Disclaimers of Joint Tenancy Interests Revisited

by

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DISCLAIMERS OF JOINT TENANCY INTERESTS REVISITED†

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† The question of joint tenancy disclaimers was considered in an earlier article. Uchtmann & Hartnell, *Qualified Disclaimers of Joint Tenancies: A Policy and Property Law Analysis*, 22 ARIZ. L. REV. 987 (1981). Subsequent to that writing, the Internal Revenue Service issued Proposed Regulations addressing the issue, and Congress passed the Economic Recovery Tax Act (ERTA) of 1981, necessitating a reconsideration of the issue. Portions of the new article, however, are drawn from the earlier article. For another discussion of joint tenancy disclaimers after the Proposed Regulations and ERTA, see Morris, *Disclaiming Joint Interests: One New Trick and No Longer a Dog*, 1983 ARIZ. S.L. J. 45. The authors express their appreciation to Ellen Kordik, Research Assistant in Agricultural Law, for her assistance in the final revision of the article.

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According to Internal Revenue Code section 2518, a qualified disclaimer is an irrevocable and unqualified refusal to accept an interest in property.[1] When a disclaimer is made, the federal estate and gift

1. I.R.C. § 2518 (1982) provides as follows:
§ 2518 (1954 Code).
(a) GENERAL RULE—For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.
(b) QUALIFIED DISCLAIMER DEFINED—For purposes of subsection (a), the term "qualified disclaimer" means 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 date 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.
(c) OTHER RULES—For purposes of subsection (a)—
(1) DISCLAIMER OF UNDIVIDED PORTION OF INTEREST—A disclaimer with respect to an undivided portion of an interest which meets the requirements of the preceding sentence shall be treated as a qualified disclaimer of such portion of the interest.
(2) POWERS—A power with respect to property shall be treated as an interest in such property.
(3) CERTAIN TRANSFERS TREATED AS DISCLAIMERS—A written transfer of the transferor's entire interest in the property—
(A) which meets requirements similar to the requirements of paragraph (2) and (3) of subsection (b), and
(B) which is to a person or persons who would have received the property had the transferor made a qualified disclaimer (within the meaning of subsection (b)), shall be treated as a qualified disclaimer.

taxes will apply as if the interest had never been transferred to the disclaimant.[2] The disclaimed interest therefore will not be included in the disclaimant's gross estate,[3] nor will the disclaimant be subject to federal gift tax for allowing the interest to pass to another party.[4]

The Internal Revenue Service (I.R.S.) has issued proposed regulations[5] for qualified disclaimers under Internal Revenue Code section 2518. These proposed regulations provide extensive explanations and examples describing the requirements for qualified disclaimers of a variety of interests.[6] The proposed regulations provide only a short statement of rules, however, concerning disclaimers of joint tenancy interests.[7] A revenue ruling and several letter rulings further elaborate the I.R.S. position on disclaimers of joint tenancy interests.[8] The I.R.S. treatment that results appears to be quite restrictive and inconsistent with disclaimer statutes enacted by Arizona, Illinois, and at least a dozen other states.[9]

This article explores the current position of the I.R.S. regarding the disclaimer of joint tenancy interests and the apparent rationale for that position. The article then critiques this position, arguing that its principal fault is reliance on an antiquated view of the nature of joint tenancy. An alternative premise is set forth, under which a less restrictive view of joint tenancy disclaimers is still compatible with the disclaimer statute. The article then considers whether the alternative premises and less restrictive view of joint tenancy disclaimers are preferred. The article concludes that a change in policy is needed and recommends language which should be incorporated in the final disclaimer regulations.

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2. *Id.* at § 2418(a).

3. Qualified Disclaimers, 45 Fed. Reg. 48,922 (1980) (to be codified at 26 C.F.R. pts. 20 & 25) (proposed July 22, 1980) [hereinafter cited as Proposed Treas. Reg.].

4. *Id.* An example will illustrate the concept of disclaimer. Assume that *A* has two heirs at law, *B* and *C*. *A* dies and bequeaths Blackacre to *B* who then gives Blackacre to *C*. Blackacre would be included in *A's* gross estate and be subject to federal estate tax if not shielded by available tax credits and deductions; the transfer of Blackacre from *B* to *C* would also be a taxable gift, if not shielded by available tax credits and deductions. The same double tax would occur if *B* bequeathed Blackacre to *C* at death, except the second tax would be federal estate tax rather than federal gift tax. In contrast, if *B* makes a qualified disclaimer of Blackacre, then Blackacre would be deemed to pass directly from *A* to his only other heir, *C*, and would be subject to federal estate or gift tax only once—in *A's* estate.

5. Proposed Treas. Reg., at § 25.2518-1(b).

6. The regulations deal with interests ranging from life insurance contracts to trusts. *Id.*

7. *Id.* at § 25.2518-2(d)(3). The exact language is reproduced in note 12 *infra*.

8. *See* notes 10-28 and accompanying text *infra*.

9. *See* text at notes 16-28 *infra*.

II. EVOLUTION AND RATIONALE OF THE I.R.S. POSITION ON JOINT TENANCY DISCLAIMERS

A. THE POSITION OF THE INTERNAL REVENUE SERVICE

In a series of letter rulings,[10] a revenue ruling,[11] and proposed regulations,[12] the position of the I.R.S. on the disclaimer of joint tenancy interests has been made clear. This position can be summarized in three points:

> (1) *Disclaimer by Donor Joint Tenant*—If only one of the joint tenants was responsible for creating the tenancy, that "donor" can never disclaim the survivorship interest, not even within nine months of the creation of the joint tenancy;[13]
>
> (2) *Irrevocable Joint Tenancies*—A surviving joint tenant, other than the joint tenant financially responsible for creating the joint tenancy, can disclaim the joint tenancy interest provided the disclaimer a) is with respect to the entire joint tenancy interest, b) is made within nine months of the creation of the tenancy, and c) meets the remaining requirements of Internal Revenue Code section 2518(b);[14]
>
> (3) *Revocable Joint Tenancies*—A qualified disclaimer of the survivorship interest in revocable joint tenancies, such as a revocable joint bank account, can be made by the surviving donee joint tenant. The disclaimer must be made within nine months of the death of the joint tenant who supplied the funds and must also meet other requirements of Internal Revenue code section 2518. The survivorship interest in

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10. I.R.S. Letter Ruls. 8208069, Nov. 25, 1981; 8201023, Sept. 30, 1981; 8151081, Sept. 25, 1981; 8140011, June 29, 1981; 8130069, Apr. 29, 1981; 8124118, Mar. 20, 1981; 7940062, July 10, 1979; 7933013, May 14, 1979; 7912049, Nov. 30, 1978; 7911005, Nov. 29, 1978; 7829008, Apr. 14, 1978.

11. Rev. Rul. 83-35, 1983-1 C.B. 234. *See* note 15 *infra*.

12. Proposed Treas. Reg., *supra* note 3, at § 25.2518-2(d)(3) deals with joint tenancies:

> To have a qualified disclaimer under section 2518 in the case of an interest in a joint tenancy (other than a revocable joint tenancy, such as a revocable joint bank account) or a tenancy by the entirety, the disclaimer
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> (i) Must be made with respect to the entire interest in property which is the subject of the tenancy,
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> (ii) Must be made within 9 months of the creation of the tenancy, and
>
> (iii) Must meet each of the remaining requirements enumerated in section 2518(b).

Id.

13. Rev. Rul. 83-35, 1983-1 C.B. 235. ("For purposes of section 2518 of the Code, a joint tenant cannot make a qualified disclaimer of property acquired by survivorship within nine months after creation of the tenancy, if the survivor originally created the joint tenancy, because the survivor was not a transferee of the interest renounced.") *Id.*

14. Proposed Treas. Reg., *supra* note 3, at § 25.2518-2(d)(3); Rev. Rul. 83-35, 1983-1 C.B. 235.

such revocable joint tenancies is the entire joint tenancy interest.[15]

B. THE PREMISE

The current position of the I.R.S. regarding disclaimer of joint tenancy interests appears to be based on a premise utilized in two private letter rulings. The first[16] involved corporate stock held in joint tenancy; the second[17] involved certificates of deposit and a bank account held in joint tenancy. In both rulings the surviving joint tenant spouse attempted to disclaim the entire joint property. The Service disallowed the disclaimers after examining Illinois law and finding that the joint tenants are seized, at the time of creation of the joint tenancy, of an undivided interest in the whole estate.[18]

According to the Service's 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.[19] Such views regarding the nature of joint tenancy are based upon the common law, under which a joint tenant was seized *per my et per tout*.[20] 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 tenant held an undivided share only.

The premise noted above provides a possible explanation for the

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15. Proposed Treas. Reg., *supra* note 3, at § 25.2518-2(d)(3), which requires a written disclaimer within nine months of the creation of the tenancy, expressly excludes revocable joint tenancies from its coverage. The exact language is reproduced in note 12 *supra*. Although the Internal Revenue Service has not yet formally adopted § 25.2518-2(d)(3), it has relied on it to justify several decisions. *See, e.g.*, I.R.S. Letter Rul. 8124118, Mar. 20, 1981 ("In the case of revocable joint tenancies, a disclaimer must be made within nine months of the date that such tenancy becomes irrevocable. . . . [T]he joint tenancy cash accounts became irrevocable at the decedent's death. Accordingly, the taxpayer's disclaimer of his deceased spouse's one-half interest in these joint accounts must be made within 9 months of the decedent's date of death."); I.R.S. Letter Rul. 8151081, Sept. 25, 1981 ("Under Nebraska law, any party to a joint account has a right to payment from the joint account without obtaining the prior consent of other joint tenants. . . . The right of a donor to withdraw the entire fund without consent of his joint tenant causes the transfer to be incomplete at the time of the creation of the joint account. . . . "[T]he joint tenancy bank accounts became irrevocable at the time of the decedent's death."); I.R.S. Letter Rul. 8208069, Nov. 25, 1981. *Cf.* I.R.S. Letter Rul. 7911005, Nov. 29, 1978 (acquiescence in establishment of joint bank account deemed to be acceptance).

16. I.R.S. Letter Rul. 7912049, Nov. 30, 1978.

17. I.R.S. Letter Rul. 7911005, Nov. 29, 1978.

18. Both rulings cited Partridge v. Beliner, 325 Ill. 253, 156 N.E. 352 (1927).

19. 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).

20. *See* 4A R. POWELL, REAL PROPERTY § 619 (1982).

requirement in the proposed regulations that "the disclaimer must be made with respect to the *entire* interest in property which is the subject of the tenancy."[21] The premise contemplates a joint tenant who holds the whole estate for certain purposes and who acquires no greater rights upon the death of another joint tenant. This emphasis on a joint tenant owning the whole is arguably consistent with a requirement that a joint tenant must disclaim the whole interest.

This premise also supports the position of the Service that a donor joint tenant can never disclaim the joint tenancy interest.[22] Since a donor joint tenant originally owns the whole estate and continues to own the whole estate even though the property is transferred into a joint tenancy, the donor joint tenant is not a transferee of any interest when the donee joint tenant dies. Since nothing is being transferred, there is nothing to disclaim.

Finally, the premise raises issues regarding the requirements of Internal Revenue Code section 2518(b)(2) (disclaimant must disclaim within nine months) and section 2518(b)(3) (disclaimant must not have accepted benefits). These issues will be separately discussed below.

C. THE APPARENT PROBLEM OF TIMELINESS

A qualified disclaimer must be made not later than nine months after the date on which the transfer creating the interest in such disclaimant is made or the day the disclaimant attains age twenty-one, if later.[23] If a surviving joint tenant attempts to disclaim any portion of the joint tenancy property interest after the death of his co-tenant and more than nine months after creation of the joint tenancy, one could argue that the nine month requirement is not met. According to the argument,[24] the surviving joint tenant was deemed to hold the whole estate from the moment the joint tenancy was created. Thus, no transfer took place at the death of the first joint tenant; rather, the rights of the decedent ceased to exist. Since no transfer took place at the death of the first joint tenant, the transfer must have taken place at the creation of the joint tenancy. Since the creation of the joint tenancy occurred more than nine months before the attempted disclaimer, the disclaimer is not timely under Internal Revenue Code section 2518(b)(2) and is, therefore, not a qualified disclaimer. This argument supports the requirement of the proposed

21. Proposed Treas. Reg., note 3 *supra* (emphasis added). The exact language is reproduced in note 12 *supra*.

22. Rev. Rul. 83-35, 1983-1 C.B. 235.

23. I.R.C. § 2518(b)(2). *See* note 1 *supra*.

24. *See, e.g.*, I.R.S. Letter Ruls. 7911005, Nov. 29, 1978; 7912049, Nov. 30, 1978; 814001, June 29, 1981.

regulations that the disclaimer "[m]ust be made within 9 months of the creation of the tenancy."[25]

D. The Apparent Problem of Prior Acceptance

For a disclaimer to be a qualified disclaimer, the disclaimant must "not . . . [have] accepted the interest or any of its benefits."[26] If a joint tenant accepts any benefits in property subject to a joint tenancy, one could argue that the prohibition regarding acceptance of benefits has been violated. According to this argument, when a joint tenancy is created, the joint tenants are seized of an undivided interest in the whole estate. Therefore, if one of the joint tenants accepts any benefits from any part or portion of the property subject to the joint tenancy, that joint tenant has accepted benefits from the whole of the jointly owned property. Since benefits have been accepted from the entire jointly owned property, an attempted disclaimer of any part of the jointly owned property will not be a qualified disclaimer. This argument of prior acceptance was the actual rationale used by the Service in disallowing the attempted disclaimer of several joint tenancy interests.[27]

III. A CRITIQUE OF THE I.R.S. POSITION

A. The Antiquated Premise

The fundamental flaw in the position of the Service regarding the qualified disclaimer of joint tenancy interests is the premise. The premise—that each joint tenant is seized of an undivided interest in the whole estate at the time the joint tenancy is created and no greater right accrues to the survivor by reason of the death of the other—is based upon shadowy and intricate common law property

25. Proposed Treas. Reg., note 3 *supra*. The exact language is reproduced in note 12 *supra*.

26. I.R.C. § 2518(b)(3). *See* note 1 *supra*.

27. I.R.S. Letter Ruls. 7940062, July 10, 1979 (acceptance based upon entering into a contract for sale); 7912049, Nov. 30, 1978 (accepting dividends from jointly-held corporate stock subsequent to its purchase and prior to disclaimer); 7911005, Nov. 29, 1978 (mere acquiescence in the establishment of joint tenancies of certificates of deposit and bank account); 7829008, Apr. 14, 1978 (proceeds of jointly-owned maturities and securities deposited into joint checking account from which household and normal living expenses were paid). *Cf.* I.R.S. Letter Ruls. 8208069, Nov. 25, 1981 (accured interest from joint savings bank certificate severed before decedent's death but paid into joint checking account after decedent's death and then used to pay joint income tax liability was not acceptance of the principal); 8143022, July 28, 1981 (paying utility bills on decedent's separate property did not constitute acceptance of the property; a relative of the taxpayer depositing a dividend check from community property stock into joint bank account did not constitute acceptance of the property); 8124118, Mar. 20, 1981 (living in community property house did not constitute acceptance if survivor paid fair market rental value for continued use of the house).

concepts and ancient fictions that bear little relationship to contemporary property law and reality.[28]

Intuitively, a student of the law must recognize that *A* has greater rights in Blackacre as the sole survivor of several joint tenants than he had in Blackacre as one of several joint tenants.[29] For example, as a sole owner *A* can sell all of Blackacre, but as a joint tenant *A* can only convey his fractional interest and that conveyance will transform the interest into a tenancy in common interest.[30] As the sole owner of Blackacre, *A* has the power to retain title to all of Blackacre. However, as a joint tenant, *A* has the power to retain title only to his fractional interest since any joint tenant can terminate the joint tenancy and create a tenancy in common at any time.[31] As a sole owner of Blackacre, *A* can keep all rents and profits, while as a joint tenant *A* must account to his co-tenants for any rents and profits exceeding his proportion.[32] As a sole owner, *A* can lease all of

28. Justice Black used similar language in describing the distinctions between joint tenancy and tenancy by the entirety in United States v. Jacobs, 306 U.S. 363, 367-71 (1939). More particularly, other courts have noted that "seizin" has no accurately defined technical meaning under state property law. *See* Ford v. Garner's Adm'r, 49 Ala. 601, 603 (1873).

29. The Supreme Court in Gwinn v. Commissioner, 287 U.S. 224, 228-29 (1932) recognized that the surviving joint tenant acquired greater property rights upon the death of the other tenants: "Although the property here involved was held under a joint tenancy with the right of survivorship created by the . . . transfer, the rights of the possible survivor were not then irrevocably fixed, since under the state laws the joint estate might have been terminated through voluntary conveyance by either party, through proceedings for partition, by an involuntary alienation under an execution [citations omitted]. The right to effect these changes in the estate was not terminated until the co-tenant's death. . . . The death became the generating source of definite accessions to the survivor's property rights." *Id.*

30. The act of one tenant in severing his or her proportional interest in property by alienation severs the joint tenancy; the right of survivorship is destroyed and the interest severed from the others becomes a tenancy in common interest. *See, e.g.*, Register v. Coleman, 130 Ariz. 9, 633 P.2d 418 (1981); Partridge v. Berliner, 325 Ill. 253, 156 N.E. 352 (1927); Williams v. Williams, 68 R.I. 233, 27 A.2d 176 (1942). If there are three or more joint tenants, a conveyance by one to a stranger will sever the joint tenancy only as to the share conveyed, which will be held by the grantee as a tenancy in common, while the other joint tenants continue to hold their interests in joint tenancy. *See, e.g.*, Hammond v.McArthur, 30 Cal. 2d 512, 183 P.2d 1 (1947); Giles v. Sheridan, 179 Neb. 257, 137 N.W.2d 828 (1965).

31. *See, e.g.*, Gwinn v. Commissioner, 287 U.S. 224 (1932); Nunn v. Keith, 289 Ala. 518, 268 So. 2d 792 (1972); Register v. Coleman, 130 Ariz. 9, 633 P.2d 418 (1981); Hammond v. McArthur, 30 Cal. 2d 512, 183 P.2d 1 (1947); Klajbor v. Klajbor, 406 Ill. 513, 94 N.E.2d 502 (1950).

32. *See, e.g.*, Graham v. Allen, 11 Ariz. App. 207, 463 P.2d 102 (1970); Swartzbaugh v. Sampson, 11 Cal. App. 2d 451, 54 P.2d 73 (1936); People v. Varel, 351 Ill. 96, 184 N.E. 209 (1932); Pistole v. Lanier, 214 Ky. 290, 283 S.W. 88 (1926); Kahnovsky v. Kahnovsky, 67 R.I. 208, 21 A. 2d 569 (1941). *But see* Black v. Black, 91 Cal. App. 2d 328, —, 204 P.2d 950, 953 (1949). ("[T]here is no equity in the claim that the mere fact of being named as joint tenant entitles one to share in the revenues produced on the land as the result of the labor, management and money of him who is in sole possession when the claim-

Blackacre and thereby transfer the right to existing possession to the lessee, but as a joint tenant *A* may only lease his aliquot portion of the property and the power to do so is subject to the rights of co-tenants to enjoy the property.[33] As a sole owner *A*, can mortgage all of Blackacre, but as a joint tenant *A* can technically encumber only his proportional interest and, realistically, may not be able to find a lender willing to accept such a mortgage.[34]

To the extent that *A*'s rights in Blackacre are greater as a sole owner than as a joint tenant, *A* has acquired something upon the death of the other joint tenants. This reality is inconsistent with the premise of the Internal Revenue Service noted above. Recognition that the *seisin per tout* doctrine lacks any contemporary significance is neither new nor novel. Justice Black did so in 1939 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.[35]

B. THE PREFERRED PREMISE

An alternative premise reflects contemporary property law

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ing cotenant has neither demanded possession, contributed to the expense of production nor previously made himself liable for possible losses.").

33. The majority view is that a joint tenant may not bind more than that tenant's aliquot portion of the joint estate: *See, e.g.*, Graham v. Allen, 11 Ariz. App. 207, 209, 463 P.2d 102, 104 (1970); Swartzbaugh v. Sampson, 11 Cal. App. 2d 451, 458, 54 P.2d 73, 77 (1936). In Reiger v. Bruce, 322 Ill. App. 689, 54 N.E.2d 770 (1944), a non-signing 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. *See also* National Gas & Oil Co. v. Rizer, 20 Ill. App. 2d 332, 335, 155 N.E.2d 848, 849 (1959).

34. There is conflicting authority as to whether a creditor's lien or mortgage actually severs a joint tenancy. The matter of severance and thus the outcome upon the death of the debtor-joint tenant depends upon whether the state follows a title, hybrid, or lien theory of mortgages. In a title jurisdiction, conveyance of a mortgage by the joint tenant will sever the tenancy and destroy the right of survivorship. In a lien jurisdiction, there is no severance of the joint interest, and the mortgagee holds only a lien which may "evaporate" if the mortgaging joint tenant is the first to die. Because of the disappearing lien problem in lien jurisdictions, a lender will be less likely to accept a mortgage or other security interest in joint tenancy property, and the ability to use the joint tenancy property as collateral essentially becomes unavailable to a joint tenant who does not desire to sever the joint tenancy and destroy the right of survivorship. For a discussion of creditors' and mortgagees' rights regarding joint tenancy property, *see* Uchtmann & Hartnell, *Qualified Disclaimer of Joint Tenancies: A Policy and Property Law Analysis*, 22 ARIZ. L. REV. 987, 1003-05 (1980) and Mattis, *Severance of Joint Tenancies by Mortgages: A Contextual Approach*, 1977 S. ILL. U. L. J. 27, 45-61.

35. United States v. Jacobs, 306 U.S. 363, 371 (1939).

much more accurately. Under this premise, the interest of a surviving joint tenant would be described as a combination of the *proportional interest* and the *accretive interest*. The proportional interest is that fractional property interest held by each joint tenant before the death of a particular joint tenant. The accretive interest is that portion of a joint tenancy interest which devolves upon a surviving joint tenant at the death of another joint tenant. For example, if *A* and *B* own Whiteacre as joint tenants, the proportional interest held by each would be one-half. If *A* dies, *B* becomes the sole owner of Whiteacre. *B*'s ownership is now composed of a one-half interest (the proportional interest) which *B* possessed from the moment the joint tenancy was created and another one-half interest (the accretive interest) which *B* now possesses because of the death of *A*.

To its credit, this alternative premise reflects the differing property rights enjoyed by a sole owner and a co-owner, such as the differing powers to retain title, to lease, and to mortgage.[36] The premise is also entirely consistent with the numerous state statutes which allow a surviving joint tenant to disclaim the accretive portion,[37] such as the Arizona statute:

> A joint tenant may renounce any interest in the joint tenancy property to the extent that he did not furnish the consideration therefore, within nine months after the date on which the joint tenant has actual knowledge that there has been a completed transfer to him, and in any case, on death of another joint tenant, the interest which the deceased joint tenant could have severed and to which the renouncing tenant succeeds by right of survivorship, within nine months after the surviving joint tenant has actual knowledge of the death.[38]

Interestingly, the alternative premise is also supported by the only court decision addressing the disclaimer issue.[39] Finally, the premise is not inconsistent with court holdings or dicta which state

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36. *See* notes 29-34 and accompanying text *supra*.

37. *E.g.*, ARK. STAT. ANN. § 62-3202(d) (Supp. 1983); CONN. GEN. STAT. ANN. § 45-300 (West Supp. 1984); HAWAII REV. STAT. § 560:2-801 (1976 & Supp. 1983); IDAHO CODE § 15-2-801(a) (1979); ME. REV. STAT. ANN. tit. 18A, § 2-801(c) (1981); MASS. GEN. LAWS ANN. ch. 191A, § 2 (West 1981); NEB. REV. STAT. § 30-2352(a) (1979); S.D. CODIFIED LAWS ANN. § 43-4-30.1 (1983); UTAH CODE ANN. § 75-2-802(1)(a) (1978); WASH. REV. CODE § 11.86.020 (1984). 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 209-10 (1978). (currently, Miss., N.H., and Vt. have no disclaimer statutes applicable to intestate interests).

38. ARIZ. REV. STAT. ANN. § 14-2801(c)(3) (Supp. 1984-85).

39. Ferguson v. United States, 81-1 T.C. 87,501, 87,504 (D. Ariz. 1981).

that joint tenants are seized *per my et per tout* (that each joint tenant holds the whole estate for purposes of tenure and survivorship, while for purposes of alienation and forfeiture each joint tenant holds an undivided share only).[40] Such court statements can be reconciled with the alternative premise by viewing the enactment of joint tenancy disclaimer statutes as effecting a substantive change in a state's property law[41] or, alternatively, by recognizing that for purposes of disclaimer analysis, the undivided fractional share attributed to a joint tenant for purposes of alienation and forfeiture is more significant than being seized of the whole estate for purposes of tenure and survivorship.[42]

C. Reconciling the Apparent Problem of Timeliness

Internal Revenue Code section 2518(b)(2) requires that a disclaimer be made within nine months of the transfer creating the interest in the disclaimant.[43] Under the alternative premise, which divides a joint tenancy interest into the proportional interest and the accretive interest, section 2518(b)(2) would require a joint tenant to disclaim his or her proportional interest within nine months of the creation of the joint tenancy since the proportional interest is transferred to the joint tenant at the time of the creation of the joint tenancy. As to the accretive interest, however, the surviving joint tenant would only need to disclaim before nine months had passed following the death of a joint tenant since the accretive interest would be transferred to the surviving joint tenant upon the death of the other joint tenant.[44]

The legislative history of section 2518 supports the application of the nine month rule described above. The conferees made it clear that the transfer that would begin the nine month period is the *taxable* transfer.[45] If *A* purchases Whiteacre and places title in *A* and *B* as joint tenants, *A* has made a taxable transfer of only half of the

40. 2 TIFFANY, REAL PROPERTY § 418 (3d ed. 1939). *See* Wilken v. Young, 144 Ind. 1, 41 N.E. 68, 69-70 (1895); *In re* Lorch's Estate, 33 N.Y.S.2d 157, 166 (Surr. Ct. 1941).

41. *See Ferguson*, 81-1 T.C. at 87,504. *See also* Morris, *Disclaiming Joint Interests: One New Trick and No Longer A Dog*, 1983 ARIZ. ST. L.J. 45.

42. Such an approach does not require an outright rejection of the older case law. Rather, it recommends a shifted emphasis on the fact that a joint tenant can convey or lose only his or her undivided interest over the traditional emphasis on the right of survivorship and being "seized of the whole."

43. *See* note 1 *supra*.

44. *See* text at notes 35-38 *supra*.

45. 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. 48,926 (1980) (to be codified at Treas. Reg. § 25.2518-2(c)(2)).

jointly owned property (the proportional interest).[46] At the time of the creation of the joint tenancy, *B* has nine months to disclaim *B*'s proportional interest. When *A* dies, he or she will be deemed to make a taxable transfer of the entire joint tenancy interest for which *A* supplied the consideration.[47] Thus, the nine month time limit for disclaiming the accretive portion begins to run.[48]

Based upon the analysis noted above, the requirement of the proposed regulation, that the disclaimer of any interest in a joint tenancy be made within nine months of the creation of the joint tenancy,[49] is a much stricter requirement than the statutory requirement. Under the proposed regulation, a disclaimer of the accretive interest would need to be made within nine months of the creation of the joint tenancy interest, while under the statute such a disclaimer could be made any time prior to the date nine months after death.

D. Reconciling the Apparent Problem of Prior Acceptance

Under the alternative premise the total interest of a surviving joint tenant is composed of his or her proportional interest and his or her accretive interest. Any attempt to determine whether the joint tenancy interest has been accepted in contravention of the requirements of Internal Revenue Code section 2518(b)(3), must *separately* consider the acceptance of the proportional interest and the accretive interest.

Several examples will illustrate this point. If *A* and *B* own stocks, a certificate of deposit, and Whiteacre as joint tenants and if the dividends, interest, and rent are paid to *A* and *B* and accepted by *A* and *B*, then *A* will have accepted income from *A*'s proportional interest and *B* will have accepted income from *B*'s proportional interest. Neither, however, will have accepted benefits from the accretive

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46. I.R.C. §§ 2511, 2512 (1982).

47. I.R.C. § 2040(a) (1982). However, in the case of a "qualified joint interest," only one-half of the value of the joint tenancy property is includible in the gross estate of the deceased joint tenant, without regard to which joint tenant paid for the property. In order to be a "qualified joint interest," the property must be held in joint tenancy by the decedent and his or her spouse at the time of the decedent's death; no other person may have an interest in the property. Further, the joint tenancy must have been created by the decedent, by the decedent's spouse, or by both. I.R.C. § 2040(b) (1982).

48. The value of *A's* interest in the joint tenancy property is included in *A's* estate. I.R.C. § 2040 (1982). The transfer of the estate, which is defined to include *A's* interest in the joint property, occurs upon *A's* death and is a taxable transfer. *Id.* at § 2001(a). Thus *B* should have nine months from the time of this taxable transfer to disclaim the accretive portion (*A's* interest), which is nine months from the date of *A's* death.

49. Proposed Treas. Reg., *supra* note 3, at § 25.2518-2(d)(3)(iii). The exact language is reproduced in note 12 *supra*.

interest. In contrast if all of the dividends, and interest, and rent is paid to *A* and accepted by *A* while *B* is still alive, or if all the dividends, interest, and rent is paid to *A* and accepted by *A* as surviving joint tenant, then *A* will have accepted the accretive interest as well as the proportional interest.

Alternatively, if *A* and *B* own Whiteacre as joint tenants and if each residing on Whiteacre or otherwise possesses Whiteacre, then the act of residing on the premises or otherwise possessing the property represents an acceptance of the proportional interest only.[50] *A* will have accepted the accretive interest as well as the proportional interest only if (1) while *B* is still alive, *A* either ousts *B* or otherwise acts inconsistently with *B*'s equal right to nonexclusive possession or if (2) after *B*'s death, *A* continues to live on the premise or otherwise possess the property thereby enjoying the right of exclusive possession inherent in the sole surviving joint tenant.

Based upon the above analysis, Internal Revenue Code section 2518(b)(3) does not require that acceptance of benefits from the proportional interest of a joint tenancy be viewed as acceptance of the accretive interest. The position of the I.R.S. that acceptance of any benefits in the joint tenancy interest constitutes acceptance of the entire joint tenancy interest is, therefore, more restrictive than the requirements of section 2518(b)(3).

No court has adjudicated the issue of a qualified disclaimer of a joint tenant's interest under Internal Revenue Code section 2518. However, *Ferguson v. United States*,[51] a 1981 tax case in which the decedent died before 1977, supports the above analysis. Following her husband's death, the wife's representative in *Ferguson* sought to disclaim under Internal Revenue Code section 2511[52] the accretive portion of several joint tenancies held by the couple. The court up-

50. In the case of a residence held in joint tenancy, each joint tenant lives in the residence and appears to accept the entire tenancy. However, as a joint tenant, *A* is also a co-owner and has an undivided right to non-exclusive possession of the whole residence. By living in the residence, *A* is acting in accordance with his property rights as co-owner and is not necessarily accepting the benefits of the accretive portion. Only after the death of the first tenant will the surviving tenant gain the right to exclusive possession of the residence.

51. 81-1 T.C. 87,501 (D. Ariz. 1981).

52. The qualified disclaimer provision of I.R.C. § 2518 (1982) applies with respect to transfers creating an interest in the disclaimant made after December 31, 1976. Prior to the enactment of § 2518, the federal consequences of disclaimer were governed by § 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." Treas. Reg. § 25.2511-1(c). *See* Frimmer, *Using Disclaimers in Post*

held the disclaimer because under Arizona law a joint tenant could disclaim the accretive portion.[53] According to the court, at common law each joint tenant owned the whole of a joint tenancy from its inception, and no interest would pass to the surviving tenant on the death of the other tenant.[54] Because state law changed this common law rule by allowing a surviving tenant to disclaim the accretive portion, the court stated that the tenancy became a tenancy in common as to the surviving tenant.[55] During the tenancy, the wife could then enjoy nonexclusive possession of the whole property and an equal share of the profits. In the court's opinion, this would constitute acceptance of one-half of the co-owned property but not acceptance of the accretive portion.[56] Upon the death of the first tenant, the surviving tenant could then disclaim the accretive portion of the joint tenancy.[57]

IV. THE SERVICE SHOULD ADOPT THE PREFERRED PREMISE AND LESS RESTRICTIVE REGULATIONS REGARDING JOINT TENANCY DISCLAIMERS

A. REFUSAL TO ADOPT THE PREFERRED PREMISE AND LESS RESTRICTIVE REGULATIONS PERPETUATES AN INEQUITY BETWEEN JOINT TENANCY AND TENANCY IN COMMON

1. The Disparate Tax Impact

If a tenant in common[58] bequests his interest in the property to the surviving tenant, the I.R.S. will allow the surviving tenant to disclaim the interest.[59] Because the common law recognizes each tenant

Mortem Estate Planning: 1976 Law Leaves Unresolved Issues, 48 J. TAX'N 322, 323-25 (1978).

53. Ferguson v. United States, 81-1 T.C. at 87,503-04.

54. *Id.*

55. *Id.* at 87,504.

56. *Id.*

57. *Id.*

58. "*Tenancy in Common.* A form of ownership whereby each tenant (i.e., owner) holds an undivided interest in property." BLACK'S LAW DICTIONARY 1314 (5th ed. 1979). For ease of discussion, this section will treat tenancies in common and joint tenancies as if each had only two tenants. The principles outlined in this section would apply equally to tenancies with more co-owners.

59. *See* Uchtmann & Hartnell, *supra* note 34, at 988. The I.R.S. has issued two letter rulings allowing disclaimers of community property interests which passed to the surviving spouse by will or intestacy. I.R.S. Letter Ruls. 8124118, Mar. 20, 1981 (will); 8051122, Sept. 26, 1980 (intestacy). In many ways, a community property interest is simply an interest in a tenancy in common between the spouses. *Compare* 4A R. POWELL, *supra* note 20, at § 625(1) ("Community property laws provide a system of property ownership for legally married persons in which spouses are treated as equal

in common as having only a fractional interest in the whole,[60] the I.R.S. maintains that each tenant does not accept any benefits of the other portion of the tenancy.[61] A surviving tenant in common can, therefore, disclaim an interest in the tenancy in common bequeathed him by the deceased co-tenant.[62] The I.R.S.. thus treats tenancies in common and joint tenancies disparately, allowing disclaimers in one case and not in the other.[63]

The impact of this disparate treatment is apparent in the following examples which examine the actual federal estate and gift tax consequences resulting from several hypothetical situations involving tenancy in common ownership and joint tenancy ownership. Since the marital deduction causes these consequences to differ if the surviving co-owner is the spouse of the deceased co-owner, examples using married co-owners, and then unmarried co-owners, have been selected. Also, since the issue of disclaiming joint tenancies can be especially important in agricultural estates, the following examples utilize farmland as the co-owned property. Other assumptions common to all the examples are 1) the total value of co-owned land is $2,000,000 and no other property is owned by the parties, 2) the per acre value of co-owned property does not change over time, 3) there are no estate administration expenses, debts, or other expenses to be deducted from the gross estate, 4) acquisition of all co-owned land resulted from the equal contribution of both co-owners, 5) the undivided interest of all co-owners are equal, 6) that all co-owners have the same heir at law, and 7) that the surviving co-owner dies intestate ten years later

EXAMPLE 1: Tenancy in Common Between Spouses: *A* and *B* are spouses owning farmland worth $2,000,000 as equal tenants in common. *A* dies in 1984 bequeathing *A*'s one-half undivided interest in farmland to *B*. Upon advice of legal counsel, *B* disclaims a fractional portion ($325,000 worth) of the bequest and accepts the remainder ($675,000) of the bequest. The disclaimed portion worth $325,000

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partners for the duration of the marriage. Each acquires a present, vested, undivided one-half interest in all community property obtained during the marital relation.") *with* note 58 *supra* and note 60 *infra* (defining a tenancy in common).

60. "The characteristic attribute of a tenancy in common is unity of possession. This means that each of the co-owners has a separate and distinct claim to some fraction of the ownership involved, but shares with his cotenants one single right to possession, which right applies to every part of the affected property." 4A R. POWELL, *supra* note 20, at § 601.

61. *See* Uchtmann & Hartnell, *supra* note 34, at 988.

62. *Id.*

63. *Compare* I.R.S. Letter Rul. 8124118, Mar. 20, 1981 (living in community property residence held not to constitute acceptance of benefits; disclaimer allowed under § 2518) *with* I.R.S. Letter Rul. 7829008, Apr. 14, 1978 (living in joint tenancy residence held to constitute acceptance of benefits; disclaimer not allowed under § 2511).

passes to heir. *B* dies ten years later and all *B*'s property, less the amount sold to pay *B*'s federal estate taxes, passes to heir. The tax impacts are as follows:

Estate Tax Paid By *A*'s Estate	$ 0[64]
Estate Tax Paid by *B*'s Estate	+441,750[65]
Combined Estate Tax Paid by A and B	$441,750

EXAMPLE 2: Joint Tenancy Between Spouses: *C* and *D* are spouses owning farmland worth $2,000,000 as joint tenants. C dies in 1984.

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64. I.R.C. § 2040(b)(1) (1982), applicable to joint tenancies between spouses, provides that one-half the value of a joint tenancy be included in the gross estate of a decedent joint tenant, regardless of the initial contributions. Thus *A's* gross estate will be $1 million.

Under I.R.C. § 2056(a) (1982), all property that will pass to the decedent's spouse is deducted from the decedent's gross estate, thereby escaping federal estate taxes. In the example given in the text, the marital deduction would be the amount not disclaimed by the surviving spouse, which equals $675,000. Thus *A's* taxable estate after the marital deduction would be $325,000.

The tentative tax on an estate valued between $250,000 and $500,000 as provided in I.R.C. § 2001(c)(1) is $70,800 plus 34% of the excess over $250,000. Thus for a $325,000 taxable estate, the tentative tax is $96,300.

The unified credit against estate tax of I.R.C. § 2010 (1982) is to be phased in over a six-year period. For decedents dying in 1984, the unified credit is $96,300. Thus the tax payable upon the death of spouse will be $0.

Gross Estate of *A*	$1,000,000
Marital Deduction	$ 675,000
Taxable Estate of *A*	$ 325,000
Tentative Tax	$ 96,300
1984 Unified Credit	$ 96,300
Tax Payable Upon Death of *A*	$ -0-

65. Upon the death of *B* ten years later, the gross estate of *B* which will pass to heir totals $1,675,000 (the original $1 million joint interest of *B* plus the $675,000 not disclaimed by *B*).

There will be no applicable marital deduction upon the death of *B*. The taxable estate remains at $1,675,000.

Under I.R.C. § 2001(c)(1) (1982), the tentative tax on an estate valued between $1.5 and $2 million is $555,800 plus 45% of the excess over $1.5 million. Thus, for a $1,675,000 taxable estate, the tentative tax would total $634,550.

The unified credit for decedents dying in 1987 or later will be $192,800. I.R.C. § 2020 (1982). Thus, the tax payable upon the death of *B* will be $441,750.

Gross Estate of *B*	$1,675,000
Marital Deduction	$ -0-
Taxable Estate of *B*	$1,675,000
Tentative Tax	$ 634,550
Unified Credit	$ 192,800
Tax Payable Upon Death of *B*	$ 441,750

66. *C's* gross estate under I.R.C. § 2040(b) (1982) will be one-half the value of the joint tenancy property or $1 million. Without disclaimer, *C's* entire interest of $1 million will be treated for tax purposes as if it passes to the surviving spouse.

However, under the marital deduction of I.R.C. § 2056(a) (1982) the entire $1 million interest will qualify for the marital deduction and escape federal estate tax.

Gross Estate of *C*	$1,000,000
Marital Deduction	$1,000,000
Taxable Estate	$ -0-
Tax Payable Upon Death of *C*	$ -0-

Legal counsel advises *D* not to attempt a disclaimer of the accretive portion of the joint tenancy interest because such an attempt would not be viewed by the I.R.S. as a qualified disclaimer. *D* dies ten years later and the farmland worth $2,000,000, less the amount sold to pay *D*'s estate taxes, passes to heir. The tax impacts are as follows:

Estate Tax Paid By *C*'s Estate	$ 0[66]
Estate Tax Paid By *D*'s Estate	588,000[67]
Combined Estate Tax Paid by *C* and *D*	$588,000

EXAMPLE 3: Tenancy in Common Between Non-Spouses: *E* and *F*, who are siblings, own farmland worth $2,000,000 as equal tenants in common. *E* dies in 1984 bequeathing *E*'s one-half undivided interest to *F*. Upon advice of counsel, *F* disclaims the entire bequest, whereupon *E*'s one-half undivided interest less the amount sold to pay death taxes, passes to heir. *F* dies ten years later and *F*'s one-half undivided interest, less the amount sold to pay *F*'s estate tax, passes to heir. The tax impacts are as follows:

Estate Tax Paid By *E*'s Estate	$249,500[68]
Estate Tax Paid by *F*'s Estate	153,000[69]
Combined Estate Tax Paid by *E* and *F*	$402,500

EXAMPLE 4: Joint Tenancy Between Non-Spouses: *G* and *H*, who are siblings, own farmland worth $200,000 as joint tenants. *G* dies in 1984. Legal counsel advises *H* not to attempt a disclaimer of the accretive portion of the joint tenancy interest because such an attempt would not be viewed by the I.R.S. service as a qualified disclaimer. The accretive interest, less the amount sold to pay *G*'s estate taxes,

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67. Upon the death of *D* ten years later, *D's* gross estate will total $2 million, the original value of the farmland. There is no allowable marital deduction, making the taxable estate worth $2 million.

The tentative tax of I.R.C. § 2001(c)(1) (1982) for a $2 million estate equals $780,000.

The unified credit for decedents dying in 1994 will be $192,800. I.R.C. § 2010 (1982). The tax payable upon the death of *D* will then be $588,000.

Gross Estate of *D*	$2,000,000
Marital Deduction	-0-
Taxable Estate of *D*	$2,000,000
Tentative Tax	$ 780,800
Unified Credit	$ 192,800
Tax Payable Upon Death of *D*	$ 588,000

68. The tentative tax on a $1 million gross estate is $345,800. I.R.C. § 2001(c)(1) (1982). The amount is then reduced by the $96,300 unified credit applicable for decedents dying in 1984. I.R.C. § 2010 (1982). The result is a net tax of $249,500.

69. The tentative tax on a $1 million gross estate is $345,800. I.R.C. § 2001(c)(1) (1982). This amount is then reduced by the $192,800 unified credit applicable in 1994. I.R.C. § 2010(a) (1982). The result is a net tax of $153,000.

70. The tax calculations here are the same as for the tenancy in common. *See* note 68 *supra*. Note that the taxes are paid by selling an equivalent portion of the estate. The first tenant's interest will therefore be reduced by $249,500 before passing to the surviving tenant.

devolves upon *H*. *H* dies ten years later and the remaining farmland, less the amount sold to pay *H*'s estate taxes, passes to heir. The tax impacts are as follows:

Estate Tax Paid By *G*'s Estate	$249,500[70]
Estate Tax Paid by *H*'s Estate	475,725[71]
Combined Estate Tax Paid by *G* and *H*	$725,225

Clearly, the disparate treatment of joint tenancy disclaimers compared to tenancy in common disclaimers results in joint tenants paying higher taxes—$146,250 assuming spouses own co-owned property worth $2,000,000 and $322,725 assuming non-spouses own co-owned property worth $2,000,000. Such disparate treatment might be justified if the estate held in joint tenancy provided greater benefits to the co-owner than the estate held in tenancy in common, but this is not the case.

2. *The Disparate Treatment Is Not Justified By Any Meaningful Difference Between Joint Tenancy and Tenancy In Common*

The ancient property concepts of joint tenancy and tenancy in common have evolved over time. The question is the extent to which early common law distinctions between tenants in common and joint tenants have disappeared over time. If these distinctions have disappeared, or at least become sufficiently blurred, then a policy that discriminates between a tenant in common and joint tenant regarding the right to disclaim an accretive undivided interest cannot be justified.

In many states such as, for example, Illinois, meaningful distinctions between a joint tenancy interest and a tenancy in common interest have disappeared.[72] In comparing such matters as liability to one's co-tenant for rents and profits,[73] the ability to acquire legal title

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71. The tentative tax on a $1,750,500 gross estate is $668,525. I.R.C. § 2001(c)(1) (1982). The amount is then reduced by the $192,800 unified credit applicable in 1994. I.R.C. § 2010 (1982). The result is a net tax of $475,725.

72. For a thorough analysis of this issue, *see* Uchtmann & Hartnell, *supra* note 34, at 996-1007. *See generally* 4A R. POWELL, *supra* note 20, at 599-619. Powell notes that:

> [I]n very many particulars, the relations of joint tenants inter se greatly resemble the relations between tenants in common. Both types of concurrent ownership are characterized by a "unity of possession"; by recurrent conflicting claims to economic benefits; by the presence of a fiduciary factor in the relations between co-owners; and by an ability to make, and to compel the making of, partition.

Id. at 617.

73. *See, e.g.*, ILL. REV. STAT. ch. 76, § 5 (1983) ("When one or more joint tenants, tenants in common or co-partners . . . shall take and use the profits or benefits thereof, in greater proportion than his or their interest, such person or persons . . . shall account therefore to his or their cotenants jointly or severally.").

from a co-tenant by adverse possession,[74] rights to improvements,[75] rights and duties to insure and repair and be reimbursed for payment of taxes or other changes,[76] effects of leases signed by only one co-owner,[77] treatment under statutes concerning partition and homestead exemptions,[78] and right to eject a co-tenant,[79] joint tenancy and tenancy in common are virtually identical.

The right of survivorship is the final non-tax distinguishing characteristic between joint tenancies and tenancies in common. This distinction has also disappeared in states such as Arizona and Illinois, however, since state legislatures have enabled the surviving joint tenant to disclaim the accretive portion derived through survivorship following the death of the other tenant.[80] As a practical matter, then, a joint tenancy is nothing more than a tenancy in common with a "built in will." This subtle difference does not justify the disparate treatment of these co-ownership forms under the disclaimer statute.

The I.R.S.'s discriminatory treatment of tenancies in common and joint tenancies also conflicts with several goals underlying the tax laws.[81] By its inconsistent position on disclaimers, the I.R.S. treats similarly situated taxpayers differently.[82] The I.R.S. also makes the form of the transaction, rather than its substance, control the tax consequences.[83] The result is a tax structure that taxpayers

74. *See* Dimmick v. Dimmick, 58 Cal. 2d 417, 374 P.2d 824, 24 Cal. Rptr. 856 (1962) (court applied the reasoning of tenancy in common cases in determining whether a joint tenant had proved adverse possession).

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

76. *See* Uchtmann & Hartnell, *supra* note 34, at 1001-02.

77. *See, e.g.*, 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). For a collection of cases on leases by cotenants, *see* Annot., 49 A.L.R.2d 797 (1956).

78. *E.g.*, ILL. REV. STAT. ch. 110, § 17-101 (1983) provides that any interested person may compel partition of lands held in joint tenancy or tenancy in common. ILL. REV. STAT. ch. 110, § 12-901 provides for a homestead exemption which is specifically inapplicable in any action between joint tenants or tenants in common.

79. *E.g.*, ILL. REV. STAT. ch. 110, § 6-122 (1983) provides that 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.

80. ILL. REV. STAT. ch. 110 1/2, § 2-7 (1983); ARIZ. REV. STAT. ANN. § 14-2801(c)(3) (West Supp. 1983-84). *See* notes 37 and 38 and accompanying text *supra*.

81. For a list of seven goals for the tax laws, *see* FEDERAL ESTATE AND GIFT TAXATION: RECOMMENDATIONS OF THE AMERICAN LAW INSTITUTE AND REPORTERS' STUDIES 78 (1969).

82. Such treatment conflicts with the goal "to treat taxpayers similarly situated in the same manner." *Id.*

83. Such treatment conflicts with the goal "to reduce, if not eliminate, the circumstances under which the form of a transfer will affect the tax result." *Id.*

will regard as unfair.[84]

The I.R.S. should allow disclaimers for both tenancies in common and joint tenancies. In both cases, whether the surviving spouse takes the decedent's interest by will or as the surviving joint tenant, the surviving spouse acquires no interest in the accretive portion until after the death of the first spouse. Only then will the surviving spouse gain an interest in, and accept the benefits of, the accretive portion.[85] The surviving spouse should, therefore, be able to disclaim the accretive portion at this point.

B. THE EXPANDED MARITAL DEDUCTION AND THE INCREASING UNIFIED CREDIT HAS NOT MADE THE ISSUE MOOT

One could argue that the Economic Recovery Tax Act of 1981 (ERTA)[86] alleviates any problems resulting from the I.R.S. position regarding joint tenancy disclaimer. According to this view, the unlimited marital deduction of ERTA[87] prevents the double taxation of spousal joint tenancies that would have occurred under the limited marital deduction of prior law.[88] The increases in the unified credit[89] also restrict any remaining unfairness to only the largest estates.

This argument fails to recognize several important points. First, some uncertainty regarding the scheduled increase in the unified credit exists. In times of large federal budget deficits, the theoretical possibility always exists that Congress will enact legislation freezing the unified credit at the 1984 level or at least would delay the scheduled increases. Furthermore, this argument assumes that all joint tenancies are between spouses. Some joint tenancies, however, are

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84. The correct goal is "to produce a tax structure that will be regarded as fair." *Id.*

85. *See* notes 50-57 and accompanying text *supra.*

86. Pub. L. No. 97-34, 95 Stat. 172 (codified as amended in scattered sections of 26 U.S.C.).

87. I.R.C. §§ 2056(a), 2523(a) (1982). Section 2056 allows all property that will pass to the decedent's spouse to be deducted from the decedent's gross estate, thereby escaping federal estate taxes. Section 2523 provides that a donor may deduct all gifts made to a spouse when computing taxable gifts.

88. With a limited marital deduction, the accretive portion would be taxed in the first tenant's gross estate before passing to the surviving tenant. The accretive portion would also be taxed in the surviving spouse's gross estate. *See* Uchtmann & Hartnell, *supra* note 34, at 990-91. *Cf.* text at notes 70 and 71 *supra* (Example 4 showing tax impact on nonspousal joint tenancy, in which no marital deduction is allowed).

89. I.R.C. § 2010(a), (b) (1982). The unified credit is to be phased in. For decedents dying in 1983, the credit will be $79,300 (sheltering $275,000); in 1984, the credit will be $96,300 (sheltering $325,000); in 1985, the credit will be $121,800 (sheltering $400,000); in 1986, the credit will be $155,800 (sheltering $500,000); in 1987 and thereafter, the credit will be $192,800 (sheltering $600,000). *See generally* Uchtmann & Fischer, *Agricultural Estate Planning and the Economic Recovery Tax Act of 1981*, 27 S.D.L. REV. 422 (1982).

nonspousal,[90] and these co-owners are not entitled to a marital deduction. Without the marital deduction, the joint tenancy will be subject to double taxation—the accretive portion will be included in the taxable estates of both tenants[91] as was the case in Example 4 above.

Even in spousal joint tenancies, however, the unlimited marital deduction does not remove all the inequities. The I.R.S. does not allow a disclaimer of the accretive portion, and the portion thus passes to the surviving spouse. If all assets are in joint tenancy, the couple therefore loses the benefit of the first spouse's unified credit[92] and incurs a higher effective tax rate because the value of the entire tenancy is taxed in the surviving joint tenant's gross estate.[93] The result is higher taxes as was the case in Example 2 above.

By not allowing the disclaimer, the I.R.S. also precludes the likelihood that a couple's children will be able to acquire title to farmland or other property earlier than the second parent's death. The surviving spouse will own the whole estate after the first spouse's death and, at least in the agricultural context,[94] is not likely to gift significant farmland to the children. The surviving spouse will want to gain the valuation benefits of section 2032A,[95] and because these benefits are available only for transfers at death,[96] the surviving spouse will have a strong incentive to retain the property. Early acquisition and development of the farmland by the couple's children is thus thwarted because the I.R.S. does not allow the surviving spouse to disclaim the accretive portion of the joint tenancy.

IV. SUMMARY AND RECOMMENDED REGULATIONS

A. A REVIEW OF THE SERVICE'S CURRENT POSITION AND ITS SHORTCOMINGS

Currently, the I.R.S. takes the position that a joint tenant responsible for creating a joint tenancy can never disclaim any part of

90. *See* notes 70 and 71 and accompanying text *supra*.

91. *Id.*

92. *See* notes 66 and 67 and accompanying text *supra*.

93. The progressive tax causes the tenancy to be taxed at a higher rate when taxed entirely in one gross estate rather than separately in each spouse's gross estate. *See* notes 66 and 67 and accompanying text *supra*.

94. The "use valuation of farmland under I.R.C. § 2032A (1982) provides that, for tax purposes, qualifying farmland transferred in a decedent's estate can be transferred at its income-generating value rather than its market value. However, the significant tax saving under § 2032A is not available for *inter vivos* transfers and thus provides a strong incentive to hold on to farmland until death.

95. I.R.C. § 2032A (1982).

96. *Id.*

the joint tenancy interest,[97] that for irrevocable joint tenancies a surviving joint tenant can only disclaim the entire joint tenancy interest and must do so within nine months of the creation of the joint tenancy,[98] and that for revocable joint tenancies (such as joint bank accounts) a surviving joint tenant can only disclaim the entire joint tenancy interest and must do so within nine months of the donor-joint tenant's death.[99] This very restrictive position of the Service regarding joint tenancy disclaimers is based upon the premise that under common law, a joint tenant was seized *per my et per tout* which 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 tenant held an undivided share only.[100] This premise contemplates a joint tenant who holds the whole estate for certain purposes and who acquires no greater rights upon the death of another joint tenant.

The premise that each joint tenant is seized of an undivided interest in the whole estate at the time of the creation of the joint tenancy and acquires no greater rights by reason of the death of other joint tenants is not consistent with contemporary property law.[101] In addition the premise results in the unjustified, disparate treatment in the taxation of tenancy in common interests and joint tenancy interests.[102]

An alternative premise is preferred because it more accurately reflects contemporary property law and resolves the disparate treatment of tenancy in common and joint tenancy disclaimers.[103] Under this premise, the interest of a surviving joint tenant would be described as a combination of the proportional interest and the accretive interest. The proportional interest is that fractional property interest held by each joint tenant before the death of a particular joint tenant. The accretive interest is that portion of a joint tenancy interest which devolves upon a surviving joint tenant at the death of another joint tenant. Under this premise and Internal Revenue Code section 2518 (regarding disclaimers), the rules regarding disclaimers of joint tenancy interests can be much less restrictive. The Service should recognize the alternative premise and modify its restrictive position.

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97. *See* note 13 and accompanying text *supra*.
98. *See* note 14 and accompanying text *supra*.
99. *See* note 15 and accompanying text *supra*.
100. *See* notes 16-20 and accompanying text *supra*.
101. *See* notes 28-35 and accompanying text *supra*.
102. *See* notes 58-85 and accompanying text *supra*.
103. *See* notes 36-42 and accompanying text *supra*.

B. RECOMMENDED DRAFT FOR THE DISCUSSION OF JOINT TENANCY IN FINAL REGULATIONS UNDER INTERNAL REVENUE CODE SECTION 2518

Disclaimers of Interests in Joint Tenancies

The rules for qualified disclaimers under section 2518 apply to interests in joint tenancies and tenancies by the entirety in the same manner as other property interests. The following rules recognize that a particular co-tenant's interest in jointly owned property includes his proportional interest (the non-accretive portion) which arises when the joint tenancy is created and the accretive interest which enures to his benefit when another joint tenant dies.

(1) *Disclaimers of the Entire Joint Tenancy Interest.* In general, to disclaim his interest in the entire joint tenancy (accretive and non-accretive portions), the disclaimant must:

(a) make the disclaimer with respect to the entire interest in property which is the subject of the tenancy;

(b) make the disclaimer within nine months of the creation of the tenancy (for purposes of this rule a revocable joint tenancy, such as a joint bank account, will not be deemed to be created until one of the joint tenants withdraws money deposited by another joint tenant);

(c) not have accepted any interest in the tenancy nor any of its benefits; and

(d) make a disclaimer which meets each of the remaining requirements of section 2518(b).

(2) *Disclaimers of the Accretive Portion.* In general, to disclaim the accretive portion of a joint tenancy, the disclaimant must:

(a) make the disclaimer with respect to the entire interest in property which is the subject of the right of survivorship;

(b) make the disclaimer before the point in time nine months after the death of the tenant whose portion would pass to the disclaimant;

(c) not have accepted the interest in the accretive portion nor any of its benefits; and

(d) make a disclaimer which meets each of the remaining requirements of section 2518(b).

(3) *Examples*: In general, a joint tenant who continues to live in a residence after the first joint tenant dies will be held to have accepted the benefits of the entire tenancy and, therefore, will not be able to disclaim the accretive portion. On the other hand, a joint tenant in investment real estate or personal property will be allowed to disclaim the accretive portion, provided the tenant has accepted no income from the accretive portion.

Example (1): *A* and *B* are married and live in a residence which they hold in joint tenancy. The couple also holds a tract of investment real estate and stocks and bonds in joint tenancy. *A* dies, and *B* continues to live in the residence but does not personally accept income or other benefits from the accretive portion of the investment real estate and stock and bonds. *B* executes a disclaimer of the accretive portion of the joint tenancies in the residence, investment real estate, and stocks and bonds. The disclaimer of the accretive portion of the joint tenancy in the residence will not be allowed under section 2518 because *B* will have accepted the benefits of the entire tenancy after *A*'s death by living in the residence. Provided the other requirements of section 2518 are satisfied, however, the disclaimer of the accretive portion of the joint tenancies in the investment real estate and the stocks and bonds will be effective.

Example (2): Assume the same facts as Example 1, except that *A* and *B* are not married. The results in (1) will remain the same.

Example (3): *A* and *B* create a joint tenancy in investment real estate. *A* dies several years later, and, thereafter, *B* executes a disclaimer of both the accretive portion of the tenancy and the non-accretive portion. The disclaimer of *B*'s interest in the non-accretive portion will not be allowed because he has accepted the benefits of that interest, and has made the disclaimer more than nine months after the creation of the tenancy. The disclaimer of the accretive portion, however, will be effective.