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Exclusion of Montana Joint Tenancies from the Federal Estate Tax Marital Deduction

Maxon R. Davis

EXCLUSION OF MONTANA JOINT TENANCIES FROM THE FEDERAL ESTATE TAX MARITAL DEDUCTION

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I. INTRODUCTION

A bill enacted by the 1975 Montana legislature,[1] designed to reduce the legal expenses of surviving spouses, may ultimately occasion financial liabilities far in excess of the contemplated savings. The bill, now codified as R.C.M. 1947, § 91-4321.1, offers a procedure whereby surviving spouses may themselves prove title to property jointly held with the deceased spouse and at the same time work a transfer to their own name as sole owner. As part of that process, the state department of revenue will assess the requisite inheritance tax, thereby avoiding the problem of a tax lien clouding the survivor's title.[2] If an attorney is in any event still employed by the surviving spouse to assist in the transfer, that attorney's fees are specifically limited by subsection seven of the act to no more than two percent of the value of the interest passing to the surviving spouse.[3]

The problem with this new law involves language that makes vesting of the jointly held property in the survivor conditional upon compliance with the terms of the statute:

> Title to property held in joint tenancy by a husband and wife with the right of survivorship shall, upon the death of one of the spouses, vest in the surviving spouse *provided the requirements of this section have been complied with.* [Emphasis added.][4]

The draftsmen of the legislation must not have known that such wording may result in a denial of the federal estate tax marital deduction on jointly held property.

II. THE MARITAL DEDUCTION

The marital deduction, found in § 2056 of the Internal Revenue Code, provides that the decedent's gross estate, upon which the estate tax is assessed, is reduced by the value of the interests in property which pass to the decedent's surviving spouse. To qualify for the deduction, such interests must have been included in the

1. S. 223, enacted as Mont. Sess. Laws 1975, ch. 303, § 1.
2. REVISED CODES OF MONTANA, (1947) [hereinafter cited as R.C.M. 1947], § 91-4321.1(6).
3. R.C.M. 1947, § 91-4321.1(7).
4. R.C.M. 1947, § 91-4321.1(1).

decedent's gross estate, as defined in Code § 2031 and following sections. For purposes of R.C.M. 1947, § 91-4321.1, it is sufficient to note that by I.R.C. § 2040, the gross estate specifically includes joint interests in property held by the decedent and another person.

The marital deduction is, however, limited to 50% of the value of the adjusted gross estate,[5] which represents the gross estate less certain losses, taxes, and expenses charged against the decedent's property.[6]

A further limitation on the marital deduction—and the one brought into play by the adoption of R.C.M. 1947, § 91-4321.1—is the terminable interest rule, contained in § 2056(b). In pertinent part it states:

> Where, on the lapse of time, on the occurance of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest. . . .[7]

This general exclusion is conditioned upon three additional considerations: first, that by reason of the failure of an event or contingency or by lapse of time, the interest passes to a third person,[8] and secondly, that such third person may possess and enjoy the property.[9] The third consideration speaks directly to the surviving spouse who takes his or her interest as beneficiary of a testamentary trust, regardless of third party intervention.[10]

The terminable interest limitation serves to remove the possibility that property escaping the estate tax as part of the marital deduction will never be taxed.[11] What Congress had in mind in enacting § 2056(b) was the frequently employed testamentary disposition whereby a decedent created a life estate in certain property for the surviving spouse, with a remainder to some third person(s) upon the latter's demise.[12] Were such life estates includible in the

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5. INTERNAL REVENUE CODE OF 1954, § 2056(c). [hereinafter cited as INT. REV. CODE OF 1954.]

6. INT. REV. CODE OF 1954, § 2056(c)(2).

7. INT. REV. CODE OF 1954, § 2056(b)(1).

8. INT. REV. CODE OF 1954, § 2056(b)(1)(A).

9. INT. REV. CODE OF 1954, § 2056(b)(1)(B).

10. INT. REV. CODE OF 1954, § 2056(b)(1)(C).

11. *See, e.g., Dougherty v. United States*, 292 F.2d 331 (6th Cir. 1961). There the Court said:

> Generally speaking, the "terminable interest" concept was devised for the purpose of assuring that if the property bequeathed to the spouse was to be excluded from the gross estate of the decedent, it would be adequately integrated in the spouse's estate so that on her death, it would not escape the death tax a second time. *Id.* at 337.

12. S. Rep. No. 1013, 80th Cong., 2d Sess., 2 U.S. CODE CONGRESSIONAL & ADMIN. NEWS 1190 (1948).

marital deduction, the remainderman would receive his interest free of any tax assessment, as no interest would have passed between the surviving spouse and the remainderman upon termination of the former's estate.

While the language of § 2056(b)(1) manifestly excludes life interests from the marital deduction, the terminable interest rule has been given a broader application by the courts. Since the prohibition includes "failure" as well as termination, investigation has focused not only on what happens after the interest vests in the surviving spouse, but also on what, if anything, occurs prior to vesting. The federal rule is that the determination of whether an interest is terminable is to be made as of the moment of the decedent's death.[13] Therefore, the failure of an interest to vest at the moment of death will result in the exclusion of that interest from the marital deduction. The reasons advanced by the United States Supreme Court for this strict date of death rule, as set forth in the leading case of *Jackson v. United States*,[14] include the Court's perception of Congressional intent and the fact that there is a specific six month exception in § 2056(b)(3), as regards interests whose vesting is made conditional on the spouse's surviving for such a period.

III. The Montana Problem

By the express terms of R.C.M. 1947, § 91-4321.1, vesting of title in the surviving joint tenant appears to be conditional. Failure to file the four documents listed in that section[15] arguably will result in a delay or refusal to recognize the unitary title of the surviving spouse. The expressly conditional aspect of the Montana law will then ostensibly bring joint tenancies within the ambit of the terminable interest exclusion.

As alluded to earlier, the consequences of such a finding will be disastrous. If one notes that family agricultural holdings in Mon-

13. Jackson v. United States, 376 U.S. 503, 508 (1964); Allen v. United States, 359 F.2d 151 (2d Cir.), *cert. den.*, 385 U.S. 832 (1966). In *Allen*, the court said:

> It is now well settled that the determination of whether an interest is terminable is to be judged in the light of events at the precise moment of the decedent's death. If, viewed at the time of the death, the interest bequeathed to the spouse might terminate under some circumstances, that interest is terminable for the purposes of section 2056(b)(1) regardless of what subsequent events come to pass. Thus a reviewing court must focus on the moment of the testator's death to determine the nature of a marital gift for estate tax purposes, unless the Internal Revenue Code expressly provides to the contrary, as in section 2056(b)(3). *Id.* at 154.

14. Jackson v. United States, *supra* note 13.

15. They are: (1) a copy of a death certificate, (2) an affidavit listing property held jointly with the deceased spouse, (3) a list of those properties, including their values, and (4) copies of deeds or similar documents creating the joint titles. R.C.M. 1947, §§ 91-4321.1(2),(3),(4) and (5).

tana commonly run to hundreds of thousands or millions of dollars at current valuation and that many of these properties are jointly held by spouses, one can foresee a distinctly ironical reach to R.C.M. 1947, § 91-4321.1, resulting as it will in a savings of legal fees in the range of a few hundred dollars and up, while at the same time forcing the assumption of an estate tax liability tens of thousands of dollars higher than was anticipated.

Before the general citizenry and the members of the Bar in particular throw up their arms in utter despair, it must be noted that § 91-4321.1 is new and, as yet, without authoritative judicial interpretation. Furthermore, incursion of federal tax liability involves more than a determination of the scope of the Internal Revenue Code. While Congress does delineate what, and how, interests in property are taxed, it is state law which defines the interests in property a person in fact possesses.[16]

A. *Montana Law and the Date of Death Determination*

The impact of state law on federal tax liability assumes critical importance within the context of R.C.M. 1947, § 91-4321.1. It has been noted that *Jackson v. United States* sets forth the applicable rule and underlying rationale for judging terminable interests; the case can also illustrate how differing state views of vesting affect tax liability. *Jackson* involved the question of whether the California widow's allowance had to be excluded from the marital deduction as a terminable interest. The Supreme Court stated that it did, basing its decision on two points. Primary emphasis seemed to have been placed on the fact that the allowance would be lost if the widow remarried.[17] More importantly for the purposes of this discussion, the Court also noted that under California law, "the right to a widow's allowance is not a vested right and nothing accrues before the order granting it."[18] Either reason appears by itself sufficient to support a finding of terminability. What the opinion of the Court makes clear is that the Court was relying on California's characterization of the interest, rather than subjecting the California probate procedure to its own analysis.

Since *Jackson*, other federal courts in various jurisdictions,[19] including Montana,[20] have disallowed widow's allowances, finding

16. Blair v. Commissioner, 300 U.S. 5, 9-10 (1937); Bosch v. Commiszioner, 387 U.S. 456, 464-65 (1967); Rusoff, *The Federal Estate Tax Marital Deduction in Montana: A Warning and Suggestions*, 34 MONT. L. REV. 17, 21 (1973).

17. Jackson v. United States, *supra* note 13 at 507.

18. *Id.* at 506.

19. *E.g.*, In re Estate of Abely v. Commissioner, 489 F.2d 1327 (1st Cir. 1974).

20. Stephens v. United States, 270 F. Supp. 968 (D. Mont. 1967).

terminability in the post-death aspect of the court order. Significantly, though, other federal courts have included such allowances in the estate tax marital deduction, and they have done so in full cognizance of *Jackson.*[21] In *Estate of J. Wendell Green v. United States,*[22] a district court in Michigan declared that since Michigan law considered a widow's allowance, of the same type as that in *Jackson*, as vesting at death, inclusion of the allowance in the marital deduction was warranted.

These widow's allowance cases are not being cited for their precedential value. As noted, the federal district court in Montana has found the award to be a terminable interest, at least as to the pre-U.P.C. allowance.[23] That litigation over what is essentially the same interest in property has occasioned such a diversity of results since *Jackson* serves to demonstrate the decisive role played by the state's characterization of the interest, especially as to when it vests. These cases illustrate that the way is left open for the Montana supreme court to rule that title to jointly held property vests in the surviving spouse at the moment of death, despite the wording of R.C.M. 1947, § 91-4321.1. A possible basis for such a holding would be the argument that upon compliance with the requirements of the statute, the vesting of the survivor's interest relates back to the date of death of the decedent.[24] Or, the court could simply state that the new law does not alter traditional notions of survivorship in joint tenancy. Decisions like *Estate of J. Wendell Green* have shown that such a position is in and of itself reasonable and, moreover, valid for estate tax purposes. If R.C.M. 1947, § 91-4321.1 were given such an interpretation, the interest of a deceased joint tenant would still be eligible for the marital deduction in Montana.

B. *Impact of Post-mortem Procedural Hurdles*

An argument similar to the widow's allowance analogy, but not as dependent on a state court pronouncement, is that post-mortem procedural hurdles can be overlooked in a date of death determination. No hard and fast rule has yet developed to enable one to distinguish between formalistic requirements that can be disregarded in judging terminability, and those conditions precedent

21. *See* Estate of Green v. United States, 70-1 U.S.T.C. ¶ 12, ¶ 650; *aff'd.*, 441 F.2d 303 (6th Cir. 1971); Rev. Rul. 53-83, 1953-1 CUM. BULL. 395.

22. Estate of Green v. United States, *supra* note 21.

23. Stephens v. United States, *supra* note 20.

24. *See Estate of Kennedy v. United States*, 302 F. Supp. 343, 345 (D.S.C. 1969). The *Kennedy* case involved a dower election, but it is submitted that the dower election is sufficiently analagous to both the widow's allowance cases and R.C.M. 1947, § 91-4321.1 within the context of § 2056(b)(1).

which, if not complied with, force a delay that occasions exclusion from the marital deduction under § 2056(b)(1). Nevertheless, several petitioners have successfully litigated terminability upon such a theory.

In *Eggleston v. Dudley*,[25] a panel of the Third Circuit Court of Appeals was concerned with the task of resolving expressly contradictory terms of settlement of the insured's life insurance policy so as to effectuate the undisputed intention of the insured that payment of the proceeds be eligible for the marital deduction. By way of dicta, the court stated that the insurer's requirement that proof of the insured death be received prior to payment did not work the type of delay in vesting to which § 2056(b)(1) speaks.[26] In two subsequent cases,[27] the Tax Court seized upon this statement from *Eggleston* in dismissing the government's contention that since the widow-beneficiary of life insurance proceeds might not send in proof of death until six months after death, she would not be entitled to the proceeds until a date beyond the specific six month exception of § 2056(b)(3). Terminability still would not result:

> A requirement in the policy that proof of death be made before settlement, is not a condition where compliance fixes the time of vesting of policy rights. . . . Compliance with the proof of death requirement did not bring into existence the wife's right to withdraw the insurance proceeds. Those rights existed from the moment of the insured's death by virtue of the clause providing settlement was to be made with the wife if living at the time of insured's death.[28]

Similar considerations can apply to R.C.M. 1947, § 91-4321.1. The procedure outlined in the statute can have no bearing on the fact that the surviving spouse is the only person entitled to assumption of the deceased co-tenant's interest. That right arises at the time of the creation of the joint tenancy, much as the beneficiary's right to insurance proceeds is created at the time the policy is issued.

This type of argument avoids the legalistic sleight-of-hand that a relation-back theory might represent. It is submitted that it may be more palatable for a federal court assessing tax liability to swallow. One drawback of the quoted language of the Tax Court, when applied to R.C.M. 1947, § 91-4321.1, is that, unlike an insurance policy, the Montana statute purports to expressly fix the time of vesting. One assumes that greater weight attaches to the command

25. Eggleston v. Dudley, 257 F.2d 398 (3d Cir. 1958).
26. *Id.* at 399-400.
27. Estate of Cornwell, 37 T.C. 688 (1962); Estate of Jennings, 39 T.C. 417 (1962).
28. Estate of Cornwell, *supra* note 27 at 692-93.

of a statute than to the contract right of a private party.

The widow's allowance cases bear directly upon this last problem, since the requirements of how and when the surviving spouse applies to the court for the allowance are also provided by statute. In that respect, such cases are closely analogous to R.C.M. 1947, § 91-4321.1. Indeed, the affirmation of *Estate of Green* by the Sixth Circuit[29] disposed of an assertion by the government similar to that faced by the Tax Court. In *Green* the Internal Revenue Service contended that the possibility of the widow's failure to file for the allowance rendered that allowance both inchoate and conditional, and therefore terminable, regardless of the time of vesting established by state law. The court was not impressed:

> There is no doubt that both of these representations are correct, but we do not agree with the government's conclusion to their effect under the Code and under the *Jackson* case. Indeed, it seems to us if either of these conditions were held to be an "event or contingency" occasioning terminability under section 2056(b), that we would be holding that Congress for all practical purposes had repealed the allowance for Marital Deduction.[30]

The court seemed to be distinguishing, for purposes of the terminable interest exclusion, between procedural conditions precedent, which would render the interest terminable, and conditions subsequent, which are no less mandatory but do not upset the prior vesting, at least for tax purposes. This interpretation is borne out in language from an earlier pronouncement by the same court. In *Hamilton National Bank v. United States*,[31] a pre-*Green*, post-*Jackson* widow's allowance case, the Sixth Circuit panel stated:

> It has been uniformly held that compensation qualifies for the marital deduction, and invoking the necessary legal procedures to enforce the right is not a condition or contingency precedent to its existence. [Citations omitted.]
>
> To hold that an interest is terminable only because legal procedures are invoked to enforce an interest which is otherwise vested at the date of the husband's death, is to hold that all elective rights, such as the widow's allowance and the statutory interest in lieu of dower, are disqualified as marital deductions.[32]

One can argue that such reasoning does violence to the letter of the law. Section 2056(b)(1) includes within the exclusion interests that fail upon merely "a lapse of time" or upon "the failure of an event

29. Estate of Green v. United States, *supra* note 21.
30. *Id.* at 307.
31. Hamilton Nat'l Bank v. United States, 353 F.2d 930 (6th Cir. 1965).
32. *Id.* at 932.

or contingency to occur." Yet, is it not valid to distinguish, as the Sixth Circuit has done, between vesting delayed because of the mode of disposition by the decedent and vesting delayed because the state or some other third party has erected procedural barriers to the surviving spouse's enjoyment of the property? If the distinction is valid, and the insurance and widow's allowance cases imply as much, there is no apparent reason why one cannot argue that the same considerations apply to the problem engendered in Montana by R.C.M. 1947, § 91-4321.1. The documents required by the statute are externally imposed formalistic requirements. Despite the need to file them, the survivor's interest will vest at death.

IV. Prior Treatment of Joint Tenancies as Affecting R.C.M. 1947, § 91-4321.1

The proposition that R.C.M. 1947, § 91-4321.1 merely imposes nonterminable formalistic requirements is further supported by an examination of the pre-existing law regarding joint tenancies, which, given the nature of the new statute, one assumes that the legislature was not consciously trying to reform. The proposition is also supported by several fundamental principles from the law of testate and intestate succession, to which the new law appears to be an adhesion.

A. *The Common Law Heritage*

A surviving joint tenant's title derives from the instrument which created the joint tenancy, and not from any law of succession, be it testate or intestate.[33] By the common law, the right of survivorship blossoms into full ownership immediately upon the death of the joint tenant. By both statute[34] and case law,[35] this common law incident of joint tenancies has been incorporated into the law of Montana. To assert that R.C.M. 1947, § 91-4321.1 reforms joint tenancies to the extent that it purports to do, throws it into conflict with these authorities. The assumption is, though, that the legislature did not intend to affect existing law in such a circuitous fashion. To interpret R.C.M. 1947, § 91-4321.1 as actually delaying vesting of the survivor's interest will abrogate both a common law tradition and a substantial body of modern jurisprudence. Such an effect seems wholly unwarranted for an enactment aimed at saving widows and widowers a particular legal expense.

33. Hennigh v. Hennigh, 131 Mont. 372, 309 P.2d 1022, 1025 (1957); 20 Am. Jur. 2d *Cotenancy and Joint Ownership*, § 3, p. 95 (1965).

34. R.C.M. 1947, § 67-310.

35. Hennigh v. Hennigh, *supra* note 33 at 1025.

Furthermore, constitutional infirmity appears to attach to an interpretation of R.C.M. 1947, § 91-4321.1 which gives effect to the plain meaning of the statute. If the surviving joint tenant must take steps in addition to merely surviving a co-tenant for the unitary title to vest, the state may have fatally abrogated what can be viewed as a vested right of survivorship. To do so comes within the constitutional proscription of deprivation of property without due process of law. In the case of *Butte and Boston Consolidated Mining Co. v. Montana Ore-Purchasing Co.*,[36] the Montana supreme court declared:

> The right of survivorship—the indispensible ingredient and characteristic of the estate, and not a mere expectancy or possibility, as, for example, is the inchoate right of dower—accrues as a vested right when and as soon as the joint tenancy is created, and the legislature is without authority to divest or interfere with such right. A joint tenant cannot be so deprived of his property. Constitutional limitations, state and national, prohibit it.[37]

In response, it can be argued that the new law does not affect the right of survivorship *per se*; rather, it merely delays the time of the survivor's taking. Logic, though, rebuts such a distinction:

> (1) If one starts with the premise that R.C.M. 1947, § 91-4321.1 has no effect on vesting, then the surviving joint tenant's unitary title vests immediately, as it always has. There is no constitutional infirmity, and, as already indicated, the tax problem will disappear.
>
> (2) The only other possible premise is that R.C.M. 1947, § 91-4321.1 *does* affect vesting in the manner in which it states that it affects vesting. Accordingly, vesting is made conditional upon the surviving spouse filing the appropriate documents. If the surviving spouse never files the documents, the survivor's unitary title will never vest. Inherent in the mandated delay is the possibility of denial of the vested right of survivorship.

Thus, the possible consequences of this imposition appear to result in the type of interference with the right of survivorship which the Montana supreme court has stated it will not tolerate.

Given the court's predilection for assuming that legislative enactments are valid, the court will have to decide that R.C.M. 1947, § 91-4321.1 does not change the immediate vesting element of the right of survivorship. The plain meaning of R.C.M. 1947, § 91-4321.1 would otherwise result in an unconstitutional construction.

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36. Butte & Boston Consol. Mining Co. v. Montana Ore-Purchasing Co., 25 Mont. 41, 63 P. 825 (1901).

37. *Id.* at 827.

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B. *A Probate Analogy*

While, as noted, the law of succession does not extend to the joint tenant's right of survivorship, comparison of the law of descent and distribution with that of joint tenancies reveals a fruitful analogy. Until enactment of R.C.M. 1947, § 91-4321.1, joint tenancy interests, as well as probated and intestate property, vested at death. As with joint tenancies, the rule applicable to heirs and devisees was expounded by statute[38]—at least until 1975—as well as by case[39] law. The consistent approach to death-inspired vesting represents a carryover of the common law abhorrence of an abeyance of seisin. If this heritage remains preserved for probated and intestate property, it makes no sense to create an aberration for property held in joint tenancy.

As a corollary, one must note that a court decree of distribution neither creates nor transfers title to property.[40] Yet, realistically, not until the entry of the decree of distribution are some of the assets sufficiently identified to make the concept of "vesting" more than a hollow legal term. The probate procedure thus works as a type of formalistic condition subsequent to the vesting of the property. By analogy, one can argue that R.C.M. 1947, § 91-4321.1 is a similar condition subsequent. Both are equally mandatory for the situations to which they apply but both have no effect on the time of vesting. In short, R.C.M. 1947, § 91-4321.1 can be viewed as a "probate" of jointly held property. It is submitted that this interpretation is consistent with the legislative intent, assuming that such an intent is, in fact, discernible. Like an actual probate, the procedure outlined in R.C.M. 1947, § 91-4321.1 is aimed at clearing, rather than obstructing, a recipient's title by certifying that tax liabilities have been satisfied. Conditional vesting is not a necessary element of that process; nor is it analogously consistent.

V. Equities of the Alternative Interpretations

A final argument implicit in the foregoing discussion rests on the subjective merits of the alternative interpretations of R.C.M. 1947, § 91-4321.1. The construction that vesting is delayed will prove costly to Montanans, to the extent that estates will be reduced by the increased estate tax liability. This construction will have the anomolous effect of adding to expenses, when the expressed intent of the law is to put a ceiling on certain legal fees, if not to actually

38. R.C.M. 1947, §§ 91-225 and 91-402. These two statutes raising the presumption of immediate vesting, were repealed by the 1975 legislature.

39. In re Hosova's Estate, 143 Mont. 74, 387 P.2d 305 (1963).

40. Henningsen v. Stromberg, 124 Mont. 185, 221 P.2d 438, 448 (1950).

eliminate them. Could the legislature have intended to penalize the public to such an extent? Furthermore, how much litigation will be engendered by an act whose very title states that its purpose is the avoidance of court procedures?[41]

Conversely, the interpretation that the law has no effect on the time of vesting will in no way upset the law's announced purpose. R.C.M. 1947, § 91-4321.1 will still occasion the expected reduction in legal fees, without the risk of incurring unanticipated estate tax liabilities. In countering the argument that such an interpretation would, if given the imprimatur of a court, amount to judicial legislation, one can only respond that it is judicial legislation in the best sense of the phrase. To declare that R.C.M. 1947, § 91-4321.1 affects no change in the vesting of the surviving joint tenant's interest will redound to the benefit of all citizens of the state. It can operate to the possible detriment of only one party—the federal government as recipient of tax revenues. Yet, until enactment of the law, jointly held property interests were proper elements of a marital deduction; therefore, the government will be deprived of, at best, a wholly unexpected windfall. There is, in short, no valid reason for accepting the plain meaning of the statute.

VI. A Few Practical Considerations

The discussion until this point has been predicated upon anticipation of a contest with the Internal Revenue Service over the terminability of Montana surviving spouses' interests in jointly held property. There are, however, some practical considerations for attorneys who wish to avoid the costs and risks of a contest. Because of the space limitations of this article, only a general discussion of those considerations is provided.

A. *Legislation*

The obvious solution to the problem is to amend R.C.M. 1947, § 91-4321.1 to remove the objectionable language. When the legislature next meets—in 1977—the Bar, as a whole, and attorneys individually must convince the legislature to change the law. Anticipating the argument that it is in the profession's self-interest to change a law which attempts to reduce legal fees, one can point out that another enactment of the 1975 legislature[42] accomplishes the same savings for unmarried joint tenants, without language that makes vesting conditional. It would serve as an appropriate model.

41. S. 223's title was "An Act to Provide for the Transfer of Real and Personal Property Held in Joint Tenancy by Husbands and Wives Without Court Procedures."

42. R.C.M. 1947, § 91-4469.

B. *Curative Bequest*

An attorney can advise clients to plan around R.C.M. 1947, § 91-4321.1. Planning does not have to go so far as deeding property out of joint tenancy, since that may involve adverse tax consequences of its own. Rather, one recalls that the terminable interest rule of § 2056(b)(1) is conditioned on there being a third person who can enjoy the interest of a spouse that fails to vest or terminates.[43] But, if the decedent's joint interest is willed outright to the spouse, it will vest by Montana law in the spouse at the moment of death. Third party rights will be cut off, and the interest will once again be includible in the marital deduction. This result could be achieved by a short codicil:

> I hereby bequeath to my spouse any and all interests in property held jointly with my spouse, should such interests fail to vest in my spouse immediately upon my death due to the operation of law.

It is submitted that the only effect of such a codicil will be to circumvent the negative tax ramifications of a plain-meaning construction of R.C.M. 1947, § 91-4321.1. Since the codicil only insures what the joint tenancy was expected to accomplish, it can have no disruptive effect on the client's estate plan.

C. *Renunciation*

For the lawyer whose client has done him the manifest disservice of dying before increased estate tax liability under R.C.M. 1947, § 91-4321.1 can be avoided, renunciation of the joint tenancy may be the only post-mortem device to escape the harshness of terminability.[44] Of course, renunciation is itself dependent on there being other assets in the estate sufficient to take advantage of the marital deduction. The example of the family farm with agricultural property jointly owned provides no comfort in this regard. Furthermore, renunciation is itself a nice legal question in the context of joint tenancies; it is not recommended as a simple solution.[45]

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43. *Accord*, Rev. Rul. 56-26, 1956-1 CUM. BULL. 447; Estate of Cunha v. Commissioner, 279 F.2d 292 (9th Cir.), *cert. den.*, 364 U.S. 942 (1960).

44. INT. REV. CODE OF 1954, § 2056(d). What will happen to the property when a disclaimer is made is a crucial consideration. If the spouse is not the residuary legatee, the disclaimed interest of the decedent will not pass to her.

45. Clapp, *Post Mortem Planning*, 1 THE PROBATE LAWYER 1, 15-16 (1974). R.C.M. 1947, § 91A-2-801 contains the new Montana procedure for renunciation. While the editorial comments to that section make clear that the ability to renounce has been extended to intestate property as well as devises under a will, the language of the section does not expressly answer the question of the ability to renounce interests accruing by virtue of the right of survivorship.

VII. CONCLUSION

The impact of R.C.M. 1947, § 91-4321.1 will vary according to the reliance of Montanans on joint tenancies in their estate plans. If the act is given a plain meaning construction, it will stand as a costly piece of legislative drafting. The common law heritage that has been carried over as the substantive law of this state indicates that R.C.M. 1947, § 91-4321.1 does not affect vesting. Increased federal estate tax liability can be avoided if the Montana supreme court adopts this view. Were the court to do so, the procedure outlined in the new law can be described as the type of formalistic requirement that does not cause terminability under § 2056(b).