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FEDERAL TRANSFER TAXES ON PROPERTY OWNED JOINTLY WITH RIGHT OF SURVIVORSHIP

Part 1—Federal Gift Tax*

HENRY T. LOWE**

I. INTRODUCTION

In Missouri and elsewhere coownership with right of survivorship is very common, primarily because the right of survivorship avoids the delays and expenses of transferring title to property passing at death. Real estate,¹ corporate stocks and bonds,² government securities,³ bank ac-

*These comments are in two parts. Part 1 includes general comments on recent reform legislation in the federal estate and gift taxes, a discussion of rights of survivorship and severance under Missouri law with respect to various property interests, and finally a summary of the federal gift tax consequences of common transactions involving coownership with right of survivorship. Part 2 will appear in a subsequent issue of the Missouri Law Review. It will discuss the federal estate tax consequences of coownership with right of survivorship and some planning considerations involved in the choice of this form of ownership, the termination of the right of survivorship, and the consequences and desirability of election to qualify property held in this form by husband and wife, the effect of which is to make federal estate tax consequences resemble more closely ownership rights under Missouri law.

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The author acknowledges the research assistance of Mr. Stephen Sokoloff in the preparation of these comments.

1. *Powers v. Buckowitz*, 347 S.W.2d 174 (Mo. En Banc 1961); *Gibson v. Zimmerman*, 12 Mo. 385 (1849); RSMo §§ 442.025, .450 (1969).

2. *Osterloh's Estate v. Carpenter*, 337 S.W.2d 942 (Mo. 1960); *In re Gerling's Estate*, 303 S.W.2d 915 (Mo. 1957).

3. *Awtry's Estate v. Comm'r*, 221 F.2d 749 (8th Cir. 1955); *In re Clemmon's Estate*, 49 N.W.2d 883 (Iowa 1951); *Valentine v. St. Louis Union Trust Co.*, 250 S.W.2d 167 (Mo. 1952); 31 C.F.R. §§ 315.2, 306.10, 316.4 (1978).

counts⁴ and other items of personal property⁵ are owned in this form. The form of ownership may be tenancy by the entirety, joint tenancy with right of survivorship, a statutory form of coownership with right of survivorship available for bank deposits and safe deposit arrangements, or ownership under federal law of government securities payable to the survivor(s) of one or more persons. Each of these forms of coownership has the survivorship feature.

The federal estate and gift tax consequences of common transactions involving property held as coowners with right of survivorship are a source of confusion. Often the basic questions are not easy to answer: 1) When one of the coowners dies what portion, if any, of the value of the property is subject to the federal estate tax under a test based on "contributions" to the acquisition cost of the property? 2) How are "contributions" determined? 3) When property is acquired by coowners with right of survivorship, has one of them made a gift for federal gift tax purposes to the other(s) if their contributions to the acquisition cost are unequal? The answer to this question may turn on the relationship of the parties, the type of property acquired, and the time when it was acquired. 4) If the coowners sell or dispose of the property, has one of them made a gift for federal gift tax purposes to the other(s) if the proceeds are divided by the parties or reinvested in other property? The answer to this question may depend in turn on the answer to the previous question.

The answers to these and related questions are complicated further by the enactment in 1976 of legislation reforming the federal estate and gift tax laws.⁶ Not only did this legislation abolish the separate rate schedules and exemptions for the two taxes, it also sought to simplify the answer to some of the questions involving coownership of property with the right of survivorship where the coowners are husband and wife. It created a new classification of property—"qualified joint interest."⁷ The Revenue Act of 1978⁸ added technical amendments⁹ for further clarification and a new approach for determining "contributions" where husband and wife acquire business property¹⁰ as coowners with right of survivorship.

The primary purpose of the comments to follow is to discuss the federal estate and gift tax consequences of common transactions involving prop-

4. *In re LaGarce's Estate*, 487 S.W.2d 493 (Mo. En Banc 1972); RSMo § 362.470 (Supp. 1977) (banks and trust companies); RSMo § 369.174 (Supp. 1971) (savings and loan associations); RSMo § 370.287 (1969) (credit unions).

5. *Longacre v. Knowles*, 333 S.W.2d 67 (Mo. 1960); RSMo § 301.195 (Supp. 1974).

6. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (codified in scattered sections of 26 U.S.C.).

7. I.R.C. § 2040(b)(2).

8. Pub. L. No. 95-600, 92 Stat. 2763 (1978) (to be codified in scattered sections of the I.R.C.).

9. *Id.* at § 702(k)(2), 92 Stat. 2932 (codified at I.R.C. § 2040(d), (e)).

10. *Id.* at § 511(a), 92 Stat. 2881 (codified at I.R.C. § 2040(c)).

erty held by coowners with right of survivorship by taking into account the impact of the recent developments. As background for this discussion Part II summarizes the major features of the recent estate and gift tax reform legislation.

II. UNIFIED TRANSFER TAX—THE 1976 TAX REFORM ACT

Before the enactment of reform legislation in 1976 the federal transfer taxes, estate and gift, were separate taxes with separate rate schedules and separate exemptions. Gift tax rates applied on a progressive scale to cumulative, taxable life-time donative transfers;¹¹ the gift tax exemption was a \$30,000 deduction¹² available to the donor on an elective basis.¹³ Federal estate tax rates applied on a progressive scale to a taxable estate;¹⁴ the estate tax exemption was a \$60,000 deduction¹⁵ available to the executor in determining the taxable estate. Under the separate gift and estate tax system gift tax rates were lower than estate tax rates in comparable rate brackets, and the use of the separate gift tax exemption and the lower gift tax rates was a prominent feature of estate and tax planning.

Reform legislation in 1976 repealed the separate rate schedules and exemptions for the two taxes¹⁶ and in their place established a single rate schedule¹⁷ and a single exemption, now classified as a transfer tax credit.¹⁸ Accompanying the structural changes in rates and exemptions were significant changes in the gift and estate tax marital deductions¹⁹ for trans-

11. Int. Rev. Code of 1954, Pub. L. No. 83-591, § 2502, 68A Stat. 403 (amended 1976).

12. *Id.* at § 2521, 68A Stat. 410 (repealed 1976).

13. Treas. Reg. § 25.2521-1(a) (1972).

14. Int. Rev. Code of 1954, Pub. L. No. 83-591, § 2001, 68A Stat. 373 (amended 1976).

15. *Id.* at § 2052, 68A Stat. 389 (repealed 1976).

16. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2001, 90 Stat. 1846 (codified at I.R.C. § 2001).

17. *Id.* at § 2001, 90 Stat. 1847 (codified at I.R.C. § 2001(c)).

18. *Id.* at § 2010, 90 Stat. 1848 (codified at I.R.C. § 2010); *id.* at § 2505, 90 Stat. 1849 (codified at I.R.C. § 2505). For taxable transfers by lifetime gift made after 1976 a donor must apply the available transfer tax credit against the federal gift tax liability. Under the prior law the use of the \$30,000 exemption deduction was optional with the donor. Thus if a donor in 1981 or a later year for the first time makes a taxable transfer by gift of \$175,000, the donor must report the gift on a federal gift tax return for 1981 and offset the gift tax liability of approximately \$47,000 by the available transfer tax credit of \$47,000. Thereafter if the donor makes a second taxable transfer by lifetime gift in the amount of \$25,000, the donor must report the second gift on a federal gift tax return for the year of the gift, and compute the federal gift tax on the aggregate of the first and second gifts (\$200,000). In this example, the federal gift tax liability of \$54,800 is offset by the transfer tax credit of \$47,000 and the difference of \$7,800 is due and payable when the return is filed.

19. *Id.* at § 2002(a), 90 Stat. 1854 (1976) (codified at I.R.C. § 2056(c)); *id.* at § 2002(b), 90 Stat. 1854-55 (1976) (codified at I.R.C. § 2523(a)).

fers between spouses and the filing requirements for gift and estate tax returns.²⁰ These changes are summarized briefly in paragraphs to follow.

A. *Exemptions and Rates*

The separate gift and estate tax exemptions have now been replaced by a unified transfer tax credit, phased-in over a five year period and fully effective in 1981 and later years.²¹ When fully effective the unified transfer tax credit of \$47,000 will be the equivalent of an exemption deduction of \$175,600, approximately twice the amount of the combined gift (\$30,000) and estate tax (\$60,000) exemption deductions under the prior law.²²

Under the unified transfer tax system the federal estate tax liability of a decedent dying after 1976 is determined by applying the new rate schedule to the aggregate of (1) the taxable estate of the decedent and (2) the amount of any adjusted taxable gifts made by the decedent after 1976.²³ The amount of any federal gift taxes paid on gifts made by the decedent after 1976 offsets the amount so determined.²⁴

While convenient to refer to the transfer tax credit of \$47,000 as the equivalent of an exemption of \$175,600, it is not strictly accurate to do so. The old estate tax exemption was a deduction; it reduced tax liability in

20. See I.R.C. sections cited notes 37-52 *infra*.

21. I.R.C. §§ 2010, 2505.

22. Int. Rev. Code of 1954, Pub. L. No. 83-591, § 2521, 68A Stat. 410 (1954) (codified at I.R.C. § 2521) (repealed 1976); *id.* at § 2052, 68A Stat. 389 (1954) (codified at I.R.C. § 2052) (repealed 1976).

23. I.R.C. § 2001(b).

24. I.R.C. § 2001(b)(2). The following three examples involve transfers by an individual who is unmarried and illustrate the operation of the new unified transfer tax.

A single person dies in 1981 or in some later year with a taxable estate of \$175,600. This decedent has made no taxable transfers by gift either before 1977 or after 1976. The tentative tax of \$47,000 will be offset by a transfer tax credit of \$47,000. The estate will incur no federal estate tax liability.

A single person dies in 1981 or some later year with a taxable estate of \$175,600. The decedent has made taxable transfers by gift of \$175,600 before 1977 but no taxable transfers by gift after 1976. The tentative tax will be approximately \$47,000 and this amount will be reduced by the transfer tax credit of \$47,000. This estate will incur no federal estate tax liability; the donor did, however, incur federal gift tax liability on the lifetime gifts made before 1977.

A single person dies in 1981 or some later year with a taxable estate of \$175,600. The decedent has made taxable transfers by gift of \$175,600 after 1976 but no taxable transfers by gift before 1977. The tentative tax will be approximately \$105,000, determined by applying the new rate schedule to an aggregate of \$350,000. The tentative tax will be reduced by the transfer tax credit of \$47,000. During his lifetime the donor must apply the transfer tax credit against taxable gifts; the donor will pay no gift tax but has, in effect, used up the available credit. On the estate tax return the transfer tax credit will offset only the first \$175,000 of transfers, those made by the donor while living; the taxable estate (the transfers made at death) incurs a federal estate tax liability of approximately \$57,000.

the top brackets. The transfer tax credit offsets the tax liability on the first \$175,600 of transfers; it reduces tax liability in the bottom brackets.

B. *Marital Deductions*

The Revenue Act of 1948²⁵ established federal gift and estate tax deductions for transfers between spouses to establish greater equality between states having community property laws and states having the common law, separate property system.²⁶ These deductions remained basically unchanged until the 1976 reform legislation. Changes introduced in 1976 in these deductions have an important bearing on transactions involving coownership with right of survivorship since this form of ownership occurs frequently with married persons.

Before 1977 the federal gift tax marital deduction was a deduction for one-half the value of property transferred to a spouse in a non-terminable form.²⁷ The federal estate tax marital deduction was a full deduction for non-terminable interests passing to a surviving spouse but the maximum allowable deduction was limited to 50% of the adjusted gross estate.²⁸

Reform legislation in 1976 changed the federal gift tax marital deduction to a full deduction for the first \$100,000 of aggregate post-1976 gifts to a spouse in a non-terminable form.²⁹ For aggregate post-1976 non-terminable gifts to a spouse in excess of \$100,000 but less than \$200,000 there is no federal gift tax marital deduction.³⁰ For aggregate post-1976 non-terminable gifts to a spouse in excess of \$200,000 the federal gift tax marital deduction is one-half the value of the property transferred,³¹ the same deduction permitted under the law in effect before 1977.

Reform legislation in 1976 increased the maximum allowable federal estate tax marital deduction to the greater of \$250,000 or 50% of the adjusted gross estate.³² For estates of \$500,000 or less the maximum estate tax marital deduction is now \$250,000; for estates in excess of \$500,000 the maximum marital deduction is 50% of the adjusted gross estate, the same limitation in effect prior to 1977.

To coordinate the changes made in the gift and estate tax marital deductions the 1976 reform legislation provides that the *maximum* estate tax marital deduction is reduced to the extent that post-1976 gift tax marital deductions allowed to a decedent exceed the gift tax marital

25. Ch. 168, 62 Stat. 110.

26. Revenue Act of 1948, ch. 168, § 351, 62 Stat. 116; *id.* at § 361, 62 Stat. 117 (1948); *id.* at § 371, 62 Stat. 125; *Northeastern Pa. Nat'l Bank & Trust Co. v. United States*, 387 U.S. 213, 219 (1967).

27. Int. Rev. Code of 1954, Pub. L. No. 83-591, § 2523, 68A Stat. 412 (amended 1976).

28. *Id.* at § 2056(c), 68A Stat. 392 (amended 1976).

29. I.R.C. § 2523(a)(2).

30. I.R.C. § 2523(a)(2)(A), (B)(ii).

31. I.R.C. § 2523(a)(2)(B).

32. I.R.C. § 2056(c)(1)(A).

deductions allowable under the prior law³³ (*i. e.*, 50% of the value of the property transferred). Thus if a donor gave \$100,000 of aggregate post-1976 deductible gifts to a spouse the donor is entitled to gift tax marital deductions of \$100,000 under the new law, but would have been entitled to gift tax marital deductions of \$50,000 under the prior law. In this instance the donor's estate would have a *maximum* estate tax marital deduction of the greater of \$200,000 (\$250,000 minus \$50,000) or 50% of the adjusted gross estate reduced by \$50,000. For many smaller estates this coordination provision should not have any serious impact since the estate may not seek to utilize the maximum estate tax marital deduction.

The acquisition of property in the coownership form with right of survivorship may constitute a gift from one of the coowners to the other(s) where one coowner contributes all or a disproportionate share of the acquisition price.³⁴ Where the coowners are husband and wife such a gift qualifies for the gift tax marital deduction; the right of survivorship (the possibility that the donee spouse will not survive the donor) is disregarded.³⁵ Property passing at death to a surviving spouse by right of survivorship qualifies for the estate tax marital deduction to the extent the value of the property is reflected as part of the gross estate of the decedent.³⁶

C. Filing Requirements—Gift and Estate Tax Returns

Before the enactment of reform legislation in 1976 a gift tax return was due for any calendar quarter in which a donor made transfers by gift.³⁷ A gift tax return for a calendar quarter was due on or before the fifteenth day of the second month following the close of the calendar quarter during which the gift was made.³⁸ Unless extended the filing date for the federal estate tax return was within nine months after the date of the decedent's death.³⁹

Reform legislation in 1976 retained the estate tax return filing requirement but changed the gift tax filing requirement. After 1976 a gift tax return is not required until the filing date for the last calendar quarter (on or before February 15 of the following calendar year) unless taxable gifts

33. I.R.C. § 2056(c)(1)(B).

34. Treas. Reg. § 25.2511-1(h)(5) (1973).

35. I.R.C. § 2523(d); Treas. Reg. § 25.2523(d)-1 (1972). The creation of a tenancy by the entirety in personal property and in real property, where an election to treat the transfer as a gift has been made by the contributing spouse, may qualify in part as a gift of a present interest for the \$3,000 present interest exclusion under § 2503(f). The present interest is the right of the non-contributing spouse to receive one-half the income from the property while both coowners are living. In Missouri, each tenant by the entirety is entitled to receive one-half the income from the property. *See* cases cited note 273 *infra*.

36. I.R.C. § 2056(e)(5).

37. I.R.C. § 6019(a). Exceptions to the filing requirement were made for present interest gifts of \$3,000 or less and charitable gifts.

38. I.R.C. § 6075(b).

39. I.R.C. § 6075(a).

by the donor exceed \$25,000.⁴⁰ A gift tax return is due for the calendar quarter in that year in which aggregate unreported taxable gifts for that year exceed \$25,000 in amount.⁴¹

The gift tax return filing requirements are sometimes overlooked or ignored. Since many gift tax returns do not involve the payment of any tax the act of filing a return is sometimes viewed as a formality with little substantive importance.

Civil penalties for failure to file a return may be imposed in the form of additions to the gift tax liability which should have been paid for the year of the gift.⁴² If, however, the donor incurred no tax liability when the gift was made because of offsetting deductions or the availability of the unified transfer tax credit, there appears to be no basis for the imposition of any civil penalty for failure to file a gift tax return.⁴³

It is a misdemeanor to fail to file a gift tax return if the donor does so "willfully,"⁴⁴ but if the failure to file a gift tax return is attributable to oversight or ignorance and if no gift tax liability for the year is incurred because of offsetting deductions or credits, there appears to be no basis for the imposition of a criminal penalty.⁴⁵

Even though no federal gift tax liability is involved, the filing of a return has important consequences for married persons. The availability of the gift splitting privilege for gifts by married persons to others depends on the proper and timely filing of a federal gift tax return.⁴⁶ Even before the 1976 reform legislation if a husband and wife acquired real property as coowners with right of survivorship and desired to treat the acquisition as a gift, the donor spouse had to file a federal gift tax return.⁴⁷ Under the 1976 reform legislation and the 1978 Revenue Act both real and personal property owned by husband and wife as coowners with right of survivorship may be "qualified" property. The federal estate tax advantages of qualified property will be available for real estate only if timely gift tax returns are filed.⁴⁸

The filing of a gift tax return affects the limitations period for the collection of gift taxes. If the donor files no return the three year limitation period is suspended.⁴⁹ If the donor files a return but omits to report an item or items in excess of 25% of the total amount of gifts reported on the return, the three year limitation period is increased to six years.⁵⁰ If the

40. I.R.C. § 6075(b)(2)(B).

41. I.R.C. § 6075(b)(2)(A).

42. I.R.C. § 6653(a).

43. I.R.C. § 6653(c).

44. I.R.C. § 7203.

45. *Id.*

46. I.R.C. § 2513(b).

47. Int. Rev. Code of 1954, Pub. L. No. 83-591, § 2001, 68A Stat. 409 (1954) (amended 1978).

48. I.R.C. § 2040(b)(2).

49. I.R.C. § 6501(c)(3).

50. I.R.C. § 6501(e)(2).

donor files a return and pays federal gift tax when the return is filed, the values of the gifts as reflected on the return are binding for future gift and estate tax determinations if the limitation period has run.⁵¹ But if the donor files a return and pays no federal gift tax when the return is filed, the values reported on the return are not binding for future gift tax determinations and probably are not binding for determining the federal estate tax liability of the estate.⁵²

Under the 1976 reform legislation the determination of the federal estate tax liability involves not only the calculation of the taxable estate from information reported on the estate tax return but also the determination of taxable gifts of the decedent made after 1976.⁵³ If the donor has failed to report taxable gifts made after 1976 by filing a return, the executor may experience difficulty in collecting the information needed to complete the federal estate tax return. In order to assist the executor in assembling information required on the estate tax return, the Congress in 1978 passed legislation relieving the executor from personal liability for additional estate taxes not shown on a return if the executor in good faith relied on information furnished by the Internal Revenue Service concerning taxable gifts made by the donor after 1976.⁵⁴ Presumably this protection extends only to the executor and the Internal Revenue Service may collect from the beneficiaries of the estate additional estate tax liability attributable to unreported adjusted taxable gifts of the decedent made after 1976.⁵⁵

III. SURVIVORSHIP AND SEVERANCE

For property held in the coownership form two incidents of ownership are particularly important for federal gift and estate tax purposes—the right of survivorship and the right in either coowner to sever or partition his interest at anytime. The presence of either or both of these incidents of ownership will depend on the application of state law except for obligations of the United States where federal law determines these and other property rights and interests.

A. *Right of Survivorship*

1. Real Property

The right of survivorship is an incident of ownership for real property held by coowners as joint tenants or as tenants by the entirety.⁵⁶ Only a husband and wife may own real property as tenants by the entirety,⁵⁷ but

51. I.R.C. § 2504(c).

52. Treas. Reg. § 25.2504-2 (1972).

53. I.R.C. § 2001(b)(2).

54. I.R.C. § 2204(d).

55. Treas. Reg. § 20.2002-1 (1958). *See also* I.R.C. § 6324(a), (b).

56. McClendon v. Johnson, 337 S.W.2d 77 (Mo. 1960); Gibson v. Zimmerman, 12 Mo. 385 (1849).

57. Powers v. Buckowitz, 347 S.W.2d 174 (Mo. En Banc 1961).

husband and wife may own real property as joint tenants and not as tenants by the entirety if that intention is clearly expressed in the instrument creating the interest.⁵⁸ Two or more persons not husband and wife may hold real property as joint tenants.⁵⁹

By statute in Missouri and by later declared Missouri common law, it is permissible to create a joint tenancy or tenancy by the entirety in real property by direct conveyance from *A*, the owner of the property, to *A* and *B* as coowners with right of survivorship.⁶⁰ This statute changes the common law rule in most jurisdictions that joint tenants and tenants by the entirety must take their title at the same time from a third party.

In Missouri a grant or devise to two or more persons *A* and *B* as coowners creates a tenancy in common where the coowners are not married.⁶¹ But where the coowners are husband and wife a conveyance to husband and wife in fee creates presumptively a tenancy by the entirety and a right of survivorship in both spouses even if the words "entirety," joint tenants, or right of survivorship are omitted.⁶² Where the coowners are other than husband and wife a conveyance in fee which expresses the right of survivorship has been given effect even though the form of the conveyance may be otherwise defective.⁶³ Thus a conveyance to mother and daughter in fee as tenants by the entirety or to the survivor of them created a joint tenancy with right of survivorship; in its opinion the Missouri Supreme Court indicated the same conveyance without a recital of survivorship might not create a joint tenancy in the coowners.⁶⁴ A conveyance to *A* and *B*, as "joint tenants" creates a joint tenancy and each of the coowners has a right of survivorship;⁶⁵ and a conveyance to *H* and *W*, husband and wife, as tenants by the entirety creates a tenancy by the entirety and each of the spouses has a right of survivorship.⁶⁶

2. Personal Property

In Missouri it is permissible to create a right of survivorship in personal property.⁶⁷ This is important for common forms of investments in intangible personal property interests—bank accounts, corporate securities, promissory notes and other debt instruments.

58. Davidson v. Eubanks, 354 Mo. 301, 189 S.W.2d 295 (1945).

59. McClendon v. Johnson, 337 S.W.2d 77 (Mo. 1960).

60. RSMo § 442 App. (1970) (Title Examination Standards of the Missouri Bar, No. 25).

61. RSMo § 442.450 (1969).

62. Wilhite v. Wilhite, 284 Mo. 387, 224 S.W. 448 (1920); Otto F. Stifel's Union Brewery Co. v. Saxy, 273 Mo. 159, 201 S.W. 67 (1918); Ashbaugh v. Ashbaugh, 273 Mo. 353, 201 S.W. 72 (1918); Holmes v. Kansas City, 209 Mo. 513, 108 S.W. 9 (1907); Herbert v. Herbert, 272 S.W.2d 705 (Spr. Mo. App. 1954).

63. Powers v. Buckowitz, 347 S.W.2d 174, 176 (Mo. En Banc 1961).

64. Powers v. Buckowitz, 347 S.W.2d 174 (Mo. En Banc 1961).

65. McClendon v. Johnson, 337 S.W.2d 77, 81 (Mo. 1960).

66. See cases cited note 62 *supra*.

a. Bank Accounts—Certificates of Deposit

Accounts and deposits in banks and savings and loan associations in two or more names payable to the survivor or survivors are subject to statutory provisions which provide that where the coowners are other than husband and wife the account is held by them as joint tenants and where the coowners are husband and wife the account is held by them as tenants by the entirety.⁶⁸ On the death of one coowner the survivor(s) takes title to the entire account or deposit.⁶⁹

In 1972 the Missouri Supreme Court in the *LaGarce* case⁷⁰ held that the surviving coowner had a statutory right of survivorship in a joint account. There a certificate of deposit in a savings and loan association was registered in the names of *A*, *B* and *C* "as joint tenants with right of survivorship and not as tenants in common." The funds for the certificate originally belonged to *A*, a married man, who had a remote relationship to *B* and none to *C*, who was *B*'s wife. At the time of *A*'s death *B* and *C* had possession of the certificate. The court upheld the right of survivorship of *B* and *C* in a proceeding instituted by *A*'s surviving spouse and said:

The statute is clear and needs no construction. It is our view that if the statute is complied with, in the absence of fraud, undue influence, mental incapacity or mistake, the survivor will become the owner of the account. Depositors have the right to expect the statute to be enforced according to its plain language.⁷¹

A right of survivorship under the statutes and the court's opinion in *LaGarce* will depend on the wording of the account or deposit contract, which may grant rights to the depositors "in the conjunctive or disjunctive or otherwise."⁷² Rights of survivorship should exist for accounts or deposits registered in: *A* or *B* or the survivor; *A* and *B* and the survivor; *A* and *B* and the survivor; *A* and *B* or the survivor; *A* and *B* as joint tenants; and *H* and *W* as tenants by the entirety.⁷³ Where the account or deposit contract does not provide for a right of survivorship the result will likely be different.⁷⁴ An account or deposit in the names of unmarried persons, *A* or *B* or *A* and *B*, does not create a right of survivorship.⁷⁵ An account or deposit in the names of husband and wife, "*H* and *W*" or "*H* or *W*," may or may not create a right of survivorship.⁷⁶

68. RSMo §§ 362.470(1), (5), 369.174(1), (4), 370.287 (1969 & Supps. 1975 & 1977).

69. *Id.*

70. *In re LaGarce's Estate*, 487 S.W.2d 493 (Mo. En Banc 1972).

71. *Id.* at 501.

72. RSMo § 362.470(1), 369.174(1), 370.287(1) (1969 & Supps. 1971 & 1977).

73. *Id.*

74. *In re Jefferies' Estate*, 427 S.W.2d 439 (Mo. 1968); *Smith v. Thomas*, 520 S.W.2d 132 (Mo. App., D. Spr. 1975).

75. *Smith v. Thomas*, 520 S.W.2d 132 (Mo. App., D. Spr. 1975).

76. *In re Jefferies' Estate*, 427 S.W.2d 439 (Mo. 1968).

b. Corporate Securities, Notes, and Debt Instruments

Under Missouri law a right of survivorship in intangible personal property, other than bank accounts and deposits, will depend on the rules relating to the creation of joint tenancies and tenancies by the entirety.⁷⁷ While it is well established that coownership in personal property with right of survivorship is permissible in either of these forms,⁷⁸ it is less clear from the decisions of the Missouri courts what language and attending circumstances are necessary in order to create a joint tenancy or tenancy by the entirety. The problem may arise where a person, *A*, from his separate funds acquires property with title taken in the names of himself and another, *B*, as coowners. *A* may retain exclusive possession of the item and the income until death, and *B* may not learn of the transaction until *A*'s death. Typically *A* will not file a federal gift tax return. As the following discussion indicates the decisions are not entirely consistent.

Where a father, *A*, from his separate property acquired two notes, one endorsed to *A* or *B* (a son) or to the survivor and the other endorsed to *A* or *C* (a daughter) or *D* (a daughter) or the survivor, the Kansas City Court of Appeals upheld rights of survivorship in *B*, *C* and *D*.⁷⁹

Later the Missouri Supreme Court decided a case⁸⁰ where *A* deposited unregistered United States government bonds with a bank as the property of *A* or *B* (daughter in law) or the survivor. *A* retained possession of the deposit receipt until his death and received the income from the bonds. The court upheld a right of survivorship in *B* and emphasized the wording of the receipt, and the fact that *B* knew of the arrangement before *A*'s death. Acceptance by *B* of a beneficial interest was presumed without actual delivery.

The supreme court ruled⁸¹ there was no right of survivorship in United States bonds (apparently unregistered) found in *A*'s safe deposit box in an envelope marked property of *A*, *B* (a sister). The word survivor did not appear on the envelope. The court indicated a need on *B*'s part to show delivery of the property and a change of ownership from sole owner to cotenant. The notation on the envelope was not sufficient to do this.

The Missouri Supreme Court spoke again in *Longacre v. Knowles*,⁸² decided in 1960. There *A* furnished the entire consideration for certain

77. *Estate of Osterloh v. Carpenter*, 337 S.W.2d 942 (Mo. 1960); *Longacre v. Knowles*, 333 S.W.2d 67 (Mo. 1960) (notes and bonds); *In re Gerling's Estate*, 303 S.W.2d 915 (Mo. 1957) (stock); *Napier v. Eigel*, 350 Mo. 111, 164 S.W.2d 908 (1942) (contents of safe deposit box); *Bunker v. Fidelity Nat'l Bank & Trust Co.*, 335 Mo. 305, 73 S.W. 242 (1934) (corporate bonds); *In re Martin's Estate*, 219 Mo. App. 51, 266 S.W. 750 (K.C. 1924) (notes).

78. See cases cited note 77 *supra*.

79. *In re Martin's Estate*, 219 Mo. App. 51, 266 S.W. 750 (K.C. 1924).

80. *Bunker v. Fidelity Nat'l Bank & Trust Co.*, 335 Mo. 305, 73 S.W.2d 242 (1934).

81. *Napier v. Eigel*, 350 Mo. 111, 164 S.W.2d 908 (1942).

82. 333 S.W.2d 67 (Mo. 1960).

notes which he retained in his possession until death. These notes were payable jointly to *A* and *B*, a nephew, in different forms: *A* and *B*; *A* and/or *B*; *A* or *B*; *A* and/or *B*, or survivor; and *A* and/or *B* as joint tenants with right of survivorship. For those notes payable to "*A* or *B*," "*A* and/or *B*," and "*A* and/or *B*, or survivor," the court ruled there was no joint tenancy and no right of survivorship in *B*, the disjunctive "or" being incompatible with joint tenancy. Similarly for notes payable to "*A* and *B*" the court ruled there was no joint tenancy and no right of survivorship in *B*. The court, however, upheld *B*'s right of survivorship in the note payable to *A* and/or *B* as joint tenants with right of survivorship. It concluded that by having the note issued in this form *A* knew how to create a joint tenancy; delivery to *B* was unnecessary; his acceptance of a beneficial interest was presumed.

In 1967 the Kansas City Court of Appeals⁸³ refused to find a right of survivorship for a note payable to *A* or *B* as tenants by the entirety where *A* and *B* were longtime sweethearts but unmarried. In applying the reasoning from *Longacre v. Knowles* the court resolved ambiguities—the disjunctive "or" and the phrase "tenants by the entirety"—against the creation of a right of survivorship.

Although the earlier cases recognize a right of survivorship when the coowners are *A* or *B* or the survivor, later decisions indicate that the use of "or" may now be inconsistent with joint tenancy and a right of survivorship. Where title is in *A* and *B* there likely will be no right of survivorship if *A* and *B* are not married;⁸⁴ if title is in *H* and *W*, and *H* and *W* are married, there is reason to believe the courts will follow the decisions involving real property and hold that *H* and *W* presumptively hold as tenants by the entirety.⁸⁵ If title is in *A* and *B* as joint tenants, or in *A* and *B* as joint tenants with right of survivorship, a joint tenancy under Missouri law with a right of survivorship is created.⁸⁶ Similarly if title is in *H* and *W* (husband and wife) as tenants by the entirety or in *H* and *W* as tenants by the entirety with right of survivorship, a tenancy by the entirety under Missouri law with a right of survivorship is created.⁸⁷

c. United States Government Obligations

Generally, ownership interests in obligations of the United States are determined by federal law. Where there is a conflict between the state and federal law the Supreme Court of the United States has held that federal

83. *Horton v. Estate of Elinore*, 420 S.W.2d 48 (K.C. Mo. App. 1967).

84. *Longacre v. Knowles*, 333 S.W.2d 67 (Mo. 1960).

85. *Coffey v. Coffey*, 485 S.W.2d 167 (Mo. App., D.K.C. 1972); *Cann v. M & B Drilling Co.*, 480 S.W.2d 81, 84 (Mo. App., D. St. L. 1972); *Smith v. Smith*, 300 S.W.2d 275, 281 (Spr. Mo. App. 1957); *In re Greenwood's Estate*, 201 Mo. App. 39, 208 S.W. 635, 637 (K.C. 1919).

86. *Estate of Osterloh v. Carpenter*, 337 S.W.2d 942 (Mo. 1960); *In re Gerling's Estate*, 303 S.W.2d 915 (Mo. 1957); *Rodney v. Landau*, 104 Mo. 251, 15 S.W. 962 (Mo. 1891).

87. *Gibson v. Zimmerman*, 12 Mo. 385 (1849).

law is controlling. Thus where treasury bonds purchased with community funds were registered in the names of "husband or wife," the Court held that on the death of one coowner the survivor became the sole owner of the bonds, even though the community property law of the state yielded a different result.⁸⁸ And where a Series E bond registered in the names of "A or B" was delivered by A to B with intention by A of making a gift to B of the entire interest, the transfer was ineffective for federal estate tax purposes on A's death. For a transfer to be effective A must follow the requirements of federal law—surrender of the bond and reissue in the name of B.⁸⁹

Congress has authorized the Treasury Department to issue regulations concerning obligations of the United States,⁹⁰ and detailed regulations now cover transferable and non-transferable treasury securities and United States Savings Bonds.⁹¹ The federal law found in these regulations which pertains to coownership with right of survivorship is different for United States Savings Bonds and other securities.

A United States Savings Bond registered in the coownership form "A or B" will be paid to either upon request and upon payment the interest of the other coowner ceases.⁹² If either coowner dies, the survivor becomes the sole and absolute owner.⁹³

For transferable and non-transferable securities of the United States, other than savings bonds and notes, the regulations expressly recognize registration in the coownership form with right of survivorship.⁹⁴ Permissible forms of registration with right of survivorship include: A or B or the survivor;⁹⁵ A or B;⁹⁶ A and B;⁹⁷ A and B as joint tenants with right of survivorship and not as tenants in common.⁹⁸ Securities registered in the coownership form may be transferred only if all coowners join in the assignment.⁹⁹ If the security is registered in the "or" form—A or B; A or B or the survivor—either coowner may surrender the obligation at maturity or on call for his or her separate account even if the other coowner is living.¹⁰⁰ If the security is registered in the "and" form—A and B; A and B as joint tenants with right of survivorship and not as tenants in common—the surrender of the obligation at maturity or on call while both coowners are living is for the account of both coowners.¹⁰¹

88. *Free v. Bland*, 369 U.S. 663 (1962).

89. *United States v. Chandler*, 410 U.S. 257 (1973). See 31 C.F.R. § 315.60 (1978).

90. 31 U.S.C. §§ 739, 752-754, 754a, 755, 757c (1978).

91. 31 C.F.R. §§ 306.10, 315.60, 316.4 (1978).

92. *Id.* at § 315.60.

93. *Id.* at § 315.62. See *Valentine v. St. Louis Union Trust Co.*, 250 S.W.2d 167 (Mo. 1952).

94. 31 C.F.R. § 306.11(2) (1978).

95. *Id.* at § 306.11(2)(i).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at § 306.56(a).

100. *Id.* at § 306.56(c)(2).

101. *Id.*

B. *Partition—Severance*

Partition and severance are the rights of one coowner to divide or assign his interest in coownership property with or without the consent of the other coowner. Partition connotes the division of the property into separate identifiable units;¹⁰² severance connotes in addition the right of one coowner to assign his interest in the property to another.¹⁰³ Partition or severance by one coowner of his interest will terminate any rights of survivorship that previously existed.¹⁰⁴

Where persons acquire property as coowners with right of survivorship the right in any of the coowners to partition or sever his interest has important federal gift tax consequences. If one coowner contributes all or a disproportionate part of the acquisition price of the property in which another coowner has the right to partition or sever, the former may have made a gift to the latter for federal gift tax purposes of a present interest.¹⁰⁵

Partition and severance are available to coowners holding property as joint tenants with right of survivorship,¹⁰⁶ but are not available to either husband or wife who own property as tenants by the entirety.¹⁰⁷

1. Real Property

A joint tenant has a statutory right of partition in Missouri.¹⁰⁸ If partition is not possible without "great prejudice" to the owners, a joint tenant may insist on a sale of the property and a division of the proceeds.¹⁰⁹ Partition by a joint tenant, whether voluntary or pursuant to the statute, terminates the rights of survivorship in all joint tenants.¹¹⁰

A joint tenant may sever his interest in the tenancy by conveying his interest in the property to another.¹¹¹ By such a conveyance the grantee

102. RESTATEMENT OF PROPERTY § 174(e) (1936); A. FREEMAN, COTENANCY AND PARTITION § 393 (2d ed. 1886); 2 AMERICAN LAW OF PROPERTY § 6.19 (A. Casner ed. 1952).

103. McClendon v. Johnson, 337 S.W.2d 77 (Mo. 1960).

104. *Id.*

105. Treas. Reg. § 25.2511-1(h)(5) (1973). See I.R.C. § 2515.

106. McClendon v. Johnson, 337 S.W.2d 77 (Mo. 1960); Estate of Osterloh v. Carpenter, 337 S.W.2d 942 (Mo. 1960).

107. Robinson v. Pattee, 222 S.W.2d 786 (Mo. 1949).

108. RSMo § 528.030 (1969). See Stout v. Stout, 564 S.W.2d 89 (Mo. App., D. St. L. 1978). A devise of property to A and B as joint tenants with right of survivorship may not create a true joint tenancy where each coowner has a right of severance. In Hunter v. Hunter, 320 S.W.2d 529 (Mo. 1959), the court so held. For comments on the Hunter decision, see Eckhardt, *Property Law in Missouri*, 24 MO. L. REV. 456-59 (1959) and Eckhardt, *Property Law in Missouri*, 25 MO. L. REV. 390-92 (1960).

109. RSMo § 528.340 (1969).

110. McClendon v. Johnson, 337 S.W.2d 77 (Mo. 1960).

111. *Id.*

becomes a tenant in common with the other coowner.¹¹² If the deed which severs the joint tenancy is a conveyance to two or more persons as joint tenants with right of survivorship, the grantees will be joint tenants as to their interest, but will be tenants in common with respect to the other original joint tenant.¹¹³ Involuntary partition and severance are not available to a tenant by the entirety.¹¹⁴ Neither spouse can partition or convey any interest held by the entirety without the consent of the other spouse.¹¹⁵

As indicated above a husband and wife may own real property as joint tenants if the language in the conveyance is appropriate to that end and severance partition would lie.¹¹⁶

2. Personal Property

Personal property may be held by coowners as joint tenants with right of survivorship and by husband and wife as tenants by the entirety.¹¹⁷ As indicated above the rights of coowners in bank deposits are subject to statutory provisions in Missouri,¹¹⁸ and the rights of coowners of obligations of the United States are governed by federal law.¹¹⁹ And even though the ownership interest is referred to as a joint tenancy the rights of partition and severance may not be available for these interests.

Unless the depositors in a joint account give written instructions to the bank to the contrary, any coowner may withdraw all or any part of the deposit at any time.¹²⁰ For a savings account or time certificate of deposit the deposit contract may require the surrender of the pass book or the evidence of indebtedness, and if one coowner retains exclusive possession and control of these, the other coowner does not have the present right to partition or sever. The federal gift tax regulations reflect this common situation.¹²¹

In Missouri a joint tenancy with right of survivorship may be created in personal property other than bank accounts or deposits.¹²² Where this occurs each of the joint tenants will have the right to partition or sever.¹²³ Where appropriate language is used a husband and wife may own personal property as joint tenants with right of survivorship and not as tenants by

112. *Id.*

113. *Id.*

114. *Robinson v. Pattee*, 222 S.W.2d 786 (Mo. 1949).

115. *Id.*

116. *Davidson v. Eubanks*, 189 S.W.2d 295 (Mo. 1945).

117. *Estate of Osterloh v. Carpenter*, 337 S.W.2d 942 (Mo. 1960); *Longacre v. Knowles*, 333 S.W.2d 67 (Mo. 1960).

118. RSMO §§ 362.470, 369.174, 370.287 (1969 & Supps. 1971 & 1977).

119. *Free v. Bland*, 369 U.S. 663 (1962).

120. RSMO § 362.470(1) (Supp. 1977).

121. *Treas. Reg. § 25.2511-1(h)(4)*.

122. *Longacre v. Knowles*, 333 S.W.2d 67 (Mo. 1960).

123. *Id.*; *Estate of Osterloh v. Carpenter*, 337 S.W.2d 942, 946 (Mo. 1960).

the entirety or tenants in common.¹²⁴ Family investments in marketable securities often take this form.

The Supreme Court of the United States has emphasized the importance of federal law in determining ownership rights in federal obligations.¹²⁵ Federal regulations state the permissible forms of registration and the rights of the coowners to surrender or transfer their interests.¹²⁶ Whether one coowner has a right to partition or sever will likely depend on the application of federal law and the language used in the registration of the property.¹²⁷

IV. FEDERAL GIFT TAXES

Federal gift tax problems involved in the coownership of property with right of survivorship reflect the differences that state and federal law impose on various forms of coownership. For convenience the comments to follow address separately the situations where the coowners are (1) other than husband and wife and (2) husband and wife.

An individual owning property in his or her sole name may change the title to coownership with right of survivorship;¹²⁸ or may acquire property in the coownership form with right of survivorship and either pay directly, or indirectly all or a disproportionate part of the acquisition price.¹²⁹ In each instance a transfer for federal gift tax purposes may occur.

Coowners of property who have a right of survivorship may terminate the right of survivorship and become tenants in common,¹³⁰ partition or sever their interests,¹³¹ sell the property and divide or reinvest the proceeds,¹³² or exchange the property for different property to be held as coowners with right of survivorship or otherwise.¹³³ In each instance the possibility of a transfer for federal gift purposes should be considered.

A. *Where Coowners Are Not Husband and Wife*

1. Bank Accounts and Deposits

A deposit by one coowner to a joint checking or savings account is not a gift to the other coowner. Either of the coowners may withdraw funds from the account, and so long as the contributing coowner may do this there is no completed transfer to the other coowner. There may, however, be a gift

124. Davidson v. Eubanks, 189 S.W.2d 295 (Mo. 1945).

125. Free v. Bland, 369 U.S. 663 (1962).

126. 31 C.F.R. §§ 306.10, 315.60 (1978).

127. Valentine v. St. Louis Union Trust Co., 250 S.W.2d 167 (Mo. 1952).

128. Treas. Reg. § 25.2515-1(c)(1) (1972).

129. *Id.*

130. Treas. Reg. § 25.2515-1(d) (1972).

131. *Id.*

132. *Id.*

133. *Id.*

when the non-contributing coowner draws upon the account without any obligation to account for the sums withdrawn to the contributing coowner.¹³⁴ In Missouri the statutes which apply to joint checking and savings accounts apply also to time certificates of deposit. The gift tax consequences for the creation and termination of time certificates of deposit should be the same as for checking and savings accounts in the joint form.

On termination or withdrawal of funds from a joint account if the funds are invested in other property, the federal gift tax consequences of the new investment will depend on the ownership interests in the other property.¹³⁵

2. Corporate Securities, Notes, and Debt Instruments

Two or more persons not husband and wife may acquire corporate securities and debt instruments as coowners with right of survivorship.¹³⁶ A common ownership designation on corporate stocks and bonds is "A and B as joint tenants with right of survivorship and not as tenants in common." In Missouri a joint tenant has the right to sever or partition his interest in property so-owned,¹³⁷ and where a non-contributing coowner may partition or sever, the purchase or acquisition of the property will be a transfer for gift tax purposes from the contributing to the non-contributing coowner at the time of acquisition or purchase.¹³⁸ If the contributing coowner pays the entire acquisition cost and there are two coowners, the amount of the transfer by gift will be one-half of the amount paid and the entire transfer will be a present interest.¹³⁹ Whether a particular ownership designation creates a joint tenancy is a question to be decided under state law. In Missouri the creation of a joint tenancy will likely depend on the form of ownership designation.¹⁴⁰ Retention by the contributing coowner of possession and control of the securities, notes, or other evidences of debt does not of itself prevent the creation of a joint tenancy, since acceptance of a beneficial interest by the non-contributing coowner may be presumed.¹⁴¹ If the coowners later sell the property and divide the proceeds in accordance with their ownership interests under Missouri law, there is no gift for federal gift tax purposes on termination of the coownership.¹⁴² But an unequal division of the proceeds of sale may constitute a

134. Treas. Reg. § 25.2511-1(h)(4) (1973).

135. Treas. Reg. §§ 25.2511-1(h)(4) (1973), 25.2515-1(d) (1972).

136. *In re Estate of Gerling*, 303 S.W.2d 915 (Mo. 1957); *Benton v. Smith*, 171 S.W.2d 767 (K.C. Mo. App. 1943).

137. *Estate of Osterloh v. Carpenter*, 337 S.W.2d 942 (Mo. 1960).

138. Treas. Reg. §§ 25.2511-1(h)(5) (1973), 25.2515-2(b)(1) (1972). See Charles Guzy, 8 T.C.M. (CCH) 681 (1949).

139. See authorities cited note 138 *supra*.

140. See cases cited note 77 *supra*.

141. *Id.*

142. Treas. Reg. § 25.2515-4(b) (1972).

gift from one coowner to the other for federal gift tax purposes.¹⁴³ Similarly, if the right of survivorship is terminated and the coowners take equal separate interests in the property or become tenants in common in the property, there is no gift for federal gift tax purposes.¹⁴⁴ If the property is exchanged for other property, or is sold and the proceeds invested in other property, there is no gift for federal gift tax purposes if the coowners have the same ownership rights in the new or replacement property either as coowners with right of survivorship, as tenants in common, or as owners of separate equal shares.¹⁴⁵ If, however, the ownership interests of the coowners in the new or replacement property are different from those held in the original property, the transaction may involve a gift from one coowner to the other(s).¹⁴⁶

3. United States Government Obligations

In Revenue Ruling 78-215¹⁴⁷ the Service discusses the federal gift tax consequences of registration in the "or" form ("A or B or the survivor") of certain Treasury notes purchased by A, retained at all times by A, and redeemed by A at maturity, all without knowledge of B; A received all interest payments for his own account. According to the ruling, the federal gift tax consequences of this acquisition depend on the state law of A's domicile—whether this acquisition did or did not create a joint tenancy under local law. If under local law this registration creates a joint tenancy, A at the time of acquisition has made a gift to B of present rights to receive one-half the interest payments and one-half of the redemption value. If, however, under local law, registration in this form does not create a joint tenancy, the only gift from A to B is the value of survivorship rights in interest and principal payments if A dies before the notes mature.

There is reason to question this ruling in so far as it makes ownership rights and federal gift tax consequences depend on the application of state law. The United States Supreme Court has emphasized the importance of federal law in determining ownership rights of federal obligations.¹⁴⁸ In the situation described in Revenue Ruling 78-215 one may argue that the rights of A and B are established in the Treasury regulations themselves. A may receive and retain the interest payments and may redeem the notes at maturity or on call for his own account.¹⁴⁹ B has survivorship rights in interest and principal payments and must join with A in a transfer of the obligation before maturity.¹⁵⁰ If local law does not apply, any gift from A to B in the situation described is probably nominal—being the value of the

143. *Id.*

144. *Id.*

145. Treas. Reg. § 25.2515-1(d)(2)(ii) (1972).

146. *Id.*

147. Rev. Rul. 78-215, 1978-1 C.B. 298.

148. *Free v. Bland*, 369 U.S. 663 (1962).

149. 31 C.F.R. § 306.56(c) (1978).

150. *Id.* at § 306.56(a), (b).

survivorship rights in interest and principal payments if *A* should die before the notes mature.

If the Treasury notes described in Revenue Ruling 78-215 were registered in the "and" form ("*A* and *B*") a federal right of survivorship is conferred on each coowner.¹⁵¹ Under such a registration the federal courts probably will not recognize ownership rights based on the application of state law. The rights of the coowners are determined under the Treasury regulations¹⁵²—interest checks are payable jointly to *A* and *B*;¹⁵³ on redemption the proceeds are for the account of both coowners;¹⁵⁴ a transfer of the notes before maturity requires the assignment of both coowners. Federal gift tax consequences should follow these ownership rights. *A* has made gifts to *B* of both interest and principal payments which do not require *B* to survive *A*.¹⁵⁵

A permissible form of coownership with right of survivorship is: "*A* and *B* as joint tenants with right of survivorship and not as tenants in common."¹⁵⁶ If the Treasury notes described in Revenue Ruling 78-215 were registered in this form, the ownership rights of *A* and *B* in the notes may depend on the application of federal or state law. If the Treasury regulations in this instance refer to or incorporate state law, the federal gift tax consequences in Missouri will depend on whether *B* as joint tenant has a right of severance in the situation described in the ruling.¹⁵⁷ If the ownership rights are determined under federal law, a right of severance in *B* may not depend on state law.¹⁵⁸

Because the respective interests of the coowners are fixed at the time of acquisition, the federal gift tax consequences of termination are to be measured by what disposition is made of the proceeds and what interests the coowners have in any replacement property attributable to an exchange or a reinvestment of sales proceeds from the original property.¹⁵⁹ If the coowners of these securities exchanged the securities for other securities of the United States and have the property acquired in the exchange registered in the same form as the original property, there will be no gift for federal gift tax purposes.¹⁶⁰ If the original securities are sold and the proceeds are divided in some proportion different from their prior ownership interest, a gift for federal gift tax purposes may occur.¹⁶¹

151. *Id.* at § 306.11(a)(2).

152. *Free v. Bland*, 369 U.S. 663 (1962).

153. 31 C.F.R. § 306.37 (1978).

154. *Id.* at § 306.26.

155. Rev. Rul. 78-215, 1978-1 C.B. 298 (situation 1).

156. 31 C.F.R. § 306.11(a)(2)(i) (1978).

157. *Estate of Osterloh v. Carpenter*, 337 S.W.2d 942 (Mo. 1960).

158. *Free v. Bland*, 369 U.S. 663 (1962).

159. See regulations cited notes 142-46 *supra*.

160. Treas. Reg. § 25.2515-1(d)(2)(ii) (1972).

161. *Id.*

The acquisition of United States Savings Bonds in the coownership form with right of survivorship is not a gift for federal gift tax purposes even though one coowner furnishes all or a disproportionate part of the acquisition price.¹⁶² The termination of this interest will have federal gift tax consequences if the proceeds from the sale of the bonds are divided in some proportion different from the respective proportionate contributions of the coowners to the acquisition price of the original savings bonds.¹⁶³ If the original savings bonds are exchanged for other United States Savings Bonds which are held in the coownership form with right of survivorship, there is no gift for federal gift tax purposes when the new bonds are acquired.¹⁶⁴ Similarly if the proceeds from the sale of the original bonds are reinvested in other United States Savings Bonds which are held in the coownership form with right of survivorship, there is no gift for federal tax purposes.¹⁶⁵ But if the proceeds from the sale of the original bonds are reinvested in other property to be held in the coownership form with right of survivorship, a gift for federal gift tax purposes may occur at the time of acquisition of the new property if one coowner furnishes all or a disproportionate part of the acquisition cost of the original bonds.¹⁶⁶

4. Real Property

Where the coowners are not husband and wife, the coowner who makes a disproportionate contribution to the acquisition cost of real property has made a gift to the other coowner at the time of the acquisition.¹⁶⁷ If either of two coowners may sever his interest in the property, the amount of the gift is one-half the value of the property if the contributing coowner pays the entire acquisition price and the entire gift is a present interest.¹⁶⁸

A recent ruling¹⁶⁹ illustrates the application of these principles. A parent *D* and his children *A* and *B* acquired real estate as joint tenants with right of survivorship in a state where each coowner has the right to sever his interest. The acquisition called for an initial cash payment, monthly payments of principal and interest on a mortgage, and monthly payments for insurance and real estate tax payments. The parent made the initial cash payment and the monthly payments thereafter. The ruling states that for federal gift tax purposes the parent made gifts of present interests to each of his children of one-third of the initial payment and one-third of each monthly payment.

A termination of a joint tenancy while all coowners are living will not be a gift for federal gift tax purposes if the coowners become tenants in

162. Treas. Reg. § 25.2511-1(h)(4) (1973).

163. *Id.*

164. *Id.* at § 25.2515-1(d)(2)(ii).

165. *Id.*

166. Rev. Rul. 75-507, 1975-2 C.B. 378.

167. Treas. Reg. § 25.2511-1(h)(5) (1973).

168. *Id.*; Treas. Reg. § 25.2503-2(b) (1972).

169. Rev. Rul. 78-262, 1978-40 I.R.B. 374.

common,¹⁷⁰ if each coowner receives his share of the proceeds of any sale¹⁷¹ or retains his proportionate interest in any property acquired in an exchange or with the proceeds from the disposition of the original property.¹⁷² Otherwise a transfer for federal gift tax purposes may occur.¹⁷³

B. *Where Coowners Are Husband and Wife*

1. Generally

a. Missouri Law

In Missouri husband and wife may own real and personal property as joint tenants with right of survivorship or as tenants by the entirety.¹⁷⁴ A joint tenant may,¹⁷⁵ but a tenant by the entirety may not,¹⁷⁶ sever or partition his or her interest without the consent or joinder of the other tenant. Since some federal gift tax consequences depend on the presence of a right to sever or partition,¹⁷⁷ the difference between a tenancy by the entirety and a joint tenancy with right of survivorship is important. In Missouri there is a presumption that property owned jointly by husband and wife is owned by them as tenants by the entirety and a recital of survivorship is not necessary in the case of real or personal property.¹⁷⁸

Where husband and wife are coowners of a joint bank account with right of survivorship their rights are determined by state statute and the deposit contract.¹⁷⁹ And if husband and wife are coowners with right of survivorship of United States Savings Bonds or securities of the United States their respective ownership interests are determined under federal law or by the law of the State of Missouri.¹⁸⁰

b. Federal Gift Tax Rules

For transfers made before 1955 the federal gift tax rules for coowners with right of survivorship who were husband and wife were similar to the rules summarized and illustrated in the previous discussion.¹⁸¹

170. Treas. Reg. § 25.2511-1(h)(5) (1973).

171. *Id.* at § 25.2515-4(a), (b) (1972).

172. *Id.*

173. *Id.*

174. *Powers v. Buckowitz*, 347 S.W.2d 174 (Mo. En Banc 1961); *Lee v. Guetler*, 391 S.W.2d 311 (Mo. 1965); *McClendon v. Johnson*, 337 S.W.2d 77 (Mo. 1960); *Longacre v. Knowles*, 333 S.W.2d 67 (Mo. 1960); *Davidson v. Eubanks*, 189 S.W.2d 295 (Mo. 1945); *Gibson v. Zimmerman*, 12 Mo. 385 (1849).

175. *McClendon v. Johnson*, 337 S.W.2d 77 (Mo. 1960).

176. *Robinson v. Pattee*, 222 S.W.2d 786 (Mo. 1949).

177. I.R.C. § 2511; Treas. Reg. § 25.2511-1(h)(5) (1973).

178. See cases cited notes 62 & 85 *supra*.

179. RSMO § 362.470 (Supp. 1977).

180. *Free v. Bland*, 369 U.S. 663 (1962).

181. See discussion Part IV(A) *supra*.

The Internal Revenue Code of 1954 introduced a significant departure from the previous pattern. For an acquisition of *real property* made after 1954 where the coowners were husband and wife with right of survivorship there was no gift from the contributing to the non-contributing spouse unless the donor spouse elected to treat the transfer as a gift by filing a timely gift tax return(s).¹⁸² This change applied only to real property and not to personal property interests where the coowners were husband and wife.¹⁸³

The Tax Reform Act of 1976¹⁸⁴ established a new classification for interests (real and personal property) created after 1976 where the coowners with right of survivorship are husband and wife. Such an interest is a "qualified joint interest."¹⁸⁵ The significance of this new classification is two-fold: (1) for federal estate tax purposes the decedent coowner is treated as owning only one-half the value of the property;¹⁸⁶ and (2) for federal gift tax purposes in the case of real property transfers the Act eliminated the need to make actuarial computations where property was held as tenants by the entirety.¹⁸⁷ A "qualified joint interest" is one the creation of which, by either or both of the spouses, constituted a gift in whole or in part from one spouse to the other, and, in the case of real property, an appropriate gift tax election is made.¹⁸⁸ The 1976 Act applied to interests created after December 31, 1976, but the committee reports indicated that for interests acquired before 1977 it would be possible to "qualify" the property by recreating the tenancy and filing an appropriate and timely federal gift tax return.¹⁸⁹ Qualification after 1976 of interests acquired before 1977 will have federal gift tax consequences.¹⁹⁰

The Revenue Act of 1978¹⁹¹ made two additional changes. First it corrected an omission in the 1976 Act by eliminating the need for actuarial computations for gifts of personal property where the coowners are husband and wife with right of survivorship.¹⁹² Under the 1978 Act the amount of the gift will be one-half the value of the excess contribution made by one spouse.¹⁹³ In Missouri this change would apply to a tenancy

182. Int. Rev. Code of 1954, Pub. L. No. 83-591, § 2502, 68A Stat. 409 (amended 1976 and 1978).

183. *Id.*

184. Pub. L. No. 94-455, 90 Stat. 1520 (1976) (codified in scattered sections of the I.R.C.).

185. I.R.C. § 2040(b).

186. *Id.* at § 2040(b)(1).

187. *Id.* at § 2515(c)(3).

188. *Id.* at § 2040(b)(2).

189. H.R. REP. NO. 94-1380, 94th Cong., 2d Sess. 20, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3374.

190. *Id.*

191. Pub. L. No. 95-600, 92 Stat. 2763 (1978) (codified in scattered sections of the I.R.C.).

192. I.R.C. § 2515A.

193. *Id.*

by the entirety in personal property, such as corporate shares, where the absence of the right of severance or partition in either spouse required the use of actuarial tables for valuation of the gift. The second change made by the 1978 Act is more fundamental. It permits the qualification of joint interests of a husband and wife in real and personal property acquired before 1977 without recreation of the tenancy if the donor spouse makes an election to do so by filing a federal gift tax return for any calendar quarter in 1977, 1978 or 1979.¹⁹⁴ The election may be made even if the amount involved is less than the annual present interest gift tax exclusion of \$3,000.¹⁹⁵ For those who did recreate a joint interest after 1976 and before 1980 the interest will be qualified if a timely election is filed for any calendar quarter before 1980.¹⁹⁶ After 1979, however, recreation will be required to qualify an interest acquired before 1977,¹⁹⁷ and the interest will be a "qualified joint interest" only if the donor spouse makes the election in a timely gift tax return for the calendar quarter during which the recreation of the interest occurs.¹⁹⁸

Thus a donor spouse may qualify property acquired before 1977 by making an election (1) before 1980 for any calendar quarter in 1977, 1978 or 1979 whether or not the interest is recreated; or (2) after 1979 by recreating the interest and filing a timely return for the calendar quarter when the interest is recreated.

For property first acquired after 1976 the property will be qualified if the acquisition was a gift in whole or in part from one spouse to the other and in the case of real property if a timely election (gift tax return) is filed.

Under both the 1976 and 1978 Acts, personal property interests acquired after 1976 by husband and wife as coowners with a right of survivorship may be qualified even if a gift tax return is not filed. But the return requirement is a condition to the qualification of real property interests acquired after 1976.

2. Particular Types of Property

Where one spouse contributes all or a disproportionate part of the acquisition price for an item of jointly owned personal property there may be a transfer for federal gift tax purposes even if the contributing spouse files no federal gift tax return and regardless of the date of acquisition.¹⁹⁹ Because neither spouse has a right of severance or partition in property held as tenants by the entirety the amount of the transfer before 1977 from the contributing to the non-contributing spouse for property held in that form depended on actuarial factors based on the respective ages of the

194. *Id.* at § 2040(d).

195. *Id.* at § 2040(d)(2).

196. *Id.*

197. *Id.* at § 2040(e).

198. *Id.* at § 2040(e)(2).

199. Treas. Reg. § 25.2511-1(h)(5) (1973).

spouses at the time of acquisition.²⁰⁰ The Revenue Act of 1978 eliminates the use of these actuarial factors for entireties interests in personal property created after December 31, 1976.²⁰¹

a. Bank Accounts—Certificates of Deposit

The deposit to a joint account where the coowners are husband and wife is not a transfer for federal gift tax purposes.²⁰² There may be a transfer when the non-contributing coowner draws upon the account without any obligation to account for the sums withdrawn to the contributing spouse.²⁰³

b. Corporate Securities and Debt Instruments

A husband and wife may acquire corporate stocks and bonds either as tenants by the entirety or as joint tenants with right of survivorship. This common transaction has federal gift tax consequences if one spouse contributes all or a disproportionate part of the acquisition price.

Example: *H* from his separate funds purchases 1000 shares of *X* Corporation common stock for the sum of \$20,000 cash. The shares are registered in the names of *H* and *W* as coowners with right of survivorship. *H* does not file any federal gift tax return for the year in which the shares are acquired.

If the spouses own these share as joint tenants with right of survivorship, *H* has made a transfer to *W* of \$10,000—one-half the value of the shares at the time of acquisition.²⁰⁴ Even though *H* failed to file a federal gift tax return and report the gift, the transfer is nonetheless complete and the return is delinquent.²⁰⁵

If the spouses own the shares as tenants by the entirety and the acquisition occurs before 1977, the amount of the transfer from *H* to *W* may be more or less than \$10,000 depending on the respective ages of the spouses at the date of acquisition.²⁰⁶ If the acquisition occurs after 1976 the amount of the transfer from *H* to *W* will be \$10,000 and the shares will be a qualified joint interest for federal estate and gift tax purposes.²⁰⁷

If the shares were acquired before 1977 for federal estate tax purposes, the contribution rule will apply on the death of the first of the spouses to

200. *Id.* at § 25.2515-2(b-d) (1972).

201. I.R.C. § 2515A.

202. Treas. Reg. § 25.2511-1(h)(4) (1973).

203. *Id.*

204. *Id.* at § 25.2511-1(h)(5) (1973).

205. *Id.* at § 25.6019-1(a) (1972).

206. *Id.* at § 25.2515-2(b)(2) (1972).

207. Revenue Act of 1978, Pub. L. No. 95-600, § 702(k)(1)(D), 92 Stat. 2932 (1978) (codified at I.R.C. § 2515).

die unless the donor spouse qualifies the interest after 1976.²⁰⁸ An election to qualify the interest will entail federal gift tax consequences when the election is made. In the example, if the shares were acquired for \$20,000 in 1970 and an election to qualify was made in 1979 when the shares are worth \$30,000, *H* will make a further transfer to *W* in 1979 of \$5,000, one-half of the appreciation in the value of the shares occurring from the date of acquisition to the date of the election.²⁰⁹ It appears that the federal gift tax consequences of an election in 1979 will be the same whether title was taken initially as joint tenants or as tenants by the entirety.²¹⁰

For personal property interests the 1978 Act states that the effect of the election will be to treat the transfer from *H* to *W* as one-half of the *entire value* of the property (\$15,000) "if the period of limitation on assessment under section 6501 has expired" with respect to the earlier gift.²¹¹ Since the limitation period does not expire if no return is filed,²¹² in the example the amount of the transfer from *H* to *W* occurring as a result of the election would be \$5,000.

In the example, if *H* and *W* are joint tenants of property which is not a qualified joint interest and terminate the right of survivorship in the property, there will be no additional transfer for federal gift tax purposes if they become tenants in common or divide the shares equally between them.²¹³ But if as a result of the termination of the right of survivorship one of them should own all or an unequal part of the shares, a transfer for federal gift tax purposes may occur at that time.²¹⁴ If the property is a qualified joint interest at the time of the termination of the right of survivorship, the result should be the same as indicated above.²¹⁵

If *H* and *W* are tenants by the entirety of property which is not a qualified joint interest and terminate the right of survivorship, there may be an additional transfer for federal gift tax purposes if they become tenants in common or divide the shares equally.²¹⁶ If the property is a qualified joint interest, the federal gift tax consequences of a termination of the right of survivorship should be as indicated above.²¹⁷

208. I.R.C. § 2040(a), (d).

209. *Id.* at § 2040(d)(4).

210. For gift tax purposes, *W*'s interest will likely be larger in a tenancy by the entirety than in a joint tenancy. See notes 231 & 232 *infra*. The provision of the Revenue Act of 1978 which sets out the method for valuing the transfer when an election is made, I.R.C. § 2040(d)(4), does not distinguish a joint tenancy from a tenancy by the entirety.

211. I.R.C. § 2040(d)(5).

212. *Id.* at § 6501(e)(2).

213. Treas. Reg. §§ 25.2515-2(b)(1), -4(b) (1972).

214. *Id.*

215. *Id.*

216. *Id.* at § 25.2515-4(b) (1972).

217. *Id.* at §§ 25.2515-2(b)(1), -4(b) (1972).

c. United States Government Obligations

Where husband and wife are coowners with right of survivorship of a United States Savings Bond ("*H* or *W*"), there is no gift tax transfer on the acquisition of the bond even though one spouse contributes all or a disproportionate part of the acquisition price.²¹⁸ A transfer will occur, however, if the non-contributing spouse surrenders the bond for cash without obligation to account to the other spouse for the proceeds.²¹⁹

Different ownership rules under federal law apply to transferable and non-transferable securities of the United States.²²⁰ Where husband and wife are coowners with right of survivorship the permissible forms of registration include: *H* or *W* or the survivor; *H* or *W*; *H* and *W*; *H* and *W* as joint tenants with right of survivorship and not as tenants in common; and *H* and *W* as tenants by the entirety.²²¹

Prior discussion indicates the present position of the Internal Revenue Service on the federal gift tax consequences of registration in the "or" form.²²² Presumably the Service will take the same position when the co-owners are husband and wife and apply the reasoning in the ruling to the question whether securities registered in the names of *H* or *W* are "qualified joint interests" if acquired after 1976 or may be made "qualified joint interests" if an appropriate election is made or if the tenancy is recreated for property acquired before 1977.

If the securities are registered in the names of "*H* and *W*" the Service may look to local law to determine the federal gift tax consequences.²²³ Presumably the Service will apply the reasoning in the ruling to determine whether securities registered in the names of *H* and *W* are qualified joint interests if acquired after 1976 or may be made qualified joint interests if an appropriate election is made or if the tenancy is recreated for property acquired before 1977.

If the securities are registered in the names of *H* and *W* as joint tenants or as tenants by the entirety, the federal gift tax consequences will depend on whether the federal law incorporates state law in determining ownership rights in the securities. For registration in this form the federal regulations may have intended to incorporate state law by reference.²²⁴ If so, the federal gift tax consequences of registering United States securities in either form, joint tenants or tenants by the entirety, should be the same as for corporate securities.²²⁵

218. *Id.* at § 25.2511-1(h)(4) (1973).

219. *Id.*

220. 31 C.F.R. § 306.11 (1978).

221. *Id.* at § 306.11(2).

222. Rev. Rul. 78-215, 1978-1 C.B. 298.

223. *Id.*

224. 31 C.F.R. § 306.11(2) (1978).

225. See authorities cited notes 205-17 *supra*.

Securities of the United States first acquired in this form after 1976 should be qualified joint interests. Any doubt concerning whether securities registered in the names of "*H* or *W*" or "*H* and *W*" are qualified joint interests may be removed by recreating the tenancy as a joint tenancy or tenancy by the entirety.

d. Real Property

The federal gift tax rules for real property interests where husband and wife are coowners with right of survivorship are different for transfers occurring before 1955,²²⁶ after 1954,²²⁷ and for those subject to the qualified joint interest rules in the 1976 and 1978 Acts.²²⁸ These differences are illustrated in the following examples:

Example 1. *H* and *W* acquired Blackacre for \$50,000 cash, the fair market value of the property, paid in one lump sum at the time of acquisition from funds furnished solely by *H*.

Acquisition Before 1955

If Blackacre was acquired in 1950 and title taken as joint tenants with right of survivorship, *H* made a transfer to *W* at the time of acquisition of one-half the value of Blackacre (\$25,000). As a joint tenant, *W* had the right to sever her interest at any time and was considered a one-half owner of Blackacre for federal gift tax purposes.²²⁹ If later the right of survivorship is terminated and *H* and *W* take title as tenants in common or sell the property and divide the proceeds equally, there will be no transfer at that time; each spouse will take his or her existing interest in a different form.²³⁰ If Blackacre was acquired in 1950 and title was taken in the names of *H* and *W* as tenants by the entirety, *H* made a transfer to *W* in 1950 and the amount of that transfer depended on the respective ages of *H* and *W* in 1950. Since neither *H* nor *W* could sever the tenancy, an actuarial calculation was required to determine the respective interests of the spouses.²³¹ If *H* were older than or the same age as *W*, the transfer from *H* to *W* would be more than one-half the value of the property since *W* had a greater expectation than *H* of surviving to the entire ownership. If later the right of survivorship is terminated and *H* and *W* take title as tenants in common or sell the property and divide the proceeds equally, there will be an addi-

226. I.R.C. § 2515; Treas. Reg. § 25.2515-1(b) (1972).

227. *Id.*

228. I.R.C. § 2040(b).

229. Treas. Reg. § 25.2511-1(h)(5) (1972).

230. Treas. Reg. § 25.2515-1(d)(3) (1972).

231. Treas. Reg. § 25.2515-2(b)(2) (1972); I.R.S. Publication No. 723A, Actuarial Values II, Factors at Six Percent Involving One and Two Lives (Table ET

tional transfer at that time from *W*, the younger spouse, to *H*, the older spouse.²³²

Acquisition After 1954 and Before 1977

If Blackacre was acquired in 1960 there was no gift tax transfer from *H* to *W* (whether they took title as joint tenants or tenants by the entirety) unless *H* filed a timely gift tax return and elected to treat the acquisition as a gift.²³³

If *H* did not file a timely gift tax return for the 1960 acquisition and later the right of survivorship is terminated and *H* and *W* take title to the property as tenants in common or sell the property and divide the proceeds equally, a transfer from *H* to *W* will occur at that later time.²³⁴ The amount of the transfer will be one-half the value of the property at the later time if *H* and *W* previously owned Blackacre as joint tenants with right of survivorship or as tenants by the entirety since for federal gift tax purposes *H* is considered the owner of Blackacre until the termination of the right of survivorship.²³⁵ If on termination of the right of survivorship title is taken solely in *H*'s name or if the proceeds of sale are taken solely by *H*, there will be no transfer for federal gift tax purposes.²³⁶

If *H* did file a timely gift tax return in 1960, the federal gift tax consequences would be the same as those set out for an acquisition occurring before 1955.²³⁷ The amount of the transfer from *H* to *W* would depend on how title was held, and the gift tax consequences of a termination of the right of survivorship would depend on the disposition of the proceeds of sale, or if the ownership is changed to a tenancy in common, how the title was previously held.²³⁸

Acquisition After 1976—Qualified Joint Interest

If Blackacre is acquired in 1979 and a timely gift tax return is filed with *H* electing to treat the transfer as a gift to *W*, *H* will make a transfer to *W* for gift tax purposes of one-half the value of the property (\$25,000).²³⁹ The property will be a qualified joint interest whether title is taken as joint tenants or as tenants by the entirety.²⁴⁰

Blackacre may be made a qualified joint interest even if acquired in 1950 or in 1960. In either case an election on a gift tax return for any calen-

232. Treas. Reg. §§ 25.2515-1(d)(1), -4(b) (1972).

233. I.R.C. § 2515(a).

234. I.R.C. § 2515(b); Treas. Reg. § 25.2515-3(a)(2) (1972).

235. I.R.C. § 2515(b); Treas. Reg. § 25.2515-3(c) (1972) (example 1).

236. I.R.C. § 2515(b); Treas. Reg. § 25.2515-3(a)(2) (1972).

237. See authorities cited notes 229-36 *supra*.

238. *Id.*

239. I.R.C. § 2515(c)(3).

240. I.R.C. § 2040(b)(2).

dar quarter before 1980 will qualify the property.²⁴¹ After 1979 the property may be made a qualified joint interest by recreating the tenancy and filing a timely gift tax return for the calendar quarter when the tenancy is recreated.²⁴²

The election to make a joint interest acquired before 1977 a qualified joint interest entails federal gift tax consequences. In the example the anticipated gift tax consequences will likely be as follows. If Blackacre was acquired in 1950, *H* made a transfer to *W* at that time of one-half the value of Blackacre (\$25,000) if *H* and *W* were joint tenants, and of more than one-half the value if *H* and *W* were tenants by the entirety and *H* was the same age as or older than *W*. If Blackacre is worth \$100,000 when the election to qualify the property is made, *H* will make a gift to *W* at the later time of \$25,000 if they own Blackacre as joint tenants with right of survivorship.²⁴³ The wording of the 1978 Act does not appear to make any allowance for the fact that if title was taken in *H* and *W* as tenants by the entirety in 1950, *H* made a gift to *W* at that time of more than one-half of the then value of Blackacre. Interpretation is needed to clarify this point.²⁴⁴

If Blackacre was acquired in 1960 and *H* filed no timely gift tax return at that time, the federal gift tax consequences of a qualification under the 1976 and 1978 Acts would be a transfer from *H* to *W* of one-half the value of Blackacre (\$50,000) at the time of the qualification.²⁴⁵ The result should be the same if title was held as joint tenants with right of survivorship or as tenants by the entirety. If a timely return and election had been filed in 1960 the gift tax consequences of a qualification under the 1976 and 1978 Acts should be similar to those indicated for an acquisition made in 1950.²⁴⁶

Example 2. *H* and *W* acquire Blackacre as coowners with right of survivorship for \$50,000, to be paid by an initial payment of 10% (\$5,000), and the balance to be paid by monthly payments over a period of 20 years. *H*, from his separate funds, makes the initial and all subsequent monthly payments.

Acquisition Before 1955.

If Blackacre was acquired in 1950 and title taken as joint tenants with right of survivorship, *H* made a transfer to *W* at the time of the acquisition of one-half the initial payment (\$2,500) and further transfers for each year prior to 1955 of one-half the payments made on the indebtedness.²⁴⁷ For

241. I.R.C. § 2040(d)(2).

242. I.R.C. § 2040(c).

243. *Id.*

244. See note 210 *supra*.

245. I.R.C. § 2040(d)(5).

246. I.R.C. § 2040(e). See note 210 *supra*.

247. Treas. Reg. § 25.2515-1(b) (1972).

monthly payments made after 1954 there is no transfer from *H* to *W* for any payment unless *H* elected to treat the payment as a gift by filing a timely federal gift tax return.²⁴⁸ If later *H* and *W* terminate the right of survivorship and take title as tenants in common, or sell the property and divide the proceeds equally, there will be a transfer from *H* to *W* if no gift tax returns were filed after 1954.²⁴⁹

If Blackacre was acquired in 1950 and title taken in the names of *H* and *W* as tenants by the entirety, *H* made transfers to *W* with respect to the initial payment of \$5,000 and the monthly payments made before 1955, but made no transfers to *W* for payments made after 1954 unless timely gift tax returns were made for each payment.²⁵⁰ The amount of the transfers before 1955 will depend on the respective ages of *H* and *W* when the payments were made.²⁵¹ If later *H* and *W* terminate the right of survivorship and take title as tenants in common or sell the property and divide the proceeds equally, there will likely be a transfer from *H* to *W* at that time.²⁵²

Acquisition After 1954 and Before 1977

If Blackacre was acquired in 1960 either as joint tenants or tenants by the entirety, there were no transfers from *H* to *W* for federal gift tax purposes unless *H* filed timely federal gift tax returns for the initial payment and subsequent monthly payments.²⁵³ If *H* did not file timely federal gift tax returns and, later, *H* and *W* terminate the right of survivorship and take title as tenants in common or sell the property and divide the proceeds equally, *H* will make a transfer to *W* at that later time.²⁵⁴

If *H* did file timely gift tax returns for all payments, the federal gift tax consequences for each payment would be a transfer from *H* to *W* of one-half of each payment for a joint tenancy²⁵⁵ and more than one-half of each payment for a tenancy by the entirety where *H* is the same age or older than *W*.²⁵⁶ The federal gift tax consequences of a termination of a right of survivorship would be similar to those described for an acquisition made before 1955.²⁵⁷

Acquisition After 1976—Qualified Joint Interest

If Blackacre is acquired in 1979 and *H* elects to treat the payments made in 1979 as gift tax transfers, the amount of the transfers to *W* for

248. *Id.*

249. Treas. Reg. § 25.2515-4(c) (1972).

250. I.R.C. § 2515; Treas. Reg. § 25.2515-1(b) (1972).

251. Treas. Reg. § 25.2515-2(b)(2) (1972).

252. Treas. Reg. § 25.2515-4(c) (1972).

253. I.R.C. § 2515(a), (c).

254. Treas. Reg. § 25.2515-3(c) (example 1) (1972).

255. Treas. Reg. § 25.2515-2(b)(1) (1972).

256. Treas. Reg. § 25.2515-2(b)(2) (1972).

257. Treas. Reg. § 25.2515-4(c) (1972).

1979 will be one-half the amount of the payments made in that year.²⁵⁸ Payments for later years will also be gifts from *H* to *W* of one-half the amount of the payments even if *H* does not file gift tax returns for the later years.²⁵⁹ The property will be a qualified joint interest whether title is taken as joint tenants or tenants by the entirety.²⁶⁰ Blackacre may be made a qualified joint interest even if acquired in 1950 or 1960.²⁶¹ The decision to qualify the property will likely entail federal gift tax consequences which will in turn depend on the prior federal gift tax treatment. If Blackacre is worth \$100,000 in 1979 when a decision is made to qualify the property, and if Blackacre had been acquired in 1960 and no gift tax return filed by *H* at that time, *H* would make a gift to *W* in 1979 of one-half the value of Blackacre (\$50,000).²⁶²

If Blackacre is first acquired in 1979 and if *H* does not file a timely federal gift tax return, there will be no transfers from *H* to *W* for federal gift tax purposes for either the initial or subsequent payments on the indebtedness, and Blackacre will not be a qualified joint interest.²⁶³

3. Termination of Right of Survivorship—Special Problems for Real Estate

Unless the contributing spouse files a timely federal gift tax return(s) at the time of acquisition, the federal gift tax consequences related to the acquisition of real property in the coownership form with right of survivorship between husband and wife are deferred until the termination of the right of survivorship. Rarely will a donor spouse file a timely return, and thus federal gift tax consequences become most important at the time of termination of the right of survivorship. It is then that one must know if there has been a disproportionate contribution by one of the spouses to the acquisition cost of the property, and what, if anything, counts as a contribution other than identifiable cash and property payments traceable to the separate property of the spouses. The comments to follow address three items: (1) The impact of "marital property" legislation in Missouri; (2) the use of "income" derived from property held as coowners with right of survivorship to discharge an indebtedness on such property or to acquire other property held as coowners with a right of survivorship; and (3) the contribution credit, if any, for services rendered by a spouse in a farm or other business where real property is held by the spouses as coowners with right of survivorship.

258. I.R.C. § 2515(c)(3).

259. I.R.C. § 2515(c)(2).

260. I.R.C. § 2040(b)(2).

261. I.R.C. § 2040(d).

262. I.R.C. § 2040(d)(5).

263. I.R.C. § 2040(b)(2)(B)(ii).

a. Marital Property

Effective January 1, 1974, Missouri adopted legislation on marital dissolution which empowers a court in a dissolution proceeding to divide the "marital property" of spouses in such proportions as the court deems just.²⁶⁴ Marital property is property acquired by either spouse after marriage other than by gift, devise or descent and includes property held as joint tenants and tenants by the entirety.²⁶⁵ One of the factors to be considered by the court in a dissolution proceeding is the contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker.²⁶⁶

The contribution rules for federal gift tax purposes are clearly more restrictive than those for the division of marital property. Services of a spouse even when rendered in a business may not count as a contribution for federal gift tax purposes,²⁶⁷ but a court in a dissolution proceeding may consider the contribution of the spouse as a homemaker.

If the right of survivorship on marital property is terminated voluntarily by the spouses incident to a marital dissolution, the federal gift tax consequences of the termination will depend on the timing of the termination and the existence of a written agreement between the spouses in settlement of their marital rights.²⁶⁸ A transfer of property or an interest in property pursuant to such an agreement is exempt from the gift tax if the spouses obtain a final decree of dissolution within two years after completing the agreement.²⁶⁹ Court approval of the agreement in the decree of dissolution is not necessary for this purpose.²⁷⁰ If there is no written agreement, or if the written agreement is dated more than two years before the dissolution decree, a voluntary termination of the right of survivorship may entail federal gift tax consequences.²⁷¹ It is now well established that an involuntary termination of the right of survivorship as the result of a dissolution proceeding is not a transfer for federal gift tax purposes.²⁷²

264. RSMO § 452.330 (Supp. 1975).

265. RSMO § 452.330(3) (Supp. 1975) (property acquired after marriage is presumed to be marital property, a presumption that may be rebutted if certain conditions are met).

266. RSMO § 452.330 (Supp. 1975).

267. See authorities cited notes 283-88 *infra*.

268. I.R.C. § 2516.

269. *Id.*

270. *Id.*

271. Estate of Hundley v. Comm'r, 52 T.C. 495 (1969), *aff'd*, 435 F.2d 1311 (4th Cir. 1971). *But see* Harris v. Comm'r, 340 U.S. 106 (1950); McMurtry v. Comm'r, 203 F.2d 659 (1st Cir. 1953); Comm'r v. Converse 163 F.2d 131 (2d Cir. 1947); Lasker v. Comm'r, 138 F.2d 989 (7th Cir. 1943); Jones v. Comm'r, 1 T.C. 1207 (1943).

272. Upon entry of a decree of dissolution each tenant by the entirety becomes a tenant in common, and either of them may thereafter partition the property. Allan v. Allan, 364 S.W.2d 578 (Mo. 1963); Jones v. Jones, 325 Mo. 1037, 30 S.W.2d 49 (1930). The federal gift tax is a tax on "transfers" of property. If the transfer is effected not by the voluntary action of the parties but by a

b. Income From Joint Property As Contribution

In Missouri if husband and wife own property as joint tenants or as tenants by the entirety each spouse has a right to one-half the income from the property.²⁷³ This right is independent of any contribution rules in the federal gift tax law and is not affected by the failure of a donor spouse to file a gift tax return. If the spouses can establish that income from real property held by them as coowners with right of survivorship is used to retire the indebtedness on such property or to acquire other such property, has each spouse made an equal contribution of that income for federal gift tax purposes? The income may be either rent (ordinary) or sale proceeds (capital gain) derived from disposition of the property.

The federal gift tax treatment of reinvested capital gain income is the easier of the two issues to resolve. If the spouses make equal original contributions to the acquisition cost of the real property, or if one spouse makes a disproportionate contribution and files (for acquisitions after 1954) a timely gift tax return(s), any appreciation in the value of the property for federal gift tax purposes is attributable proportionately to each of the coowners.²⁷⁴ But if one spouse, *H*, pays the entire acquisition cost of real property and does not file a timely federal gift tax return(s), no part of the appreciation in the value of the property is attributable to *W* for federal gift tax purposes.²⁷⁵ And if the property is thereafter sold and the proceeds reinvested in other real property to be held as coowners with right of survivorship, *W* will have no federal gift tax contribution in the new property.²⁷⁶ This is the plain import and settled interpretation of section 2515.²⁷⁷ If the right of survivorship on the new property is terminated, *H* will have made the entire contribution to the acquisition cost of that property for purposes of determining the federal gift tax consequences of such a termination.²⁷⁸

The result may be different if the reinvested income is rental or ordinary income from the property, held by the spouses as coowners with right of survivorship, which is used to discharge an indebtedness on the property or to acquire other real property held in the coownership form with right of survivorship.

court decree, there is no transfer for gift tax purposes. *Harris v. Comm'r*, 340 U.S. 106 (1950).

273. *Morgan v. Finnegan*, 87 F. Supp. 274 (E.D. Mo. 1949); *Grose v. Holland*, 357 Mo. 874, 211 S.W.2d 464 (Mo. 1948); *Rezabek v. Rezabek*, 196 Mo. App. 673, 192 S.W. 107 (St. L. 1917).

274. Treas. Reg. § 25.2515-1(c)(2) (1972). Example 1 states that the appreciation attributable to the original contribution by *H* is an additional contribution by *H* having the same characteristics as his original contribution.

275. Treas. Reg. § 25.2515-3(c) (example 1) (1972).

276. *Id.* at (example 2).

277. I.R.C. § 2515(b).

If the spouses have made equal initial contributions to the acquisition cost of the property, it is reasonable to attribute the reinvestment of the rental income to them on an equal basis thereafter for federal gift tax purposes.²⁷⁹ But if *H* made the initial contribution to the acquisition price of the real property and did not file a timely federal gift tax return, it may be appropriate to deny to *W* any gift tax contribution for her share of the invested rental income. This approach relies on the inconsistency of having an incomplete gift for federal gift tax purposes (no return filed by *H*) and permitting *W* to have a federal gift tax contribution for her share of rental income from the property used to pay off the indebtedness.²⁸⁰ There is a basis under state law, however, for the opposite conclusion. One-half of the ordinary rental income from the property is *W*'s income under state law subject to her control and disposition. If she reinvests the income in the joint property, arguably she has made a contribution of her separate funds. In a related problem under the federal estate tax law *W*'s share of the ordinary income has been held to count as a contribution for federal estate tax purposes under the estate tax contribution rule.²⁸¹ It may be urged that the contribution rules for estate and gift tax purposes should, whenever possible, be consistent, particularly under a unified transfer tax. At this time there appears to be no definitive answer to this question.

c. Services As Contribution

Services rendered solely as a consequence of the marital relationship (*e.g.*, homemaker) by either husband or wife do not qualify as a federal gift tax contribution to the acquisition cost of jointly owned property during the marriage.²⁸² A different question arises if the services rendered by a spouse are in a farm or other trade or business, where the business property, real or personal, is owned by the spouses as coowners with right of survivorship. If business receipts are used to discharge the indebtedness on the property or to acquire other property, have both spouses made contributions to the acquisition price of the property for federal gift tax purposes? There is little authority on this question and what little authority there is

279. Treas. Reg. § 25.2515-1(c) (1972).

280. C. LOUNDES, R. KRAMER, & J. MCCORD, *FEDERAL ESTATE & GIFT TAXES* § 30.9, at 758-60 (3d ed. 1974) (the authors comment on the dearth of authority on this issue).

281. Treas. Reg. § 20.2040(c)(5) (1972). Ordinary income from gift property which is contributed by the donee in the acquisition of coownership property with the donor is the donee's separate contribution. The regulation refers to a case where the gift property is not coownership property. In Missouri it may be argued that the same result should be reached where the gift property from *H* to *W* is coownership property and the income therefrom (under state law owned one-half by wife) is used to discharge an indebtedness on the gift property.

282. Treas. Reg. § 25.2515-1(c) (1972) (contribution may be furnished in the form of money, property or an interest in property).

speaks not to the gift tax question but to the closely related federal estate tax question.²⁸³

The question has added importance since the Revenue Act of 1978 has express statutory recognition for *federal estate tax purposes* for spousal services rendered in a farm or other business.²⁸⁴ Under the 1978 Act at the election of the estate of the decedent a spouse may receive estate tax credit for contributions of two percent²⁸⁵ for each year in which the spouse materially participated²⁸⁶ in the operation of the farm or other business. The total credit may not exceed 50%²⁸⁷ and the aggregate reduction in the value of the estate may not exceed \$500,000.²⁸⁸

By its terms the spousal service provision of the Revenue Act of 1978 applies only for federal estate tax purposes. The \$500,000 limitation refers specifically to the estate tax return. In addition, there is nothing in the committee reports to suggest any gift tax application of this provision. Until there is further clarification one may not assume the new provision will be given a federal gift tax application by the Internal Revenue Service or the courts. But apart from the Revenue Act of 1978 there may be instances where a gift tax contribution for services may be found by analogy to the estate tax contribution decisions which recognize services rendered in a farm or other business.²⁸⁹ It may be argued that the contribution rules for gift and estate taxes should be the same with respect to the rendition of spousal services, particularly under a unified transfer tax scheme where lifetime and deathtime transfers are subject to the same rates and one exemption.

283. Berkowitz v. Comm'r, 108 F.2d 319 (3d Cir. 1939); Estate of Ensley, 36 T.C.M. (CCH) 1627 (1977); Estate of Silvester, 36 T.C.M. (CCH) 1815 (1977); Estate of Otte, 31 T.C.M. (CCH) 301 (1972).

284. I.R.C. § 2040(c).

285. I.R.C. § 2040(c)(5)(B).

286. I.R.C. §§ 2040(c)(5)(B), (c)(7).

287. I.R.C. § 2040(c)(2)(A).

288. I.R.C. § 2040(c)(2)(B).

289. See cases cited note 283 *supra*.