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An Agricultural Law Research Article

**Estate Tax Section 2040(c) As a Solution to  
Discrimination against Surviving Joint  
Tenant Farm Widows**

by

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Originally published in WASHINGTON UNIVERSITY LAW QUARTERLY  
59 WASH. U. L. Q. 225 (1981)

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## ESTATE TAX SECTION 2040(c) AS A SOLUTION TO DISCRIMINATION AGAINST SURVIVING JOINT TENANT FARM WIDOWS

Joint tenancy and tenancy by the entirety are two of the most popular forms of real property ownership among married farm couples.<sup>1</sup> Common-law principles generally govern the tenancy relationship although survivorship in joint tenancy is statutory in a few states.<sup>2</sup> The primary reason for holding property in joint tenancy or tenancy by the entirety,<sup>3</sup> both of which have a survivorship feature, is to facilitate transfer to the survivor upon the death of the first joint tenant.<sup>4</sup> A second reason for having a joint tenancy, which appeals to family-oriented farming businesses, is that joint ownership reinforces family harmony

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1. Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 IOWA L. REV. 582, 587-88 (1966). See also Bayse, *Joint Tenancy: A Reappraisal*, 30 CAL. S.B.A.J. 504, 506 (1966); Campfield, *Estate Planning For Joint Tenancies*, 1974 DUKE L.J. 669, 670; Hartwig, *Estate Tax Consequences of Various Kinds of Property Holding by Husband and Wife: Joint and Reciprocal Wills; and Intestacy*, 23 N.Y.U. INST. FED. TAX. 1093 (1965); Note, *Estate Tax Section 2040: Homemakers Contribution To Jointly Owned Property*, 29 TAX LAW. 623 (1976).

Although there is frequent speculation, little data exists on exactly how much real estate is held in joint tenancy. An excellent study was made in Iowa by Professor Hines of the University of Iowa College of Law. The Iowa study showed that 40% of all farm transfers in 1964 were into joint tenancy. Hines, *supra*, at 611. The study further showed that husband and wife grantees account for virtually all of the farm joint tenancies. *Id.* at 619.

Farm couples' usage of joint tenancy increased dramatically in the post-depression years. *Id.* at 588-89. Possible reasons for increased popularity in this time period are that lending farm credit institutions were selling farmland that they had acquired through foreclosure proceedings to husband and wife co-owners. This allowed avoiding fragmentation of title by having the property put into joint tenancy with right of survivorship. In addition, before the joint income tax return couples would decrease their income tax burden by splitting the income from income-producing property by dividing the ownership of the property. Another factor that might have been partially responsible for the surge of joint tenancies in the early 1940's was patterning ownership after the war bond, which had a built-in survivorship feature. *Id.*

2. *E.g.*, ILL. REV. STAT. ch. 76, § 1 (1963); WASH. REV. CODE ANN. § 64.28.010 (1966). See generally Hines, *supra* note 1, at 596; Mann, *Joint Tenancies Today*, 1956 U. ILL. L.F. 48, 64-65.

3. A tenancy by the entirety is distinguished from a joint tenancy in several respects: (1) [I]t may be created only between husband and wife; (2) neither spouse can alienate or transfer his interest in the subject premises without the consent of the other tenant by the entirety; (3) not all states recognize tenancy by the entirety; and (4) of those states recognizing tenancy by the entirety, the majority restrict it to real property. Campfield, *supra* note 1, at 684. See 2 AMERICAN LAW OF PROPERTY § 6.6 (A.J. Casner ed. 1952); C. LOWNDES & R. KRAMER, FEDERAL ESTATE AND GIFT TAXES § 11.1, at 230 (2d ed. 1962); C. MOYNIHAN, LAW OF REAL PROPERTY 230-35 (1962); 4A R. POWELL, THE LAW OF REAL PROPERTY ¶ 621 (1979).

4. See Hines, *supra* note 1, at 596.

and the partnership notion associated with marriage.<sup>5</sup>

Substantial estate tax problems can arise when farm couples create joint tenancies in real estate. The couple often reinvests the farm profits back into the business, usually for the purpose of buying additional real estate. The rapid appreciation in value of this real estate<sup>6</sup> can have adverse estate tax consequences: Unless the survivor can show that he or she contributed to the acquisition of the property, the full value of a joint tenancy property interest is subject to taxation as part of the estate of the first joint tenant to die.<sup>7</sup>

Under the "contribution furnished" test,<sup>8</sup> it is especially difficult for a surviving farm wife who is not a wage earner<sup>9</sup> having a separate source of funds to prove contribution.<sup>10</sup> With few exceptions, courts refused to recognize a wife's work on the family farm<sup>11</sup> as a contribu-

5. See Campfield, *supra* note 1, at 671 n.3. Other advantages of joint tenancy include: (1) Avoiding fragmentation of ownership; (2) avoiding probate delays; (3) freeing the property from the claims of creditors of either spouse; (4) reducing administration costs; (5) enjoying preferential treatment for state death tax purposes; and (6) having the convenience of the automatic operation of the survivorship right. *Id.* See also Hines, *supra* note 1, at 595-98; Werig, *Joint Property: Spouses' Expectations and Estate Planners' Assumptions*, 116 TR. & EST. 516, 520 (1977); 43 U.M.K.C. L. REV. 60, 61-63 (1974).

6. To illustrate the rapid appreciation in farmland prices, the price of Illinois farmland increased 620% between 1960 and 1979. U.S. DEPT OF AGRICULTURE, FARM REAL ESTATE MARKET DEVELOPMENTS (March 1979).

7. I.R.C. § 2040(a). The subsection provides as follows:

#### JOINT INTERESTS

The value of the gross estate shall include the value of all property to the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person . . .

*Id.* See also Hines, *supra* note 1, at 599; Uchtmann, *Planning Agricultural Estates: The Impact of Estate and Gift Tax Sections of the 1976 Tax Reform Act*, 1977 S.I.U. L.J. 393, 399-400; Note, *supra* note 1, at 623-24; 43 U.M.K.C. L. REV. 60, 66 (1974).

8. See I.R.C. § 2040(a). Any further references to sections in the text will be to the appropriate sections of the Internal Revenue Code of 1954 as amended.

9. The designated roles of the husband being the person buying the farmland and the wife materially participating in the farming operation is how most of the case law reads. This Note will refer to the typical situation where husband and wife are in those roles, but this reference does not mean to exclude the situation where the roles are reversed.

10. See Uchtmann, *supra* note 7, at 400.

11. References to wife's work on the farm is not a reference to domestic work done by a homemaker but rather refers to efforts and skills in both physical work to produce crops or commodities and making management decisions. See notes 92-95, 113-14 *infra*.

tion in money or money's worth.<sup>12</sup> This view clearly discriminated against the farm wife and ignored the realities of the normal family farm operation in which both husband and wife work equally.

In 1978 Congress enacted section 2040(c)<sup>13</sup> to end this discrimination. Section 2040(c) treats services provided by the decedent's spouse in the operation of the farm or business as consideration for the purpose of diminishing the value of the decedent's estate.

This Note will examine the problem of discrimination against farm widows who are surviving joint tenants in three ways—first, by surveying the development of the law on joint tenancy and the treatment of the wife's work in the business as a contribution to the joint property; second, by evaluating the effectiveness of section 2040(c); and finally, by contrasting the results under section 2040(c) with possible judicial solutions.

## I. DEVELOPMENT OF THE LAW OF JOINT INTERESTS

Property held in joint tenancy does not become part of the estate of the decedent because, theoretically, each tenant owns the whole property under this form of ownership.<sup>14</sup> In the absence of section 2040, therefore, property held in joint tenancy would not be taxed in the estate of the first joint tenant to die.<sup>15</sup> Congress enacted section 2040(a) to prevent the use of joint tenancies to avoid taxation.<sup>16</sup> Under section 2040(a), the entire value of joint property is included in the decedent's estate except that portion attributable to monetary consideration furnished by the surviving joint owner.<sup>17</sup>

The crucial inquiry for determining if property held in joint tenancy is taxable in the decedent's estate is whether the survivor acquired the property from decedent "for adequate and full consideration in money

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12. See notes 25-42 *infra*.

13. I.R.C. § 2040(c).

14. See R. POWELL & P. ROHAN, *POWELL ON REAL PROPERTY* 615, 626 (1968); Note, *supra* note 1, at 626 n.22.

15. See R. STEPHENS, G. MAXFIELD & S. LIND, *FEDERAL ESTATE AND GIFT TAXATION* ¶ 4.12[1], at 4-233 (4th ed. 1978). Arguments supporting inclusion could be made, however, under I.R.C. § 2037—dealing with transfers taking effect at death or I.R.C. § 2033—property in which the decedent had an interest.

16. I.R.C. § 2040(a) was enacted in 1916 as section 202(c). See *Tyler v. United States*, 281 U.S. 497, 500-01, 505 (1930).

17. See I.R.C. § 2040(a); Treas. Reg. § 20.2040-1(a)(2) (1958).

or money's worth."<sup>18</sup> To make this determination, the funds used to acquire the property are traced to their source.<sup>19</sup> One judicial exception to the general rule of section 2040(a) exists when the surviving joint tenant furnished consideration consisting of income from capital, the capital having been a previous gift from deceased joint tenant to surviving joint tenant.<sup>20</sup> The income from income-producing property is considered as belonging to the donee-surviving joint tenant. Any of the income applied to joint tenancy property is consideration furnished by the donee-surviving joint tenant. This exception, however, has been limited by the courts. When husband and wife each contributed cash for the purchase of property in joint tenancy and the source of the survivor's contribution is a gift from the decedent prior to his death, the contribution is traced back to the donor's gift and the entire value is included in decedent's estate.<sup>21</sup>

Similarly, courts have dealt with cases in which joint tenancy assets were purchased subject to a mortgage upon which both joint owners were personally liable. Joint tenants can treat satisfaction of a liability

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18. This phrase is not defined in the Internal Revenue Code. The only direct statement on its meaning is found in I.R.C. § 2043(b), which provides that the relinquishment of marital rights shall not be treated as consideration in money or money's worth. For cases interpreting the phrase see *Commissioner v. Porker*, 92 F.2d 426 (2d Cir. 1937); *Commissioner v. Bryn Mawr Trust Co.*, 87 F.2d 607 (3d Cir. 1936); *Latty v. Commissioner*, 62 F.2d 952 (6th Cir. 1933). See Note, *supra* note 1, at 625.

19. See, e.g., *Dimrock v. Corwin*, 306 U.S. 363 (1939); *Tuck v. United States*, 282 F.2d 405 (9th Cir. 1960); *English v. United States*, 270 F.2d 876 (7th Cir. 1959); *Swartz v. United States*, 182 F. Supp. 540 (D. Mass. 1960); *McCrary v. Heiner*, 19 F. Supp. 575 (W.D. Pa. 1937); *Bremer v. Luff*, 7 F. Supp. 148 (N.D.N.Y. 1933); *Bowditch v. Commissioner*, 23 B.T.A. 1266 (1931), *rev'd by stipulation*, 62 F.2d 1065 (1st Cir. 1933); *Estate of Kelley v. Commissioner*, 22 B.T.A. 421 (1931); *Dean, Federal Tax Consequences of Joint Ownership*, 53 GEO. L.J. 863, 864-67 (1965); Note, *supra* note 1, at 625.

20. See *Harvey v. United States*, 185 F.2d 463 (7th Cir. 1950); *First Nat'l Bank of Kansas City v. United States*, 223 F. Supp. 963 (W.D. Mo. 1963); *Swartz v. United States*, 182 F. Supp. 540 (D. Mass. 1960); *Estate of Goldsborough v. Commissioner*, 70 T.C. 1077 (1978); *Estate of Howard v. Commissioner*, 9 T.C. 1192 (1947). *But see* *Treas. Reg. § 20.2040-1(c) example 5* (1958); *Estate of Selecman v. Commissioner*, 9 T.C.M. (CCH) 997 (1950). See also *Sugar, How New Section 2040(c) Alters the Estate Tax Burden on Jointly Owned Property*, 50 J. TAX. 270, 273 (1979); Note, *supra* note 1, at 625.

21. See *Endicott Trust Co. v. United States*, 305 F. Supp. 943 (N.D.N.Y. 1969) (limiting the applicability of *Harvey* and *First National Bank of Kansas City* to situations in which the decedent had, prior to the acquisition of the jointly owned property, given property outright to the survivor who subsequently sold that property and used the proceeds to invest in the newly acquired jointly owned property). *Accord*, *Treas. Reg. § 20.2040-1(c) example 4* (1958). See generally *Dean, supra* note 19, at 864-67.

as consideration when they are both liable for the mortgage.<sup>22</sup> When the income from the jointly owned property is used to pay off an outstanding mortgage on which husband and wife are jointly liable, each joint tenant is considered to have furnished contribution of one-half the payments.<sup>23</sup> The premise behind this is that each joint tenant is entitled to one-half the income from the property even though the property was originally a gift from the decedent to the surviving joint owner.<sup>24</sup>

Another exception to the general rule of section 2040(a), which has been carved out by the courts, is that services of the wife in a family business are consideration for jointly held property when the profits are used to purchase joint tenancy property.<sup>25</sup> Activities of the wife that have qualified as consideration include managing and handling investments in securities and real estate,<sup>26</sup> clerking and doing office work in a plumbing business,<sup>27</sup> serving as a receptionist and office helper in a husband's doctor office,<sup>28</sup> running a grocery store<sup>29</sup> or other retail store,<sup>30</sup> and managing and operating a publishing company.<sup>31</sup> Courts also have recognized the wife's work on a family farm as consideration

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22. See *Bremer v. Luff*, 7 F. Supp. 148 (N.D.N.Y. 1933) (even though there was no actual proof of whether husband or wife actually paid the mortgage). See also 43 U.M.K.C. L. REV. 60, 68 (1974).

23. See *Drummond's Estate v. Paschal*, 75 F. Supp. 46 (E.D. Ark. 1947). See also Sugar, *supra* note 20, at 273.

24. See *Drummond's Estate v. Paschal*, 75 F. Supp. 46 (E.D. Ark. 1947).

25. See *United States v. Neel*, 235 F.2d 395 (10th Cir. 1956); *Ferry v. Rogan*, 154 F.2d 974 (9th Cir. 1946); *Rogan v. Kammerdiner*, 140 F.2d 569 (9th Cir. 1944); *Berkowitz v. Commissioner*, 108 F.2d 319 (3d Cir. 1939); *Richardson v. Helvering*, 80 F.2d 548 (D.C. Cir. 1935); *Craig v. United States*, 451 F. Supp. 378 (D.S.D. 1978); *Singer v. Shaughnessy*, 96 F. Supp. 506 (N.D.N.Y. 1951), *aff'd*, 198 F.2d 178 (2d Cir. 1952); *Estate of Ehret v. Commissioner*, 35 T.C.M. (CCH) 1432 (1976); *Estate of Carpousis v. Commissioner*, 33 T.C.M. (CCH) 1143 (1974); *Estate of Otte v. Commissioner*, 31 T.C.M. (CCH) 301 (1972); *Estate of Trafton v. Commissioner*, 27 T.C. 610 (1956); *Estate of Guiliani v. Commissioner*, 11 T.C.M. (CCH) 673 (1952); *Estate of Fletcher v. Commissioner*, 44 B.T.A. 429 (1941); *In re Estate of Kersten*, 71 Wis. 2d 757, 239 N.W.2d 86 (1976). *But see* *Bushman v. United States*, 8 F. Supp. 694 (Ct. Cl. 1934), *cert. denied*, 295 U.S. 756 (1935); *Estate of Loveland v. Commissioner*, 13 T.C. 5 (1949); *Estate of Awrey v. Commissioner*, 5 T.C. 222 (1945).

26. See *Ferry v. Rogan*, 154 F.2d 974 (9th Cir. 1946); *Richardson v. Helvering*, 80 F.2d 548 (D.C. Cir. 1935); *Estate of Trafton v. Commissioner*, 27 T.C. 610 (1956).

27. See *Estate of Ehret v. Commissioner*, 35 T.C.M. (CCH) 1432 (1976).

28. See *Estate of Carpousis v. Commissioner*, 33 T.C.M. (CCH) 1143 (1974).

29. See *Berkowitz v. Commissioner*, 108 F.2d 319 (3d Cir. 1939).

30. See *Rogan v. Kammerdiner*, 140 F.2d 569 (9th Cir. 1944); *Estate of Guiliani v. Commissioner*, 11 T.C.M. (CCH) 673 (1952).

31. See *Singer v. Shaughnessy*, 96 F. Supp. 506 (N.D.N.Y. 1951), *aff'd*, 198 F.2d 178 (2d Cir. 1952).

for jointly held property.<sup>32</sup>

When determining if the wife's work qualifies as consideration, courts first inquire whether she made any capital contribution to the start of the business.<sup>33</sup> Failure of the wife to make a contribution to the start of the business, however, is not fatal to allowing contribution.<sup>34</sup>

Courts also determine whether profits from the business are put into jointly owned property or joint bank accounts.<sup>35</sup> It is important that there is some sort of profit sharing agreement between the husband and wife.<sup>36</sup> It need not be a legal partnership agreement or even be in writing,<sup>37</sup> but the agreement must show that the couple understood that the profits were to be shared.<sup>38</sup> The courts also examine the length of time that the husband and wife have worked together in the business<sup>39</sup> as

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32. See *United States v. Neel*, 235 F.2d 395 (10th Cir. 1967); *Craig v. United States*, 451 F. Supp. 378 (D.S.D. 1978); *Estate of Otte v. Commissioner*, 31 T.C.M. (CCH) 301 (1972); *In re Estate of Kersten*, 71 Wis. 2d 757, 239 N.W.2d 86 (1976). For a thorough analysis of these farming cases see notes 97-124 *infra* and accompanying text.

33. See *Berkowitz v. Commissioner*, 108 F.2d 319 (3d Cir. 1939); *Singer v. Shaughnessy*, 96 F. Supp. 506 (N.D.N.Y. 1951), *aff'd*, 198 F.2d 178 (2d Cir. 1952); *Estate of Carpousis v. Commissioner*, 33 T.C.M. (CCH) 1143 (1974); *Estate of Guiliani v. Commissioner*, 11 T.C.M. (CCH) 673 (1952).

34. See *Craig v. United States*, 451 F. Supp. 378 (D.S.D. 1978) (decendent husband inherited first piece of farmland, profits from which were used to buy other farmland).

35. *E.g.*, *Singer v. Shaughnessy*, 96 F. Supp. 506 (N.D.N.Y. 1951), *aff'd*, 198 F.2d 178 (2d Cir. 1952); *Estate of Otte v. Commissioner*, 31 T.C.M. (CCH) 301 (1972).

36. *E.g.*, *Ferry v. Rogan*, 154 F.2d 974 (9th Cir. 1946); *Rogan v. Kammerdiner*, 140 F.2d 569 (9th Cir. 1944); *Berkowitz v. Commissioner*, 108 F.2d 319 (3d Cir. 1939); *Richardson v. Helvering*, 80 F.2d 548 (D.C. Cir. 1935).

37. See *Berkowitz v. Commissioner*, 108 F.2d 319 (3d Cir. 1939); *Craig v. United States*, 451 F. Supp. 378 (D.S.D. 1978). In *Berkowitz* the Third Circuit Court of Appeals reversed the Board of Tax Appeals which searched for a partnership but failed to find one because there was no written agreement. The court found a profit sharing agreement and partnership by relying on the testimony of the survivor wife who said "we wanted to be partners, half and half." 108 F.2d at 321.

38. See *Bushman v. United States*, 8 F. Supp. 694 (Ct. Cl. 1934) (court found the only compensation wife was expecting was love and affection of husband and did not consider services as contribution), *cert. denied*, 295 U.S. 756 (1935); *Estate of Awrey v. Commissioner*, 5 T.C. 222 (1945) (because there was no agreement and she had not paid income tax from her asset share, court found she did not consider herself the owner of the joint interest).

39. *E.g.*, *Berkowitz v. Commissioner*, 108 F.2d 319 (3d Cir. 1939) (couple worked together 43 years); *Craig v. United States*, 451 F. Supp. 378 (D.S.D. 1978) (couple worked together 43 years); *Estate of Otte v. Commissioner*, 31 T.C.M. (CCH) 301 (1972) (couple worked together 35 years); *Estate of Guiliani v. Commissioner*, 11 T.C.M. (CCH) 673 (1952) (couple worked together a lifetime). *But see* *Estate of Awrey v. Commissioner*, 5 T.C. 222 (1945) (wife worked in business for several years but not during time period when business had most growth; services not allowed as consideration).

well as whether each worked equally hard in the business.<sup>40</sup>

The Tax Court on one occasion determined that domestic services of the wife did not constitute consideration.<sup>41</sup> The Tax Court, reaffirming this position, has clearly stated that for a wife's work to be consideration, the services must be related to the business and the services must be other than those of an ordinary housewife.<sup>42</sup>

Congress promulgated a statutory exception to the "consideration furnished" test in the Tax Reform Act of 1976 by enacting sections 2040(b) and 2040(d).<sup>43</sup> A qualified joint interest<sup>44</sup> in property, under

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40. *E.g.*, Estate of Guiliani v. Commissioner, 11 T.C.M. (CCH) 673 (1952) (court found wife's services in connection with business were at least equal in earning value to husband's). *But cf.* Estate of Ehret v. Commissioner, 35 T.C.M. (CCH) 1432 (1976) (because wife took care of children, Commissioner's determination that wife's contribution was 20% rather than one-half was upheld).

41. See Estate of Loveland v. Commissioner, 13 T.C. 5 (1949).

42. See Estate of Otte v. Commissioner, 31 T.C.M. (CCH) 301 (1972). For a thorough discussion urging domestic services be accepted as consideration see generally Note, *supra* note 1. The Supreme Court of Wisconsin followed the ruling in *Otte* in interpreting 2040(a). *In re Estate of Kersten*, 71 Wis. 2d 757, 239 N.W.2d 86 (1976). For a discussion that *Kersten* should not open the door for treating domestic services as consideration see *Term of the Wisconsin Supreme Court (August 1975-August 1976)*, 60 MARQ. L. REV. 512 (1976).

43. I.R.C. §§ 2040(b) and (d) are not directly related to the problem addressed in this Note but are significant in the development of the law of joint tenancies. The subsections are as follows:

(b) CERTAIN JOINT INTERESTS OF HUSBAND AND WIFE.—

(1) INTERESTS OF SPOUSE EXCLUDED FROM GROSS ESTATE.—Notwithstanding subsection (a), in the case of any qualified joint interest, the value included in the gross estate with respect to such interest by reason of this section is one-half of the value of such qualified joint interest.

(2) QUALIFIED JOINT INTEREST DEFINED.—For purposes of paragraph (1), the term "qualified joint interest" means any interest in property held by the decedent, and the decedent's spouse as joint tenants or as tenants by the entirety, but only if—

(A) such joint interest was created by the decedent, the decedent's spouse, or both,

(B)(i) in the case of personal property, the creation of such joint interest constituted in whole or in part a gift for purposes of chapter 12, or

(ii) in the case of real property, an election under section 2515 applies with respect to the creation of such joint interest, and

(C) in the case of a joint tenancy, only the decedent and the decedent's spouse are joint tenants.

(d) JOINT INTERESTS OF HUSBAND AND WIFE CREATED BEFORE 1977.—Under regulations prescribed by the Secretary—

(1) IN GENERAL.—In the case of any joint interest created before January 1, 1977, which (if created after December 31, 1976) would have constituted a qualified joint interest under subsection (b)(2) (determined without regard to clause (ii) of subsection (b)(2)(B)), the donor may make an election under this subsection to have paragraph (1) of subsection (b) apply with respect to such joint interest.

(2) TIME FOR MAKING ELECTION.—An election under this subsection with respect to any property shall be made for the calendar quarter in 1977, 1978, or 1979 selected by the donor in a gift tax return filed within the time prescribed by law for filing a gift tax



these sections, is treated as belonging fifty percent to each spouse for estate tax purposes. These subsections present the taxpayer with the advantage of avoiding the "consideration furnished" test by electing the "fractional interest" rule. Only one-half of the value of the joint tenancy property is included in the donor spouse's estate if he is the first to die, but the other one-half was a taxable gift at the creation of the joint tenancy. The lifetime gift is generally not advantageous except for the \$3,000 annual exclusion and post-gift appreciation in property.<sup>45</sup> A potential triple exposure to taxation of qualified joint property can result if the donee spouse dies first. This triple exposure problem results from the property being subject to taxation at the creation of the joint tenancy; subject to taxation at the death of the donee

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return for such quarter. Such an election may be made irrespective of whether or not the amount involved exceeds the exclusion provided by section 2503(b); but no election may be made under this subsection after the death of the donor.

(3) TAX EFFECTS OF ELECTION.—In the case of any property with respect to which an election has been made under this subsection, for purposes of this title—

(A) the donor shall be treated as having made a gift at the close of the calendar quarter selected under paragraph (2), and

(B) the amount of the gift shall be determined under paragraph (4).

(4) AMOUNT OF GIFT.—For purposes of paragraph (3)(B), the amount of any gift is one-half of the amount—

(A) which bears the same ratio to the excess of (i) the value of the property on the date of the deemed making of the gift under paragraph (3)(A), over (ii) the value of such property on the date of the creation of the joint interest, as

(B) the excess of (i) the consideration furnished by the donor at the time of the creation of the joint interest, over (ii) the consideration furnished at such time by the donor's spouse, bears to the total consideration furnished by both spouses at such time.

(5) SPECIAL RULE FOR PARAGRAPH (4)(A).—For purposes of paragraph (4)(A)—

(A) in the case of real property, if the creation was not treated as a gift at the time of the creation, or

(B) in the case of personal property, if the gift was required to be included on a gift tax return but was not so included, and the period of limitations on assessment under section 6501 has expired with respect to the tax (if any) on such gift,

then the value of the property on the date of the creation of the joint interest shall be treated as zero.

(6) SUBSTANTIAL IMPROVEMENTS.—For purposes of this subsection, a substantial improvement of any property shall be treated as the creation of a separate joint interest.

44. An interest is a qualified joint interest if the following are satisfied: (1) The interest must have been created by the decedent, his spouse, or both; (2) in the case of personal property, the creation of the joint interest must have been a completed gift for purposes of the gift tax provisions; (3) in the case of personal property, the donor must have elected to treat the creation of the joint tenancy as a taxable event at the time; and (4) the joint tenants cannot be persons other than the decedent and his spouse. I.R.C. § 2040(b)(2). Joint tenancies existing before 1977 may be severed and recreated into qualified joint interests. I.R.C. § 2040(d).

45. See Uchtmann, *supra* note 7, at 401.

spouse; and subject to taxation at the later death of the donor spouse.<sup>46</sup>

Qualified joint interests do nothing to alleviate the unnecessarily large gross estate of the second joint tenant.<sup>47</sup> One commentator, after weighing the advantages and disadvantages of the "fractional interest" rule, concluded that, even when the joint tenancies are qualified joint interests under section 2040(b), property owners should avoid large joint tenancy holdings as a general rule and should terminate many existing joint tenancies.<sup>48</sup>

States vary in their estate and inheritance treatment of jointly owned property. Twenty-one states treat property held jointly by spouses in the same manner as 2040(a).<sup>49</sup> Twenty-one states<sup>50</sup> and the District of

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46. Whether the gift tax paid by the donor spouse when the joint tenancy was created could be applied against the tentative estate tax of the donee spouse is questionable because I.R.C. § 2001(b)(2) only allows a deduction for gift taxes payable with respect to gifts made by decedent. See Uchtmann, *supra* note 7, at 401.

47. The right of survivorship necessarily requires inclusion of the property in the survivor's gross estate. See Campfield, *supra* note 1, at 688-89; Dean, *supra* note 19, at 870-72; Hines, *supra* note 1, at 599.

48. A general exception to this is joint tenancies created for convenience, such as joint ownership of a home. See Uchtmann, *supra* note 7, at 402.

49. Seven states simply compute their tax on the basis of the federal estate tax liability so that section 2040 is, in effect, being applied. ALA. CODE § 40-15-2 (1975); ALASKA STAT. § 43.31.011 (1977); FLA. STAT. ANN. § 198.02 (West 1971); GA. CODE ANN. § 91A-5702(b) (1980); N.Y. TAX LAW § 954 (McKinney 1975); N.C. GEN. STAT. § 105-7 (1979); N.D. CENT. CODE § 57-37-02 (1972 & Supp. 1980). Fourteen states have express provisions similar to section 2040. ARK. STAT. ANN. § 63-103 (1947); DEL. CODE ANN. tit. 30, § 1305 (1974); KAN. STAT. ANN. § 79-1501 (1977); MASS. ANN. LAWS ch. 65, § 1 (Michie/Law. Co-op 1978) (value of family residence is excluded); MINN. STAT. § 291.01(4) (1967) (where property was acquired prior to 1935, only one-half the value is taxed); MISS. CODE ANN. § 27-9-7(3)(b) (1972); NEB. REV. STAT. § 77-2002 (1971); N.J. STAT. ANN. § 54:34-1 (1960); OKLA. STAT. ANN. tit. 68, § 807(A)(4) (West 1966 & Supp. 1980); R.I. GEN. LAWS § 44-22-7(6) (1980); UTAH CODE ANN. § 59-12-5 (1953) (except that, for the first \$40,000, one-half the value of the property is excluded); VA. CODE ANN. § 58-152(5) (1974); WIS. STAT. ANN. § 72.12(6) (1969 & Supp. 1980); WYO. STAT. § 39-337 (1957).

50. See COLO. REV. STAT. § 39-23-106 (1973) (value of property is divided by number of present owners, except that for bank accounts value is determined by decedent's contribution); CONN. GEN. STAT. § 12-343 (1979) (value of property is divided by number of joint owners); HAWAII REV. STAT. § 236-3 (1976) (one-half the value is taxed); ILL. ANN. STAT. ch. 120, § 375(5) (Smith-Hurd 1974) (value of property is divided by the number of joint owners); IOWA CODE § 450.3(5) (1966) (one-half the value is taxed); KY. REV. STAT. ANN. § 140.050 (Baldwin 1977) (one-half the value is taxed); ME. REV. STAT. ANN. tit. 36, § 3632 (1964) (value of property is divided by number of joint owners); MONT. REV. CODES ANN. § 91-4405 (1947 & Supp. 1977) (value of property is divided by number of joint owners; additional exclusion allowed if survivor can prove contribution greater than one-half); N.H. REV. STAT. ANN. §§ 86:8, 86:9 (1970 & Supp. 1979) (treated as tenants in common); N.C. GEN. STAT. § 105-2(7) (1979) (one-half the value of property held as tenants by the entirety is taxed; no provision for joint tenancy); OHIO REV. CODE ANN. § 5731.10(B) (Page 1973) (one-half the value of the property is taxed); OR. REV. STAT.

Columbia<sup>51</sup> impose a tax on only one-half the value of jointly held property. Seven states impose no tax<sup>52</sup> and one state determines the tax by the contribution of decedent rather than the survivor.<sup>53</sup>

## II. OPERATION OF SECTION 2040(c)

Congress enacted section 2040(c)<sup>54</sup> to insure that services provided

§ 118.010 (1979) (one-half the value of property held as tenants by the entirety is taxed; the provision for joint tenancies is similar to section 2040); S.D. COMP. LAWS ANN. § 10-40-9 (1967) (one-half the value is taxed); W. VA. CODE § 11-11-1(d) (1974) (one-half the value is taxed). In seven of the community property states (Arizona, California, Idaho, Louisiana, New Mexico, Texas, and Washington) only one-half the value of the community property is taxed on the death of a spouse. The remaining community property state, Nevada, has no estate or inheritance tax. NEV. CONST. art. X, § 1. See Note, *supra* note 1, at 635-36.

51. See D.C. CODE ANN. § 47-1602 (1973) (value of the property divided by the number of joint owners).

52. See IND. CODE § 6-4.1-3-7 (1976); MD. ANN. CODE art. 81, § 151 (1980); MICH. COMP. LAWS § 205.202 (1970) (as construed in *In re Renz's Estate*, 338 Mich. 347, 61 N.W.2d 148 (1953)); MO. REV. STAT. § 145.020 (1978); NEV. CONST. art. X, § 1; PA. STAT. ANN. tit. 72, § 2485-311 (Purdon 1964); VT. STAT. ANN. tit. 32, § 6543(b) (1970).

53. See TENN. CODE ANN. § 30-1603 (1977 & Supp. 1980) (in the absence of evidence of the decedent's contribution, the value of the property is divided by the number of joint owners).

54. I.R.C. § 2040(c) states:

(c) VALUE WHERE SPOUSE OF DECEDENT MATERIALLY PARTICIPATED IN FARM OR OTHER BUSINESS—

(1) IN GENERAL.—Notwithstanding subsection (a), in the case of an eligible joint interest in section 2040(c) property, the value included in the gross estate with respect to such interest by reason of this section shall be—

(A) the value of such interest, reduced by

(B) the sum of—

(i) the section 2040(c) value of such interest, and

(ii) the adjusted consideration furnished by decedent spouse.

(2) LIMITATIONS.—

(A) AT LEAST 50 PERCENT OF VALUE TO BE INCLUDED.—Paragraph (1) shall in no event result in the inclusion in the decedent's gross estate of less than 50 percent of the value of the eligible joint interest.

(B) AGGREGATE REDUCTION.—The aggregate decrease in the value of the decedent's gross estate resulting from the application of this subsection shall not exceed \$500,000.

(C) AGGREGATE ADJUSTED CONSIDERATION MUST BE LESS THAN VALUE.—Paragraph (1) shall not apply if the sum of—

(i) the adjusted consideration furnished by the decedent, and

(ii) the adjusted consideration furnished by the decedent's spouse, equals or exceeds the value of the interest.

(3) ELIGIBLE JOINT INTEREST DEFINED.—For purposes of paragraph (1), the term "eligible joint interest" means any interest in property held by the decedent and the decedent's spouse as joint tenants or as tenants by the entirety, but only if—

(A) such joint interest was created by the decedent, the decedent's spouse, or both, and

(B) in the case of a joint tenancy, only the decedent and the decedent's spouse are joint tenants.

by the decedent's spouse in the operation of a farm or other business are treated as consideration for the purpose of diminishing the value of the decedent's estate.<sup>55</sup> Legislative history shows that the section's enactment had underpinnings in the Equal Rights Movement.<sup>56</sup> Although section 2040(c)'s thrust is to provide relief to farms or property used for farming purposes, the statute also includes property used in any other trade or business.<sup>57</sup>

Generally, section 2040(c) provides that for each year, up to a maximum of twenty-five years, a surviving spouse has "materially partici-

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(4) SECTION 2040(C) PROPERTY DEFINED.—For purposes of paragraph (1), the term "section 2040(c) property" means any interest in any real or tangible personal property which is devoted to use as a farm or used for farming purposes (within the meaning of paragraphs (4) and (5) of section 2032(e)) or is used in any other trade or business.

(5) SECTION 2040(C) VALUE.—For purposes of paragraph (1), the term "section 2040(c) value" means—

(A) the excess of the value of the eligible joint interest over the adjusted consideration furnished by the decedent, the decedent's spouse, or both, multiplied by

(B) 2 percent for each taxable year in which the spouse materially participated in the operation of the farm or other trade or business but not to exceed 50 percent.

(6) ADJUSTED CONSIDERATION.—For the purposes of this subsection, the term "adjusted consideration" means—

(A) the consideration furnished by the individual concerned (not taking into account any consideration in the form of income or gain from the business of which the section 2040(c) property is a part) determined under rules similar to the rules set forth in subsection (a), and

(B) an amount equal to the amount of interest which the consideration referred to in subparagraph (A) would have earned over the period in which it was invested in the farm or other business if it had been earning interest throughout such period at 6 percent simple interest.

(7) MATERIAL PARTICIPATION.—For purposes of paragraph (1), material participation shall be determined in a manner similar to the manner used for purposes of paragraph (1) of section 1402(a) (relating to net earnings from self-employment).

(8) VALUE.—For purposes of this subsection, except where the context clearly indicates otherwise, the term "value" means value determined without regard to this subsection.

(9) ELECTION TO HAVE SUBSECTION APPLY.—This subsection shall apply with respect to a joint interest only if the estate of the decedent elects to have this subsection apply to such interest. Such an election shall be made not later than the time prescribed by section 6075(a) for filing the return of tax imposed by section 2001 (including extensions thereof), and shall be made in such manner as the Secretary shall by regulations prescribe.

55. See H.R. REP. NO. 1800, 95th Cong., 2d Sess. 272 (1978).

56. In debate on the Senate floor, Senator Melcher of Montana who sponsored the amendment stated, "If we believe in ERA, if we believe that women have an equal right to property, then by all means the Senate should accept this unanimously." 124 CONG. REC. S. 17,758 (daily ed. Oct. 9, 1978) (remarks of Sen. Melcher).

57. See I.R.C. § 2040(c)(4). See also 124 CONG. REC. S. 17,758-59 (daily ed. Oct. 9, 1978) (remarks of Sen. Metzbaum).

pated"<sup>58</sup> in the operation of a farm or other business, two percent of the excess appreciation in value is deemed to belong to the surviving spouse. Excess appreciation is the estate value of property less the original consideration paid, less the amount the original consideration would have earned over the time period if it had been earning six percent simple interest.<sup>59</sup> Section 2040(c), which is simple in concept, is more difficult in execution. The subsection applies to decedents dying after 1978,<sup>60</sup> and must be elected by the executor to apply.<sup>61</sup> For a joint interest to be eligible for treatment under the subsection the interest must have been created by the decedent, his spouse, or both;<sup>62</sup> decedent and spouse must be the only joint tenants;<sup>63</sup> and the interest must be one in any real or tangible personal property which is used as a farm or for farming purpose or used in any other trade or business.<sup>64</sup> The subsection applies limitations on the amount that decedent's estate may be reduced. The decedent's interest cannot be reduced below fifty percent of the value of the eligible joint interest nor can the aggregate amount of the decedent's gross estate be reduced by more than \$500,000.<sup>65</sup>

In determining the amount excluded from decedent's gross estate, two factors come into play—section 2040(c) value<sup>66</sup> and adjusted consideration.<sup>67</sup> Calculating the amount to be excluded can be accomplished by the following four steps:

- (1) Calculate the *percentage rate*, which is the number of years spouse materially participated in the farm or business multiplied by two percent.
- (2) Calculate the *total adjusted consideration* which is the sum of
  - (a) decedent's adjusted consideration, which consists of decedent's original consideration plus assumed appreciation at rate of six percent on decedent's original consideration, and
  - (b) surviving spouse's adjusted consideration, which consists of

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58. For a discussion of the issues surrounding material participation see notes 92-95 *infra* and accompanying text.

59. See Uchtmann, *Joint Tenancy Planning and Problem Solving, Including the 2% Rule Under the Revenue Act of 1978*, ILL. INST. CONT. LEGAL EDUC., FARM ESTATE PLANNING AND BUSINESS ORGANIZATION (1979).

60. See H.R. REP. NO. 1800, 95th Cong., 2d Sess. 272 (1978).

61. See I.R.C. § 2040(c)(9).

62. See I.R.C. § 2040(c)(3).

63. *Id.*

64. See I.R.C. § 2040(c)(4).

65. See I.R.C. § 2040(c)(2).

66. See I.R.C. § 2040(c)(5).

67. See I.R.C. § 2040(c)(6).

surviving spouse's original consideration plus assumed appreciation at rate of six percent on surviving spouse's original consideration.

- (3) Calculate the *section 2040(c) value*, which is the excess of the estate value of the joint interest property over the *total adjusted consideration* (from 2) multiplied by the *percentage rate* (from 1).
- (4) Calculate the *amount excluded* from decedent's estate, which is the *section 2040(c) value* (from 3) plus the surviving spouse's adjusted consideration (from 2(b)).<sup>68</sup>

### III. THE EFFECTIVENESS OF 2040(c)

Congress enacted section 2040(c) as a reaction to courts' disparate treatment of the contribution of the wife's work in the family business.<sup>69</sup> Section 2040(c) avoids differences in treatment of the wife's services in cases that are substantially identical except for the fact that some taxpayers had arranged their business in proper form.<sup>70</sup> The ef-

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68. An example may clarify the operation of the statute: John and Mary Farmer bought 100 acres of farmland in 1959 at the total price of \$10,000. John furnished 75 percent of the consideration and Mary 25 percent. The property was held in joint tenancy and used as a farm. John died in 1979 at which time the property was valued at \$75,000. Mary materially participated in the farm until the time of John's death.

- (1) Percentage rate is two percent x 20 years, or 40 percent.
- (2) Total Adjusted Consideration is \$22,000, computed:
  - (a) John's adjusted consideration is \$16,500, or \$7500 plus six percent x 20 years x \$7500.
  - (b) Mary's adjusted consideration is \$5500, or \$2500 plus six percent x 20 years x \$2500.
- (3) Section 2040(c) value is \$21,200, or [ $\$75,000 - \$22,000$ ] x 40 percent.
- (4) Amount excluded from John's estate under 2040(c) is \$26,700, or \$21,200 (section 2040(c) value) plus \$5500 (surviving spouse, Mary's, adjusted consideration)

69. See notes 25-42 *supra*, 97-124 *infra* and accompanying text. The Senate Finance Committee made the following comment on this line of cases:

In the case of certain trade or business activities conducted jointly in the form of a family partnership, the partnership interest held by the surviving spouse will not be included in the deceased spouse's gross estate. In this situation, because of the form chosen, the effect is that the services performed by the surviving spouse in connection with the family owned business are taken into account, by reason of the profit sharing ratio, as consideration furnished for the purchase of jointly owned property used in the trade or business if a partnership is used to conduct business.

S. REP. NO. 1263, 95th Cong., 2d Sess. 215 (1978).

70. See S. REP. NO. 1263, 95th Cong., 2d Sess. 215 (1978). The Senate Finance Committee stated the reason for change:

The Committee believes that the performance of services by a wife in connection with a jointly owned and operated farm or other business should be taken into account as consideration furnished under the estate tax law. The committee believes that recognition of the wife's services in these cases is necessary to avoid differences in treatment for cases which are substantially identical but for counseling to arrange the business opera-

fectiveness of section 2040(c) can best be examined by comparing a hypothetical situation worked out under both section 2040(c) and under the "consideration furnished" test. Section 2040(c) has greater effect when the material participation period by the wife is longer and the property has greatly appreciated. The following hypothetical exemplifies this comparison:

*Example I(a).* John and Mary Farmer bought farmland in 1970 that was put into joint tenancy. John paid the purchase price of \$25,000 in cash. Mary "materially participated" in the farm for ten years, up until the time of John's death in 1980. At John's death, the property had a value of \$100,000.

The amount included in John's estate under section 2040(a) is \$100,000<sup>71</sup> as compared to \$88,000<sup>72</sup> under section 2040(c).

*Example I(b).* Same as I(a) except the property was held for twenty-five years during which Mary "materially participated." The farmland was purchased in 1955 and had a value at John's death in 1980 of \$200,000.

The amount included in John's estate under section 2040(a) is \$200,000<sup>73</sup> as compared to \$131,250<sup>74</sup> under section 2040(c).

The initial observation from this example is that unless the appreciation in the property is greater than six percent, section 2040(c) will have no effect. The first six percent of appreciation is viewed as a return of capital and a result of inflation.<sup>75</sup> Section 2040(c) has a substantial effect in Example I(b) when the "material participation" period is long

tion in a proper form, such as a family partnership, so that services by the wife are given some recognition.

*Id.*

71. Because John provided all the consideration, the entire amount is included in his estate.

72. Compute as follows: (1) Percentage rate 10 years x two percent = 20 percent

(2) total adjusted consideration \$40,000

(a) John's adjusted consideration \$40,000, or \$25,000 + [six percent x 10 years x \$25,000]

(b) Mary's adjusted consideration 0

(3) section 2040(c) value is \$12,000, or [\$100,000-\$40,000] x 20 percent

(4) amount excluded is \$12,000

(5) amount included in John's estate \$88,000, or [\$100,000-\$12,000]

73. Because John provided all the consideration, all \$200,000 would be included in his estate.

74. Compute as follows: (1) Percentage rate 25 years x two percent = 50 percent

(2) total adjusted consideration \$62,500

(a) John's adjusted consideration \$62,500, or \$25,000 + [six percent x 25 years x \$25,000]

(b) Mary's adjusted consideration 0

(3) section 2040(c) value is \$68,750, or [\$200,000-\$62,500] x 50 percent

(4) amount excluded \$68,750

(5) amount included in John's estate is \$131,250, or [\$200,000 - \$68,750]

75. See I.R.C. § 2040(c)(6)(B).

and there has been great appreciation in the property. The effect is much less substantial in Example I(a), however, in which the "material participation" time period is shorter and appreciation in the property is less.<sup>76</sup>

When the surviving wife has paid part of the initial consideration, and there is a short material participation period, a more desirable result is obtained under section 2040(a).

*Example II(a).* John and Mary Farmer bought farmland in 1970 that was put into joint tenancy. John paid 75 percent and Mary paid 25 percent of the purchase price. Purchase price was \$25,000. Mary "materially participated" in the farm for ten years, up until time of John's death in 1980. At the time of John's death, the property was valued at \$100,000.

In this example the amount included in John's estate under section 2040(a) is \$75,000<sup>77</sup> as compared to \$78,000<sup>78</sup> under section 2040(c).

*Example II(b).* Same as Example II(a) except the "material participation" period is 25 years and the value at John's death is \$200,000.

The amount included in John's estate under section 2040(a) is \$150,000<sup>79</sup> as compared to \$115,625<sup>80</sup> under section 2040(c).

In Example II(a), electing section 2040(c) would result in higher taxes and obviously would not be advisable. In comparing Examples I and II, section 2040(c) has a more substantial effect when the surviving spouse paid none of the initial consideration.

76. The positive effect of 2040(c) is further reduced by the marital deduction. If the estate would be sufficiently large that the 50 percent marital deduction rule applies, the taxable estate would actually be reduced by approximately one-half the amounts in Example I(a) and (b).

77. Because John contributed 75 percent of initial consideration, 75 percent of value at death or \$75,000 would be included in his estate.

78. Compute as follows: (1) Percentage rate 10 years x two percent = 20 percent

(2) total adjusted consideration \$40,000

(a) John's adjusted consideration \$30,000, or \$18,750 + [six percent x 10 years x \$18,750]

(b) Mary's adjusted consideration \$10,000, or \$6250 + [six percent x 10 years x \$6250]

(3) section 2040(c) value is \$12,000, or [\$100,000-\$40,000] x 20 percent

(4) amount excluded \$22,000, or [\$12,000+\$10,000]

(5) amount included in John's estate \$78,000, or [\$100,000-\$22,000]

79. Because John contributed 75 percent of initial consideration, 75 percent of value at death or \$150,000 would be included in his estate.

80. Compute as follows: (1) Percentage rate 25 years x two percent = 50 percent

(2) total adjusted consideration \$62,500

(a) John's adjusted consideration \$46,875, or \$18,750 + [six percent x 25 years x \$18,750]

(b) Mary's adjusted consideration \$15,625, or \$6250 + [six percent x 25 years x \$6250]

(3) section 2040(c) value is \$68,750, or [\$200,000 - \$62,500] x 50 percent

(4) amount excluded \$84,375, or [\$68,750 + \$15,625]

(5) amount included in John's estate \$115,625, or [\$200,000 - \$84,375]



The next example is representative of a common means of purchasing farm land—debt financing. In this situation, when there is also a long period of material participation and great appreciation, 2040(c) renders the most favorable result.

*Example III(a).* John and Mary Farmer bought farmland in 1970 that was put in joint tenancy. Purchase price was \$25,000 of which John paid \$5,000 down in cash. The remaining \$20,000 was financed through a mortgage upon which both John and Mary were liable. The mortgage was paid out of the profits from the farm business. Mary "materially participated" in the farm for ten years, up until John's death in 1980. At the time of John's death, the farmland was valued at \$100,000.

The amount included in John's estate under section 2040(a) is \$60,000<sup>81</sup> as compared to \$81,600<sup>82</sup> under section 2040(c).

*Example III(b).* Same as Example III(a) except Mary "materially participated" for 25 years and the value at John's death was \$200,000.

The amount included in John's estate under section 2040(a) is \$120,000<sup>83</sup> as compared to \$106,250<sup>84</sup> under section 2040(c).

As Examples III(a) and (b) demonstrate, section 2040(c) does not

81. Under the case law, see notes 22-24 *supra*, John is credited with providing one-half the value of the mortgage, or \$10,000.  $\$10,000 + \$5000$  of original consideration means that the husband, theoretically, may be credited with \$15,000 or \$25,000 or 60 percent of consideration paid for the property. Sixty percent of \$100,000 is \$60,000.

The \$15,000 figure represents the \$5,000 of original consideration plus one-half the value of the mortgage that the husband theoretically contributed. There is no allowance for appreciation in the value of the property. The \$25,000 figure includes the original contribution plus the entire value of the outstanding mortgage at the time of purchase. There is no provision for the widow's contribution or appreciation in the value of the property between the time of purchase and the husband's death. The \$60,000 figure represents that fraction of the fair market value of the property at the husband's death that the husband is considered to have contributed.  $(\$15,000 + \$25,000) \times 100,000$ .

82. Compute as follows: (1) Percentage rate 10 years  $\times$  two percent = 20 percent

(2) total adjusted consideration \$8000

(a) John's adjusted consideration \$8000, or  $\$5000 + [\text{six percent} \times 10 \text{ years} \times \$5000]$

(b) Mary's adjusted consideration 0

(3) section 2040(c) value is \$18,400, or  $[\$100,000 - \$8000] \times 20 \text{ percent}$

(4) amount excluded \$18,400

(5) amount included in John's estate \$81,600, or  $[\$100,000 - \$18,400]$

83. Sixty percent of \$200,000 value is \$120,000. See note 81 *supra*.

84. Compute as follows: (1) Percentage rate 25 years  $\times$  two percent = 50 percent

(2) total adjusted consideration \$12,500.

(a) John's adjusted consideration \$12,500, or  $\$5000 + [\text{six percent} \times 25 \text{ years} \times \$5000]$

(b) Mary's adjusted consideration 0

(3) section 2040(c) value is \$93,750, or  $[\$200,000 - \$12,500] \times 50 \text{ percent}$

(4) amount excluded \$93,750

(5) amount included in John's estate \$106,250, or  $[\$200,000 - \$93,750]$

treat income from the business of which the section 2040(c) property is a part as consideration.<sup>85</sup> The mortgage payments are not taken into account in determining adjusted consideration because they are made with income from the property. This seems to ignore the case law, which holds that payment of a joint obligation is comprised of equal contributions by each spouse.<sup>86</sup> If the mortgage payments were considered in the adjusted consideration, there would be a slight advantage for the surviving wife because the husband's estate would be reduced.<sup>87</sup>

There are several unresolved issues, however, in interpreting section 2040(c). In section 2040(c) the parenthetical phrase in the definition of adjusted consideration "not taking into account any consideration in the form of income or gain from the business of which the section 2040(c) property is a part"<sup>88</sup> presents a serious problem. It is unclear whether this phrase overrules the case law that recognizes uninvested income derived from jointly owned property as independent consideration furnished by the surviving wife.<sup>89</sup> Future regulations could state that when a wife withdraws income from the jointly owned property, pays income tax, and reinvests the proceeds, the reinvestment represents independent consideration furnished by the wife.<sup>90</sup> An adverse ruling in the regulations would be a greater incentive to demonstrate an agreement to share profits through which the spouse's reinvested income could be traded.<sup>91</sup>

A second problem concerns the definition of material participation. For the wife's work to be recognized under section 2040(c), she must materially participate in the farm or business.<sup>92</sup> The subsection says that material participation shall be determined in a manner similar to the manner used with regard to net earnings from self-employment.<sup>93</sup> The regulations under section 1402(a), dealing with the self-employment tax, indicate that material participation means engaging to a material degree in the physical work required to produce crops or

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85. See I.R.C. § 2040(c)(6)(A).

86. See notes 22-24 *supra*.

87. In determining the amount included in husband's estate under 2040(c) the amount in III(a) would be \$72,000 and the amount in III(b) would be \$105,750. These are derived by allocating \$10,000 of initial consideration to the wife and \$15,000 to the husband.

88. I.R.C. § 2040(c)(6)(A).

89. See notes 20-41 *supra* and accompanying text.

90. See Sugar, *supra* note 20, at 271.

91. See notes 25-42 *supra*.

92. See I.R.C. § 2040(c)(7).

93. *Id.*

commodities<sup>94</sup> or in the management of the production of the crops or commodities.<sup>95</sup> Because the Code links the material participation requirement to self-employment taxes, the question arises whether the wife is required to have paid the self-employment tax to have "materially participated" in the farm and thereby to qualify for section 2040(c) treatment.<sup>96</sup> Furthermore, the method of substantiating "material participation" is as yet uncertain.<sup>97</sup>

Section 2040(c) property is limited to real property or tangible personal property.<sup>98</sup> Section 2040(c) has no relevance for the husband and wife who, in joint tenancy, own the stock of a closely held corporation. Section 2040(c) would not apply, therefore, if an incorporated farm is bought by the husband, the stock of the corporation transferred to the husband and wife in joint tenancy, and then farmed by the couple.

Section 2040(c) is an estate tax provision. To recognize the wife's contribution in the inter vivos severing of a joint tenancy raises the argument as to whether the two percent material participation rule should be extended to section 2515 of the Gift Tax Code. Because section 2040(c) applies only to estates, couples may hesitate in their later

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94. See Treas. Reg. § 1.1402(a)-4(b)(3) (1956) (amended T.D. 7710, 1980-36 I.R.B. 12, for farming operations). The regulations indicate that such activities as the actual work of planting, cultivating, harvesting crops, feeding, and caring for livestock would satisfy the requirement. *Id.* For further reference to the definition of material participation see 4 N. HARL, AGRICULTURAL LAW § 37.03[3] (1980); Uchtmann & Carpenter, *The Retiring Farmer's Dilemma*, 2 AGR. L.J. 125 (1980).

95. See Treas. Reg. § 1.1402(a)-4(b)(3) (1956) (amended T.D. 7710, 1980-36 I.R.B. 12, for farming operations). The regulations indicate that the requirement is satisfied by such activities as making decisions relating to production, such as when to plant, cultivate, dust, spray or harvest the crop, and including consulting and advising, inspecting, making decisions as to matters of rotation of crops, the type of crops to be grown, the type of livestock to be raised, and the type of implements and machinery to be used. *Id.*

96. A strong argument can be made that the applicability of section 2040(c) should not hinge on whether the wife has paid self-employment tax. The self-employment tax due would not be substantial. Further, compliance with self-employment tax should not determine if an elective estate tax provision may apply.

97. I.R.C. § 2023A(b), which deals with special valuation methods of farmland for estate tax purposes, also requires the material participation standard to be met.

The regulations under this section state that payment of self-employment tax is not conclusive as to the presence of material participation. If no self-employment taxes have been paid, material participation is presumed not to have occurred unless it can be shown that material participation did in fact occur and the IRS is informed of the reason why no such tax was paid. All such self-employment taxes (including interest and penalties) determined to be due must be paid. Treas. Reg. § 20.203A-3(e)(1) (1980). This same standard will probably be set out in the regulations under § 2040(c).

98. See I.R.C. § 2040(c)(4).

years to sever the joint tenancies<sup>99</sup> by sale or for estate planning because the services of the wife would not be given credit as consideration furnished unless the property passes through an estate.<sup>100</sup>

#### IV. JUDICIAL ALTERNATIVE TO SECTION 2040(c)

Courts also have recognized the farm wife's services as consideration toward the jointly held property. These cases could lead the taxpayer to a more favorable result than obtainable under section 2040(c). *Estate of Otte v. Commissioner* exemplifies a common factual situation.<sup>101</sup> The husband bought 105 acres of land before the couple's marriage. He made a downpayment and assumed a mortgage on the balance.<sup>102</sup> This property was later transferred to him and his wife in tenancy by the entirety. The profits from the initial 105 acres were put back to buy other farmland, machinery, and livestock.<sup>103</sup> The husband and wife worked together on the farm for forty-three years, during which time their acreage grew to 639 acres held in tenancy by the entirety and considerable holdings of other tangible personal property owned jointly.<sup>104</sup>

The amount of the original property includible in the decedent husband's estate, under this fact situation and section 2040(c), would be determined similar to Example I above.<sup>105</sup> To determine the amount of the remaining property includible in the husband's estate, the downpayment made by the husband from profits on the original 105 acres would be credited as consideration furnished by him because income from section 2040(c) property cannot be allowed as consideration by

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99. Under I.R.C. § 2515(b) in the case of the termination of a joint tenancy in real property, other than because of the death of a spouse, a spouse is treated as having made a gift to the extent that the proportion of the total consideration furnished by such spouse multiplied by the proceeds of such termination exceeds the value of the proceeds of termination received by such spouse.

100. For example, farmland is bought by the husband, put into joint tenancy and farmed by the couple. Later in life the couple would like to incorporate their farming business for estate planning reasons. At the time the property is transferred from the couple to the corporation there will be a taxable gift to the wife unless the husband receives stock equal to the value of all the property. Because the transfer of property takes place while both spouses are alive, the wife's services are not credited as consideration even though she may have "materially participated" in the farm for twenty-five years before the land was transferred to the closely held corporation. *See* I.R.C. § 2515(b); note 98 *supra*.

101. 31 T.C.M. (CCH) 301 (1972). *See* notes 25-42 *supra*.

102. *Id.* at 302.

103. *Id.* at 302-05.

104. *Id.*

105. *See* notes 72, 74 *supra*.

the spouse.<sup>106</sup> Thus, the result would be similar to that in Example III above.<sup>107</sup> The size of the decedent husband's estate, under section 2040(c), would be considerably larger than the Tax Court's determination in *Otte* because the court included only one-half of all joint property.<sup>108</sup> The court, applying section 2040(a), determined that by working as a husband and wife team in the farming activities, the wife had contributed full and adequate consideration in money or money's worth.<sup>109</sup>

The Supreme Court of Wisconsin reached the same result in *In re Estate of Kersten*,<sup>110</sup> citing *Otte* and applying section 2040(a), which was adopted as part of the Wisconsin inheritance tax,<sup>111</sup> to a fact pattern similar to *Otte*.<sup>112</sup> In another farm widow case, *Craig v. United States*,<sup>113</sup> the court found a partnership and included only one-half of the personal property involved in the farming operation in the decedent husband's estate.<sup>114</sup> A more thorough look at these cases is warranted because of the more desirable result obtained for the surviving wife in these decisions than to the result under section 2040(c).

In *Craig*,<sup>115</sup> *Otte*,<sup>116</sup> and *Kersten*<sup>117</sup> virtually all of the property in controversy was acquired over the years by borrowing and paying back out of farm earnings. The activities of the wife were in excess of those of a housewife discharging ordinary domestic responsibilities.<sup>118</sup> Physical activities of the wife included caring for livestock, helping with the milking, and operating a tractor during baling season.<sup>119</sup> Most impor-

106. See notes 87-90 *supra* and accompanying text.

107. See notes 81, 83 *supra* and accompanying text.

108. See 31 T.C.M. (CCH) at 305.

109. *Id.*

110. 71 Wis. 2d 757, 763-64, 239 N.W.2d 86, 90 (1976). See also note 42 *supra*.

111. See WIS. STAT. 72.12(6)(a) (1971).

112. In *Kersten* the husband purchased the first 40 acres of land from which the farming operation was built. The couple worked together 33 years until the husband's death. 71 Wis. 2d at 758-59, 239 N.W.2d at 87-88.

113. 451 F. Supp. 378 (D.S.D. 1978). See also *United States v. Neel*, 235 F.2d 395 (10th Cir. 1967); notes 34-39 *supra*.

114. 451 F. Supp. at 383. In *Craig* the husband had a small tract of land and small bank account at the time of their marriage. From this money and the income off the land, other land and farming assets were purchased. *Id.* at 379-80. See note 37 *supra*.

115. 451 F. Supp. at 380.

116. 31 T.C.M. (CCH) at 302-05.

117. 71 Wis. 2d at 759, 239 N.W.2d at 87-88.

118. 31 T.C.M. (CCH) at 307.

119. 71 Wis. 2d at 759, 239 N.W.2d at 88.

tantly, the court in *Craig* said the wife contributed management skills and had an equal voice with her husband in all major decisions in the farm operation.<sup>120</sup>

In *Otte* the Commissioner argued that the wife's *exact* money must be traced through each change in property.<sup>121</sup> The Tax Court disagreed: "[A]ll available funds arising from the joint efforts of the parties were invested in the property in controversy . . . which convincingly shows that petitioner's contributions represented 'an adequate and full consideration in money or money's worth.'" <sup>122</sup> If section 2040(c) applied, it would be necessary to trace funds to the source of the down payment and the mortgage payments to determine adjusted consideration.<sup>123</sup> Whether these cases are valid after section 2040(c) is as yet unanswered. Because an election is necessary for section 2040(c) to apply, there is a strong argument that the surviving wife should be able to determine the amount excludible under section 2040(c) and then, if advantageous, argue *Otte* and section 2040(a) or *Craig* and family partnership.<sup>124</sup>

## V. CONCLUSION

The long time discriminatory treatment of the surviving wife's interest in joint tenancy properties ignored the realities of the normal family farm where husband and wife work equally hard to earn a living. They view themselves as partners in all aspects of the marriage, including the financial aspect, and their property is acquired by their mutual efforts.

Section 2040(c) serves in a limited capacity to remedy this discrimination. A careful analysis must still be made tracing the funds of each spouse to determine if a more desirable tax result may be attained for the widow under the "consideration furnished" test. The *Otte* or *Craig* remedies may be pursued if the fact situation is applicable and there is a large enough amount in controversy to make it feasible. Because of its elective character, section 2040(c) offers surviving joint tenants a

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120. 451 F. Supp. at 381. Note the similarity in the characterization of the wife's activities in these cases to the requirement of material participation. See notes 93-94 *supra*.

121. 31 T.C.M. (CCH) at 308.

122. *Id.*

123. See Example III, notes 81-84 *supra* and accompanying text.

124. *But see* notes 69-70 *supra*. The *Otte* theory may be used to recognize the wife's work as contribution in the severing of joint tenancies under § 2515(b).

greater range of options from which to select the most favorable tax consequences.

*S. Gene Schwarm*