

Agricultural Law Digest

Volume 3, No. 12

June 5, 1992

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ISSN 1051-2780

JOINT TENANCY DISCLAIMERS: WHAT CAN BE DISCLAIMED?

— by Neil E. Harl*

For years the Internal Revenue Service resisted the disclaimer of joint tenancy interests on the grounds that the disclaimer had to occur within nine months of the creation of the joint tenancy.¹ IRS eventually came to accept the disclaimer of *revocable* joint tenancies within nine months after death² and even more recently indicated that the Service would not resist the disclaimer of joint tenancy interests in other than revocable joint tenancies where there was a pre-death right to sever the joint interests.³

The focus on *when* joint tenancies could be disclaimed obscured the question of *what* could be disclaimed.

What can be disclaimed

In *Ltr. Rul. 9012053*,⁴ the decedent had purchased a bond in joint tenancy with his wife on March 6, 1989. The decedent died on April 15, 1989. On December 6, 1989, the wife disclaimed her *entire interest* in the bond. The ruling recites that the disclaimer of her one-half was possible because the disclaimer was within nine months of the *creation* of the joint tenancy, March 6, 1989. In the case of the two bank accounts in the ruling, to which the decedent contributed all of the funds, the wife proposed to execute disclaimers prior to January 15, 1990, of the one-half interest that would have passed to her by survivorship. The ruling recites that there was no transfer at the time the deposits were made and the transfer did not occur at the decedent's death. Therefore, the disclaimer could be made within nine months after death and a one-half survivorship interest could be disclaimed.

The key question is why the wife, as the survivor, could not have disclaimed all of the bank accounts inasmuch as no transfer took place to the wife prior to the husband's death. The same ruling permitted a disclaimer of one-half of the total interest in a residence that was acquired in 1969 at a time when joint tenancy or tenancy by the entirety interests (which this was) were not gifts to the non contributing tenant by the entirety. In the facts of that ruling, the decedent had not made an election to treat the acquisition of the residence as a gift of a proportionate part to his wife.

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Therefore, as to both the bank accounts and the residence, the decedent was deemed to be the owner for federal gift tax purposes during life yet only one-half was disclaimed.

In *Ltr. Rul. 8916070*,⁵ a joint brokerage account account was involved which is also not deemed to be a gift at the time of creation of the account.⁶ Again, a one-half interest was disclaimed.⁷ Several other private letter rulings have also been issued, all involving disclaimers of one-half interests.⁸

In *McDonald v. Commissioner*,⁹ which involved joint tenancy interests in realty, the attorney for the estate has confirmed that only one-half was disclaimed in that case.¹⁰

The Service took the position in *Ltr. Rul. 8827072*¹¹ that a surviving joint tenant could disclaim the entire interest in an account where the entire value was included in the deceased joint tenant's gross estate but that for husband-wife joint tenancies after 1981, I.R.C. § 2040(b) specifies that only one-half would be included in the deceased joint tenant's gross estate. Therefore, the surviving joint tenant's disclaimer was limited to one-half of the amount.

This argument seems to focus on the wrong aspect of the transaction in determining whether a transfer had taken place to the surviving joint tenant. That letter ruling¹² would have the federal estate tax rule determine whether a transfer had taken place. Arguably, the focus should be on the situation at the time the joint tenancy was created. At present, no gift occurs on creation of a joint tenancy in a bank or brokerage account¹³ or in U.S. Government savings bonds.¹⁴ After 1954 and before 1982, joint tenancies in real property involving a husband and wife did not involve a gift on creation of the joint tenancy¹⁵ unless treated as a gift on a gift tax return timely filed.¹⁶ In one recent case, the court applied the consideration-furnished rule¹⁷ rather than the fractional share rule¹⁸ to husband-wife joint tenancy interest created before 1982 but dying after 1981 with the entire amount included in the gross estate of the first to die and receiving a new income tax basis.¹⁹

It should be noted that the regulations take the position that a joint tenant cannot make a qualified disclaimer of any portion of a joint interest attributable to consideration furnished by that joint tenant.²⁰

FOOTNOTES

- ¹ Treas. Reg. § 25.2518-2(c)(4). See generally 6 Harl, Agricultural Law § 46.08 (1992).
- ² See *Est. of Dancy v. Comm'r*, 872 F.2d 84 (4th Cir. 1989) (surviving joint tenant disclaimed interest in money market account, stocks, bonds, and certificates of deposit).
- ³ E.g., Ltr. Rul. 9106016, Nov. 8, 1990. See *McDonald v. Comm'r*, 853 F.2d 1494 (8th Cir. 1988) (relevant transfer for joint tenancy in land occurred at death of first joint tenant to die). See also *Kennedy v. Comm'r*, 804 F.2d 1332 (7th Cir. 1986) (joint tenancy in land acquired in 1953 when joint tenancy acquisitions constituted gift to non contributing joint tenant).
- ⁴ Dec. 27, 1989.
- ⁵ Jan. 25, 1989.
- ⁶ Rev. Rul. 69-148, 1969-1 C.B. 226.
- ⁷ *Id.*
- ⁸ Ltr. Rul. 9218015, Feb. 5, 1992, see p. 91 *infra*; Ltr. Rul. 9140005, June 25, 1991; Ltr. Rul. 9135043, June 3, 1991; Ltr. Rul. 9135044, June 3, 1991 (ruling under reconsideration and IRS has indicated that it will issue a private letter ruling in early 1992 that will reverse Ltr. Rul. 9135044 although no such ruling has appeared); Ltr. Rul. 9106016, Nov. 8, 1990; Ltr. Rul. 9017026, Jan. 26, 1990.
- ⁹ *Supra* note 3.
- ¹⁰ Private communication, Garry Pearson, Grand Forks, North Dakota, March 2, 1992.
- ¹¹ April 18, 1988.
- ¹² *Id.*
- ¹³ Treas. Reg. § 25.2511-1(h)(4). See Ltr. Rul. 8302020, Oct. 5, 1982.
- ¹⁴ Treas. Reg. § 25.2511-1(h)(4). See Rev. Rul. 68-269, 1968-1 C.B. 399.
- ¹⁵ Treas. Reg. § 25.2515-1(b).
- ¹⁶ Treas. Reg. § 25.2515-2(a).
- ¹⁷ I.R.C. § 2040(a).
- ¹⁸ I.R.C. § 2040(b).
- ¹⁹ *Gollenstein v. U.S.*, 91-1 U.S. Tax Cas. (CCH) ¶ 60,088 (E.D. Ky. 1991).
- ²⁰ Treas. Reg. § 25.2518-2(c)(4)(i).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ADVERSE POSSESSION

POSSESSION. The disputed property was originally owned by a corporation which terminated in 1939. One of the remaining shareholders deeded the land to a son who rented and eventually deeded the property to the plaintiff. The plaintiff used the property as cattle pasture and allowed other ranchers to occasionally use the property as a resting place and for grazing. The court held that the plaintiff did not own the property through the deed from the corporation because the shareholder did not have the authority to transfer ownership. The court also held that the plaintiff had acquired title through adverse possession, continuous since the plaintiff started renting the property from the shareholder's son. The property so acquired included both the fenced and unfenced property because the only other uses of the unfenced property were by permission of the plaintiff. **Rice v. Hill City Stock Yards Co.**, 826 P.2d 1328 (Idaho Ct. App. 1990).

BANKRUPTCY

GENERAL

AVOIDABLE TRANSFERS. The debtor had inherited the right to receive payments under a promissory note and had assigned a number of those payments to a third party for cash. The debtor later assigned the remaining payments to the debtor's daughter for \$10 while the debtor owed several creditors. The court held that the assignment of the remainder payments was a fraudulent transfer under state law and avoidable by the trustee. **In re Davis**, 138 B.R. 106 (Bankr. M.D. Fla. 1992).

EXEMPTIONS.

OBJECTIONS. The debtor claimed exemptions for the debtor's interest in a profit sharing plan and an IRA. The trustee convened the first meeting of creditors on August 8, 1990, but at the end of the meeting, the trustee announced that the meeting was to be continued generally and

reconvened at a later unspecified date. The trustee did not announce a date for another creditors' meeting and 15 months later filed objections to the debtor's exemption claims. The court held that a continued creditors' meeting was deemed concluded for Bankr. Rule 4003(b) purposes at the end of the meeting if the trustee, within 30 days after the creditors' meeting, does not set a specific date for a continuance. The court also held that a debtor's claimed exemptions would be allowed for failure of the trustee to object within 30 days after a creditors' meeting, even if the exemption claim does not have a good faith statutory basis. Note: the second holding was also reached by the U.S. Supreme Court in *Taylor v. Freeland & Kronz*, see p. 83 *supra*. **In re Levitt**, 137 B.R. 881 (Bankr. D. Mass. 1992).

PENSION PLAN. The debtor claimed an exemption under Ind. Code § 34-2-28-1(a)(6) in the debtor's interest in an ERISA qualified profit sharing plan. Under the plan the debtor had the right to distribution in case of termination of employment or financial hardship and could borrow from the vested amount. The court held that the debtor's interest in the plan was property of the estate because the plan did not qualify as a spendthrift trust where the debtor had such access rights. The court held that ERISA did not provide a federal nonbankruptcy law exemption. The court also held that the Indiana exemption was pre-empted by ERISA. **Matter of VanMeter**, 137 B.R. 908 (Bankr. N.D. Ind. 1992).

The debtor claimed an exemption under Wis. Stat. § 815.18(31) in the debtor's interest in an ERISA qualified profit sharing plan. Under the plan the debtor had the right to distribution in case of termination of employment or financial hardship and could borrow from the vested amount. The court held that the interest in the plan was excluded from the estate under ERISA as a federal nonbankruptcy law exemption. **In re Shaker**, 137 B.R. 930 (Bankr. W.D. Wis. 1992).