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Estate Planning Iowa Joint Tenancies

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Agricultural Law Center

**College of Law
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Iowa City, Iowa**

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INTRODUCTION

This monograph is addressed to estate planning problems created by the existence of joint tenancy arrangements in property for which an estate plan is to be developed. Because joint tenancies are extensively used in Iowa and estates are becoming more valuable, the problems created by joint tenancy are increasing in importance. The discussion proceeds on the premise that in the usual situation the estate planner must take the property arrangements as he finds them, because he usually comes on the scene too late to affect the initial choice of ownership form. His task is to unearth and unravel the ownership relations established by his client in the past and to consider the adjustments required to attain the client's estate planning goals.

Because there are several forms of joint ownership existent in Iowa and even more were possible under the common law, it is necessary to isolate the estate of joint tenancy with some precision. As used herein, joint tenancy refers to that form of concurrent ownership, of either a legal or an equitable estate, in which two or more parties have been transferred undivided interests in the estate, by deed or otherwise, and in which each co-owner may potentially succeed to a larger share of the ownership by surviving the other co-owners.

The organization of the materials herein is designed to approximate the analytical process an estate planner would ordinarily follow when confronted with an estate containing jointly owned property. First he must satisfy himself that the relationship created was a joint tenancy. Next, if he confirms the creation of a joint tenancy, he must investigate to determine whether the relationship has continued intact down to the present. Once he is satisfied that the client has one or more joint tenancies, he must consider what adjustments, if any, should be made in the ownership arrangements. An evaluation of the human, property, and tax aspects of each joint tenancy in light of the over-all estate plan may be required to determine what changes are recommended. If the decision is made to sever some of the joint tenancies, consideration must be given to the most practical and economical method of severance. If it is determined that a joint tenancy should not be dissolved, attention must be focused on integrating it into the total estate plan. Numerous complications are encountered at every stage of this process.

VERIFYING THE EXISTENCE OF A JOINT TENANCY

If it is true that the typical estate for which planning assistance is requested contains several jointly owned assets, it seems obvious that to function effectively an estate planner must have a thorough knowledge of the rules governing the creation and termination of joint tenancies. Untangling a client's ownership arrangements requires a careful examination of the deeds, contracts, bills of sale, wills, and other instruments upon which ownership is founded, plus inquiry into the parties' unwritten agreements and their practices in dealing with the jointly owned property. Appreciation of the subtle distinctions that may be significant in determining whether property is jointly owned requires keen insights into the requisites of creation and severance of the joint tenancy relationship. The great extent to which tax results in this area are determined by local property laws further underlines the value of fully understanding these problems.

An awareness of the historical background of joint ownership is essential to understanding the nature of the joint tenancy relationship. Joint tenancy had its roots in feudal England as a form of ownership of real property.¹ Later as personal property gained significance in the makeup of individual wealth, the real property rules were adapted to joint ownership of personalty.² In the last century, when joint tenancy of real property fell from favor,³ similar treatment was accorded personal property joint ownership.⁴ More recently, the popularity of certain types of survivorship arrangements involving personal property, such as joint bank accounts, has led to a relaxation in the stringency of the legal requisites in the personal property sphere.⁵ Now, to some extent, it seems things have come full circle and the more liberal personal property concepts are being applied to joint interests in realty.⁶ To what extent the recent shifts have been influenced by the impact of taxation is open to conjecture, but no one who reads the cases of the last thirty years can doubt that significant changes have taken place.

Because joint tenancy is one of the few areas of property law which has undergone substantial changes in recent years, it is not enough for the estate planner to remember what the law was. He must keep his knowledge in this area current and because he is planning for the future, he must search for trends that may enable him to anticipate tomorrow's changes. The following

¹ See 2 Pollack & Maitland, *History of English Law* 20 (2d ed. 1899).

² See 2 Blackstone, *Commentaries* * 399.

³ See 4 Thompson, *Real Property* §§ 1775, 1782 (Rev. ed. 1961).

⁴ See Williams, *Personal Property* 522 (18th ed. 1926).

⁵ See *Hill v. Havens*, 242 Iowa 920, 48 N.W. 2d 870 (1951).

⁶ See, e.g., *Hruby v. Wayman*, 230 Iowa 653, 298 N.W. 639 (1941); *Conlee v. Conlee*, 222 Iowa 561, 269 N.W. 259 (1937).

discussion is an attempt to depict accurately the state of the joint tenancy law in Iowa today. Wherever an apparent trend is discovered, it will be noted.

NATURE OF THE RELATIONSHIP

The characteristic of joint tenancy that distinguishes it from other types of co-ownership is the right of survivorship. This right arises out of the concept that property held in joint tenancy is held "by the whole," which means that each joint tenant, while living, owns *all* the property subject only to the claims of the other tenant or tenants. The tenants do not own merely a proportionate interest in the property as do tenants in common. Upon the death of the other joint tenants, the survivor becomes sole owner of the entire property. This ownership arises not because of any interest passing from the decedent to the survivor; rather, it is because the interest of the decedent terminates and the survivor's interest is now free of any other interest in the property. The Iowa Supreme Court has explained the concept thusly:

"In a legal sense, his death does not transfer the rights that he possessed in the property to the surviving tenant. Death does not enlarge the estate. Death terminates his interest in the estate. It is rather a falling away of the tenant from the estate than the passing of the estate to others."⁷

During the life of the joint tenants each is entitled to a share of the income from the property proportionate to his interest therein.⁸ In absence of evidence of unequal contributions, the co-tenants are presumed to take equal interests in the jointly owned property.⁹ Where there is a showing of unequal contributions, the interests are presumed to be in the same proportion as the contributions.¹⁰

CREATION—REAL PROPERTY

At common law a conjunction of the four elements or unities was necessary to the establishment of a valid joint tenancy. If any one of the unities was missing, no joint tenancy was created. The unities were:

1. *Unity of Time*—the interests of the joint tenants had to vest at the same time.

⁷ Fleming v. Fleming, 194 Iowa 71, 88, 89, 174 N.W. 946, 953 (1922).

⁸ See 4 Thompson, Real Property § 1799 (Rev. ed. 1961).

⁹ See in re Estate of Anders, 238 Iowa 344, 26 N.W. 2d 67 (1947).

¹⁰ See Lowell v. Lowell, 185 Iowa 508, 170 N.W. 811 (1919). Note that these presumptions do not exactly jibe with those of §2040 of the Internal Revenue Code. In other jurisdictions, markedly unequal contributions to joint tenancy property have been used to raise a constructive trust in favor of the estate of the first to die. See Kane v. Johnson, 397 Ill. 112, 73 N.E.2d 321 (1947); Moss & Siebert, *Classification and Creation of Joint Interests*, 1959 U. Ill. Law Forum 883.

2. *Unity of Title*—the title of all the joint tenants had to be derived from the same instrument.
3. *Unity of Interest*—the interests of all the joint tenants had to be co-extensive, that is, each joint tenant had to have an estate of the same type and duration.
4. *Unity of Possession*—each joint tenant had to have the same right to possession of the property.

Generally Iowa has abandoned the four unities requirement in regard to the creation of a joint tenancy and has shifted emphasis to the intention of the grantor. The notion of making the creating party's intention determinative dates back to the Iowa Code of 1851; however, the court was relatively slow in coming to that realization. The departure from observance of the common law requirements did not clearly occur until the court held in *Switzer v. Pratt*¹¹ that a conveyance by a husband to himself and his wife creates a joint tenancy where appropriate language is used.

Although intent has become the touchstone in resolving uncertainties, the Iowa law cannot be said to favor joint tenancies. On the contrary, Section 557.15 of the Iowa Code provides that a conveyance to two or more persons in their own right creates a tenancy in common unless a contrary intent is expressed.¹² This Code Section has long been regarded as manifesting a policy against the creation of joint tenancies in Iowa.¹³ If the language of the creating instrument is ambiguous and the intent unclear, the statutory presumption will require a finding that a tenancy in common was created.¹⁴ Although the statute uses the term "conveyances," the court has applied the Code provision equally to wills.¹⁵

For the creating instrument to unquestionably rebut the statutory presumption, whether a conveyance or a will, it should clearly provide that the prop-

¹¹ 237 Iowa 788, 23 N.W.2d 837 (1946). Although it could be argued that *Conlee v. Conlee*, 222 Iowa 561, 269 N.W. 259 (1927) marked a clear break with the four unities.

¹² "Conveyances to two or more in their own right create a tenancy in common, unless a contrary intent is expressed." Iowa Code § 557.15 (1962).

¹³ See *Hoffman v. Stigers*, 28 Iowa 302, 307 (1869), where the court said: "With us, therefore, when the estate is held by two or more, not as trustees, but in their own right, nothing being expressed to the contrary, the tenancy would be in common. And thus most plainly and authoritatively is the estate of joint tenancy disfavored by our law. There is no reason, no necessity for such an estate, except under the most peculiar circumstances. . . . And as now we in most of the states condemn entailments or perpetuities, so we do and should joint tenancies, or at least their common-law incident, . . . the right of survivorship."

¹⁴ See *Foley v. Engstrom*, 247 Iowa 774, 74 N.W.2d 673 (1956).

¹⁵ See *In re Estate of Heckman*, 228 Iowa 967, 291 N.W. 465 (1940); *In re Estate of Carter*, 203 Iowa 603, 213 N.W. 392 (1927).

erty is to be taken by the parties "as joint tenants with the right of survivorship, and not as tenants in common." Such language performs the function of expressly articulating the specific attribute of survivorship while simultaneously negating any intent to create a tenancy in common.¹⁶ Where the granting instrument contains something less than this phraseology, the estate planner begins to earn his fee.

Construing the Creating Instrument

The Iowa court has repeatedly been called upon to determine whether a particular instrument manifests an intent contrary to a tenancy in common. In some of these cases the court has restricted its search for contrary intent to an examination of the specific language used with reference to the joint ownership. This inquiry has been complicated by attempts to apply the traditional rules of construction to reconcile conflicting provisions in the instrument. In several cases the court has based its decision on the over-all import of the instrument read as a whole.

Generally, where specific language is relied upon to prove contrary intent, the court has tended to require the use of terminology technically competent to create a joint tenancy. The one exception to this generalization is that where the conveying instrument unequivocally specifies a survivorship arrangement, the court has been willing to recognize an intent to create a joint tenancy.

Thus, a deed growing out of a voluntary partition among heirs that provided, "Said real estate being taken by said grantees jointly . . . to have and to hold the above described real estate to the said grantees, their assigns, heirs, and devisees forever" was held ineffective to create a joint tenancy.¹⁷ The court observed that the term "jointly" was insufficient to create a joint tenancy and that the subsequent language in the granting clause clearly negated any survivorship rights. Similarly, a will provision which devised property to "my two daughters Lana and Dana jointly in equal shares, that is to say to each an undivided one-half thereof" was held incompetent to create a joint tenancy.¹⁸

The requirement of technically competent language reached its zenith in *Fay v. Smiley*¹⁹ where a deed to a husband and wife "as tenants by the entirety and not as tenants in common" resulted in a tenancy in common. A careful reading of the decision discloses that it is very limited authority on either tenancy by the entirety is summarized thus: "In other words we do not wish

¹⁶ See *Switzer v. Pratt*, 237 Iowa 788, 23 N.W.2d 837 (1946).

¹⁷ *Albright v. Winey*, 226 Iowa 222, 284 N.W. 86 (1939).

¹⁸ *In re Estate of Heckman*, 228 Iowa 967, 291 N.W. 465 (1940).

¹⁹ 201 Iowa 1290, 207 N.W. 369 (1926); Note, 12 Iowa L. Rev. 415 (1927). *cf.* Iowa Code § 637.3; Note, 42 Iowa L. Rev. 551 (1957).

to hold that an estate can be created simply by naming it, without the necessary words descriptive of such estate." The court was careful to point out the narrow issue it had decided. "It may be that, had there been a subsequent provision of the deed in specific words detailing an estate which would, at common law, have been an estate in entirety, we would be disposed to recognize the creation of such an estate;"

No contention was made in *Fay v. Smiley* that the estate created was a joint tenancy. Because one of the parties had conveyed away his interest before the suit, such a relationship would have been severed, so the issue was whether the property was held by tenants by the entirety or tenants in common. Therefore, the decision is not authority on the question of whether a joint tenancy may be validly created by a grant to "A and B as joint tenants and not as tenants in common." At least one distinguished Iowa commentator has gone on record with the view that such language should be sufficient.²⁰

Because the survivorship feature is the distinguishing characteristic of joint tenancy, an instrument that specifies this right between co-owners is generally found to create a joint tenancy. Concerning a deed to a named husband and wife "or the survivor of either," the court said, "The word survivor or survivorship has no equivocal meaning and as here used is not an incident to the creation of a tenancy in common. . . . We conclude that the language in the granting clause is sufficient to clearly manifest an intention to create an estate in joint tenancy with survivorship incident thereto."²¹

The survivorship right must apply to the entire property, however, and not just to an interest therein. Where the language of the grant was "to go and be held by either (H and W) whichever survives the other, and be held by said survivor undivided until the death of said survivor, when title to said land is to be vested in the legal heirs of above grantees as the law directs," the court decided that the co-tenants held as tenants in common, with each tenant's interest subject to a life estate in the survivor of them.²²

So central is the survivorship right to the joint tenancy relationship that the court has on occasion found a valid creation of a joint tenancy where the granting instrument read as a whole manifested an intent for survivorship. The deed in *Wood v. Logue*²³ described the rights in terms of "inherit," but the court found, in interpreting the incorrect term in the context of the entire instrument, that a joint tenancy was obviously intended. Conversely, an intent against survivorship may also be discovered through an examination of the granting instrument from the viewpoint of over-all dispositive intent.²⁴

²⁰ Marshall, Iowa Title Opinions and Standards § 3.2(c).

²¹ *Hruby v. Wayman*, 230 Iowa 653, 298 N.W. 639 (1941).

²² *Gruwell v. Gruwell*, 185 Iowa 581, 171 N.W. 290 (1919).

²³ 167 Iowa 436, 171 N.W. 290 (1914).

²⁴ See *In re Estate of Heckman*, 228 Iowa 967, 291 N.W. 465 (1940).

Effect of Extrinsic Evidence and Agreements

Investigation into the circumstances surrounding the execution of an ambiguous instrument is not only a legitimate technique for solving construction problems, it is also a necessary one where, as in the joint tenancy area, the whole thrust of the interpretive process is directed to discovering intent. Thus, the court has been receptive to extrinsic evidence which has the effect of placing the questioned instrument in perspective. Perhaps the clearest example of the value of such evidence is *Albright v. Winey*,²⁵ where the showing that the deed creating the co-ownership emanated from a voluntary partition among heirs, foreclosed, as a practical matter, any likelihood that the instrument would be found to create a joint tenancy.

Not so easily understood, however, is the court's demonstrated willingness to rely on proof of an agreement extrinsic to the granting instrument to find that a joint tenancy was created. On three of four occasions the court has recognized rights based on survivorship agreements, two of which were not discoverable in the title instruments of the property affected. Only in the early *Fleming*²⁶ case did the court back away from an extrinsic survivorship contract, and then primarily for the reason that enforcement of the agreement would have prejudiced the interests of a surviving spouse.

In *Stewart v. Todd*,²⁷ a partnership agreement between husband and wife provided that "at the death of either party the one living shall fulfill all contracts, pay all debts, and have all property left or owned by either party, or in the firm name." When the wife died devising her separate property in a manner inconsistent with the agreement, the court upheld the husband's survivorship claim.

The deed to the property involved in *Conlee v. Conlee*²⁸ expressly designated the grantee brothers as tenants in common. Subsequently the brothers entered into a written agreement that the survivor of them was to have the whole property. The court recognized the validity of the contract and found that it created a joint tenancy which controlled over the granting clause in the deed under which the brothers took the property.

In *Stonewall v. Danielson*,²⁹ the agreement to hold property as joint tenants was oral and it was made prior to the acquisition of the property in issue. Without deciding whether the agreement created a true joint tenancy, the court sustained its validity and enforced the survivorship rights created thereby.

This permissive attitude toward separate contracts is perhaps explainable

²⁵ 226 Iowa 222, 284 N.W. 86 (1939).

²⁶ *Fleming v. Fleming*, 194 Iowa 71, 174 N.W. 946 (1922).

²⁷ 190 Iowa 283, 173 N.W. 619 (1920).

²⁸ 222 Iowa 561, 269 N.W. 259 (1937).

²⁹ 204 Iowa 1367, 217 N.W. 456 (1928).

as a side-effect of the liberalization of the requirements for creation of joint tenancies in personalty. However explained, it is a disturbing matter to estate planners because it means that one cannot fully rely on an examination of title instrument to detect survivorship rights. The full magnitude of the uncertainty becomes apparent with the fact that the survivorship agreement may be recognized even though it is oral and entered into prior to the acquisition of the property. The importance of a thorough inquiry into the client's unrecorded, and even unwritten arrangements concerning his property should be evident.

CREATION—PERSONAL PROPERTY

"Language which is sufficient to effectuate a joint tenancy in a deed will be equally so in personalty."³⁰ This terse statement excerpted from a recent Iowa opinion is representative of the Iowa approach to joint tenancies in personalty—permissive, yet not without boundaries. But the boundary lines are more indistinct than with realty.

The principles developed in the preceding section concerning creation of a joint tenancy in real property are equally applicable to many items of personal property. But the kaleidoscopic array of personalty susceptible to joint ownership today suggests the impracticality of attempting to resolve all personalty survivorship problems by reference to real property principles. Generally, the less reliable the analogy to real property ownership, the less likely the applicable rules will reflect the common law heritage.

Tangible personalty used in close association with real property is likely to be judged by the traditional property standards, and the statutory presumption of tenancy in common is likely to be applied. At the opposite extreme, in disputes involving such amorphous co-ownerships as joint bank accounts and government bonds, the legislative policy against survivorship may be held inapplicable and the issue decided through resort to contract or trust principles. It is helpful in discussing the personal property situation to isolate certain types of assets that frequently raise survivorship problems, including particularly tangible personalty, corporate stocks and bonds, joint bank accounts, joint safety deposit boxes, government bonds, and mortgages, land contracts, and other contractual rights.

Tangible Personalty

Surprisingly little law exists, both in Iowa and elsewhere, relating to requirements for creating a joint tenancy in tangible personalty. It seems to be generally assumed that the creation of survivorship rights in tangibles is governed by the standard property requirements of transfer, delivery, and intent

³⁰ In re Estate of Miller, 248 Iowa 19, 22-23, 79 N.W.2d 315, 318 (1956).

to create a joint tenancy derived from real property law and that the presumption against survivorship applies.³¹

Such an assumption ignores somewhat the loose undocumented arrangements that usually characterize the ownership of personal property. As a practical matter, this traditional casualness in the formation of personal property ownership arrangements permits a great deal of latitude for resolving each co-ownership problem on its own peculiar facts and leaves little room for operation of the statutory presumption. In other words, the courts are much freer to rely on intent manifested in the parties declarations and conduct regarding the property than in the normal real property situation where the determination is focused on construction of a written conveyance.³²

Because of the milieu in which rights to personal property are held in Iowa, a common problem of much significance arising from the co-ownership of personalty is the disposition of tangibles used in connection with a jointly owned land. For example, when a husband and wife hold title to the family farm as joint tenants, should such items as the livestock, feed, and machinery be regarded as subject to the survivorship right, or are they the separate property of one person? A similar question may arise in regard to an informal father and son farm partnership.

To date only one Iowa case is found that raises this issue in a farm context. Considering the sizable number of Iowa farms held in joint tenancy, this lack of litigation is remarkable. Whether this dearth of authority means that the surviving joint tenant's claim to the farm personalty is never disputed or that such a claim is never made is subject to conjecture. The few farm joint tenancy cases decided in other jurisdictions shed very little light on the issue.³³

In *Conlee v. Conlee*³⁴ the survivorship agreement was spelled out in a written contract between two brothers who farmed as partners. In enforcing the survivorship contract, the court did not distinguish between the real and personal property involved in the farm business. However, the contract in issue specified a survivorship right in the farm personalty and was quite different in content and form from the usual joint tenancy deed to a farm.

In final analysis, issues of this nature must be resolved on the basis of intent. In a husband and wife joint tenancy, the chances are very great that an intent will be found to extend the survivorship right to personal property closely associated with the land. In joint tenancies between others than husband and wife, the intent is not so easily inferred from the parties' relationship; therefore, the burden of the proving it may be substantially greater.

³¹ See *In re Estate of Miller*, 248 Iowa 19, 79 N.W.2d 315 (1956); *Conlee v. Conlee*, 222 Iowa 561, 269 N.W. 259 (1937).

³² See *O'Brien v. Biegger*, 233 Iowa 1179, 11 N.W.2d 412 (1943).

³³ See, e.g., *Block v. Schmidt*, 296 Mich. 610, 296 N.W. 698 (1941); *In re Ebdon*, 98 N.Y.S.2d 697 (1950); *Estate of Budney*, 2 Wis. 2d 389, 86 N.W.2d 416 (1957).

³⁴ 222 Iowa 561, 269 N.W. 259 (1937).

Corporate Stocks and Bonds

It is seemingly well settled in Iowa that joint tenancies may be created in corporate stocks and ordinary bonds by the same method as joint tenancies in land. The Iowa court has followed this property approach in two recent cases. In one case dealing with debentures payable to "John Miller or Robert Miller, either one or the survivor," the court said:

"Since the right of joint tenancy in personal property as well as in real estate is recognized in Iowa, it follows that language which is sufficient to effectuate a joint tenancy in a deed should be equally so in personalty, such as stock certificates, bank accounts, or the debentures involved in the case at bar."³⁵

The reliance on a property rather than a contract rationale was made clear by the statement: "The general rule is . . . that any instrument, whether pertaining to realty or personalty, in which two or more persons are grantees, or payees, creates in them a tenancy in common in the absence of expression of a contrary intent."³⁶

In a later decision construing the effect of a stock certificate made to husband and wife "as joint tenants with right of survivorship and not as tenants in common" the court reaffirmed its recognition of the joint tenancy estate in corporate stock.³⁷ The court recognized the trend to search for intent in joint tenancy cases, but noted that such a policy "does not permit the courts to completely remake written instruments after death and insanity have sealed the lips of the principals." In commenting on the creating language the court said, "No words more clear, explicit, free from misunderstanding nor technically correct could be used."

These cases approve the creation of joint tenancies in stocks and bonds through insertion of the classic language in the stock certificate, but they do not exclude other possibilities for creating survivorship rights in such property. By an analogy to real estate law, survivorship rights could be created also through a separate contract between the parties.³⁸ The contract theory developed in bank deposit cases discussed subsequently might lead to the conclusion that an appropriate contract between the registered owners and the corporation issuing the stock would constitute a sufficient survivorship agreement.³⁹

It is sometimes suggested that insofar as listed stocks are concerned, the stock exchange rules must be followed to create a joint tenancy.⁴⁰ This may be true with regard to the validity of the arrangement vis a vis the exchange and the corporation's transfer agent, but it should not prevent the parties

³⁵ In re Estate of Miller, 248 Iowa 19, 22-23, 79 N.W.2d 315, 318 (1956).

³⁶ *Id.* at 22, 79 N.W. 2d at 318.

³⁷ Hyland v. Standiford, 253 Iowa 294, 111 N.W.2d 260 (1961).

³⁸ See notes 26-29 *supra*, and accompanying text.

³⁹ See notes 41-49 *infra*, and accompanying text.

⁴⁰ See Christy and McLean, *The Transfer of Stock* § 220 (2d ed. 1940).

creating survivorship arrangements that are binding on themselves and their estates.

Joint Bank Accounts

"The increasing use of joint bank accounts makes the problem before us one of general importance. The fact that upon the death of the husband a sum is at once available to discharge the expenses of the last illness and provide for household necessities, without Court proceedings, has won for such accounts increasing favor. In fact, these accounts are regarded by people in modest circumstances as a poor man's will."⁴¹

As the above quotation would imply, survivorship provisions in joint bank accounts have generally been given effect in Iowa. However, the court experimented with a number of rationales before arriving at the current "contract" theory for enforcing such provisions.⁴² Starting with the Winkler case⁴³ in 1942, the court has recognized that the description of the joint bank account as creating a "joint tenancy" is generic and does not require application of the property principles usually associated with the term.

The contract theory proceeds in the assumption (equally supported by the real property cases) that there is no policy of the state which prevents persons from creating survivorship rights in their property through a valid contract. The court in *O'Brien v. Biegger* noted: "There is no legislative or judicial ban against agreements for joint tenancies in any kind of property," and later took pains to point out that Iowa Code Section 528.64 might be regarded as indicating a legislative policy in favor of survivorship in joint accounts by authorizing banks to pay out to any person named in an account "payable to either or the survivor."⁴⁴

The contract upon which the theory is based is the deposit agreement between the bank and the depositors. The development of the contract theory and its conceptual foundation is lucidly set forth in *Hills v. Havens*.⁴⁵ In sustaining the survivorship arrangement created by a Signature Card denominated as a "Joint Account Payable to Either or Survivor" and containing the typical language, the court said:

"The contract is that the bank will, in consideration of the deposit of funds with it and the creation of a debtor-creditor relation between itself and its depositors, consider them as owners in joint tenancy, with right of survivorship, and not as tenants in common; and that upon the death of either depositor any

⁴¹ *O'Brien v. Biegger*, 233 Iowa 1179, 1189-90, 11 N.W.2d 412, 417 (1943).

⁴² See Fitzgibbons, *Joint Tenancy in Iowa*, 34 Iowa L. Rev. 41 (1948); Note, 42 Iowa L. Rev. 551 (1957).

⁴³ *In re Estate of Winkler*, 232 Iowa 930, 5 N.W.2d 585 (1942).

⁴⁴ *O'Brien v. Biegger*, 233 Iowa 1179, 1205, 11 N.W. 2d 412, 424 (1943); See also Iowa Code §§534.11 (5) & (8) (1962).

⁴⁵ 242 Iowa 920, 48 N.W.2d 870 (1951).

balance in the account shall become the absolute property of the survivor. Language more definite, more explicit, could hardly be devised."⁴⁶

Consistent with contract principles, where the provisions of the contract are clear, parol evidence is not admissible to vary the terms of the agreement.⁴⁷ But where the contract of deposit is ambiguous, extrinsic evidence is admissible to show intent or lack of intent to create survivorship rights.⁴⁸ Evidence of intent is likewise admissible where there is no written instrument relied upon to prove the survivorship agreement.⁴⁹

*Estate of Murdoch*⁵⁰ interjected a troublesome qualification on the contract theory by its refusal to enforce a deposit agreement providing for survivorship where the survivor had not signed the deposit card. The decision was based on the ground that no valid contract has been entered into between the non-signatory survivor and the bank. It is not clear why, in absence of fraud, the agreement between the depositor and the bank would not, under contract principles, be enforceable by the survivor on a third-party beneficiary theory.⁵¹ Such a contract was enforced in a similar situation in *Estate of Lenders*,⁵² but no argument was made concerning execution of the deposit contract.

Another unusual qualification that deserves comment is the presumption against the validity of the arrangement that is raised by a confidential relationship between the joint depositors. Such a presumption places on the survivor the burden of proving the fairness of the survivorship agreement by clear and convincing evidence.⁵³

Joint Safety Deposit Boxes

A problem that may be ripe for litigation in Iowa is the ownership of property contained in a joint safety deposit box. Where the rental contract for the box specifies that only joint access is intended, it seems clear that ownership of the contents is in no way affected. However, rental agreements are occasionally found that speak in terms of creating a survivorship interest in the assets stored within the box. This practice is quite disturbing considering the

⁴⁶ *Id.* at 929-30, 48 N.W.2d at 876.

⁴⁷ *Burns v. Nemo*, 252 Iowa 306, 315, 105 N.W.2d 217, 221 (1960); *McManus v. Keokuk Savings Bank & Trust Co.*, 239 Iowa 1105, 1109, 33 N.W.2d 410, 412 (1948); *In re Estate of Murdoch*, 238 Iowa 898, 903, 29 N.W.2d 177, 179 (1947).

⁴⁸ *Williams v. Williams*, 251 Iowa 260, 100 N.W.2d 185 (1959); *In re Estate of Loudon*, 249 Iowa 1393, 92 N.W.2d 409 (1958); *Hill v. Havens*, 242 Iowa 920, 48 N.W.2d 870 (1951).

⁴⁹ See *O'Brien v. Biegger*, 233 Iowa 1179, 11 N.W.2d 412 (1943).

⁵⁰ 238 Iowa 898, 29 N.W.2d 177 (1947).

⁵¹ *Cf. Marble Savings Bank v. Mesarvey*, 101 Iowa 285, 70 N.W. 198 (1897).

⁵² 247 Iowa 1205, 78 N.W.2d 536 (1956).

⁵³ See *Burns v. Nemo*, 252 Iowa 306, 105 N.W.2d 217 (1960); *Luse v. Grenko*, 251 Iowa 211, 100 N.W.2d 170 (1959).

extent to which the Iowa court has generally endorsed contracts creating survivorship rights.

There is no Iowa authority on the issue, but if the court were to give effect to such an agreement, it is arguable that every item placed in the box would become subject to survivorship rights. In such a case would removal of the property from the box then terminate the survivorship right? It is difficult to imagine a situation more fraught with litigious uncertainties.

Creation of such fluid ownership rights has found little acceptance in other jurisdictions.⁵⁴ At least where the agreement is ambiguous, the decisions resolve the issue in favor of a joint access construction.⁵⁵

Government Bonds

The Iowa treatment of survivorship rights in government bonds has closely paralleled developments in the area of joint bank accounts. In fact, in *Hill v. Havens* the court said:

"We have discussed and determined the proper ruling as to the bank deposit in the preceding division. We think the reasoning and precedents require a similar holding in regard to the United States Bonds."⁵⁶

It now seems well settled that the contract theory is fully applicable to government bonds, and with fewer limitations than are applied to joint bank accounts because the "contract" is said to incorporate by reference the United States Treasury Regulations.⁵⁷

The applicable regulations read as follows:

"§315.60 A savings bond registered in co-ownership form, for example, "John A. Jones or Mrs. Mary C. Jones" will be paid . . . during the lives of both, as follows: (a) *Payment*. The bond will be paid to either upon his separate request, and upon payment to him the other shall cease to have any interest in the bond.

"§315.61 *After death of one . . . co-owner*. If either co-owner dies without the bond having been presented and surrendered for payment or authorized reissue, the survivor will be recognized as the sole and absolute owner. Thereafter, payment or reissue will be made as though the bond were registered in the name of the survivor alone. . . ."⁵⁸

Apparently feeling the need to make amends for earlier slights, the court in *Estate of Sprague*⁵⁹ stretched the "contract with the government" concept to the point of construing a will provision devising property received "as a

⁵⁴ See Effland, Estate Planning: Co-ownership, Seminar Series for Wisconsin Lawyers 38, Sept. 11, 1957.

⁵⁵ *Calif. Trust Co. v. Bennett*, 33 Cal.2d 694, 204 P.2d 324 (1949); *David v. Ridfely—Farmers Safe Deposit Co.*, 342 Ill. App. 96, 95 N.E.2d 725 (1950); See also *Lilly v. Schmock*, 297 Mich. 513, 298 N.W. 116 (1941).

⁵⁶ 242 Iowa 920, 930-31, 48 N.W.2d 870, 876 (1951).

⁵⁷ *Id.* at 932, 48 N.W.2d at 877.

⁵⁸ Title 31, Code of Fed. Regs. (Revised 1965).

⁵⁹ 244 Iowa 540, 57 N.W.2d 212 (1953).

surviving spouse from my husband" to exclude bonds taken by the textatrix as a surviving joint tenant with her husband.

Mortgages, Land Contracts, and other Contractual Rights

Both a real estate mortgage and a land contract are essentially contractual obligations secured by a lien on real estate. True, the security interests may be enforced through different remedies,⁶⁰ still both are essentially land-based credit arrangements. To create a survivorship interest in the proceeds owing under such instruments, must one adhere to the property principles or is the contract theory available to permit proof of an extrinsic intent? This problem is particularly sensitive in Iowa owing to the rule that a contract of sale by all joint tenants severs the joint tenancy.⁶¹

Very little authority is found on this point in Iowa or elsewhere. The implication of *Estate of Baker*⁶² is that to create a joint tenancy in the proceeds of a land contract, compliance with the usual property requirements is necessary. It would appear the statutory presumption in favor of tenancies in common would be applicable. By analogy, the same should be true of mortgage proceeds, although a distinction apparently is drawn between the contract and mortgage on the question of severance.⁶³ In *Estate of Miller*,⁶⁴ where the court was discussing applicability of the statutory presumption to personal property, the language used was "grantees or payees." Thus, it seems safe to predict that the creation of joint tenancy in the interests of real estate mortgagees and land contract vendors will require the same general precautions as would the creation of joint tenancy in the real property itself.

Unsecured contractual obligations and debts secured by chattel interests arguably could be subjected to survivorship arrangements in the same fashion as joint bank accounts. Chances are, however, that ordinary contract rights jointly owned will not receive the same favored treatment as joint bank accounts and government bonds,⁶⁵ so the sound practice is to specify the survivorship interest clearly in the contract.

SEVERANCE

Once the estate planner has satisfied himself that a survivorship right was validly created in the property, he still is not in a position to make a final judgment concerning the extant form of ownership until he has ascertained

⁶⁰ Compare Iowa Code c. 654 with c. 656 (1962).

⁶¹ See *In re Baker's Estate*, 247 Iowa 1380, 78 N.W.2d 863 (1956); *In re Sprague's Estate*, 244 Iowa 450, 57 N.W.2d 212 (1953).

⁶² 247 Iowa 1380, 78 N.W.2d 863 (1956).

⁶³ See notes 72-78 and accompanying text.

⁶⁴ 248 Iowa 19, 79 N.W.2d 315 (1956).

⁶⁵ The "payees" language of *In re Estate of Miller* would seem to apply equally to ordinary contract obligees.

that the joint tenancy was not subsequently severed. The variety of methods by which a joint tenancy may be terminated is often cited as proof of the instability of the relationship. This allegation is not wholly fair because it implies that there is considerable danger of an unintentional severance occurring—a state of affairs that the cases simply do not support.

In Iowa the emphasis on intent, which now characterizes the resolution of issues involving joint tenancy creation, has not been accompanied by a similar shift in the attitude toward severance.⁶⁶ Today, references to the “four unities” are most frequently found in cases dealing with termination questions. Generally, an effective termination requires an intent to sever plus a deliberate act inconsistent with the continuance of the survivorship right—intent alone is not sufficient. As with creation problems, the nature of the property subjected to the survivorship rights affects the formality of the act required to effect termination. For example, where tangible personalty is involved, it is often not clear whether certain conduct toward the property rebuts the existence of survivorship rights or severs a validly created joint tenancy; and in most such cases the distinction is not really important.

The discussion of severance law has been divided into a number of problem areas. It is not certain that all possibilities have been covered, but a substantial start has been made on the list.

Partition

Partition is the most formal method of severing joint tenancy and little question can exist concerning its effectiveness in Iowa.⁶⁷ However, the tenancy is probably not severed until the partition judgment is rendered, although it could be argued that commencement of the action is an act clearly manifesting an intent to sever.

Mutual Agreement

If joint tenancy can be created by contract, logically it should be severable by the same method. The Iowa court has never been squarely faced with the issue, but has indicated in dicta that it would recognize a mutual agreement as effecting a severance.⁶⁸ In *Estate of Baker*,⁶⁹ the court quotes extensively a passage from Blackstone's Commentaries supporting the effectiveness of a mutual agreement to sever.

Conveyance

The joint tenancy relationship does not preclude a unilateral transfer of a co-tenant's undivided interest or a joint transfer of the property by all the

⁶⁶ See Fitzgibbons, Joint Tenancy in Iowa, 34 Iowa L. Rev. 41 (1948).

⁶⁷ See *Indra v. Wiggins*, 238 Iowa 728, 28 N.W.2d 485 (1947).

⁶⁸ *Wood v. Logue*, 167 Iowa 436, 171 N.W. 290 (1914).

⁶⁹ 247 Iowa 1380, 78 N.W.2d 863 (1956).

co-tenants. The effect of such a conveyance by one joint tenant is to sever the joint tenancy as to the interest transferred.⁷⁰ If there are more than two co-tenants, the conveyance of one undivided interest usually does not affect the relationship of the remaining joint tenants *inter se*. A deed by one spouse in husband and wife joint tenancy of homestead property would not cause a severance because such a deed is void under Section 561.13 of the Iowa Code.⁷¹

Contract of Sale

An enforceable contract to sell his undivided interest entered into by one joint tenant ordinarily severs the joint tenancy. Under the doctrine of equitable conversion, the unity of title clearly would be broken.⁷²

In Iowa, a contract to sell joint tenancy property by all co-tenants was held in *Estate of Baker*⁷³ to sever the joint tenancy unless the contract specifically provides that the proceeds are to be received in joint tenancy. The rationale of this decision was primarily in terms of the destruction of the four unities and the statutory presumption against joint tenancies.

The *Baker* case was decided by a 5-4 majority and has been criticized as creating an opportunity for an unintentional severance through insistence on anachronistic technical rules⁷⁴ and defended as creating a parity between real estate credit arrangements different in form only.⁷⁵ One twist to the *Baker* rule that should be recognized is that the subsequent forfeiture of the buyer's interest and restoration of the full title to the sellers would not restore a joint tenancy relationship where the contract failed to provide for the receipt of the proceeds as joint tenancy property.

The effect of the *Baker* rule on contracts to sell personal property is speculative. The result will probably depend on the closeness of the analogy of the personalty sold to real property.

Mortgage and Pledge

Although there is no direct Iowa authority, and the cases in which the question has been obliquely involved suggest conflicting results,⁷⁶ it is gen-

⁷⁰ See *In re Heckman's Estate*, 228 Iowa 967, 291 N.W. 465 (1940).

⁷¹ "No conveyance or encumbrance of, or contract to convey or encumber the homestead, if the owner is married, is valid unless the husband and wife join in the execution of the same joint instrument . . ." Iowa Code § 561.13 (1962).

⁷² *In re Estate of Sprague*, 244 Iowa 540, 57 N.W.2d 212 (1953).

⁷³ 247 Iowa 1380, 78 N.W.2d 863 (1956).

⁷⁴ Comment, 42 Iowa L. Rev. 646 (1957).

⁷⁵ See Marshall, Iowa Title Opinions and Standards § 3.2(j) (1963).

⁷⁶ See, e.g., *Hyland v. Standiford*, 253 Iowa 294, 111 N.W.2d 260 (1961); *Indra v. Wiggins*, 238 Iowa 728, 28 N.W.2d 485 (1947); *In re Estate of Heckman*, 228 Iowa 967, 291 N.W. 465 (1940).

erally believed that in a "lien" jurisdiction like Iowa, a mortgage by one or all joint tenants does not cause a severance of the joint tenancy.⁷⁷ Although this result would likely square with the intent of the parties, it is somewhat difficult to reconcile with the four unities concept—the interest of the joint tenants does change to an equity of redemption.⁷⁸ Of course, a transfer of the joint tenancy property or an interest therein at a foreclosure sale will cause a severance.

In *Hyland v. Standiford*⁷⁹ a pledge of stock was expressly held not to sever the survivorship right where no further alienation or foreclosure took place.

Judgment Liens

Most jurisdictions recognize that a joint tenant's undivided interest in real property is subject to the claim of his creditors, but it is generally held that a severance is not effected until the interest is actually sold at execution sale.⁸⁰ Although there is no Iowa authority on the point, it is commonly believed that neither the perfecting of a judgment lien nor a non-possessory levy will (without more) cause a severance.⁸¹

Special Limitation

In Iowa a joint tenancy may be automatically severed upon the occurrence of an event upon which the estate was conditioned. The Iowa court has held that a forfeiture provision to take effect in the event of the marriage of a grantee was not inconsistent with the estate of joint tenancy.⁸² The court stated that:

"... the objection is sufficiently answered by the suggestion that this provision does no more than provide for a contingency upon the happening of which the joint tenancy should cease."⁸³

Effect of a Lease

At common law, a lease for years by one joint tenant constituted a valid severance of the tenancy so long as the lease continued, and it took precedence over the right of survivorship in the other joint tenants.⁸⁴ Some authorities today argue that a total severance should take place because a destruc-

⁷⁷ See Marshall, Iowa Title Opinions and Standards § 4.11 (1963) Note, 41 Iowa L. Rev. 425 (1956).

⁷⁸ See 2 American Law of Property § 6.2 (Casner ed. 1952).

⁷⁹ 253 Iowa 294, 111 N.W.2d 260 (1961).

⁸⁰ See *Van Antwerp v. Horan*, 390 Ill. 449, 61 N.E.2d 358 (1945); *Musa v. Segelke & Kohlhaus Co.*, 224 Wis. 432, 272 N.W. 657 (1957).

⁸¹ See Marshall, Iowa Title Opinions and Standards, § 10.6 (B) (1963).

⁸² See *Wood v. Logue*, 167 Iowa 436, 149 N.W. 613 (1914).

⁸³ *Id.* at 441, 149 N.W. at 615.

⁸⁴ See generally Littleton's Tenures § 289; Co. Litt *185a, *186b.

tion of the unity of interest occurs. Others hold the view that the lease severs the tenancy but it can be revived if the lease terminates, prior to the death of the lessor. A third view suggests that no severance occurs and the survivor takes the entire estate subject to the rights of the leasee.⁸⁵ This latter position seems most consistent with modern joint tenancy concepts. The Iowa court has never been faced with the issue.

Acquisition of an Adverse Interest

In an early case the Iowa court recognized that a tenant in common cannot defeat the rights of his co-tenant by permitting the property taxes to become delinquent and then purchasing the property at a tax sale.⁸⁶ Whether such a rule would be extended to preclude the effectiveness of such an act to cause the severance of a joint tenancy is not clear.

Presumably a joint tenancy may be severed by the adverse possession of one tenant against another where there has been an ouster. The Iowa court has not been directly confronted with the question, but in *Lynch v. Lynch*,⁸⁷ one tenant in common was permitted to claim the share of the other through adverse possession.

Bankruptcy

A strong argument could be made for the proposition that bankruptcy of a joint tenant severs the joint tenancy automatically.⁸⁸ In any event it seems clear that a trustee in bankruptcy has the power to sever the joint estate for the benefit of creditors of the bankrupt. The trustee is vested with all interests owned by the bankrupt and is charged with the duty of marshalling and selling the assets in order to distribute the proceeds.⁸⁹ Thus, it would logically follow that acts done in such capacity would effect a severance, if such were the legal consequence of the same acts had they been done by the bankrupt joint tenant himself.

Disposition by Will

A disposition of joint tenancy property by will generally has no effect because the testator's interest disappears at the instant of his death. This proposition has been consistently recognized in the Iowa cases.⁹⁰

In a few jurisdictions a doctrine of election has grown up in cases where property held in a husband and wife joint tenancy is devised away by the first

⁸⁵ See 2 Tiffany, Real Property § 425 (3d ed 1939).

⁸⁶ *Weaver v. Van Meter*, 42 Iowa 128, 20 Amer. Rep. 616 (1875).

⁸⁷ 239 Iowa 1245, 34 N.W.2d 485 (1948).

⁸⁸ The unity of title would seem to be broken immediately on appointment of the trustee.

⁸⁹ Bankruptcy Act, 11 U.S.C.A. § 75 (1965).

⁹⁰ See, e.g., *Wernet v. Jurgenson*, 241 Iowa 833, 43 N.W.2d 194 (1950).

to die in a will which the survivor accepts.⁹¹ In substance this doctrine holds that the acceptance by the survivor of the will containing a disposition inconsistent with the joint tenancy effects an election against the survivorship right. The Iowa court has not indicated any responsiveness to such a rule.

However, Iowa does recognize the power of joint tenants to limit the extent of the survivorship right through a subsequent contractual will. Thus, it has been held recently that a contractual will impressed a constructive trust on property taken by the surviving joint tenant in favor of the devisees in the will.⁹² In enforcing the provision in such a will against a surviving joint tenant in *Jennings v McKeen*,⁹³ the court remarked: "That the survivor may become owner by virtue of the joint tenancy is immaterial so long as she received benefits under the will sufficient to constitute consideration to support the contract." It is interesting to note that the Eighth Circuit found the Iowa law to preclude the limitation of joint tenancy property through a contractual will in a 1955 case involving the availability of the estate tax marital deduction.⁹⁴

Divorce

The general rule seems to be that absent a property settlement affecting the joint tenancy relationship, divorce of married joint tenants does not cause a severance.⁹⁵ Such a result seems contrary to the intent of at least one of the co-tenants. Iowa has not had occasion to examine the question directly.⁹⁶

Simultaneous Death

In a sense, the simultaneous death of all joint tenants effects a severance through the provision of the Uniform Simultaneous Death Act.⁹⁷ Under that Act the jointly owned property is distributed as if each joint tenant survived as to his proportionate interest in the property.

⁹¹ See, e.g., *Estate of Parker*, 223 Wis. 29, 76 N.W.2d 712 (1956).

⁹² *Tiemann v. Kampmeier*, 252 Iowa 587, 107 N.W.2d 689 (1961).

⁹³ 245 Iowa 1206, 65 N.W.2d 207 (1954).

⁹⁴ *Awtry v. Comm'r*, 221 F.2d 749 (8th Cir. 1955).

⁹⁵ This rule emphasizes the degree to which intent is disregarded in the rather blind allegiance to the common law unities demonstrated by severance principles.

⁹⁶ In *Indra v. Wiggins* the court casually approved a lower court finding of law that a divorced couple were still "joint tenants" 238 Iowa 728, 38 N.W.2d 485 (1947).

⁹⁷ Uniform Simultaneous Death Act § 3; Iowa Code Ann. § 633.525 (1964).

CONSIDERATIONS IN THE DECISION TO PRESERVE OR SEVER JOINT TENANCY

When it has been determined that the estate contains assets currently subject to valid survivorship rights, the estate planner must next turn his attention to weighing the advantages and disadvantages to the estate of preserving or severing particular joint tenancy relationships. In this evaluative process different types of considerations must be recognized and balanced against one another.

Generalizations concerning the weighting of various factors are of little value because the relative significance of each consideration is singularly dependent on the peculiar facts of each case—the size and composition of the estate, the relationships, needs, and abilities of family members, and the client's personal objectives. It should be helpful, however, to note here the factors commonly associated with the evaluation of joint tenancies. At this stage, the taxation material is segregated in an effort to minimize confusion. Tax considerations are merged with other factors in the later sections where specific problems are developed.

HUMAN FACTORS

The individual personalities and feelings of the joint tenant and his family are considerations that cannot be ignored. The spiritual aspects of joint tenancy are often debunked; nevertheless, in many cases it may be that the sense of security and feeling of involvement in the family's affairs generated by joint tenancy holdings run so deep that they override any other considerations.

At a slightly different level, family members may habitually own their property in joint tenancy and be unwilling to deviate from the established pattern. Or it may be that the joint ownership is simply a matter of convenience and is preferred for that reason. In such situations these personal preferences might be expected to yield upon a showing of significant advantage or disadvantage on other counts.

Although hardly consistent with good estate planning practice, the reluctance of many persons with modest estates to make wills is firmly entrenched. Situations are conceivable where the results within the family under joint tenancy survivorship are preferable to those that would obtain in intestacy. For example, between a husband and wife with no children or with minor children, survivorship to the entire property by the wife under joint tenancy would likely be more nearly consistent with the best interests of the family than would be the division of the estate required by the intestate laws.

Of course, the personal aspects of the situation may also militate against continuation of the joint tenancy. Where one of the joint tenants is a spend-

thrift or does not possess the managerial ability to handle the property as survivor, a change in ownership form is indicated. Likewise, if extensive use of joint tenancy channels the bulk of the estate to one member of the family, the probability of creating a rift between the survivor and the rest of the family might suggest termination of the survivorship feature.

Also it should be kept in mind that joint tenancies are readily severable and that the trust reposed in a person today may be proved unsound by future events. Once a joint tenancy has been created, the most the creating tenant can get back without the consent of the other tenants is his proportionate share.⁹⁸ The other tenants have equal rights to sever the joint tenancy and take their share, and their creditors can also reach the property.⁹⁹

Full realization of the legal implications of the survivorship right is required before the client can fully appreciate the effect on the family situation. Many people, for example, fail to understand that joint tenancy property can not be validly disposed of by an ordinary will. Thus, the man married to his second wife may be surprised to learn that he cannot continue the joint tenancy with his wife and still effectively will his interest in the property to his children by the earlier marriage. Likewise, the farmer holding the family farm in joint tenancy with his wife is alarmed to discover that on his death no part of the farm will go to the son with whom he farms in partnership.

PROPERTY LAW

Two of the principle advantages enjoyed by the joint tenancy relationship are attributable to the peculiar position the survivorship right occupies in the property law. As explained earlier, conceptually, a surviving joint tenant takes his interest not from the deceased joint tenant, but through the original conveyance.¹⁰⁰ The deceased tenant's interest is simply destroyed by his death.

Thus it is clear in Iowa for example, that ownership may be transferred at death through a survivorship arrangement without the time, trouble, and expense of estate administration. In the case of real property, the survivor may perfect a marketable title relatively easily through a showing of the other tenant's death and non-liability of the property for death taxes.¹⁰¹ A surviving joint bank account depositor may withdraw the entire account without making any showing regarding the other depositor's death.¹⁰² In small estates this

⁹⁸ See *Wernet v. Jurgenson*, 241 Iowa 833, 43 N.W.2d 194 (1950); 4 Thompson on Real Property § 1780 (1961).

⁹⁹ See generally 2 Tiffany, Real Property § 425 (3d ed. 1955).

¹⁰⁰ See *Fleming v. Fleming*, 194 Iowa 71, 174 N.W. 946 (1922).

¹⁰¹ Iowa Land Title Standard 4.4 (3d ed. 1955).

¹⁰² Iowa Code § 528.64 (1962). The recent change in the Iowa Inheritance Tax Law requires the bank to give notice of the account balance on the date of decedent's death to the Tax Commission before releasing funds to the survivor. H.F. 679, 61st G.A. (1965). See also *Hill v. Havens*, 242 Iowa 920, 48 N.W.2d 870 (1951).

ability to quickly and inexpensively obtain control over the property has real value. In larger estates where administration is likely to be required anyway, the possibility of rapid realization of the survivor's interest loses much of its importance.

Another advantage that is granted to the surviving joint tenant by Iowa law is the right to take the joint tenancy property free and clear of the debts of the deceased tenant. Again under the survivorship concept of joint tenancy, unsecured creditors, judgment creditors, and even mortgagees who have claims against only the deceased joint tenant cannot reach the joint tenancy property in the hands of the survivors.¹⁰³ This state of affairs may seem somewhat unfair to creditors, but the Iowa position seems clearly to be that the creditor who is not alert enough to protect himself in this respect is just out of luck.

An additional advantage of the joint tenancy in some cases may be the avoidance of fractionalized interests possible through survivorship. Good reasons may exist for trying to keep certain property together as a unit, i.e. a family farm. It should be recognized that joint tenancy cannot guarantee freedom from division as any joint tenant has the power to sever the relationship.

On the debit side, the property law aspects of joint tenancy limit its usefulness in several ways. For one thing the joint tenancy relationship is subject to great uncertainties. The complexities of creating and preserving the survivorship rights have been discussed in detail earlier. An interest based on such a complicated set of rules is highly susceptible to disputes, a good percentage of which may lead to litigation. A joint tenancy is not a very promising substitute for a will if it is likely to cause dissention within the family and precipitate an expensive law suit.

A second serious disadvantage of the joint tenancy in today's rapidly changing world is its inherent inflexibility in comparison to an estate planning tool like the trust. The placing of property in joint tenancy may somewhat assure the passage of title to the survivor, but no provision can be made for the myriad changes in the family situation that might require a different temporary or permanent use of the asset. No assurance of competent management is available through joint tenancy. There is no simple procedure for responding to the special needs of minors or other dependents. In the husband and wife joint tenancy, no possibility exists for avoiding death taxes through the life estate-remainder device. There is no method for preventing an immediate realization on his interest by a spendthrift, and no way of assuring that the ownership of the whole property may be restored to the tenant providing the original consideration for it if the other tenants become incom-

¹⁰³ See *Wood v. Logue*, 167 Iowa 436, 149 N.W. 613 (1914); Marshall, Iowa Title Opinions and Standards § 10.6 (A) (1963).

petent, insolvent, or undeserving. All of these results, and others, are readily obtainable through judicious use of the trust.

The division of ownership incident to a joint tenancy may cause difficulties that are not present in separate ownership. Each tenant has equal rights to use and possess the property and is entitled to share equally in its income.¹⁰⁴ It is easy to see that where tangible personalty, e.g. a registered bull, is the subject of the joint tenancy, these rights could cause problems. The right of each joint tenant to sever the relationship and take out his undivided interest could also be troublesome in such a case. In joint bank accounts and government bonds one joint tenant has the right under the contract to appropriate the entire property to his own use, either by withdrawing the balance of the bank account or cashing in the bonds.¹⁰⁵ Protection against this eventuality lies chiefly in safeguarding the possession of the pass book or bonds.

Additional difficulties that may arise through use of the joint tenancy include the simultaneous death of the joint tenants and the danger that the estate will lack necessary liquidity. Both of these matters are discussed elsewhere and need not be covered in detail here.

TAXATION

Bear in mind that this monograph proceeds on the assumption that a joint tenancy is already in existence, therefore the tax rules of primary significance are those concerning termination of the relationship by severance or death and the income taxation of co-ownerships subject to survivorship rights. The following discussion is fairly elementary and is intended to indicate only the general principles involved. Particular application of these principles is left to the subsequent chapters where the problems of severance and integration are developed more fully.

Taxation on Death

From the standpoint of planning to minimize death taxes, the biggest single deficiency of the joint tenancy is its preclusion of any use of the life interest-remainder technique to avoid death taxation twice in one generation or to skip a generation of death taxes. When property is held in joint tenancy the likelihood is that all or a substantial part of it will be taxed in the estate of the first to die and it will also be fully taxed in the estate of the survivor. In husband and wife joint tenancies, the availability of the marital deduction

¹⁰⁴ See *Fleming v. Fleming*, 194 Iowa 71, 174 N.W. 946 (1922).

¹⁰⁵ See notes 42-47 *supra* and accompanying text.

may mean that the property is taxed only one and one-half times in one generation.¹⁰⁶

When property is owned separately, it will be fully taxed in the estate of the owner,¹⁰⁷ but either during his lifetime or through his will he may transfer all or a portion of property in trust to pay income to his wife, children, or other dependents for their life with the remainder interest going to others in the family. By this technique the income value of the property is made available to designated persons without incurring a diminution of the property by death taxes on the passage of the estate from such persons down to the next generation.¹⁰⁸ In the husband and wife situation the use of the two-trusts will be such standard practice that it hardly deserves elaboration here.¹⁰⁹ When compared to the tax planning possibilities of life interest-remainder arrangements, it is apparent that the joint tenancy may cause an unnecessary depletion of the estate through cumulative death taxes.

Federal Estate Tax

Under section 2040 of the Internal Revenue Code the general rule is that the total value of joint tenancy property is included in the gross estate of the joint owner who dies first unless it can be affirmatively proved that the property was not acquired entirely with consideration furnished by the decedent or was acquired by the decedent and other joint owner or owners by gift, bequest, devise, or inheritance.¹¹⁰ Included under this section are joint tenancies of both real and personal property, joint bank accounts, and all like interests in property.¹¹¹ Where the property is held by owners as tenants in common, only the decedent's fractional interest is included.¹¹²

Thus, if a husband purchases a residence and title is placed in joint tenancy with his wife, the entire value of the residence, as of the date of his death, or one year later if the optional valuation date is used,¹¹³ would be included in the husband's gross estate.¹¹⁴ But if the wife instead of the husband were

¹⁰⁶ To explain, even if fully included in the estate of the first to die, other things being equal, the marital deduction will result in a taxing of only one-half the property. When the surviving tenant dies owning the whole property it will all be included in her estate.

¹⁰⁷ Int. Rev. Code of 1954, § 2033, Reg. Treas. 20.2033-1.

¹⁰⁸ The value of a decedent's gross estate includes the value, at the time of his death, of all property. Int. Rev. Code of 1954, § 2031. Since the value of the decedent's life estate at the time of death is zero, none of the property producing the income is included in decedent's gross estate.

¹⁰⁹ See Iowa Probate Practice Manual 8J (1965); Cusack and Snee, Principles and Practice of Estate Planning 281 (1959).

¹¹⁰ Treas. Reg. § 20.2040-1(a)(2).

¹¹¹ Treas. Reg. § 20.2040-1.

¹¹² See Int. Rev. Code of 1954, § 2033; Treas. Reg. 20.2033-1 20.2040-1(b).

¹¹³ Int. Rev. Code of 1954, § 2032.

¹¹⁴ Treas. Reg. § 20.2040-1(c)(1).

to die first, nothing would be included in her estate assuming the husband could prove that he furnished the entire purchase price.¹¹⁵ If the husband and wife received the residence by gift or inheritance and title was held in joint tenancy, only one-half the value of the residence would be included in the husband's gross estate.¹¹⁶

The effect of Section 2040 is to place the burden on the taxpayer to prove that part of the consideration was not furnished by the decedent. It may be a very difficult to sustain this burden of proof where both spouses, or joint owners other than husband and wife, have independent estates or earnings. Accurate records may be required to show exactly from where the consideration used to purchase the joint tenancy property originally came. For example, it is not sufficient to prove that the property was purchased with funds from a joint bank account. The question is the original source of the consideration—who put the money into the joint account.¹¹⁷ Not even a prior gift of part of the consideration to the other joint tenant on which a gift tax was paid is effective to prevent inclusion of the joint tenancy property in the estate of the donor joint tenant.¹¹⁸

Services of a wife may constitute adequate consideration for her share in joint tenancy property if the wife actively rendered these services to the family business and the income from the business was used to purchase joint tenancy property. However, generally it must be shown that there was a contractual agreement under which the wife was to share in the profits.¹¹⁹ One of the difficulties where there is no formal contractual agreement is that generally the husband has a right to the services of the wife under state law, with no obligation to compensate her.¹²⁰

Although primary estate tax concern is with Section 2040, certain lifetime transfers terminating the joint tenancy relationship may have estate tax consequences. Where the terminating transfer is for less than full value and takes place within three years of death, a gift in contemplation of death may be found under Section 2035. If in the transfer of a joint tenant's interest, a life estate in the property is retained, the property may be included in his estate under Section 2036. In both of the situations, the tax authorities are likely to attempt to include in the gross estate the total property formerly held as a

¹¹⁵ Treas. Reg. § 20.2040-1(c)(2).

¹¹⁶ Treas. Reg. § 20.2040-1(c)(7).

¹¹⁷ *Elwood Mead*, P-H BTAM ¶42,236. Cf. *Herbert D. Robinson*, 21 B.T.A. 1373 (1931), *aff'd* 63 F.2d 652 (6th Cir. 1932) *cert. denied* 289 U.S. 758 (1933).

¹¹⁸ Treas. Reg. § 20.2040-1(c)(4).

¹¹⁹ This requirement was satisfied although there was no formal partnership agreement, when husband and wife considered themselves equal partners from the time the wife became active in the business. See *Singer v. Shaughnessy*, 198 F.2d 178 (2d Cir. 1952).

¹²⁰ See *Bushman v. United States*, 8 F. Supp. 694 (Ct. c. 1934).

joint tenant to the extent it would have been included if the transfer had not been made. These problems are discussed in detail in a subsequent section.¹²¹

To keep in perspective the significance of the estate tax it should be remembered that the tax applies only to taxable estates in excess of \$60,000,¹²² and that there are a number of deductions to be considered in the calculation of the taxable estate. Most important of these is the marital deduction, which permits a deduction for up to one-half the value of the gross estate for property transferred to a surviving spouse.¹²³ Joint tenancy property expressly qualifies for the marital deduction.¹²⁴ Therefore, joint tenancy between husband and wife should cause no estate tax problems in estates of less than \$120,000.

Iowa Inheritance Tax

The Iowa Inheritance Tax, as outlined in Chapter 450 of the Iowa Code, is a tax on the succession to both real and personal property by reason of the death of the owner. Taxable transfers specifically include the passage of property that is "jointly held by the decedent and any other person or persons."¹²⁵ Except to the extent that the survivor can prove that he provided consideration at the time the joint tenancy was created, he will be taxed on the entire value of the property passing to him as a joint tenant.¹²⁶

The scope of the inheritance taxation of jointly held property was discussed by the court in *Estate of Loudon*¹²⁷ where the status of government bonds was in issue. Construing the term "jointly held" the court pointed out that the purview of the tax law was broader than the technical concept of joint tenancy. "The intent of the legislature to reach property held by two or more parties so that upon the death of one it passes directly to the survivor, or survivors, is manifest."

The court made it clear that the wording in 450.3(5) concerning the portion of the property "proven to have belonged to the survivor" refers to substantial ownership and not ownership in form alone. The essential question is what did the survivor contribute to the purchase of the property, and not what was his proportionate undivided interest.

The inheritance tax applies to all estates over \$1,000 in value,¹²⁸ but because of the personal exemptions accorded members of the immediate

¹²¹ See notes 179-182 *infra* and accompanying text.

¹²² Int. Rev. Code of 1954, § 2052.

¹²³ Int. Rev. Code of 1954, § 2056(a). There are qualifications and limits, of course. See §§ 2056 (b)(c).

¹²⁴ Treas. Reg. 20.2056(e)-1(1).

¹²⁵ Iowa Code § 450.3(5) (1962).

¹²⁶ See *In re Estate of Loudon*, 249 Iowa 1393, 92 N.W.2d 409 (1958).

¹²⁷ 249 Iowa 1393, 92 N.W.2d 409 (1958).

¹²⁸ Iowa Code § 450.4(1) (1962).

family and the relatively low tax rates, the tax is of real importance primarily in larger estates.¹²⁹ The recent changes in the rate structure have increased the significance of the tax,¹³⁰ however, and in certain medium-sized estates inheritance tax may be a greater concern than the federal estate tax.

The chart at the end of this section illustrates the death tax results under various circumstances.

Federal Gift Tax

In joint tenancies involving personal property and in those involving real property to which the special provisions regarding husband and wife do not apply, a taxable gift occurs on the creation of the relationship to the extent the consideration furnished by one joint tenant exceeds the interest acquired by him in the property under local law.¹³¹ Likewise, on the termination of such a joint tenancy a taxable gift may be found whenever the separate share in the property or proceeds received by one joint tenant is less than his proportionate interest in the property under local law.¹³²

The one exception recognized to the above pattern is in the case of certain jointly owned intangibles where the donor joint owner can reappropriate the entire property to his own use. In such cases, no taxable gift is recognized until the donee actually receives a portion of the asset.¹³³ For example, in a joint bank account created by A for himself and B, no gift is made to B until B draws on the account for his own benefit, and then the gift is limited to the amount withdrawn.

Special Rules Regarding Real Property Between Husband and Wife. Under section 2515 of the Internal Revenue Code there is no taxable gift upon the creation of a joint tenancy in real property between husband and wife unless the parties so elect. This applies only to: (1) joint tenancies between husband and wife, (2) joint tenancies in real property, and (3) joint tenancies created after 1954. All three of these conditions must be satisfied before section 2515 is operative.

This section permits the deferment of the taxation until the tenancy is terminated. If the tenancy is terminated by death of a spouse, the estate tax is applicable, but if the termination is in any other manner a taxable gift may be found if the proceeds received by one spouse are larger than the proceeds allocable to the consideration furnished by that spouse to the tenancy.¹³⁴ Thus, where the husband paid the entire consideration for the property and no election was made, if, on sale of the joint tenancy he retains the entire

¹²⁹ Iowa Code §§ 450.9, .10.

¹³⁰ H.F. 679, 61st G.A. (1965).

¹³¹ Treas. Reg. § 25.2511-1(h)(5).

¹³² Treas. Reg. § 25.2512-8.

¹³³ Treas. Reg. § 25.2511-1(h)(4).

¹³⁴ Int. Rev. Code of 1954, § 2515(b) Treas. Reg. § 25.2515-3.

proceeds, no gift is recognized. No termination of the tenancy occurs where the property subject to the tenancy is exchanged for other real property, the title to which is held by the spouses in an identical tenancy.¹³⁵

Where an election is made to treat the creation of the joint tenancy as a gift, the later termination of the relationship has no gift tax consequences unless one tenant receives more than his proportionate share in the property.¹³⁶

Deductions, Exclusions, and Gift Splitting. The impact of gift taxation on a joint tenancy cannot be accurately assessed without recognizing the various provisions of the gift tax law that may be utilized to reduce taxes. The first \$3,000 of gifts made to each individual each year are tax free.¹³⁷ Every person has a \$30,000 lifetime exemption that may be applied to taxable gifts at any time.¹³⁸

A gift-tax marital deduction permits one half of the value of gifts between spouses to be deducted in computing the tax.¹³⁹ This deduction is subject to the same general qualifications as the estate tax marital deduction including the "terminable interest" limitation.¹⁴⁰ A transfer to the spouse severing a marital joint tenancy should cause no terminable interest problem, and a transfer to a spouse as a joint tenant either with the donor or with some third party would seem to fall within exceptions to the terminable interest limitation.¹⁴¹

Under Section 2513 of the Internal Revenue Code a husband and wife are permitted to split gifts made by either of them filing a consent to such an arrangement. This most beneficial privilege would seem to offer little advantage in gifts by husband and wife joint tenants, except in cases where one spouse may have a large portion of the lifetime exemption left or be in a lower gift tax bracket.

The chart at the end of this section illustrates the gift tax results under various circumstances. Iowa, of course, has no state gift tax.

Federal Income Tax

Survivor's Basis in the Property. Section 1014 (b) (9) of the Internal Revenue Code provides that for a decedent dying after December 31, 1953, the surviving joint tenant's tax basis is the fair market value of the property to the extent the property is included in determining the decedent joint tenant's

¹³⁵ Treas. Reg. § 25.2515-1(d)(2)(ii).

¹³⁶ Treas. Regs. §§ 25.2515-1(d), 25.2515-4.

¹³⁷ Int. Rev. Code of 1954, § 2503(b), Treas. Reg. § 25.2503-2.

¹³⁸ Int. Rev. Code of 1954, § 2521, Treas. Reg. § 25.2521-1.

¹³⁹ Int. Rev. Code of 1954, §§ 2523(a), (d), Treas. Regs. §§ 25.2523(a)-1, 25.2523(d)-1.

¹⁴⁰ Int. Rev. Code of 1954, § 2523(b), Treas. Reg. § 25.2523(b)-1.

¹⁴¹ Int. Rev. Code of 1954, § 2523(d), Treas. Regs. §§ 25.2523(d)-1, 25.2523(e)-1 (g)(2).

estate for estate tax purposes.¹⁴² This may be a substantial benefit to the surviving joint tenant whenever the property has substantially appreciated in value. Where only a part of the property is included in the deceased tenant's gross estate, the survivor's basis is the sum of his old basis in his interest plus the estate tax value of the included portion.¹⁴³

To some extent this section relieves the hardship to a surviving joint owner who is unable to sustain the burden of proving that he contributed to the purchase of the property. In some cases, the survivor may not try very hard to make this proof because the estate tax may be more than offset by the income tax savings which may be realized as a result of a substantial acceleration of the tax basis in the property.

Allocation of Income and Expenses. The general rule is that income from jointly owned property is taxed equally to all the joint tenants.¹⁴⁴ Also, income from the sale of property is generally allocable equally to all the joint tenants.¹⁴⁵ Dividends are considered as being received by each tenant to the extent he is entitled under local law to a share of such dividends.¹⁴⁶

The rules regarding deductibility of expenses are generally consistent with the income splitting concept discussed above. Even where he has paid the full amount of an expense, a joint tenant is limited to his proportionate share of the deduction on the ground that he is entitled to reimbursement from the other tenant.¹⁴⁷

The Iowa Income tax law relating to joint tenancy is substantially identical to the federal income tax.¹⁴⁸

¹⁴² A limited exception to this statement exists where the survivor has realized the benefit of any depreciation deductions attributable to the property included in the gross estate. Thus where a husband pays for a perishable asset and takes the title in joint tenancy, under local law the joint tenant wife is considered to have realized one half of any depreciation deduction taken. When the property is wholly included in the husband's gross estate the new basis is the market value less the depreciation deduction constructively enjoyed by the survivor. Treas. Reg. § 1.1014-6(a)(2). This result has been criticized as causing a double write off. See *Anderson*, "Pros and Cons of Holding Real Estate," 14 J. Tax. 355 (1961).

¹⁴³ Int. Rev. Code of 1954, § 1014(a), Treas. Reg. § 1.1014-1.

¹⁴⁴ 2 P-H Federal Taxes ¶ 7512 (1965).

¹⁴⁵ *Ibid.*

¹⁴⁶ Treas. Reg. § 1.34-1(d).

¹⁴⁷ *Estate of Boyd*, 28 T.C. 564 (1957); *Reynolds v. Commissioner* 26 T.C. 1225 (1956). However, where a husband paid the entire mortgage interest, it has been held that he may take the entire amount on his separate return. See *F. C. Nicodemus, Jr.*, 26 B.T.A. 125 (1932).

¹⁴⁸ See Iowa Code c. 422 (1962). See generally *Miller*, *The New Iowa Income Tax Law*, 41 Iowa L. Rev. 85 (1955); *Weible*, "Accountability of Cotenants," 29 Iowa L. Rev. 558 (1944).

FEDERAL AND IOWA TAXATION OF

NATURE OF ORIGINAL TRANSFER

GIFT TAX ON CREATION*

- | | |
|---|---|
| 1. H transfers realty owned by him into joint tenancy with W, or purchases realty and takes title in joint tenancy with W, on or after January 1, 1955. | 1. Federal—(a) None unless H elects to treat as a gift. IRC 2515 (a). (b) H may elect to treat as a gift of half interest IRC 2515 (c) subject to marital deduction IRC 2523. |
| 2. Same transfers before January 1, 1955. | 2. Federal—gift of half interest taxed subject to marital deduction under IRC 2523. |
| 3. Same transfers between parties other than H and W, <i>e.g.</i> , father transfers realty owned by him into joint tenancy with son or purchases realty and takes title in names of both as joint tenants. | 3. Federal—gift of half interest is taxed. Regs. 25.2511-1 (h)(5). |
| 4. Donor purchases stock in joint tenancy with another. | 4. Federal—gift of half interest is taxed. Regs. 25.2511-1 (h)(5). If H and W, marital deduction is allowable as in 1 above. |
| 5. Donor purchases government bonds registered in names of donor and donee as co-owners, donor retaining full control. | 5. Federal—gift only to extent that donee surrenders obligations for cash without an obligation to account for a part of the proceeds to donor. Regs. 25.2511-1 (h)(4). |
| 6. Donor deposits money in joint bank account, intending "true joint tenancy." | 6. Federal—gift to the extent that donee draws on the account without obligation to donor. Regs. 25.2511-1 (h)(4). See also 25.2511-1 (g)(1). |
| 7. Donor deposits money in joint checking account, intending to reserve full power to withdraw. | 7. Federal—same as 6 above. |
| 8. Donor deposits money in joint savings account, intending to retain full control during life by retention of the passbook. | 8. Federal—same as 6 and 7 above. |
| 9. X, as a gift, transfers any type of property into joint names of Y and Z (who may or may not be H&W); realty, stock, bonds, bank account, etc. | 9. Federal—taxed as gift of half interest to Y and half to Z. IRC 2501. |

* Iowa has no gift tax

† This chart is adapted from one appearing in Effland, Estate Planning: Co-ownership 39, Seminar Series for Wisconsin Attornies, University of Wisconsin (1957).

VARIOUS FORMS OF JOINT OWNERSHIP†

GIFT TAX ON TERMINATION DURING LIFETIME*

1. Federal—(a) gift to extent that W receives proceeds IRC 2515 (b), subject to marital deduction. (b) gift to extent that either receives more than half of the proceeds, subject to marital deduction. IRC 2515(b).
2. Federal—same as 1(b) above.
3. Federal—same as 1(b) above but no marital deduction.
4. Federal—gift if either receives more than half of proceeds (if H&W, marital deduction allowed).
5. Federal—gift to extent that donee receives any of the proceeds.
6. Federal—same as 5 above.
7. Federal—gift to extent that donee is permitted to withdraw and retain any of funds.
8. Federal—gift to the extent donee draws and retains any funds.
Iowa—No tax.
9. Federal—gift to the extent that either receives over half of proceeds.

TAXES ON TERMINATION AT DEATH OF DONOR (ESTATE & INHERITANCE)

1. Federal—Both (a) and (b) taxed 100% in estate of H. IRC 2040; qualifies for marital deduction under IRC 2056(e) (5).
Iowa—100% taxed under 450.3(5).
2. Federal—same as 1 above.
Iowa—same as 1 above.
3. Federal—same as 1 above but without the marital deduction.
Iowa—same as 1 above.
4. Federal—same as 1 above.
Iowa—same as 1 above.
5. Federal—taxed 100% IRC 2040.
Iowa—taxed 100% 450.3(5) Iowa code.
6. Federal—taxed 100%.
Iowa—taxed 100%.
7. Federal—100% taxable.
Iowa—probably 100% taxable. See 249 Iowa 1393 (1958).
8. Federal—100% taxable.
Iowa—probably 100% taxable.
9. Federal—not taxable to donor unless transfer in contemplation of death within 3 years—50% taxable on death of a joint tenant.
Iowa—same 450.3(2) as amended 7/4/65.

PLANNING A SEVERANCE

If the decision is made to terminate certain of the client's joint tenancies, the selection of the method for effecting the severance may require a thorough evaluation of the several available alternatives. Space limitations preclude inquiry into all of the possible means of ridding the estate of a joint tenancy. However, the options most likely to be realistic in the great majority of cases are sale of the whole property, transferring to one of the joint tenants complete ownership, converting into a tenancy in common, and transferring the property in whole or in part to someone else in the family. These common procedures for doing away with a joint tenancy may have markedly different family and tax implications.

One problem that may arise in the course of planning a severance is the discovery that an earlier gift made in creating the joint tenancy was not reported for gift tax purposes. Quite often before a joint tenancy is severed, it is necessary to straighten out such prior gifts and report them, lest the severance have unnecessary tax ramifications. If in excess of the annual exclusion, such gifts should be reported, even though the use of the allowable deductions or the \$30,000 exemption would permit the donor to escape paying any tax. The allowable deductions and the lifetime exemption must be properly claimed to be used.¹⁴⁹ Except for a husband and wife situation under Section 2515, the Revenue Service will usually accept the filing of a late return. An election to treat a transfer as a gift under Section 2515 must be timely filed.¹⁵⁰

TRANSFER FOR VALUE

If the property held in joint tenancy is readily salable, the simplest way to terminate the joint tenancy would be to convert the property into cash. A sale for full value outside the family should avoid any disputes over ownership of the property among the family or with the tax collectors. Like most simple answers, this solution has so many qualifications that it has limited utility. In the first place, it is of no help where the joint property is itself cash, or, more accurately, a right to obtain cash, e.g., a bank account. Also, there may be any number of personal reasons why the joint tenants might not wish to sell certain property, e.g., the family farm. Of course, a sale within the family may solve these objections, but this opens up additional problems.¹⁵¹ If the property is not of a type for which there is a ready market,

¹⁴⁹ E & G vol. P-H Fed. Tax Serv. ¶¶ 125, 210; 125, 290.

¹⁵⁰ Int. Rev. Code of 1954, § 2515(c).

¹⁵¹ For example, if the sale is to be made to a child, financing the purchase may require the extension of a long-term credit by the parent. Such credit arrangements may involve aspects of a gift if the terms are too favorable to the purchaser-child. Also the arrangement may be a burden to other beneficiaries of the estate, if it may continue for an extended period after the seller's death. See generally Harris and Hines, *Installment Land Contracts in Iowa*, Agricultural Law Center Monograph No. 5 (1965).

a sale of the property may be economically unwise.

From a tax standpoint, if the property has appreciated considerably, the joint tenants may not wish to realize a large taxable gain at the time. The relative life expectancies of the parties may be such that it would be advisable to transfer the total ownership to one on the likelihood that at his death the tax basis of the property would be accelerated.¹⁵²

Handling of the cash sale proceeds may cause gift tax headaches where one joint tenant has furnished most or all of the consideration. If a joint tenancy involving real estate owned by a husband and wife was created after 1954 and no gift tax election was filed, the husband should have no gift tax liability if he keeps the entire sale proceeds.¹⁵³ However, if under such circumstances he divides the sale proceeds with his wife, he is likely making a taxable gift.¹⁵⁴ If the joint tenancy is between others than husband and wife, or is a pre-1954 husband and wife arrangement, or is a post 1954 joint tenancy for which an election was filed, there will be a taxable gift only if the joint tenants do not each receive their proportionate share of the proceeds.¹⁵⁵ The one exception to this statement is where the creation of the joint tenancy did not result in an immediate taxable gift, for example, where the joint tenancy was in a bank account or in certain government bonds.¹⁵⁶

TRANSFER TO ONE JOINT TENANT

Consolidation of the undivided interests in one of the joint owners through a transfer from the others is a technique offering considerable promise in some estates. If the other joint tenants will agree to such a transfer and this may be no small problem on occasion, it may be possible to make some tax-free division of the estate while effecting a severance of the joint tenancy. For example, where a husband and wife own in joint tenancy two parcels of investment real estate of approximately identical worth, each could convey his one-half interest in different tracts to the other. If each was recognized as the owner of his undivided interest, the transfer may be entirely free from all taxes. Of course, it is unusual to get a situation where different items of property have identical values, but this idea of unifying the interests in particular assets by cross-transferring jointly owned property deserves further pursuit.

If a true cross-transfer is effected, there should be no concern over the property being included in the estate of the transferor, even if the exchange was made in contemplation of death, because the transfer was for adequate consideration.¹⁵⁷

¹⁵² Int. Rev. Code of 1954, § 1014 (basis for property acquired from a decedent is the market value at the date of decedent's death).

¹⁵³ Int. Rev. Code of 1954, § 2515(b), Treas. Reg. § 25.2515-3(a).

¹⁵⁴ Int. Rev. Code of 1954, § 2515(b), Treas. Reg. § 25.2515-3(a).

¹⁵⁵ Treas. Regs. §§ 25.2511-1(h)(5), 25.2515-3(a), 25.2515-4.

¹⁵⁶ Treas. Reg. § 25.2511-1(h)(4).

¹⁵⁷ Int. Rev. Code of 1954, § 2035.

Interests in property held for productive use in trade or business or for investment may be exchanged income tax free.¹⁵⁸ In such exchanges each joint tenant takes for a basis in the interest acquired the amount that was his basis in the interest transferred.¹⁵⁹

Where the properties to be exchanged are not eligible for a tax free exchange under Section 1031 and have appreciated substantially in value, the potential income tax liability may be so large as to require resort to some less costly method of severance. If a non-tax free cross-transfer is carried out, the basis situation might be somewhat complicated because each transferee would have different bases in each half of the property now consolidated—the old basis in the half retained and a basis in the half transferred to him equal to the value of his interest in the property transferred.¹⁶⁰

Any time the proportionate joint ownership has been established for gift tax purposes, there should be no gift tax liability incurred by cross-transfer, except to the extent the interest received by one party exceeds the value of the interest transferred.¹⁶¹ The cross-transfer plan could obviously cause gift tax problems whenever the original transfer in joint tenancy did not constitute a complete gift. Thus, for example, where the one joint ownership involves realty between husband and wife and was created subsequent to 1954, and no gift tax election was timely filed, there may be no consideration for the transfers to one joint tenant.¹⁶²

Laying aside cross-transfers, if the only desire is to restore complete ownership in the co-tenant who has paid the total consideration for the property, the transfer is most easily accomplished, tax-wise, where the creation of the joint tenancy did not amount to a completed gift—the father who has deposited all of the money in a joint account with his children may draw out the funds without receiving a gift from them.¹⁶³ The corollary of this proposition also bears watching. If the donee in the incomplete joint tenancy is later transferred the entire property, there is a gift to the total extent of the property transferred—if, in the father-children joint account above, the children withdraw all of the funds, they have received a gift in the amount withdrawn.¹⁶⁴

Where the undivided interests are recognized as being fully owned by the respective joint tenants, and the intent is simply to destroy the co-ownership

¹⁵⁸ Int. Rev. Code of 1954, § 1031, Treas. Reg. § 1.1031(a)-1.

¹⁵⁹ Int. Rev. Code of 1954, § 1031(d), Treas. Reg. § 1.1031(d)-1(a).

¹⁶⁰ Int. Rev. Code of 1954, § 1001, Treas. Reg. 1.1001-1.

¹⁶¹ Int. Rev. Code of 1954, § 2512, Treas. Reg. § 25.2512-8.

¹⁶² Int. Rev. Code of 1954, § 2515(b), Treas. Reg. § 25.2512-8.

¹⁶³ Treas. Reg. 25.2511-1(h)(4).

¹⁶⁴ Treas. Reg. 25.2511-1(h)(4).

by transferring all the undivided interests to one of the co-tenants, the gift and income tax results are relatively clear. Regardless of the relationship of the parties,¹⁶⁵ there is a gift to the transferee to the extent he receives the outstanding interests for less than full value.¹⁶⁶ The gift causes no realization of income,¹⁶⁷ nor does it give rise to any deduction in the usual case.¹⁶⁸ The donee takes the donor's basis in the interest received.¹⁶⁹

If the transfer is for less than adequate consideration and within three years prior to the death of the transferor, the possibility exists that the property would be included in the transferor's estate as a gift in contemplation of death.¹⁷⁰ If it is so included, the estate may receive a credit against the federal estate tax for any gift tax paid on the transfer.¹⁷¹ Iowa has no gift tax, so the Iowa tax problems in planning the severance are limited to minimizing income and inheritance taxes.

CONVERTING INTO A TENANCY IN COMMON

If it is determined that a joint-tenancy ownership does not fit the family needs or may cause undue tax liability or administration difficulties, a destruction of the survivorship rights may be all that is required, the co-ownership being retained as a tenancy in common. If this is the choice, a simple memorandum signed by all the joint tenants in which they relinquish their rights to take by survivorship should be adequate to sever the joint tenancy.¹⁷² More often, this result is accomplished by a deed by all of the joint tenants conveying to themselves as tenants in common. In some jurisdictions the validity of such a conveyance has been questioned, but in Iowa it is well settled that such a transfer is effective to sever the joint tenancy.¹⁷³ Conservative estate planners may still insist on having the joint tenants transfer to a strawman who reconveys to them as tenants in common.

The character of the jointly owned property is a factor to be considered in deciding what sort of an adjustment is most advantageous. It may be unwise

¹⁶⁵ The relationship of the parties may influence the amount of gift tax liability—if they are husband and wife the gift tax marital deduction will be available. Int. Rev. Code of 1954, § 2523(d), Treas. Reg. 25.2523(d)(1).

¹⁶⁶ Int. Rev. Code of 1954, § 2512(b), Treas. Reg. 25.2512-8.

¹⁶⁷ Int. Rev. Code of 1954, § 102, Treas. Reg. § 1.102-1.

¹⁶⁸ Only gifts of a charitable nature as described in the Code are deductible. Int. Rev. Code of 1954, § 170, Treas. Reg. § 1.1701.

¹⁶⁹ Int. Rev. Code of 1954, § 1015(a), Treas. Reg. § 1.1015-1.

¹⁷⁰ Int. Rev. Code of 1954, § 2035, Iowa Code, § 450.3. Note that the time period in the Iowa provision has recently been changed from two to three years to conform to the federal law. The new Iowa provision is effective for decedents dying on or after July 4, 1965. House File 679, 61st G.A. (1965).

¹⁷¹ Int. Rev. Code of 1954, § 2012, Treas. Reg. § 20.2012-1.

¹⁷² See Notes 68, 69 *supra* and accompanying text.

¹⁷³ See *Fay v. Smiley*, 201 Iowa 1290, 207 N.W. 369 (1926).

to remove the survivorship rights without consolidating ownership in one of the co-owners. For example, the potential for parceling of a farm or business property inherent in joint ownership by tenants in common may be quite inconsistent with the long-range aims of the estate plan.

Conversion of the joint tenancy into a tenancy in common is an adjustment that does not require the consent of the other joint tenants. In absence of a binding contract protecting the survivorship rights, any joint tenant has the power to unilaterally sever this incident of the co-ownership. He may effect the severance in several ways, but the most practical method if he wants to retain an interest is a conveyance of his interest to a strawman who immediately reconveys. Thus, if there is some resistance by other joint tenants to the realignment of the joint interests, the survivorship aspect of the co-ownership can be dissolved with little difficulty, and if necessary without the other joint tenants even knowing that such a severance has taken place. Of course, if more than two persons are involved in the joint tenancy, the severance of the relationship by one does not affect the survivorship rights of the other parties among themselves.¹⁷⁴

Arguably, the conversion of a joint tenancy into a tenancy in common should cause no tax liabilities because the ownership interests have not changed—each still owns the same quantum of undivided interest. In the easy case where the joint tenants each fully own their undivided interests and the severance is effected more than three years before the death of any co-tenant, this should be the result. Because Iowa apparently does not recognize the tenancy by the entirety as such,¹⁷⁵ a disparity between the joint tenants relative life expectancies should not cause tax concern.¹⁷⁶ However, at least a couple of tax problems may arise in converting to a tenancy in common.

Where the joint tenancy to be severed was within the election requirements of Section 2515 on creation and no gift was reported, conversion of the ownership into a tenancy in common will result in a taxable gift to the extent one spouse contributed more than one-half of the consideration in the acquisition of the property.¹⁷⁷ It is a little difficult to imagine a case where an ad-

¹⁷⁴ See *Fleming v. Fleming*, 194 Iowa 71, 174 N.W. 946 (1922).

¹⁷⁵ See discussion on pages 4 & 5 *infra*.

¹⁷⁶ Where a non-severable joint ownership is involved, such as a tenancy by the entirety, on termination Section 2515(b) requires an inquiry into the relative life expectancies of the co-tenants to determine the gift tax results. For example, a husband and wife are given property by a third person as tenants by the entirety. At a time when the husband is 30 and the wife 25, they sell the property for \$15,000. At that time under the actuarial tables H's interest in the property was 46¾ per cent and W's 53¼ per cent. If they distribute the proceeds in any other proportion, a gift will be found of the difference. For a more complete discussion of this problem see *Joint Tenancy and the Federal Tax Law*, 101 *Trusts & Est.* 1151 (1962).

¹⁷⁷ *Treas. Reg.* §25.2515-3.

vantage would be gained through switching to a tenancy in common of bank accounts or government bonds, but if such a transfer was effected, presumably the same gift tax potential would exist as in the Section 2515 situation.¹⁷⁸

To illustrate, suppose that in 1955 a husband and wife purchased a farm for \$100,000, H providing \$60,000 of the purchase price and W supplying the other \$40,000 from her personal funds. The title is taken in joint tenancy, but no gift tax return is filed. In 1965, when the farm is worth \$150,000 H and W convey to each other an undivided one-half interest as tenants in common. H has made a gift of \$15,000 to W at this time. Her contribution would entitle her to a 40 per cent interest (\$60,000) in the farm, instead she received a 50 per cent (\$75,000) interest; therefore, she received a gift in the amount of the difference.

Precarious is perhaps the appropriate description for the status of transfers converting a joint tenancy into a tenancy in common within three years of the death of a joint owner. The Internal Revenue Service seems currently committed to challenging on every occasion the once well-accepted principle that no taxable transfer takes place because under local property law the parties have the same relative interest in the property after the severance as before.¹⁷⁹ The precise issue in these cases is whether the "interest transfer" language in Section 2035 refers to the interest actually owned and controlled by the transferor, or, as the service contends, to the interest that would have been included in the transferor's taxable estate had the transfer not been made.

The taxpayer's position finds support in *Estate of Sullivan*,¹⁸⁰ which is still regarded as the leading decision on the question. The rationale of the *Sullivan* rule was that the interest "transferred" by a joint owner in contemplation of death could not exceed the interest which he held or controlled under local law. Thus, no interest was "transferred" where a joint tenancy was severed in a manner that fully recognized the co-owners' proportionate interests. Alternatively, the court pointed out that it could be found that the mutual relinquishment of survivorship rights was adequate consideration for the transfer.

To date, the government has not won a decisive victory on this battleground, but some inroads have been made. For example, in *Estate of Allen*,¹⁸¹ the Tenth Circuit accepted the government's theory in a case involving the relinquishment of a retained life interest in contemplation of death and included in the estate the entire value of property in which the interest was released instead of the value of the life interest itself. Although the problem

¹⁷⁸ Treas. Regs. §§ 25.2511-1(3), (e), (h)(4).

¹⁷⁹ See Young, *Severance of Joint Tenancy in Contemplation of Death—Will There Be a New Look?* 15 J. Taxation 156 (1961).

¹⁸⁰ 175 F.2d 657 (9th Cir. 1949).

¹⁸¹ 293 F.2d 916 (10th Cir. 1961), *cert. denied*, 368 U.S. 944.

is somewhat different than severance of a joint tenancy, the underlying concept is the same. The contrary result was reached subsequently by the Seventh Circuit in *Estate of Glaser*,¹⁸² which definitely revitalized the *Sullivan* rule.

At the moment, then, the situation seems to be this: Until the Supreme Court resolves the issue, the government is likely to continue to challenge joint tenancy severances within three years of death; therefore, almost any such severance may lead to a hassle with the government. On the other hand, the simple conversion from joint tenancy into a tenancy in common will probably be the hardest case for government to upset, and proof of a live motive for the transfer is always an avenue open to the taxpayer. So where the severance is important to the estate, the planner should proceed on the assumption that *Sullivan* is the "law," but at the same time build whatever foundation he can to substantiate a claim of a live motive, if such should become necessary.

Where the joint tenancy is between husband and wife, the contemplation of death problem may be of lesser importance owing to the availability of the marital deduction. But this need not always be the case. For example, what are the estate tax results in the following situation? H owns stock in joint tenancy with W for which H paid the entire purchase price. In year one H severs the joint tenancy with W in contemplation of death. Later that same year, W dies and one-half the property is included in her estate. In year three, but over two years after W's death, H dies. If the entire value of the property is included in H's estate under 2035, does H have any deductions or credits against the estate tax?¹⁸³

TRANSFER TO A FAMILY MEMBER

One well-established estate-planning technique is the partial disposition of the estate through lifetime gifts within the family. Joint tenancy interests may be the subject of such gifts, and in some situations inter vivos transfers of jointly owned property may fulfill several estate planning objectives at once. For example, a gift of jointly owned property to a child may reduce the donor's taxable estate, lessen over-all family income taxes by spreading income to lower bracket taxpayers, avoid complications arising from the joint ownership, permit the child to receive his eventual inheritance immediately and therefore to plan his life with more certainty and security, and promote over-all family harmony.

On the negative side, if not carefully planned, such a lifetime gift may deplete unduly the donor's income or financial reserves, burden a child with

¹⁸² 306 F.2d 57 (7th Cir. 1962), reversing 196 F. Supp. 47 (D.C. Ind. 1961).

¹⁸³ The marital deduction appears to be allowed only in a case where there is a living spouse. Int. Rev. Code of 1954, § 2056(a). Among the possibilities to consider are the credits for the gift tax paid, Int. Rev. Code of 1954, § 2012, and for the tax on prior transfers, Int. Rev. Code of 1954, § 2013. See also the Regulations corresponding to these sections.

the responsibilities of ownership prematurely, create dissension within the family by generating feelings of favoritism for or discrimination against particular individuals, and result in unnecessary liability for gift taxes. Regardless of the care exercised in planning, the transfer may be found to be in contemplation of death if the donor dies within three years.

Through thoughtful planning, the balance can often be struck in favor of transferring the jointly owned property to a family member. The transfer for value and the consolidation of the property ownership in one joint tenant have been discussed earlier. The transfer alternatives remaining are a gift of one co-owner's undivided interest to someone else within the family, a gift of the jointly owned property by all of the co-owners, and a gift of either type with the retention of certain life interests.

Gift of an Undivided Interest

A transfer giving away one tenant's interest in jointly owned property is a simple way to dispose of the joint tenancy, but it may have certain disadvantages. For one thing, such a gift contains the potential for needlessly complicating the ownership situation, depending on the relationship between the donee and the other co-owners. An example of bad planning would be a gift of an undivided interest to the donor's mother, where the other co-tenant is the donor's wife. Aside from "mother-in-law" problems, there is a real possibility that on the parent's death the undivided interest would be further fractionalized and ultimately a sale or partition of the property would be necessitated. On the other hand, a transfer of an individual interest may best fit the intentions of the donor. For example, obtaining the maximum benefit of the gift tax split-gift provisions in combination with the annual exclusion may require husband and wife co-owners to transfer their interests in different years.¹⁸⁴ The point is that the nature of the property and the vicissitudes of the family situation should be carefully considered before counseling a gift of an undivided interest.

From a tax standpoint the problems are not dissimilar to those already discussed in connection with other transfers. The gift of undivided interest is taxable like any other gift, the amount of the gift being the value of the interest when transferred.¹⁸⁵

One snare of which to be wary is a gift of an interest in Section 2515 property acquired since 1954 with separate funds for which no election was filed. A transfer of an undivided interest causes a severance and would, therefore, constitute a gift to the other spouse of any difference between the value of the proportionate ownership to which the spouse is entitled, as a tenant in

¹⁸⁴ Int. Rev. Code of 1954, §§ 2503, Treas. Reg. § 25.2503-2 (annual exclusion), 2513, Treas. Reg. § 25.2513-1 (splitting gifts).

¹⁸⁵ Int. Rev. Code of 1954, § 2512(a), Treas. Reg. § 25.2512-1.

common, and the value of the share to which the spouse would have been entitled, based on her proportionate contributions.¹⁸⁶

If no interests are retained, the property transferred should not be includible in the donor's taxable estate unless the gift was made in contemplation of death. If includible for that reason, then the issue arises as to how much should be included. Where, except for the gifts, the whole value of the joint tenancy property would have been includible in the donor's gross estate, the government will likely urge inclusion of the total value. As discussed earlier, whether it will be successful in this contention is somewhat in doubt.¹⁸⁷ The donee takes the donor's tax basis in the undivided interest, including any reduction required by depreciation deductions taken by the donor.¹⁸⁸

Gift of the Whole Property

Obviously, giving away jointly owned property requires the assent of all joint tenants. Where such assent can be obtained and sound reasons exist for making the gift, a transfer of the whole property avoids some of the pitfalls discussed in the preceding section. As a practical matter it is as easy to execute a conveyance by all joint tenants as it is by one, if they are in accord.

Tax-wise, the gift will be treated as made proportionately by each joint tenant.¹⁸⁹ Here again, the gift tax results are relatively straight-forward except where the joint tenancy relationship involves an uncompleted gift. For example, suppose the property transferred was realty acquired by a husband and wife since 1954 and no election was filed. If the husband had paid for the property from separate funds, what is the effect of the wife joining in the conveyance as a grantor? Is she to be regarded as receiving a gift to the extent of the one-half interest recognized by her in the conveyance? If she does not sign the conveyance as a grantor, a valid transfer of the whole property will not be effected. It would appear that this case is distinguishable from both the division of sale proceeds and the gift by one tenant which causes a severance, and that no gift should be recognized.

The gift in contemplation of death raises the same issues here as discussed earlier. It might be noted that a gift of the whole property by husband and wife as joint tenants is the fact situation in which the contemplation of death question is most commonly litigated.¹⁹⁰ If the gift is important to the estate plan it should nevertheless be made. If the donor survives three years no question can be raised. If not, the only substantial risk is the probability of having to litigate the issue if it arises and, of course, this can be avoided by

¹⁸⁶ Int. Rev. Code of 1954, § 2515(b), Treas. Regs. §§ 25.2515-3, -4.

¹⁸⁷ See cases cited notes 179-182 *supra*, and accompanying text.

¹⁸⁸ Int. Rev. Code of 1954, § 1015(a), Treas. Reg. § 1.1015-1.

¹⁸⁹ Int. Rev. Code of 1954, § 2512, Treas. Reg. §§ 25.2511-1(h)(6), 25.2512-5.

¹⁹⁰ See 3 Mertens, *Law of Federal Gift and Estate Taxation*, § 22.04 (1959).

conceding the question. If a gift tax is paid and then the property is brought back into the donor's gross estate, a credit will be available.¹⁹¹

Retention of Life Interests

The severance of a joint tenancy by a transfer in which life interests in the property are retained is an arrangement that offers both interesting possibilities and difficult problems. Such a transfer may be accomplished by a direct gift to the donee with a retained life estate or through the use of a trust. The traditional objections to the use of legal life estate would suggest that the trust arrangement might hold more promise. The retained life estates may be of the "joint and survivor" variety.¹⁹²

Generally, the same considerations are involved in the decision to retain a life interest on the transfer of jointly owned property as on the transfer of separate property. Income from a life interest will be taxable to the donor,¹⁹³ and the value of the life interest will be figured in calculating the value of the gift.¹⁹⁴ Because the gift involves a future interest, the \$3,000 annual exclusion will not be available.¹⁹⁵

The retained life interest adds a new dimension to the estate tax problems associated with joint tenancy. The central issue, however, is the same as that raised earlier in the contemplation-of-death discussion. If Section 2036 requires the inclusion in the gross estate of property in which the decedent has retained a life interest, and except for the transfer with the retained life interest the whole jointly owned property would have been included, can the government tax all or only half of the property? The latest answer to this question was supplied by the Seventh Circuit in *Estate of Glaser*¹⁹⁶ in a rather unequivocal holding that only the portion over which he had control under local law was taxable. The commissioner has not acquiesced in the *Glaser* decision and it is not expected that *Glaser* will be the last word on the issue.

To reduce the vulnerability of this type of severance to the minimum, the best practice would seem to be first to convert the joint tenancy into a tenancy in common. Then each joint tenant may convey his undivided interest to the intended donee, reserving a life estate in himself and creating a survivorship life interest in the other joint tenant. Such a procedure should nullify the commissioner's argument that in a severance which involves the retention

¹⁹¹ Int. Rev. Code of 1954, § 2012(a), Treas. Reg. § 20.2012-1.

¹⁹² See, e.g., *Estate of Borner*, 25 T.C. 584 (1955).

¹⁹³ Int. Rev. Code of 1954, §102(b)(1), Treas. Reg. § 1.102-1.

¹⁹⁴ Int. Rev. Code of 1954, §2512(a), Treas. Reg. § 25.2512-5(c).

¹⁹⁵ Int. Rev. Code of 1954, § 2503(b), Treas. Regs. §§ 25.2503-2, -3.

¹⁹⁶ 306 F.2d 57 (7th Cir. 1962), reversing 196 F. Supp. 47 (D. C. Ind. 1961).

of survivorship life estates the donor has retained a contingent life interest in the other tenant's share of the property.¹⁹⁷

INTEGRATING JOINT TENANCY INTO THE ESTATE PLAN

Seldom does the holding of property ownership in joint tenancy constitute a complete estate plan. Steps may be required to preserve the evidence of the joint tenancy arrangement and to guard against its unintentional severance. In most estates there will be some individually owned property to contend with. Because joint tenancy only transfers the property to the survivor, problems in making a disposition during his life or at his death must be anticipated. The possibility of a family catastrophe should be recognized and provided for. Often trusts and guardianships are indicated by the presence of minor children or incompetents in the family. Where a substantial portion of the estate is held in joint tenancy, care must be taken to assure that sufficient liquid assets are available in the estate to satisfy the various obligations that become payable at death. Thus, once the decision is made to retain certain joint tenancies, the estate planner must become concerned with integrating the joint ownership into the over-all estate plan.

SAFEGUARDING THE RELATIONSHIP

One of the first problems to be faced is assuring, to the extent possible, that the facts of the joint tenancy relationship can be proved after one or more of the joint tenants have died. Closely related to this is making sure that the joint tenant's separate contribution to the joint tenancy property can be substantiated if and when necessary. In both situations the solution ordinarily lies in establishing, marshaling, and preserving the relevant evidence. Bank records, accounts, bills of sale, and other types of written proof of prior arrangements are most valuable in this respect, but affidavits of the parties concerning what they did and expended may suffice if competent extrinsic evidence cannot be collected.

Problems of proof are particularly sticky where tangible personal property is involved. Ordinarily ownership interests in such property are transferred without any writing to record the transfer. As suggested earlier, difficult problems may arise where personalty is closely associated with real property held in joint tenancy, such as the machinery, livestock, and so on used on a farm held in joint tenancy. Many disputes may be avoided if the estate planner anticipates these difficulties and attempts to straighten out the relationships while the parties are all still alive. A simple memorandum signed

¹⁹⁷ See Young, *CA-7 follows Sullivan in severance of joint tenancies; stage set for High Court Review*, 17 J. Taxation 296 (1962).

by the parties may serve to avoid costly litigation and to minimize intra-family bickering.

If the estate plan is premised on the continued existence of joint tenancies, the estate planner is well advised to counsel his clients concerning the transactions that may cause a severance of the joint tenancy. Although, as discussed earlier, it is relatively rare that a joint tenancy will be unwittingly severed, one need only consider the result where joint tenants convey real estate by contract without specifying that the proceeds will be received as joint tenants to realize that such severance can occur.¹⁹⁸ If, in such a case, the joint tenancy property so conveyed constituted the major asset in the estate, the success of the whole estate plan could well be imperiled.

JOINT TENANCY AND THE WILL

No single misconception is probably more detrimental to efficient estate planning than the belief among laymen that joint tenancy is a sufficient substitute for a will. Far from being a will substitute, in many cases the use of joint tenancy makes the execution of a will more essential than it might otherwise have been. For example, an elderly individual with a spouse and several children might be better advised, from both family and economic viewpoints, to let the intestate law divide all of his property than to pass the bulk of it to his aged spouse through use of joint tenancies and then permit her to take a substantial share of the remaining non-joint tenancy assets as a surviving spouse in intestacy. To avoid laboring the point, it is sufficient to assert that great difficulty would be found in trying to imagine a situation in which the use of the joint tenancy relationship completely obviates the need for a will.

Also, as suggested earlier, caution is warranted in drafting the will lest joint tenancy property is inadvertently devised to some third party in a situation that might give rise to an estoppel claim against the surviving joint tenant. If such a situation arises, litigation may be unavoidable. The following paragraphs suggest common reasons for the execution of a will by one who is a joint tenant.

Individually Owned Property

Although theoretically all property may be the subject of survivorship rights, as a practical matter certain kinds of property do not lend themselves to joint ownership, e.g., a valuable ring. It is therefore likely that even where the property owner is firmly committed to the holding of his property in joint tenancy, there will be certain items of individually owned property that must be disposed of. Sometimes such property can be given away inter vivos, but often the owner prefers to retain control until his death, so a will is indicated.

¹⁹⁸ See *In re Baker's Estate*, 247 Iowa 1380, 78 N.W.2d 863 (1956).

Possibility of Survivorship

The joint tenancy arrangement is only effective to pass property ownership among the joint tenants. If the survivorship feature is not destroyed, eventually the surviving joint tenant will own the property completely. But how is it possible to predict in advance who the surviving joint tenant will be? Because such prophecies are inherently fallible, each joint tenant must recognize the possibility that he might eventually be the sole owner of the property and make plans in anticipation of that possibility. Where the mortality tables favor the chances for survivorship of a particular joint tenant, it is even more important that his plans take into account this probable enlargement of his interest. It might be argued that once the survivorship becomes a fact there will be plenty of time to decide what to do with the property. But this is not sound planning; it ignores the human tendency to procrastinate in acting in such matters, and more important, it overlooks the possibility of consecutive deaths within a relatively short time period, as discussed below.

Simultaneous or Closely Consecutive Deaths

The possibility of joint tenants dying in very close succession should be recognized and should be a conclusive argument in itself to prove the necessity of a will. Where there is no sufficient evidence that all joint tenants died other than simultaneously, the Uniform Simultaneous Death Act provides that the property shall be divided equally among them.¹⁹⁹ This distribution may or may not accord with the wishes of the parties, but it emphasizes the need for a will to dispose intelligently of each joint tenant's interest.

A greater likelihood is that the joint tenants' consecutive deaths will not be simultaneous, but will be sufficiently close to preclude effective planning in the interim. If there is no will, the survivor's estate distributes the property in intestacy—a result that few joint tenants would elect if provided a choice.

Note that it is not possible to put into the will a time limitation on survivorship that will prevent the property from being part of the estate of the survivor. The unavailability of such a planning option is a deficiency of the joint tenancy arrangement and not of the will.

Need for Trustee, Guardian, or Executor

Where the family of the joint tenant contains minor children, incompetents, or others for whom special arrangements are required, a will creating a trust or designating a guardian is usually necessary. The comparison between a joint tenancy and a trust has been made earlier. The point here is that where there are persons dependent upon the joint tenant, especially minor children, it is good practice to have a will creating trusts to care for the de-

¹⁹⁹ Uniform Simultaneous Death Act § 3; Iowa Code Ann. § 633.525 (1964).

pendents and in the case of minor children, to name a guardian of their person and property.

Similarly, if there is any likelihood that the joint tenant's estate may be administered, it is helpful to the surviving family to have a will designating who shall be the executor and if desirable, waiving his bond. Of course, such directions are not mandatory on the Probate Court,²⁰⁰ but the court usually acquiesces.

LIQUIDITY

The need for ample liquidity in the probate estate is a point the estate planner must always keep in mind. Estate administration proceeds most smoothly and usually most inexpensively when the estate contains a fund of cash, or property easily convertible into cash, sufficient to satisfy the payment of debts, expenses of the last illness and funeral, costs of administration, and death taxes. Where such liquidity is lacking the estate may suffer economic loss through a forced sale of non-liquid assets, or it may be necessary to sell or mortgage cherished personalty or real estate outside the family, unless estate beneficiaries are willing to advance the costs out of their own pockets.

The liquidity problem may be aggravated where a substantial portion of the decedent's property passes outside the probate estate through a survivorship arrangement. Through use of the joint tenancy, property is placed beyond the reach of the decedent's personal representative,²⁰¹ but often its value is included in the estate for death tax purposes, thereby increasing the cash needs of the estate. Under Section 449 of the Iowa Probate Code such apportionment of estate taxes is possible only where the decedent's will or trust instrument so directs. In absence of a contrary express direction, the federal and state taxes are paid out of the property of the estate. As a practical matter most wills contain a tax clause directing the payment of death taxes out of the residue of the probate estate.

The liquidity problem is most acute where funds usually depended upon to supply the cash requirements of the estate are subject to survivorship rights. It is very often the case that a decedent's checking account, savings account, government bonds, and readily salable stock are all held in joint tenancy. Life insurance proceeds are usually payable to named beneficiaries and therefore not directly available to the estate.

This discussion only serves to highlight the potential for a shortage of estate liquidity that may be associated with a heavy commitment to joint owner-

²⁰⁰ See Iowa Code Ann. § 633.22 (1964).

²⁰¹ Both federal and state tax laws give the personal representative a limited right to collect taxes attributable to property passing outside the probate estate from the person receiving such property. See Int. Rev. Code of 1954 §§ 2206, 2207; 6 Mertens, Law of Federal Gift and Estate Taxation § 44.06 (1960); Iowa Code §§ 450.53, .54, .57 (1962); 1 CCH *Inh., Est. & Gift Tax Rep.*, Ia. 2035 (1960).

ship of property, and the importance of the estate planner being conscious of the need to provide necessary liquidity where the client's testamentary plan should not be substantially upset. There may well be cases where the client cannot both keep his joint tenancies and be assured that his testamentary plan will not fail for lack of liquidity. If this is the situation, it should be explained to him fully so that he can decide which aspect of his plan is really the more important to him. In many instances the allegiance to the joint tenancy may be expected to waiver when the choice is presented in these terms.

Some observers might suggest that life insurance is the easy solution to such a liquidity problem. The process would be to simply calculate the amount of liquidity required and purchase a life insurance policy in that amount payable to the estate. In many cases this is not a realistic suggestion, owing to health or economic factors. Although life insurance may be a most valuable tool in the estate planners kit, it is not a free tool, and it falls considerably short of being a panacea for the liquidity problem, and for most other estate planning problems, for that matter.

CONCLUSION

A reviewer of this monograph might voice the concern that, read as a whole, it manifests an unscholarly bias against the joint tenancy form of owning property. Perhaps this observation would be accurate, but the author did not approach the problem with such a predilection. A critical examination of the uses to which survivorship rights currently are being put was intended, rather than a criticism of the institution (and joint tenancy is just that) itself.

Of itself, the joint tenancy form of ownership is neither good nor bad, wise nor unwise. It is a neutral form with great utility that takes on value connotations only when it is utilized in particular fact situations. Joint tenancy may be the most desirable estate planning vehicle in some circumstances and very foolhardy in others; the value judgment is entirely attributable to the context in which the joint tenancy is found. That joint tenancy is not a perfect and self-sufficient estate plan is no more a fair criticism of joint tenancy than it is of any other single estate planning technique. The knowledgeable and experienced estate planner can plan for, or around, or do away with, joint tenancy ownership with much the same devices and by reference to the same standards as are utilized for other estate planning problems.

Having said all this, however, any underlying prejudice against joint tenancy that the monograph might contain remains unexplained. The explanation, if one be necessary, probably lies in the conjunction of two essential factors: the nature of the estate planner's role and the incidence of joint tenancy ownership in Iowa.

To the extent that estate planning has become a specialization within the legal profession, the estate planner has ascended to the position of the foremost practitioner of "preventive law." A principle responsibility of the estate planner is to apply his expertise to his client's estate and try to anticipate and plan for all eventualities that might impede the maximum attainment of the client's estate planning goals. In fulfilling this duty, the estate planner is inclined to search particularly for things affecting the client's estate that might "go wrong." Joint tenancy has long been a prime suspect in this search, and for just cause.

Initial reports from a field research project studying the use of joint tenancies in Iowa show an incidence of use in excess of even the most liberal predictions. In one county over 80 percent of all deeds recorded in 1964 named joint tenant grantees. The only conclusion that can be drawn from this kind of data is that for a substantial preponderance of the persons acquiring Iowa real property today, a decision, knowledgeable or otherwise, is being made in favor of joint ownership.

When the estate planning orientation of this monograph is considered in light of the enormous current popularity of joint tenancy, it would be surprising if the overall tone of the discussion was not one of caution toward joint tenancy. The concern is not that too many people are using joint tenancy, it is that too few are using it knowledgeably.

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