1980

Qualified Disclaimers of Joint Tenancies: A Policy and Property Law Analysis

Helen E. Hartnell
Golden Gate University School of Law, hhartnell@gmail.com

D. L. Uchtmann

QUALIFIED DISCLAIMER OF JOINT TENANCIES: A POLICY AND PROPERTY LAW ANALYSIS

D.L. Uchtmann*
H.E. Hartnell**

INTRODUCTION

The Tax Reform Act of 1976[1] enacted a federal disclaimer provision under which no federal gift tax is incurred by the disclaimant if the requirements for a "qualified disclaimer" are met.[2] In a number of private letter rulings, the Internal Revenue Service ruled that disclaimers made by surviving joint tenants were not qualified because there had been a prior acceptance of the interest or its benefits.[3] To support this conclusion, the Service relied upon the ancient property concept that a joint tenant is seised both of the whole and of the part from the moment the tenancy is created.[4]

The position of the Service regarding the disclaimer of joint ten-

---

* Associate Professor of Agricultural Law, University of Illinois, Urbana. B.S., 1968, University of Illinois; M.A., 1972, University of Leeds; J.D., 1974, Cleveland State University. Member, Ohio and Illinois bars.

** Research assistant, agricultural law, University of Illinois, Urbana. B.A., 1976, J.D., 1980, University of Illinois.

1. Pub. L. No. 94-455, 90 Stat. 1520 (1976).

2. I.R.C. § 2518(b) defines a qualified disclaimer as:

> an irrevocable and unqualified refusal by a person to accept an interest in property but only if—
> (1) such refusal is in writing,
> (2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of—
> (A) the day on which the transfer creating the interest in such person is made, or
> (B) the day on which such person attains age 21,
> (3) such person has not accepted the interest or any of its benefits, and
> (4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either—
> (A) to the spouse of the decedent, or
> (B) to a person other than the person making the disclaimer.

I.R.C. § 2045 refers to § 2518 for the estate tax consequences of a disclaimer.

3. *See* text & notes 38-50 *infra*; I.R.C. § 2518(b)(3).

4. *See* 4A R. POWELL, REAL PROPERTY ¶ 619 (1979).

ancy property is important both because of the increasing number of states that have adopted disclaimer statutes applicable to joint tenancy properties and the widespread use of joint tenancy ownership between spouses, especially farm couples.[5] Spouses often utilize the joint tenancy form of ownership because it provides a simple way of accomplishing many estate planning goals unrelated to tax minimization. Regrettably, the joint tenancy form of ownership often results in an estate tax disaster in larger estates when the total estate tax burden of both spouses is finally determined. Many a surviving spouse does not fully appreciate this fact until after the other spouse has died. If the disclaimer of a joint tenancy interest is a qualified disclaimer, a surviving spouse can effect a post mortem cure of this tax disaster by forfeiting the right of survivorship[6]—something the couple probably would have done before death if the couple had sought and received sound estate planning advice. But if the disclaimer of a joint tenancy interest is not a qualified disclaimer, many couples who have not terminated a joint tenancy during their lifetime will pay considerably more total estate tax than couples possessing identical wealth who transformed their joint tenancy interests into other forms of property ownership more compatible with estate tax minimization objectives.

In light of the present position of the Service on the issue of joint tenancy disclaimers and the importance of this issue in many estates, a thorough analysis of this issue is warranted. The following sections of this Article will examine: 1) whether such a disclaimer should be treated as a "qualified disclaimer" on policy grounds; and 2) whether a disclaimer or the "accretive portion" of a joint tenancy interest[7] by a surviving joint tenant meets the technical requirements of a "qualified disclaimer" under federal law in light of contemporary property law.[8]

---

5. Despite the scarcity of empirical research, commentators suspect that joint tenancies enjoy wide popularity today. Mattis, *Severance of Joint Tenancies by Mortgages: A Contextual Approach*, 1977 S. ILL. U. L.J. 27, 38-40. An empirical study of Iowa counties suggested a preference for joint tenancy over tenancy in common. Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 IOWA L. REV. 582, 617, 623 (1966). *See* D. KAHN & L. WAGGONER, FEDERAL TAXATION OF GIFTS, TRUSTS, AND ESTATES 657 (1977). For a listing of states expressly providing for the disclaimer of joint tenancy interests, see note 19 *infra*.

6. Of course, the right of survivorship is what made joint tenancy attractive in the first place.

7. The "accretive portion" in a joint tenancy is the one-half undivided interest effectively passing from the deceased joint tenant to the surviving joint tenant by right of survivorship. The initial one-half undivided interest held by the survivor plus the accretive portion passing at death results in outright ownership of the whole property by the survivor.

8. The facts in this discussion generally involve joint tenancies in real property between husband and wife, but the arguments are just as persuasive in a nonmarital, personal property setting. The requirements for the existence of a joint tenancy estate are that the co-owners "have one and the same interest accruing by one and the same conveyance commencing at one and the same time and held by one and the same undivided possession." Hood v. Commonwealth Trust & Savings Bank, 376 Ill. 413, 423, 34 N.E.2d 414, 420 (1941). Although the four unities (time, title, interest, and possession) were strictly required at common law, Jackson v. O'Connell, 23 Ill. 2d 52, 55-56, 177 N.E.2d 194, 195 (1961), these strict requirements have been modified over centuries,

I. DISCLAIMER OF THE ACCRETIVE PORTION BY THE SURVIVING JOINT TENANT: A POLICY ANALYSIS

A. *A Sketch of Federal Estate and Gift Taxation Policies*

In addressing the policy question of whether the disclaimer of a joint tenancy interest should be treated as a qualified disclaimer under federal law, it will be helpful to sketch the various policies that underpin the federal estate and gift tax system. The American Law Institute articulated seven goals in formulating recommendations for reform of the federal estate and gift tax system:

> In relation to any proposals in the gift and estate tax area, a decision must be made on the goals which tax legislation in this field is designed to accomplish. The goals which have guided this Study are as follows (not necessarily listed in the order of their importance):
> (1) to produce revenue;
> (2) to impose reasonable restrictions on the inheritance of wealth;
> (3) to guard against the destruction of incentives to accumulate wealth;
> (4) to reduce, if not eliminate, the circumstances under which the form of a transfer will affect the tax result;
> (5) to have a tax system that is readily understandable in the normal and routine transfer situations;
> (6) to treat taxpayers similarly situated in the same manner; and
> (7) to produce a tax structure that will be regarded as fair.
> It is obvious that in some instances the achievement of some of these goals will call for solutions directly opposite to the achievement of other goals. In such instances, a decision has to be made as to which goals should predominate.[9]

To determine whether these underlying policies are served by the Service's position regarding the disclaimer of joint tenancy interests, it is necessary to identify the practical consequences of that position.

B. *Disallowing the Disclaimer: Practical Results*

The consequences of the Service's position that a surviving joint tenant cannot disclaim the accretive portion of a joint tenancy interest because of a prior acceptance can best be seen by example. Since the issue of disclaiming joint tenancies is especially important in agricul-

---

particularly concerning the unity of time. *See* 4A R. POWELL, *supra* note 4, ¶ 616. Contemporary statutes frequently provide for the creation and existence of joint tenancies.

At common law, a joint tenancy between spouses also involved a fifth unity, that of person. Budwit v. Herr, 339 Mich. 265, 272, 63 N.W.2d 841, 844 (1954). This particular estate, a tenancy by the entirety, still exists in many states. In other states, there is no property law difference between a tenancy by the entirety and a joint tenancy between spouses. For a helpful discussion of property law, *see* 4 G. THOMPSON, REAL PROPERTY §§ 1770-1833 (1979).

9. AMERICAN LAW INSTITUTE, FEDERAL ESTATE AND GIFT TAXATION: RECOMMENDATIONS OF THE AMERICAN LAW INSTITUTE AND REPORTERS' STUDIES 78 (1969).

tural estates, the following examples deal with land held by a farm couple.

In both examples, the couple's only property is assumed to be farmland worth one million dollars.[10] It is further assumed that the farm real estate was acquired through the equal contributions of both spouses and that the annual rate of appreciation in value is zero. Deductions for debts, estate administration expenses, state death taxes, and other expenses are assumed to be zero for the sake of simplicity.

In the first example, the farm real estate is held by the husband and wife as equal tenants in common with each spouse bequeathing his or her interest to the other at death. In the second example, the farm real estate is assumed to be held by the husband and wife as joint tenants with right of survivorship. Both examples illustrate the total federal estate taxes paid by husband and wife before the property is finally distributed to the next generation, assuming one spouse survives the other by at least ten years.

EXAMPLE 1. Tenancy in Common Ownership: Effective Disclaimer by Surviving Spouse

First spouse dies in 1981; $500,000 individual interest in farm real estate bequeathed to surviving spouse; surviving spouse executes qualified disclaimer allowed under present law by which the real estate passes to children:
Federal Estate Tax Payable..... $108,800[11]

Surviving spouse dies ten years later, without remarrying; leaves $500,000 undivided interest in real estate to children:
Federal Estate Tax Payable..... $108,800

Total Tax Paid in Both Estates $217,600

EXAMPLE 2. Joint Tenancy Ownership: Disclaimer Disallowed by Service

First spouse dies in 1981; $500,000 undivided interest in farm real estate passes to surviving spouse; disclaimer by spouse disallowed by the Service:
Federal Estate Tax Payable..... $23,800[12]

---

10. The example is not at all unrealistic. It could represent a 300 acre Illinois farm worth a little over $3000 per acre.

11. *See* I.R.C. §§ 2001, 2010. A $500,000 adjusted gross estate *minus* a zero marital deduction *equals* a $500,000 taxable estate. This taxable estate generates $155,800 in tentative tax from which is subtracted the $47,000 unified credit (available in 1981 and thereafter). Assume the $108,800 is paid by selling farm real estate of equivalent value. The identical calculation also applies to the estate of the surviving spouse ten years later.

12. *See* I.R.C. §§ 2001, 2010. A $500,000 adjusted gross estate *minus* a $250,000 marital deduction *equals* a $250,000 taxable estate. This taxable estate generates $70,800 in tentative tax

Surviving spouse dies ten years later without remarrying; leaves $976,200 in farm real estate to children:
Federal Estate Tax Payable..... $289,518[13]
Total Tax Paid in Both Estates..... $313,318

C. *Examination of Practical Results in Light of Federal Estate and Gift Tax Policies*

The position of the Service that a joint tenancy interest cannot be disclaimed for federal estate and gift tax purposes is clearly in conflict with at least three of the general goals attributed to our federal estate and gift tax system by the American Law Institute. Specifically, such a position is inconsistent with the goals "to reduce, if not eliminate, the circumstances under which the form of a transfer will affect the tax result," "to treat taxpayers similarly situated in the same manner," and "to produce a tax structure that will be regarded as fair."[14]

In both examples above, the original intent of the parties was to have the surviving spouse own all of the farm real estate. In the first example, the surviving spouse acquires the second half of the property by testate succession; in the second example, the surviving spouse acquires the accretive portion of the joint tenancy interest by right of survivorship. In effect, the only difference between these examples is the *form* of the anticipated transfer of the second one-half undivided interest to the surviving spouse. Yet, under the Service's present position, this subtle difference in form is of critical importance because the transfer by will can be disclaimed whereas the transfer by right of survivorship cannot. The resulting tax cost of this subtle difference in form is almost $100,000 under the circumstances of the above examples.

Furthermore, the parties in the examples are *similarly situated* up to the time of the first spouse's death. In both examples the parties are married, the total property rights are initially divided equally between the spouses, the combined wealth of the husband and wife is exactly one million dollars, the children ultimately receive the property, and, as will be apparent in the later technical analysis, the right of each spouse to enjoy his or her undivided interest in the real estate is essentially identical. Nevertheless, under the present position of the Service, one couple must pay considerably more federal estate tax than the other similarly situated couple.

---

from which is subtracted the $47,000 unified credit. Assume the $23,800 is paid by selling farm real estate of equivalent value.

13. *See* I.R.C. §§ 2001, 2010. A $976,200 adjusted gross estate *minus* a zero marital deduction *equals* a $976,200 taxable estate. This taxable estate generates $336,518 in tentative tax from which is subtracted the $47,000 unified credit.

14. *See* text & note 9 *supra*.

Finally, in disallowing a qualified disclaimer by a surviving joint tenant, the tax system also is vulnerable to attack on the simple, yet persuasive ground of unfairness. In larger estates, such as those illustrated in the examples, any estate plan that concentrates all of the couple's wealth in the hands of the surviving spouse generates considerably more estate tax than would be generated if the total wealth had been divided between their estates. This unfair result occurs because of the progressive nature of this tax[15] and because half the estate is taxed twice. Well-advised individuals are aware of this fact and typically develop estate plans that avoid concentrated, outright ownership in the surviving spouse, either directly or by the planned use of disclaimers.[16]

Unfortunately, joint tenancy ownership between spouses automatically results in concentrated outright ownership in the surviving spouse and the attendant adverse estate tax consequences. Disallowing the qualified disclaimer of a joint tenancy interest prevents the surviving spouse from curing this estate tax disaster. Thus, couples who utilize joint tenancy as a simple way of transferring ownership to the survivor because they lack adequate estate tax knowledge or advice are unfairly required to pay a severe estate tax penalty for their lack of sophistication. Congress could not have intended that joint tenants be punished for not having been warned by legal counsel of the dangers of joint tenancy ownership. To impose such a result through the estate and gift tax system smacks of unfairness, especially to the ordinary citizen.

The American Law Institute recognized that it is not always possible to promote all seven of its goals at the same time.[17] But the only goal achieved by the Service's present policy is that of raising revenue. That goal, however, can be accomplished in a manner that does not discriminate against joint tenancy ownership.[18]

---

15. *See* I.R.C. § 2001. The progressive nature of the tax is reflected in the rate structure which is 18% in the first bracket, increasing to 70% in subsequent brackets.

16. Interestingly, the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763, included a provision that allows a surviving spouse to disclaim an outright bequest but indirectly retain an income interest therein if the will provides that property disclaimed by a spouse passes to remaindermen with the income to be paid to the disclaiming spouse for life. I.R.C. § 2518(b)(4). The indirect retention of an income interest allows a surviving spouse to enjoy the income and use of all the couple's combined property during lifetime (that property owned outright and that property in which a life income interest is indirectly retained) while still avoiding the tax problems of concentrated outright ownership.

17. See text & note 9 *supra*.

18. In addition to being inconsistent with three goals of the federal estate and gift tax system discussed above, see text at note 14 *supra*, the Service's denial to joint tenants of the effective use of the disclaimer provision is inconsistent with recent developments treating joint tenants more like tenants in common for estate and gift tax purposes. For example, the enactment of qualified joint interest provisions reflects an attempt to ease the tax burden on joint tenants by providing special estate tax treatment to qualified joint tenancies identical to the treatment accorded tenancies in common. *See* I.R.C. §§ 2040(b), 2515A.

II. DISCLAIMER OF THE ACCRETIVE PORTION BY THE SURVIVING JOINT TENANTS: A TECHNICAL ANALYSIS IN LIGHT OF CONTEMPORARY PROPERTY LAW

In developing a technical analysis of the disclaimer issue, it is helpful to identify the relationship between federal and state disclaimer statutes. It is also essential to consider whether the four requirements of the federal disclaimer law are met when a surviving spouse disclaims the accretive portion of a joint tenancy interest.

A. *Relationship of Federal and State Disclaimer Law*

Numerous states have statutes that permit a surviving joint tenant to disclaim the accretive portion of the estate derived through survivorship.[19] When a disclaimer is made, the accretive portion passes as though the survivor had predeceased the other joint tenant.[20] If a disclaimer is to be effective in remedying the inequity of the federal estate tax, however, it must meet the requirements of a "qualified disclaimer" under federal tax law.[21]

Prior to the enactment of section 2518, it was clear that a disclaimer must be valid under state law before it could be recognized for federal tax purposes.[22] The Tax Reform Act of 1976 added sections

---

19. For example, ILL. ANN. STAT., ch. 30, § 211 (Smith-Hurd Supp. 1980-81) states: "A surviving joint tenant may disclaim in whole or in part any property or interest therein held in joint tenancy with right of survivorship with a deceased joint tenant. An accretive portion derived through survivorship is a separate interest in the property or interest for purposes of this section." *Id.* Other states also have disclaimer laws that specifically permit disclaimers of joint tenancy property. *E.g.*, ARIZ. REV. STAT. ANN. § 14-2801(A) (Supp. 1980-81); ARK. STAT. ANN. § 62-3202(a) (Supp. 1979); CONN. GEN. STAT. ANN. § 45-300 (West Supp. 1980); HAWAII REV. STAT. § 560:2-801 (1976 & Supp. 1979); IDAHO CODE § 15-2-801(a) (1979); ME. REV. STAT. ANN. tit. 18, § 1252 (Supp. 1980-81); MD. EST. & TRUSTS CODE ANN. § 9-201 (Supp. 1980); MASS. ANN. LAWS ch. 191A, § 2 (Michie/Law. Co-op. Supp. 1980); NEB. REV. STAT. § 30-2352(a) (1979); OKLA. STAT. ANN. tit. 84, §§ 22-23 (West Supp. 1980-81) (statute broadly describes interests that may be disclaimed although no specific provision deals with joint tenancy); S.D.CODIFIED LAWS ANN. § 43-4-30.1 (Supp. 1980); UTAH CODE ANN. § 75-2-802(1) (1978); WASH. REV. CODE ANN. § 11.86.020 (Supp. 1980-81). Generally, all states have statutes allowing the disclaimer of property that would pass to the disclaimant by virtue of the state's statute of descent and distribution. For a detailed listing of these statutes, *see* Frimmer, *Disclaimers After the Tax Reform Act of 1976: Chaos out of Disorder*, 31 U.S.C. TAX INST. 811, 822 n.41 (1979). *But see* Comment, *Federal Taxation: Section 2518 Disclaimers—Anything But Uniform*, 31 U. FLA. L. REV. 188, App. D, at 209 (1978) (Ala., Miss., N.H., N.J., Nev., S.C., Vt., and Wyo. have no disclaimer statutes applicable to intestate interests).

20. *See, e.g.*, ILL. ANN. STAT. ch. 30, § 213 (Smith-Hurd Supp. 1980-81). The disclaimer severs the joint tenancy. After the severance, the surviving joint tenant becomes a tenant in common with the takers of the accretive portion because the unities of both time and title are destroyed by the disclaimer. *See* 4A R. POWELL, *supra* note 4, ¶ 618.

21. *See* I.R.C. § 2518 (gift tax), set forth in note 2 *supra*. Section 2518 applies with respect to transfers creating an interest in the disclaimant made after December 31, 1976. H.R. REP. NO. 94-1380, 94th Cong., 2d Sess. 65-68 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3419, 3419-22 [hereinafter cited as Committee Report]. For transfers made before January 1, 1977, the rules relating to disclaimers under pre-§ 2518 law, including the period within which a disclaimer must be made, will still apply. *Id.* at 67-68. Disclaimers not governed by § 2518 are governed by Treas. Reg. §§ 25.2511-1(c), 20.2055-2(c), and 20.2041-3(d).

22. Prior to enactment of § 2518, the federal consequences of disclaimer were governed by

2518 and 2045 to achieve uniform treatment of disclaimers for estate and gift tax purposes.[23] Therefore, the continuing relevance of state disclaimer law is difficult to assess given the congressional intent to remedy the confusion caused by the variety of conflicting state laws.

Practitioners tend to take one of two views: either that the federal law provides a "safe harbor," or that both state and federal requirements must be met. The "safe harbor" theory views compliance with federal requirements as sufficient to effect a qualified disclaimer. This theory receives support from language in the legislative history of the Tax Reform Act of 1976.[24] The "safe harbor" theory reflects the intent to achieve uniform treatment of disclaimers, but can be criticized as being logically inconsistent.[25] Those who contend that both state and federal disclaimer requirements must be met argue that a disclaimer ineffective under state law cannot possibly meet the requirements of section 2518.[26]

The Internal Revenue Service seems to have embraced the view that a disclaimer must meet both state and federal requirements. In a letter ruling, the Service ruled that "proposed disclaimers will be 'qualified disclaimers' . . . if the procedural requirements of [§ 2518] are complied with . . . . Additionally, the disclaimer must meet the requirements of . . . [the state code] so that, under local law, title to the property passes to the person who is to take the property as a result of the disclaimers."[27] Finally, proposed regulation § 25.2518-1(c), pub-

---

§ 2511 which provides that the gift tax applies to a transfer by way of gift whether the transfer is in trust or otherwise, whether the property is real or personal, tangible or intangible. Section 25.2511-1(c) of the Treasury Regulations provides that where the law of the state of administration of the decedent's estate gives a right to refuse to accept ownership, no gift will result if the refusal is made within a reasonable time after knowledge of the existence of the transfer. "The refusal must be . . . effective under the local law." *Id.* *See* Frimmer, *Using Disclaimers in Post Mortem Estate Planning: 1976 Law Leaves Unresolved Issues*, 48 J. TAX. 322, 323-25 (1978).

23. Congress especially meant to eliminate the uncertainties which result from the inconsistencies among local property rules, such as rules governing the proper time within which a disclaimer must be made. Committee Report, *supra* note 21, at 66-67.

24. The House Report states:

> If the requirements of [§ 2518 or § 2045] are satisfied, a refusal to accept property is to be given effect for Federal estate and gift tax purposes even if the applicable local law does not technically characterize the refusal as a "disclaimer" or if the person refusing the property was considered to have been the owner of the legal title to the property before refusing acceptance of the property.

Id. at 67.

25. If A attempts to disclaim an interest in property and is unsuccessful under state law, then title to that property will vest in A. How can it then be argued that A "has not accepted the interest or any of its benefits?" McCue, *Disclaimers: A Survey of I.R.C. Section 2518 and the Illinois Disclaimer Statute*, 1978 U. ILL. LAW F. 395, 406. Moreover, how can the property "pass to" the decedent's spouse or someone other than the disclaimant if the disclaimer is ineffective under state law? Frimmer, *supra* note 22, at 325; J. MCCORD, 1976 ESTATE AND GIFT TAX REFORM ANALYSIS, EXPLANATION AND COMMENTARY § 5.28(5), at 253-54 (1977); McCue, *supra*, at 406.

26. See note 25 *supra*.

27. IRS Letter Rul. 7909055, November 29, 1978 (CCH). *See* IRS Letter Rul. 7820022, Feb. 15, 1978 (CCH).

lished in the Federal Register on July 22, 1980, clearly states that the disclaimer must be effective under local law in order to be a qualified disclaimer.[28]

But even where the requirements of a qualified disclaimer were met, the Internal Revenue Service in a number of private letter rulings has ruled that a disclaimer by a surviving joint tenant did not meet the requirements of a qualified disclaimer.[29] Because the Service's refusal to permit surviving joint tenants to disclaim the accretive portion has potentially serious federal estate and gift tax consequences, it is necessary to reexamine the federal disclaimer statute.

B. *Requirements for a Qualified Disclaimer Under Federal Law*

The threshold requirement for a qualified disclaimer is that there be an irrevocable and unqualified refusal by the disclaimant to accept an interest in property.[30] This is essentially the definition of a disclaimer.[31] The four remaining requirements of § 2518[32] will be examined to determine whether they support the disclaimer by a surviving joint tenant of the accretive portion of joint property.

1. *The Need for a Writing*

A disclaimer must be made in writing.[33] This requirement is easily satisfied by a surviving joint tenant since state law commonly requires disclaimers to be written.[34]

2. *The Passing Requirement*

As a result of the disclaimer, the disclaimed interest must pass without any direction on the part of the person making the disclaimer.[35] In addition, the interest must pass to either the spouse of the decedent or to a person other than the person making the disclaimer.[36] This federal requirement may be satisfied when the disclaimer is effective under state law. Illinois law, for example, provides that the disclaimed (one-half of the joint) property will pass as if it was owned outright by the deceased and as if the disclaiming party had prede-

28. 45 FED. REG. 48925 (1980) (to be codified at Treas. Reg. § 25.2518-1(c)).
29. IRS Letter Ruls. 7829008, Apr. 14, 1978; 7911005, Nov. 29, 1978; 7912049, Nov. 30, 1978 (CCH). For a discussion of these rulings, see Section III(B)(3) of this Article *infra*.
30. I.R.C. § 2518(b); *see* Treas. Reg. §§ 25.2511-1(c), 20.2055-2(c).
31. *See* text & note 2 *supra*.
32. See note 2 *supra*.
33. I.R.C. § 2518(b)(1).
34. *E.g.*, ARIZ. REV. STAT. ANN. § 14-2801(A) (Supp. 1980-81); ILL. ANN. STAT. ch. 30, § 211 (Smith-Hurd Supp. 1980-81).
35. I.R.C. § 2518(b)(4).
36. *Id.*

ceased the decedent.[37] In this way the property passes without any direction on the part of disclaimant.

3. *The Problem of Prior Acceptance*

a. The IRS position on disclaimers of joint tenancy property

If a disclaimer is to be effective under § 2518, the disclaimant must not have previously accepted the interest or any of its benefits.[38] State disclaimer law commonly contains a similar requirement.[39]

Numerous private letter rulings involve an attempt by a surviving joint tenant to disclaim all or part of the joint property subsequent to the death of the other joint tenant. The Service usually imposes a gift tax, finding that the disclaimer is not "qualified" since there has been a prior acceptance of the property or its benefits.[40] The existence of a prior acceptance has generally been ascertained by analyzing the relevant state property law.[41]

Two substantially identical letter rulings involved an attempt by the surviving joint tenant spouse to disclaim the *entire* joint property. In each, the Service found that a taxable gift was made,[42] using a two-step analysis previously embraced by the federal courts.[43] The Service first found that Illinois law allows a surviving joint tenant to disclaim an interest in jointly held property. Illinois property law was then analyzed to determine whether there had been an acceptance of the benefits barring disclaimer. The Service found that under Illinois law joint tenants are seised, at the time of creation of the joint tenancy, of an

---

37. ILL. ANN. STAT. ch. 30, § 213 (Smith-Hurd Supp. 1980-81); *accord*, ARIZ. REV. STAT. ANN. § 14-2801(D)(3) (Supp. 1980-81).

38. I.R.C. § 2518(b)(3); Treas. Reg. §§ 25.2511-1(c), 20.2055-2(c).

39. *E.g.*, ARIZ. REV. STAT. ANN. § 14-2801(E)(2) (Supp. 1980-81); ILL. ANN. STAT. ch. 30, § 213 (Smith-Hurd Supp. 1980-81).

40. *See, e.g.*, IRS Letter Ruls. 7912049, Nov. 30, 1978; 7911005, Nov. 29, 1978 (CCH).

41. IRS Letter Ruls. 7912049, Nov. 30, 1978; 7911005, Nov. 29, 1978 (CCH). Both of these rulings deal with I.R.C. § 2511 rather than § 2518. *But see* IRS Letter Rul. 7803065, Oct. 21, 1977 (CCH), in which state law was consulted to determine whether there had been a prior acceptance for purposes of § 2518(b)(3). *Cf.* IRS Letter Rul. 7829008, Apr 14, 1978 (CCH), where the Service consulted a tax court case, Fuller v. Commissioner, 37 T.C. 147 (1961) (receipt of income from trust over 25-year period was an acceptance), rather than state law to determine whether there was an acceptance for purposes of § 2511.

42. IRS Letter Ruls. 7912049, Nov. 30, 1978; 7911005, Nov. 29, 1978 (CCH). The difference is that in Letter Ruling 7912049, corporate stock was held in joint tenancy, while in Letter Ruling 7911005, certificates of deposit and a bank account were held in joint tenancy.

43. *E.g.*, Krakoff v. United States, 313 F. Supp. 1089 (S.D. Ohio 1970), *aff'd*, 439 F.2d 1023 (6th Cir. 1971); Bishop v. United States, 338 F. Supp. 1336 (N.D. Miss. 1970), *aff'd*, 468 F.2d 950 (5th Cir. 1972). Gifts were found to have been made despite the surviving joint tenants' purported disclaimers in both *Krakoff* and *Bishop* for two reasons. First, state law did not permit disclaimer of jointly held property by the surviving joint tenant. Krakoff v. United States, 313 F. Supp. at 1093; Bishop v. United States, 338 F. Supp. at 1348. Second, the surviving joint tenant in each case was found to have accepted the gift upon creation of the joint tenancy. Krakoff v. United States, 313 F. Supp. at 1094; Bishop v. United States, 338 F. Supp. at 1348.

undivided interest in the whole estate.[44] According to this view, the rights of each joint tenant vest at the creation of the tenancy and no greater right accrues to the survivor by reason of the death of the other. The rights already existing in the survivor continue while those of the decedent cease to exist.[45] Therefore, in both rulings the Service concluded that there had been an acceptance by the survivor of the entire property upon creation of the joint tenancy, and the execution of the disclaimer was actually a taxable gift of the whole interest.[46]

Another letter ruling involved an Arizona couple who owned a home, securities, and mutual fund shares as joint tenants.[47] The representative of the estate of the surviving joint tenant renounced whatever interest the survivor would have taken by survivorship. As is true in Illinois, the Arizona statute specifically allows a surviving joint tenant to renounce the accretive portion of the property to which the renouncing tenant would succeed by right of survivorship.[48] Nevertheless, the Service relied upon a tax court decision[49] to find an acceptance of the property prior to the death of the first joint tenant. Acceptance was found in the deposit of income from the jointly owned assets as well as the proceeds of maturities and sales of securities into the joint checking account, payment by the spouses of household and normal living expenses from the joint checking account, and occupancy of the jointly owned residence by both spouses until the time of their respective deaths.[50]

---

44. Both rulings cited Partridge v. Berliner, 325 Ill. 253, 156 N.E. 352 (1927). At common law, a joint tenancy was seised "per my et per tout." *See* 4A R. POWELL, *supra* note 4, ¶ 619. This meant that each joint tenant was deemed to hold the whole estate for purposes of tenure and survivorship, while for purposes of alienation and forfeiture each joint tenant held an undivided share only. Duncan v. Suhy, 378 Ill. 104, 109, 37 N.E.2d 826, 828 (1941). A tenant in common, by contrast, owns only an undivided share in the whole for all purposes. *See* 4 G. THOMPSON, *supra* note 8, § 1795.

45. The rulings cited Klajbor v. Klajbor, 406 Ill. 513, 94 N.E.2d 502 (1950); Erwin v. Felter, 283 Ill. 36, 119 N.E. 926 (1918).

46. The Service framed the issues in these letter rulings as:

1. May the surviving joint tenant disclaim?
2. If so, is the interest disclaimed
   a. only the decedent's share, thus making the survivor's share a transfer that constitutes a gift, or
   b. the entire amount with no gift consequences?

Because the answer to the first question was negative, the second issue was never discussed. This is unfortunate, since the only way to achieve a sensible result in these cases is to determine what exactly is disclaimed and whether that is the same interest which was accepted.

47. IRS Letter Rul. 7829008, Apr. 14, 1978 (CCH).

48. ARIZ. REV. STAT. ANN. § 14-2801(A)(7), (C)(3) (Supp. 1980-81).

49. Fuller v. Commissioner, 37 T.C. 147 (1961).

50. IRS Letter Rul. 7829008, Apr. 14, 1978 (CCH). In both the Illinois and Arizona instances, the Service has ignored the state's plain statutory language, choosing instead to pursue the uncertain notion of acceptance. In Illinois, the language of the Conveyancing Act itself speaks against the Service's conclusion. ILL. ANN. STAT. ch. 30, § 213 (Smith-Hurd Supp. 1980-81) states that the right to disclaim is barred by a prior acceptance of the interest or its benefits. *Accord*, ARIZ. REV. STAT. ANN. § 14-2801(E)(2) (Supp. 1980-81). ILL. ANN. STAT. ch. 30, § 211 (Smith-Hurd Supp. 1980-81) says that a surviving joint tenant may disclaim the accretive portion of the

b. A reconsideration of the IRS position

In analyzing the IRS position, it will be helpful to determine whether a tenant in common who is bequeathed the remaining tenancy in common interest is precluded from making a qualified disclaimer of that bequest. It will also be helpful to carefully examine the contemporary similarities and differences between the interest of a tenant in common and that of a joint tenant.

(i) There is no prior acceptance of a tenancy in common interest. The federal disclaimer statute permits the transferee of an undivided interest to disclaim the whole undivided interest. This conclusion is supported by the general language of § 2518(a) that "any interest" may be disclaimed.[51] Once the tenant in common meets the writing, timeliness, and undirected disposition requirements of § 2518(b), there is nothing inherent in the nature of a tenancy in common to prevent a surviving cotenant from disclaiming the decedent's undivided share which passes to the survivor by way of descent or bequest. Each tenant in common holds a separate title and may enjoy his or her undivided interest so long as there is no infringement upon the cotenant's share.[52] No conceptual basis exists for an argument that one tenant in common has previously accepted the undivided interest of a cotenant which cannot now be disclaimed.

(ii) The only practical difference today between the estates of joint tenancy and tenancy in common is the right of survivorship, at least in states such as Illinois. The ancient property concepts of joint tenancy and tenancy in common have evolved over time in order to serve changing policies regarding land ownership. For example, at early common law, the policy favoring the aggregation of landed estates in the hands of a few gave rise to the joint tenancy estate.[53] Current policy, however, favors alienability of land and has produced legislation

---

joint estate. *Accord*, ARIZ. REV. STAT. ANN. § 14-2801(A)(7) (Supp. 1980-81). The only way these sections can be consistent is if a joint tenant has not accepted the accretive portion, *i.e.*, the cotenant's share of the joint property before disclaimer. But the Service argues that the accretive portion is accepted because of the very nature of joint tenancy.

51. I.R.C. § 2518(a). A tenant in common's undivided interest would fall under this heading. The language of § 2518(c)(1) that "[a] disclaimer with respect to an undivided portion of an interest . . . shall be treated as a qualified disclaimer of such portion of the interest" seems to contemplate a more complex fact situation. One scholar suggests that the intent of § 2518(c)(1) might be to permit partial disclaimers, for instance, allowing a transferee of a sole interest to accept an undivided one-half interest as a tenant in common but disclaim the other undivided one-half. J. MCCORD, *supra* note 25, § 5.29(1), at 254-55. *See* Frimmer, *supra* note 19, at 838.

52. The share owned by each tenant in common in Illinois is owned as an entire and separate estate. Mittel v. Karl, 133 Ill. 65, 69, 24 N.E. 553, 554 (1890); 2 E. GRIGSBY, ILLINOIS REAL PROPERTY § 907 (1948).

53. E. GRIGSBY, *supra* note 52, § 917.

designed to expedite the termination of joint tenancy interests.[54]

The question is the extent to which early common law distinctions between tenants in common and joint tenants have evaporated over time.[55] If these distinctions have become blurred or have disappeared, then a policy that discriminates between a tenant in common and a joint tenant regarding the right to disclaim an accretive undivided interest cannot be justified. If the property rights of the tenant in common and joint tenant are essentially the same, to allow one to disclaim but not the other on the ground of prior acceptance is inconsistent.

The following paragraphs compare the treatment of tenants in common and joint tenants in states such as Illinois. The analysis includes a comparison of liability to one's cotenant for rents or profits, the ability to acquire legal title from a cotenant by adverse possession, rights to improvements, rights and duties to insure and repair, rights to be reimbursed for payment of taxes or other charges, effects of leases signed by only one co-owner, treatment under statutes concerning partition and homestead exemptions, right to eject a cotenant, and ability to utilize the co-owned property as collateral for a loan.[56]

Rents and profits. There is no ascertainable difference in present-day treatment of joint tenants and tenants in common on the issue of liability of one's cotenant for rents or profits received by the tenant in possession. In an action for partition, a tenant in common must account to a cotenant for an aliquot portion of the rents and profits actually received.[57] A joint tenant is also liable for rents and profits received in excess of that tenant's share.[58] Illinois statutory law plainly states that "[w]hen one or more joint tenants [or] tenants in common . . . in real estate . . . shall take and use the profits or benefits thereof, in greater proportion than his or their interest, such person . . . shall account therefor to his . . . co-tenant."[59] Little room for controversy

54. For example, contemporary partition statutes typically allow any co-owner, including a joint tenant, to initiate a partition action the result of which is a termination of the co-ownership. 4 G. THOMPSON, *supra* note 8, § 1820.

55. At least one contemporary court in dicta has adhered to the ancient doctrine that joint tenants are seised of the whole and therefore enjoy greater present rights in co-owned property than do tenants in common. Duncan v. Suhy, 378 Ill. 104, 109, 37 N.E.2d 826, 828 (1941). But the repetition of scholarly Latin phrases may in fact distort the contemporary underlying substantive law. A deeper analysis is warranted.

56. *See generally* 4A R. POWELL, *supra* note 4, ¶¶ 601-19; E. GRIGSBY, *supra* note 47, §§ 907, 918.

57. Clarke v. Clarke, 349 Ill. 642, 648, 183 N.E. 13, 16 (1932); Wolkau v. Wolkau, 299 Ill. 176, 184, 132 N.E. 507, 511 (1921); Cheney v. Ricks, 187 Ill. 171, 173, 58 N.E. 234, 235 (1900). At common law, a tenant in common had no remedy against a cotenant unless the latter had been appointed bailiff, in which case the tenant in common was liable for what was actually received and for what might have been received through the exercise of reasonable diligence. Woolley v. Schrader, 116 Ill. 29, 39, 4 N.E. 658, 662 (1886).

58. Tindall v. Yeats, 392 Ill. 502, 509, 64 N.E.2d 903, 906 (1946) (dictum); People v. Varel, 351 Ill. 96, 101-02, 184 N.E. 209, 211-12 (1932).

59. ILL. ANN. STAT. ch. 76, § 5 (Smith-Hurd 1966).

remains.

In the tenancy-in-common context, the question has arisen whether a cotenant in possession must pay the rental value of the property to the cotenant out of possession. The old rule was that the tenant in possession was not liable until a demand was made or until an ouster by the tenant in possession.[60] In *Clarke v. Clarke*,[61] however, this rule was repudiated on the strength of the statutory right to an accounting.[62] Today the rule in Illinois is that rental value in excess of the tenant's aliquot share must be paid to the cotenant out of possession.[63] A similar result would presumably occur if title were held in joint tenancy.[64]

Adverse possession. The acquisition of title by adverse possession is fully possible as between cotenants despite the adage that "the possession of one will be presumed to be the possession of all."[65] If one tenant in common disseises another through an unequivocal ouster and the other cotenant has knowledge of this ouster, the statute of limitations will begin to run.[66] The burden of proving an ouster (or disseisin) is seldom carried as between tenants in common.[67] Although there is no Illinois case involving an attempt by a joint tenant to take title as against a cotenant by adverse possession, there is such a case from the California Supreme Court. In *Dimmick v. Dimmick*,[68] the California court applied the reasoning of the tenancy in common cases in holding that the plaintiff had not met the burden of proving an ouster.[69] This is a logical result, since an ouster by a joint tenant is just as inconsistent with any other cotenant's right to enjoy the property as an ouster by a tenant in common.

Improvements. Illinois courts apply similar rules to cases involv-

60. Cooper v. Martin, 308 Ill. 224, 230-31, 139 N.E. 68, 70 (1923).
61. 349 Ill. 642, 183 N.E. 13 (1932).
62. *Id.* at 648, 183 N.E. at 16.
63. Burkholder v. Burkholder, 10 Ill. App. 2d 565, 565, 135 N.E.2d 504, 505 (1956).
64. No case has arisen involving a joint tenancy, but the result is presumably the same under ILL. ANN. STAT. ch. 76, § 5 (Smith-Hurd 1966). *See* 4 G. THOMPSON, *supra* note 8, § 1805, at 193 n.22.
65. Knox v. Despain, 156 Ill. App. 134, 139 (1910).
66. Mercer v. Wayman, 9 Ill. 2d 441, 445, 137 N.E.2d 815, 818 (1956); Clarke v. Clarke, 349 Ill. 642, 646, 183 N.E. 13, 15 (1932).
67. Steele v. Steele, 220 Ill. 318, 322, 77 N.E. 232, 233 (1906) (disseisin where cotenant sold entire tract and grantee took possession of the property); Burgett v. Taliaferro, 118 Ill. 503, 518-19, 9 N.E. 334, 341 (1886) (disseisin occurred when cotenant made a warranty deed for the entire estate). In the following cases, no disseisin was deemed to have occurred: Mercer v. Wayman, 9 Ill. 2d 441, 137 N.E.2d 815 (1956) (possession, collection of all rents and profits, payment of all taxes); Harlan v. Douthit, 379 Ill. 15, 24-25, 39 N.E.2d 345, 349-50 (1942) (payment of taxes); Clarke v. Clarke, 349 Ill. 642, 183 N.E. 13 (1932) (possession, collection of all rents and profits, payment of all taxes); Blackaby v. Blackaby, 185 Ill. 94, 97, 56 N.E. 1053, 1054 (1900) (tenant in common paid taxes, made improvements, and took control of entire property); Busch v. Huston, 75 Ill. 343, 347 (1874) (possession, appropriation of rents and profits, making of improvements, and payment of taxes).
68. 58 Cal. 2d 417, 374 P.2d 824, 24 Cal. Rptr. 856 (1962).
69. *Id.* at 422, 374 P.2d at 827, 24 Cal. Rptr. at 859.

ing improvements on joint tenancy and tenancy in common property. At partition, a court will attempt to setoff the improved portion to the improving cotenant. If this is impractical, the improving cotenant may recover the amount that the improvement added to the value of the property.[70]

With regard to joint tenancy, the courts have said that each cotenant has full power to improve the property and that such improvements inure to the benefit of all.[71] An equivalent result has been reached with regard to tenancies in common. In *Young v. McKittrick*,[72] one tenant in common drilled an oil well on the common property. When later sued for profits by his cotenants, the improving cotenant was allowed a setoff for the costs of the improvement.[73] The improvement inured to the benefit of all tenants in common who were able to reap the profits. The statutory action for accounting will prevent disparate results in this area.

Repairs and insurance. Joint tenants have full power to repair the joint tenancy property.[74] The Illinois Supreme Court in *Tindall v. Yeats*[75] stated that repairs are an incident to all cotenancies, that repairs inure to the benefit of all cotenants, and that all cotenants are equally liable for expenses incurred in their making.[76] Thus both joint tenants and tenants in common have a duty to preserve the estate.

Both types of cotenants also have an insurable interest in jointly held property.[77] In *Tindall*, the court stated that the insurance would be for the benefit of all cotenants notwithstanding any clause in the contract to the contrary.[78] A similar result was reached in a tenancy in common case, although by a different route. In *Estate of Ray*,[79] the court held that the cotenant in possession had a duty to be prudent in preserving the common property, and declared the cotenant in possession a constructive trustee of the insurance proceeds for the benefit of his cotenants.[80]

Taxes and other expenses. With respect to the removal of charges

70. Heppe v. Szczepanski, 209 Ill. 88, 107-08, 70 N.E. 737, 744 (1904) (tenancy in common); Capogreco v. Capogreco, 61 Ill. App. 3d 512, 514, 378 N.E.2d 279, 281 (1978) (joint tenancy).

71. Tindall v. Yeats, 392 Ill. 502, 508-09, 64 N.E.2d 903, 906 (1946); Jeffers v. Brua, 40 Ill. App. 2d 156, 159, 189 N.E.2d 374, 376 (1963).

72. 267 Ill. App. 267 (1932).

73. *Id.* at 270.

74. *See* cases cited at note 66 *supra*.

75. 392 Ill. 502, 64 N.E.2d 903 (1946).

76. *Id.* at 508-09, 64 N.E.2d at 906.

77. Generally speaking, a person has an insurable interest in property whenever that person would profit or gain some advantage from its continued existence and suffer loss or disadvantage by its destruction. Reznick v. Home Ins. Co., 45 Ill. App. 3d 1058, 1061, 360 N.E.2d 461, 463 (1977).

78. 392 Ill. at 509, 64 N.E.2d at 906 (joint tenancy).

79. 7 Ill. App. 3d 433, 287 N.E.2d 144 (1972).

80. *Id.* at 440, 287 N.E.2d at 149.

on the joint estate, both joint tenants and tenants in common are entitled to reimbursement on an aliquot basis. In *Kratzer v. Kratzer*,[81] the court held that a husband joint tenant who had paid taxes and insurance premiums was entitled to contribution.[82] In *Carter v. Penn*,[83] a tenant in common who had advanced money to remove an encumbrance was entitled to reimbursement on partition.[84] In *Pure Oil Co. v. Byrnes*,[85] a tenant in common in possession was entitled to reimbursement for money expended for taxes, for labor expended in protecting and preserving the common property, and for marketing costs.[86] And in *Heineman v. Hermann*,[87] a tenant in common who had paid the costs of an abstract of title was entitled to an accounting.[88]

Leases. The majority view is that neither a joint tenant nor a tenant in common may bind more than that tenant's aliquot portion of the joint estate.[89] A joint tenant may lease the aliquot portion of the property, but the power to do so is subject to the right of cotenants to enjoy the property. If one joint tenant executes a lease for the whole property without the participation of the cotenants, the lease is presumed to be for the benefit of all.[90] A nonsigning joint tenant who objects to the purported lease of the entire premises, however, has a right to eject the lessee.[91] Each tenant in common has an equal right to enter onto the whole property but may not exclude cotenants. In practice, then, a tenant in common, like a joint tenant, may lease only the undivided interest possessed by that tenant.[92]

Other treatment. Three other Illinois statutes illustrate the similar-

81. 130 Ill. App. 2d 762, 266 N.E.2d 419 (1971).
82. *Id.* at 768-69, 266 N.E.2d at 423.
83. 99 Ill. 390 (1881).
84. *Id.* at 396.
85. 388 Ill. 26, 57 N.E.2d 356 (1944).
86. *Id.* at 39, 57 N.E.2d at 362.
87. 385 Ill. 191, 52 N.E.2d 263 (1943).
88. *Id.* at 199, 52 N.E.2d at 267.
89. Prairie Oil & Gas Co. v. Allen, 2 F.2d 566, 572-73 (8th Cir. 1924) (tenancy in common); Graham v. Allen, 11 Ariz. App. 207, 209, 463 P.2d 102, 104 (1970) (joint tenancy); Swartzbaugh v. Sampson, 11 Cal. App. 2d 451, 458, 54 P.2d 73, 77 (1936) (joint tenancy). As these cases demonstrate, there is no difference between joint tenants and tenants in common regarding a cotenant's right to lease. For a collection of cases on leases by cotenants, see Annot., 49 A.L.R.2d 797 (1956).
90. Booth v. Cebula, 25 Ill. App. 2d 411, 418, 166 N.E.2d 618, 621 (1960). In this case, one joint tenant had leased the entire property under a lease containing an exculpatory clause. When the lessee sued the nonsigning joint tenant, the latter was allowed to invoke the exculpatory clause since the lease was presumed to be for the benefit of both cotenants. *Id. See* Janusz v. Kaleta, 57 Ill. App. 2d 127, 207 N.E.2d 142 (1965).
91. In Reiger v. Bruce, 322 Ill. App. 689, 54 N.E.2d 770 (1944), a nonsigning joint tenant was allowed to bring an action of forcible entry and detainer to recover the property from the lessee. The lessee does not, however, lose its rights against the signing joint tenant. National Gas & Oil Co. v. Rizer, 20 Ill. App. 2d 332, 335, 155 N.E.2d 848, 849 (1959).
92. *See* Thomas v. Farr, 380 Ill. 429, 434, 44 N.E.2d 434, 437 (1942). *But see* Schwartz v. McQuaid, 214 Ill. 357, 73 N.E. 582 (1905), where one tenant in common purported to lease the entire estate. The lessee was in possession and paid rent for several months. The court presumed, in the absence of evidence to the contrary, that the lease was made with the knowledge and consent of all the cotenants. *Id.* at 361, 73 N.E. at 584. *See also* Gridley v. Wood, 206 Ill. App. 505,

ity in treatment of joint tenants and tenants in common. The first is the partition statute by which any interested person may compel partition of lands held in joint tenancy or tenancy in common.[93] The second is the homestead exemption which is specifically inapplicable in any action between joint tenants or tenants in common.[94] Third, in an action brought by a joint tenant or a tenant in common to eject a cotenant, the plaintiff must prove that the defendant actually ousted the plaintiff or denied the plaintiff's rights.[95]

Another feature common to both tenancies is the ability to convert outright ownership by one person into either a tenancy in common or a joint tenancy. Illinois statutes allow outright ownership to be converted to a joint tenancy ownership by deeding the property directly from the original owner to that original owner and another as joint tenants.[96] In an earlier time, it would have been necessary to take title through a "straw person" to preserve the four unities of time, title, interest, and possession.[97]

Severance and creditor's rights. The doctrine of severance further illustrates the true dimensions of the present interest enjoyed by a joint tenant. Any action by a cotenant that destroys one of the four unities of a joint tenancy converts that joint tenancy into a tenancy in common and destroys the right of survivorship.[98] This discussion focuses on the unity of possession since it is directly related to the joint tenant's tenure of the property.

The fact that a certain property transaction severs a joint tenancy indicates the functionally aliquot nature of the present interest enjoyed by joint tenants. For example, a conveyance by deed of one cotenant's interest in the joint property effects a severance.[99] Likewise, an executory written agreement to convey the joint tenant's interest has been held to sever the joint tenancy.[100]

---

510 (1917), where some of the nonsigning cotenants knew of the lease, never objected to it, and had accepted rent from the lessee. *Id.*

93. ILL. ANN. STAT. ch. 106, § 44 (Smith-Hurd Supp. 1980-81).

94. *Id.* ch. 52, § 1 (Smith-Hurd Supp. 1980-81). Thus, in an action to compel partition of jointly owned property, one cotenant may not setoff the homestead as against the other. Rosenbaum v. Rosenbaum, 65 Ill. App. 3d 228, 232, 382 N.E.2d 270, 274 (1978) (joint tenancy); Phillips v. Phillips, 56 Ill. App. 3d 276, 280, 372 N.E.2d 98, 100-01 (1978) (joint tenancy); Gottemoller v. Gottemoller, 37 Ill. App. 3d 689, 693, 346 N.E.2d 393, 396 (1976) (tenancy in common).

95. ILL. ANN. STAT. ch. 45, § 26 (Smith-Hurd 1944).

96. *Id.* ch. 76, § 1(b) (Smith-Hurd 1966).

97. *See* 4A R. POWELL, *supra* note 4, ¶ 616.

98. Van Antwerp v. Horan, 390 Ill. 449, 451, 61 N.E.2d 358, 359 (1945). The four unities at common law were unity of time, title, interest, and possession. In tenancies by the entirety there was a fifth requirement—unity of person. 4 G. THOMPSON, *supra* note 8, § 1784, at 64. A divorce destroys this unity. *Id.* § 1792, at 121-22.

99. Szymczak v. Szymczak, 306 Ill. 541, 545, 138 N.E. 218, 220 (1923). Lawler v. Bryne, 252 Ill. 194, 196, 96 N.E. 892, 892 (1911).

100. Naiburg v. Hendriksen, 370 Ill. 502, 505, 19 N.E.2d 348, 350 (1939).

Uncertainty exists in Illiniois as to whether a creditor's lien or a mortgage severs the joint tenancy. The whole subject matter of creditors' rights in joint tenancy property interests is beset by conflicting policies. The outcome of these conflicts is particularly relevant to the question of whether joint tenants enjoy a greater or lesser present interest in joint property than do tenants in common. It must be remembered that the Service views the joint tenant's rights as greater, relying on the *seisin per tout* doctrine.[101]

As will become apparent, both joint tenants and tenants in common are liable to have their fractional interests taken in satisfaction of debts. Assume that a judgment creditor of a cotenant has properly recorded the judgment and has thereby obtained a lien against all of the debtor-cotenant's real property located in the county. If the debtor is a tenant in common, upon his death the debtor's undivided interest in the property passes to the debtor's estate.[102] The lien retains its viability as against the undivided interest.[103] Now suppose that the debtor is instead a joint tenant. If the debtor dies before the joint tenancy is severed, the surviving joint tenant takes the whole joint property by right of survivorship, free and clear of the lien.[104] As recently stated by an Illinois appellate court, the lien expires at the moment of death because there is no longer any interest to which it can attach.[105]

To effect a severance of a joint tenancy under Illinois law, it is not enough that a judgment creditor obtain a lien and then levy upon the property. The diminution of the debtor/joint tenant's interest resulting from these acts by the creditor has been held insufficient to destroy the unity of interest.[106] In *Jackson v. Lacey*,[107] a judgment creditor of a joint tenant had caused the joint tenant's interest in the property to be sold. The debtor/joint tenant died before the expiration of the redemption period. The Supreme Court of Illinois held that the surviving joint tenant took the whole property free and clear of the creditor's lien since

101. See text & notes 35-40 *supra*, 116 *infra*.

102. *See* 4 G. THOMPSON, *supra* note 8, § 1793.

103. *Id.* "Each tenant in common has a separate and distinct freehold title. Each holds his title and interest independently of the others. His interest therefore can be transferred, devised or incumbered separately and without consent of the other cotenants." *Id.* at 137. Accordingly, just as a lien on real estate owned individually survives the death of the owner, so too does the lien created by a tenant in common survive the death of the tenant in common.

104. Merchant's Nat'l Bank v. Olson, 27 Ill. App. 432, 434, 325 N.E.2d 633, 634 (1975). The court considered § 219(b) of the Probate Act, ILL. ANN. STAT. ch. 110 1/2, § 20-19 (Smith-Hurd 1978), entitled "No Exoneration of Encumbered Interests in Real Estate." The court concluded that this section was not intended to alter the creditor's rights or the doctrine of severance in Illinois, and under that doctrine the lien was extinguished at the moment of the debtor's death. *See* People v. Nogarr, 164 Cal. App. 2d 591, 330 P.2d 858 (1958) (mortgage); Gau v. Hyland, 230 Minn. 235, 41 N.W.2d 444 (1950) (old age assistance liens).

105. Merchant's Nat'l Bank v Olson, 27 Ill. App. 3d 432, 434, 325 N.E.2d 633, 634 (1975).

106. Van Antwerp v. Horan, 390 Ill. 449, 454, 61 N.E.2d 358, 360 (1945).

107. 408 Ill. 530, 97 N.E.2d 839 (1951).

there had not been a severance before the debtor/joint tenant died.[108]

When the creditor is a mortgagee of a joint tenancy interest, the outcome upon the death of the debtor-joint tenant is less certain. The matter of severance turns upon whether Illinois follows a title, hybrid, or lien theory of mortgages.[109] If Illinois is a title jurisdiction, conveyance of a mortgage by the joint tenant will sever the tenancy.[110] Under this theory, a joint tenant has the same mortgagable interest that a tenant in common has.[111] It is more likely, however, that Illinois is a lien jurisdiction. Under the lien theory, there is no severance and the mortgagee holds only a lien which may evaporate if the mortgaging joint tenant is the first to die.[112]

As is apparent from the preceding paragraphs, the problem of the disappearing lien exists as to both general liens, such as judgment liens, and specific liens, such as mortgages. The existence of the problem supports the conclusion that joint tenants currently enjoy lesser rights in the joint property than do tenants in common. An important benefit of land ownership is the ability to use that land as security to obtain loans. In view of the disappearing lien problem, however, a lender is less likely to accept a mortgage or other security interest in a joint tenancy interest than in a tenancy in common interest. Unless the joint tenant severs and thereby destroys the right of survivorship, a joint tenancy interest is practically worthless as collateral.[113]

Right of Survivorship. The right of survivorship is the final distinguishing characteristic between joint tenancies and tenancies in common.[114] This distinction has been eroded in Illinois, however, since the Illinois legislature has enabled the surviving joint tenant to disclaim the

---

108. *Id.* at 531, 97 N.E.2d at 840.

109. Under the title theory, conveyance of a mortgage interest severs a joint tenancy. *See* Mattis, *supra* note 5, at 49. Early joint tenancy cases contain dictum asserting this theory. *See, e.g.*, Hardin v. Wolf, 318 Ill. 48, 59, 148 N.E. 868, 872 (1925); Lawler v. Byrne, 252 Ill. 194, 196, 96 N.E. 892, 892 (1911). The hybrid theory received some attention in Illinois in Central Republic Trust Co. v. Petersen Furniture Co., 279 Ill. App. 492, 496 (1935). The modern cases assert that Illinois is a lien jurisdiction, although none of these cases involve the question of severance of a joint tenancy. Kerrigan v. Unity Savings Ass'n, 58 Ill. 2d 20, 25, 317 N.E.2d 39, 42 (1974); Kling v. Ghilarducci, 3 Ill. 2d 454, 460, 121 N.E.2d 752, 756 (1954); Merrick v. Daehler, 5 Ill. App. 3d 269, 272, 282 N.E.2d 163, 165 (1972).

110. *See* Mattis, *supra* note 5, at 49.

111. Since the conveyance of the mortgage by a joint tenant severs the joint tenancy thereby creating a tenancy in common, obviously the joint tenant (now a tenant in common) has the same mortgagable interest as one who is a tenant in common from the start.

112. *See* Mattis, *supra* note 5, at 55-58.

113. This problem, especially as related to mortgages, is thoroughly explored in Mattis, *supra* note 5. Mattis' solution is the same as that offered by the Indiana Supreme Court in Wilkins v. Young, 144 Ind. 1, 41 N.E. 68 (1895). The court held that a joint tenant might mortgage his interest in the joint estate in like manner as though he were a tenant in common. *Id.* at 7, 41 N.E. at 70. The right of survivorship is destroyed or suspended to the extent of the mortgage lien. *Id.* At the death of the tenant, the survivor will succeed only to the equity of redemption. *Id.*

114. *See* 4 G. THOMPSON, *supra* note 8, § 1779.

accretive portion derived through survivorship following the death of the other joint tenant.[115] In effect, this statute permits a post mortem severance of the joint tenancy.

The previous paragraphs have demonstrated that a joint tenant does not enjoy a greater present right in property than does a tenant in common. Thus, as a practical matter, a joint tenancy is nothing more than a tenancy in common with a built-in will.

(iii) No practical reason exists to allow tenants in common to disclaim their deceased cotenant's share in the joint property, while denying that ability to joint tenants. The foregoing discussion of Illinois property law demonstrates the absurdity of the Service's position that joint tenants, because they are supposedly seised of the whole, enjoy greater present rights in the joint property than do tenants in common. Joint tenants are treated aliquotly, as are tenants in common. If anything, a joint tenant enjoys a lesser present interest in the joint property than do tenants in common because of the difficulty a joint tenant will have in using the land as security.

The Service has rested its analysis of acceptance on the outdated doctrine of *sesin per tout*: that the joint tenant holds the entire estate from the original investiture, and acquires no additional interest by virtue of the death of the other joint tenant.[116] The actual nature of a joint tenancy interest should be acknowledged by the Service as it has been by the Supreme Courts of Illinois and the United States. In *Bradley v. Fox*,[117] where one joint tenant had murdered the other, the Illinois Supreme Court imposed a constructive trust upon one-half of the joint property to prevent the murderer from enjoying the accretive portion which he would have received as survivor.[118] In *United States v. Jacobs*,[119] Justice Black repudiated the *seisin per tout* doctrine as follows:

> Upon the death of her co-tenant [the wife] for the first time became possessed of the sole right to sell the entire property without risk of loss which might have resulted from partition or separate sale of her interest while decedent lived. There was—at his death—a distinct shifting of economic interest, a decided change for the survivor's benefit.[120]

These cases make it clear that in reality the joint tenant does not own

115. ILL. ANN. STAT. ch. 30, § 211 (Smith-Hurd Supp. 1980-81). See text & note 19 *supra*.
116. See text & notes 41-50 *supra*.
117. 7 Ill. 2d 106, 129 N.E.2d 699 (1955). *See* Mattis, *supra* note 5, at 31 n.15.
118. 7 Ill. 2d at 117, 129 N.E.2d at 705.
119. 306 U.S. 363 (1939).
120. *Id.* at 371. *Jacobs* involved the law of a state which does not recognize the common law tenancy by the entirety as being distinct from a joint tenancy with right of survivorship between spouses. There are a number of states which no longer recognize tenancy by the entirety. *See* 4 G. THOMPSON, *supra* note 8, § 1791.

the whole estate from the date of creation of the tenancy, but instead succeeds to the accretive portion only upon the death of the other joint tenant.

c. Special consideration of tenancy by the entirety

In the many states that still recognize tenancy by the entirety, the particular incidents of the estate vary widely. There are, however, fundamental bases of similarity among the states which may be extracted as relevant to the matter of prior acceptance.

A tenancy by the entirety is essentially a joint tenancy between husband and wife.[121] Thus, when one spouse dies, the property is owned by the surviving spouse.[122] A tenancy by the entirety, however, requires a fifth unity beyond those necessary to create a joint tenancy—the unity of person.[123] The archaic notion that husband and wife were one person resulted in the rule that an estate by the entirety could be destroyed or terminated only by the joint acts of the husband and wife or by divorce, and not by the unilateral act of either one of them.[124] Further, the estate by the entirety was not liable for the separate debts of either spouse, and neither spouse could encumber the land without the consent of the other.[125] These incidents of an estate by the entirety do not conclusively distinguish tenants in common from tenants by the entirety.

Indeed, it is widely recognized that tenants by the entirety have an equal right to the use and enjoyment of the estate during their joint lives.[126] In effect, they become tenants in common or joint tenants of the use of the estate, each being entitled to one-half of the rents and profits therefrom during their joint lives, with the power in each to dispose of or to encumber his or her moiety.[127] In only two states does the husband continue to enjoy the right to all of the income from the property.[128] To a large extent, then, the present rights of tenants in common and tenants by the entirety to enjoy the joint estate are similar. A surviving tenant by the entirety therefore should not be automatically barred from disclaiming the accretive portion.

The difference between an estate by the entirety and the other two

121. 4 G. THOMPSON, *supra* note 8, § 1786, at 80.
122. *Id.* § 1792, at 128.
123. *Id.* § 1786, at 80.
124. *Id.* § 1792, at 125-26 n.20.
125. *Id.* § 1790, at 107-08 n.19.
126. *Id.* § 1789, at 100; D. KAHN & L. WAGGONER, *supra* note 5, at 653. *See* State v. Brady, 53 Mo. App. 202, 206 (1893); Buttlar v. Rosenblath, 42 N.J. Eq. 651, 657, 9 A. 695, 698 (1887); Hiles v. Fisher, 144 N.Y. 306, 315, 39 N.E. 337, 339 (1895).
127. 4 G. THOMPSON, *supra* note 8, § 1789, at 100.
128. Pineo v. White, 320 Mass. 487, 490-91, 70 N.E.2d 294, 297 (1946); Davis v. Bass, 188 N.C. 200, 206-07, 124 S.E. 566, 569-70 (1924).

forms of concurrent ownership is that a tenant by the entirety may not have the ability to dispose of his or her moiety.[129] In practical terms, this aspect of "seisin of the whole" is a limitation upon the individual tenant's enjoyment of the property. Thus, it is absurd to construe "seisin of the whole" as a prior acceptance of the accretive portion of the estate. Since a tenant by the entirety has a right to present enjoyment equivalent to that enjoyed by a tenant in common or a joint tenant, the three types of tenancies should be treated similarly as far as the issue of prior acceptance is concerned.

4. *The Time Within Which a Disclaimer Must Be Made*

The written disclaimer must be received by the transferor of the interest, the transferor's legal representative, or the holder of the legal title to the property disclaimed not later than the date which is nine months after the later of the day on which the transfer creating the interest in such person is made, or the day on which such person attains age twenty-one.[130] State disclaimer statutes establish the proper time for making a disclaimer.[131] It is entirely possible that a given disclaimer will satisfy both state and federal time requirements.

The legislative history of section 2518 makes it clear that the nine-month period for making a disclaimer is to be determined in reference to each taxable transfer.[132] For purposes of section 2518(b)(2), a transfer is deemed to be made when it is treated as a completed transfer for gift tax purposes (with respect to inter vivos transfers) or upon the date of decedent's death (with respect to testamentary transfers).[133] A disclaimer of the accretive portion by a surviving joint tenant spouse upon the death of the first spouse is consistent with this congressional intent.

For federal estate and gift tax purposes, joint tenancy property is taxed in one of two ways. When the original contribution of the joint tenants is not equal,[134] either there is an inter vivos gift of one-half the value of the property upon creation of the joint tenancy and a testamentary transfer of one-half the value of the property when the first

---

129. *See* 4 G. THOMPSON, *supra* note 8, § 1784, at 63.

130. I.R.C. § 2518(b)(2). Treas. Reg. § 25.2511-1(c) requires that a disclaimer be made "within a reasonable time after knowledge of the existence of the transfer."

131. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-2801(C)(3) (Supp. 1980-81); ILL. ANN. STAT. ch. 30, § 212 (Smith-Hurd Supp. 1980-81).

132. JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, S. REP. NO. 94-1236, 94th Cong. 2d Sess. 607, 623-24, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 4246, 4262. *See* 45 FED. REG. 48926 (1980) (to be codified at Treas. Reg. § 25.2518-2(c)(2)).

133. H.R. REP. NO. 94-1380, 94th Cong., 2d Sess. 65, 67, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3419, 3421. *See* 45 FED. REG. 48,926 (1980) (to be codified at Treas. Reg. § 25.2518-2(c)(2)).

134. This explanation assumes that the first joint tenant spouse to die was the one who had contributed all the consideration for the acquisition of the property. This is frequently the farm husband.

joint tenant dies,[135] or there is a testamentary transfer of the entire value of the property when the first joint tenant dies.[136] Under either scheme of taxation, it is clear that for tax purposes, a maximum of one-half of the value of the joint property is transferred inter vivos from the donor to the donee.[137] If the original contribution of the joint tenants was equal, there is no inter vivos taxable event at all.[138] In other words, there is never an inter vivos taxable transfer of the *whole* estate to the donee joint tenant that would trigger the timing provision of the disclaimer statute as to the *accretive* portion. Therefore, the survivor need not disclaim the accretive portion until nine months after death.

CONCLUSION

Where a state has enacted a disclaimer statute allowing a surviving joint tenant to disclaim the accretive portion of a joint tenancy interest or a tenancy by the entirety interest, the requirements for a qualified disclaimer under federal law can also be met. Clearly, the federal requirements for a "writing" and a "passing" can be met.

The requirement that there be no prior acceptance can also be met as to the accretive portion of the estate. Under contemporary property law, a joint tenant, like an equal tenant in common, accepts an interest only in his or her aliquot share at the time the tenancy is created. The joint tenant has no greater right in the other cotenant's interest than does the tenant in common. In fact, the joint tenant arguably has a lesser right in the entire estate than the tenant in common because the joint tenant may have greater difficulty using the estate as collateral for a loan.

The remaining federal requirement that the disclaimer be made within nine months can be met because the nine-month period begins to run when the *taxable* transfer is made. Since the transfer of the accretive portion is never a taxable event until the first joint tenant dies, a surviving spouse always has nine months from the date of death to disclaim the accretive portion of the joint tenancy property.

It is apparent that the present position of the Service is erroneous and should be changed. The appropriateness of this change, however, is not grounded solely in the technical application of current statutes. The need to permit a qualified disclaimer of the accretive portion of

135. This is a "qualified joint interest" under I.R.C. § 2040(b).

136. *Id.* § 2040(a).

137. Under similar circumstances, the creation of an equal tenancy in common constitutes an inter vivos gift of one-half the value of the joint property.

138. I.R.C. § 2515. Except for the accretive portion, however, the disclaimer is not "qualified" because the surviving spouse would have accepted the *nonaccretive* portion of the property when the joint tenancy was created.

joint tenancy interests is also supported by solid policy considerations. Only by allowing such disclaimers can our federal estate and gift tax system achieve the desirable goals of eliminating disparate tax results arising solely because of the form of the transfer, providing similar tax treatment for taxpayers similarly situated, and creating a tax structure perceived as fair by the general population.