'y Gen., August 3, 1956.

Another group of questions arises under the joint property section from the language stating that the tax applies only where the decedent "shall transfer any property which he owns, or shall cause any property to which he is absolutely entitled to be transferred to or vested in himself and any other person jointly". First it may be asked what actions by the decedent will be held to "cause" property to be transferred or vested. Does this mean that the decedent must have been the instigator of the transaction in which the property was transferred to himself and his co-tenant, or does it mean that he must have paid the consideration for the transfer or vesting? If the consideration test is not to be applied, property held in joint tenancy will not be subject to the tax in any case where the survivor initiated the transaction in which the property was acquired, regardless of who paid the purchase price. Whichever interpretation is valid, the tax apparently would not apply to property held in joint tenancy where neither the decedent nor the survivor paid part of the purchase price or caused the transfer; for instance, the tax would not apply to property previously devised or given to *A* and *B* as joint tenants, on the death of the first to die of *A* or *B*.

Another question of importance under this section is whether the tax applies to property held in tenancy by the entirety. Inheritance tax statutes of some states contain specific exemptions for property held in this manner, and others have been interpreted to exclude property held by the entireties.[97] It is doubtful whether the language of the West Virginia statute, strictly construed, would apply to property held by husband and wife as tenants by the entirety. This question makes it all more important to determine whether that estate in property can be created in West Virginia.[98]

These questions lose some of their importance as a result of a recent amendment to the joint property section, which provides that "not more than" one-half of property of which the decedent's spouse is the co-owner, otherwise subject to the tax under the section, shall be taxed.[99] For instance, assuming that property held

[97] See Annot., 1 A.L.R.2d 1101 (1948); CCH INH., EST. & GIFT TAX REP. § 1575 (1958).

[98] Merricks, *supra* note 2.

[99] The statutory language, in the form of a proviso at the end of the joint property section, note 95 *supra*, is as follows: "And provided further, that, in the case of a surviving spouse, not more than fifty per centum of the value of any transfer mentioned in this subsection (d) shall be included and taxed in any such decedent's estate." This proviso was added by W. Va. Acts 1957, ch. 157, in effect 90 days after passage on March 5, 1957.

by husband and wife as joint tenants would previously have been wholly subject to the tax, under the new provision only one-half is taxed. Where the surviving spouse has contributed to the purchase of the property it is not clear under the statute what portion is to be subject to the tax; if the survivor has contributed ¼ of the total, for instance, this new proviso might exclude ½. ⅝ or ¾ of the total value of the property.[100]

A further proviso exempts up to $2,500 held in a joint bank account or accounts in the name of the decedent and his spouse, child, parent or descendant.[101] The inter-relation of the joint bank account exemption and the exclusion of one-half of property held jointly by husband and wife is a typical problem of construction under this article. It is understood that the present position of the state tax commissioner is in favor of the taxpayer; the exclusion of one-half of joint bank accounts of husband and wife is first applied, and the $2,500 exemption is subtracted from the balance.

Another common inheritance tax problem in these days of joint ownership is the taxation of jointly owned savings bonds. The present position of the state tax commissioner is based upon an opinion of the attorney general to the effect that United States savings bonds in "*A* or *B*" form will ordinarily not be subject to the tax under the joint property section, because there is no vesting of title at the death of the first co-owner, but may in some cases be taxable where purchased in contemplation of death.[102]

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[100] The interpretation of the inheritance tax division is understood to be that ½ of the total value of the property is first to be excluded under the proviso, and the survivor's contribution is then subtracted from the balance, so that if the survivor contributed ½ or more to the purchase, the whole property is excluded.

[101] The statutory language is in the form of a proviso in the joint property section preceding that quoted in note 99, as follows: "Provided, however, that this subsection shall not apply to bank accounts payable to the class designated in section two-a in a total amount of twenty-five hundred dollars or less."

[102] OPS. W. VA. ATT'Y GEN., August 3, 1956, addressed to Richard E. Bailey, Director-Attorney, Inheritance Tax Division. The opinion that "*A* or *B*" bonds will not ordinarily be subject to tax under the joint property section is based on a holding that the tax applies only in cases where title vests in the survivor at the death of the first co-owner to die. But *cf.* Note, 59 W. VA. L. REV. 342 (1957). The Attorney General's opinion takes the position that bonds purchased by the decedent which are not to become the property of the surviving co-owner until the death of the purchaser are taxable as gifts in contemplation of death. The failure of the Tax Commissioner to press collection of the tax in this common situation may be attributable to the implication in the Attorney General's opinion that the burden of proof is on the state. Bonds registered in "*A*, payable on death to *B*" form are presumably subject to tax at the death of *A*.

Many of the questions which occur in connection with the application of the federal estate tax to jointly held property are also potential inheritance tax problems. Additional questions may also be raised under the inheritance tax statute because of its peculiar nature.

An example may be cited in the area of creation and termination of joint tenancies in contemplation of death. The West Virginia inheritance tax law contains a section purporting to tax transfers in contemplation of death.[103] Most of the examples discussed earlier in connection with the federal estate tax in this area would logically be resolved in similar fashion in computing the value of the property subject to inheritance tax, as, for instance, a gift in contemplation of the husband's death of joint tenancy property by husband and wife to a third person. However, in the case where the husband, in contemplation of death, conveys his separate property to himself and his wife as joint tenants, the whole property would clearly be subject to the federal estate tax, whether as jointly owned property or as property transferred in contemplation of death, whereas the application of the inheritance tax in this situation is impossible to predict. It might be argued that the whole property is taxable as a gift in contemplation of death; that half is taxable as a gift in contemplation of death and half as jointly held property; or that a maximum of one-half is taxable, as jointly held property, the other half being excluded by law.[104]

Another complex of problems which may be of importance in determining the inheritance tax are those relating to actual ownership of property. Reference has already been made in connection with the federal estate and gift taxes to the fact that personal property is particularly subject to informal treatment.[105] The determination of the true owner may be especially important where the exemptions for property owned jointly with the decedent's spouse and for joint bank accounts are applicable. Problems of ownership may also occur more frequently in estates which are too small to be subject to the federal estate tax, but where the inheritance tax is of considerable importance in proportion to the size of the estate.

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[103] W. VA. CODE ch. 11, art. 11, § 1(c) (Michie 1955).

[104] It is even possible to argue that the whole property is taxable as a gift in contemplation of death and half taxable again as jointly owned property passing to the wife; the counter argument is that the contemplation of death and joint property sections are mutually exclusive, and that the property may be taxed under one or the other of the sections, but not under both.

[105] Parts I D and II A 5, *supra*, and particularly notes 27, 68 and 69 *supra*.

A bothersome question of ownership results from the decision in *Lett v. Twentieth Street Bank*,[106] which holds that bank accounts in the names of two or more persons "in form to be paid to either" are held in joint tenancy.[107] It is not clear from the decision whether there is a conclusive presumption that the full account passes to the survivor, or whether it is still possible to prove, as it should be, that the parties understood actual ownership of the funds to be otherwise.

The list of questions which may occur under the joint ownership provision of the West Virginia inheritance tax law is almost endless, as it is under many of the other sections of this law. Unfortunately, there are few answers, and it is the opinion of most practitioners that the only practical solution lies in the enactment of a completely new law, preferably in the form of an estate tax. It does not seem profitable to devote further discussion to these problems.[108]

CONCLUSION

It should be unnecessary to point out that devices of joint ownership which involve survivor features do not serve to avoid death taxes, and that they often create new and additional problems for the survivor as well as for the estate of the first cotenant to die. In short, joint ownership is a poor substitute for a will.

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[106] 138 W. Va. 759, 77 S.E.2d 813 (1953).

[107] As the nature of a bank account differs considerably from that of real property, it would certainly be impossible to fulfill all the common law requirements for the creation of a joint tenancy in a bank account, and it is difficult to envision any of the common law attributes of the estate other than the right of the survivor to take the whole. If the deposit of funds in an account of "*A* or *B*" creates a joint tenancy, what rights do the joint tenants have in the funds during their joint lives?

[108] The attitude of the State Tax Commissioner towards some of these questions almost ten years ago is stated in Koontz, *West Virginia Inheritance and Transfer Taxes*, 28 TAXES 669 (1950).