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DISCLAIMING THE SURVIVORSHIP INTEREST IN JOINT TENANCY PROPERTY

— by **Neil E. Harl***

For decades, joint tenancy property has been a popular form of co-ownership for farm and ranch property.[1] Although a gradual shift occurred in the 1960s and 1970s to tenancy in common ownership, as joint tenancies were severed into tenancy in common ownership and as title to newly acquired assets was taken in tenancy in common, joint tenancy continued to be used widely, particularly for those with modest estates, those desiring to minimize probate expense and those who had given little thought to planning for the disposition of their estates at death.

Recent developments have clarified the rules governing the disclaimer of the survivorship interest in joint tenancy property.[2]

"Revocable" joint tenancies. When a person establishes a joint bank with another, there is no gift tax liability even if that person is the only depositor.[3] By the IRS view, the creator and sole contributor to a joint brokerage account is treated similarly; a gift does not occur until the one not providing the consideration draws on the account for his or her benefit without any obligation to account to the other joint owner.[4] For such "revocable" joint tenancies in joint bank or brokerage accounts, a gift occurs only when one of the joint tenants withdraws more than he or she contributed to the account.[5]

For disclaimer purposes, a non-contributing joint tenant can disclaim his or her interest in a joint bank or brokerage account within nine months of the depositor's death.[6] There is considered to be no acceptance of the benefit so a disclaimer may be made within the usual nine month period for disclaimers.[7] Thus, IRS has ruled favorably on disclaimers of joint tenancy interests in savings certificates,[8] joint stock brokerage accounts,[9] mutual funds,[10] and U.S. Government series E and H bonds owned in joint tenancy.[11]

IRS has also approved a disclaimer of a joint tenancy interest in a house acquired by a husband and wife before 1982.[12] Through 1981, for a joint tenancy in real property created after December 31, 1954, in a husband and wife by one of the spouses, a taxable gift did not result at the time of the transfer unless the donor elected to treat the transfer as a gift.[13] "Contribution" was defined in terms of "money, other property or an interest in property."[14] The same rule of no taxable gift applied if the transaction involved an increase in value of the property because of improvements or reduction of indebtedness on real property.[15] Note that the real property exception to a gift upon creation of joint tenancies or tenancies by the entirety between husband and wife was repealed in 1981 effective commencing in 1982.[16]

The IRS position has been that a joint tenant apparently could not make a qualified disclaimer of property acquired by survivorship within nine months after creation of the tenancy, if the survivor originally created the joint tenancy because the survivor was not a transferee of the interest renounced.[17]

Other joint tenancies. For several years, the Internal Revenue Service seemed to be pursuing a different rule for attempted disclaimers of joint tenancy-held real estate interests as opposed to otherwise "revocable" joint tenancies such as those in joint bank and brokerage accounts.[18] The IRS theory for real estate (other than husband and wife joint tenancies in realty after 1954 and before 1982) was that the "transfer" from the joint tenant supplying funds is made at the time of purchase. Thus, to be valid, the IRS position was that joint tenancy disclaimers of non-revocable joint tenancy interests must be made within nine months after creation of the joint tenancy.[19] The Tax Court generally agreed with the IRS position.[20]

The Courts of Appeal for the Seventh[21] and Eighth[22] Circuits have disagreed where a right to sever or partition the joint interest existed. IRS, in an Action on Decision, now indicates that it will not contest disclaimers of survivorship interests where there was a pre-death right to sever the joint interests. [23] Moreover, IRS will no longer contend that a joint tenant cannot make a qualified disclaimer of any part of a joint interest attributable to consideration furnished by the joint tenant.

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FOOTNOTES

[1] See generally 5 Harl, **Agricultural Law** § 43.02[2] (1991).
[2] See 6 Harl, *supra* note 1, § 46.08.
[3] Treas. Reg. § 25.2511-1(h)(4). See Ltr. Rul. 8302020, Oct. 5, 1982 (either mother (the contributor) or daughter as joint tenants could withdraw from savings account; gift occurred on withdrawal by daughter).
[4] Rev. Rul. 69-148, 1969-1 C.B. 226. But see First Wisconsin Trust Co. v. U.S., 553 F. Supp. 26 (E.D. Wis. 1982) (gift on transfer of corporate stock to street account in joint tenancy with other spouse).
[5] See notes 3 and 4 *supra*.
[6] Treas. Reg. § 25.2518-2(c)(5), Ex. 9.
[7] Est. of Dancy v. Comm'r, 872 F.2d 84 (4th Cir. 1989), *rev'g*, 89 T.C. 550 (1987) (disclaimers of "revocable" interests were qualified; disclaimer of interest in tenancy by entirety interest in real property not permitted).
[8] Ltr. Rul. 8208069, Nov. 25, 1981.
[9] Ltr. Rul. 8916070, Jan. 25, 1989 (decedent made all contributions to account and surviving spouse never made withdrawals from account, thus no completed gift to spouse during decedent's lifetime).
[10] Ltr. Rul. 9012053, Dec. 27, 1989.
[11] Ltr. Rul. 9017026, Jan. 26, 1990.
[12] Ltr. Rul. 9012053, Dec. 27, 1989.
[13] Treas. Reg. § 25.2515-1(b).
[14] Treas. Reg. § 25.2515-1(c)(1)(i).
[15] Treas. Reg. § 25.2515-1(b).
[16] Economic Recovery Tax Act of 1981, Pub.L. 97-34, Sec. 403(c)(3)(B), 95 Stat. 302 (1981), repealing I.R.C. § 2515.
[17] Rev. Rul. 83-35, 1983-1 C.B. 234. See Ltr. Rul. 8951070, no date given (disclaimer not qualified where disclaimant provided consideration to joint accounts).
[18] See notes 3-16 *supra*.
[19] Treas. Reg. § 25.2518-2(c)(4) (qualified disclaimer of joint tenancy or tenancy by the entirety interests must be made no later than nine months after creation of the joint interest, except for interests created before 1982). See Ltr. Rul. 7829008, April 14, 1978.
[20] *E.g.*, Est. of O'Brien v. Comm'r, T.C. Memo. 1988-240 (disclaimer of joint tenancy interest ineffective where not made within nine months of creation of joint tenancy).
[21] Kennedy v. Comm'r, 804 F.2d 1332 (7th Cir. 1986), *rev'g*, T.C. Memo. 1986-3 (period for reasonable time to disclaim surviving spouse's interest in joint tenancy interest held by decedent runs from date of death and not creation of joint tenancy).
[22] McDonald v. Comm'r, T.C. Memo. 1989-140, *on rem. from* 853 F.2d 1494 (8th Cir. 1988), *rev'g*, 89 T.C. 293 (1987), *on remand*, T.C. Memo. 1989-140 (disclaimer timely where surviving joint tenant made disclaimer within nine months of joint tenant's death but more than nine months after creation of joint tenancy). See also Ltr. Rul. 9135043, June 3, 1991 p. 165 *infra*.
[23] See Ltr. Rul. 9106016, Nov. 8, 1990 (disclaimer of tenancy by entirety interest by husband); Ltr. Rul. 9135044, June 3, 1991 p. 165 *infra*..

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

BANKRUPTCY

GENERAL

AUTOMATIC STAY. The court held that the conversion of a Chapter 13 case to Chapter 7 after a creditor had obtained relief from the automatic stay did not affect the relief from the automatic stay and the creditor could continue with foreclosure against the debtor's property. ***In re* Campos, 128 B.R. 790 (Bankr. C.D. Cal. 1991)**.

AVOIDABLE LIENS. The debtor's residence was subject to a first mortgage in excess of the residence's fair market value and an IRS tax lien. The trustee abandoned the house and the debtors were granted a discharge. The debtors petitioned for avoidance of the IRS claim as an unsecured claim, under Section 506(d). The court examined the competing authority of *Gaglia v. First Federal Savings & Loan Ass'n, 889 F.2d 1304 (3rd Cir. 1989)* (avoidance allowed) *and In re Dewsnup, 908 F.2d 588 (10th Cir. 1990), cert. granted, 111 S. Ct. 949 (1991)* (avoidance not allowed), and held that avoidance of the unsecured claim was not allowed after the property subject to the lien was abandoned. The court stated that avoidance was not necessary because the discharge effectively prevented a deficiency judgment against the debtors on the lien in a post-bankruptcy foreclosure. ***In re* Elam, 129 B.R. 137 (Bankr. N.D. Ohio 1991)**.

AVOIDABLE TRANSFERS. Prior to filing bankruptcy, the debtors fraudulently transferred their homestead to third parties. One of the debtors' creditors filed suit in state court and received a judgment of fraudulent transfer which was filed prior to the debtors' bankruptcy filing. In the bankruptcy case, the trustee also moved for avoidance of the transfer as fraudulent. The trustee objected to the creditor's judgment lien claim against the homestead, arguing that the judgment lien did not attach to the property because the debtors did not have ownership and possession of the property when the lien was recorded. The court held that under state law, the judgment attached to the property when filed and remained a senior interest against the property after the bankruptcy filing and during the trustee's avoidance of the transfer. ***In re* Mathiason, 129 B.R. 173 (Bankr. D. Minn. 1991)**.

ESTATE PROPERTY. The debtor was a cotton merchant which purchased several truck loads of cotton from a seller but which failed to pay for four truck loads before filing bankruptcy. The seller claimed a priority