JOINT OWNERSHIP IN ESTATE PLANNING

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The term "joint ownership" is essentially ambiguous. It means many different things to different people, and if it is to be used with precision, it must be reasonably defined so that we all can be sure we are considering the same thing.

This ambiguity has been particularly notable in Ohio because of the consistent refusal of the Ohio courts to incorporate either joint tenancy or tenancy by the entireties into the state's legal system. The background for this refusal is indistinct, since joint tenancy has a long and honorable history in the common law, and no such aversion to the tenancy appeared in the laws of Massachusetts, New York, Connecticut or Virginia, the principal formative sources of Ohio law. Whatever the reason, Ohio courts have consistently held that the expression "joint tenancy" created or referred to a tenancy in common and that technically, joint tenancy is not recognized in either the real estate or personal property law of this state. As a result, it has become common practice for Ohio lawyers as well as laymen to refer to a tenancy in common as "joint tenancy" or as "joint ownership" of the particular property.

Of course such a statement is literally true in a non-technical sense, but it conflicts with the traditional legal concept that "joint" ownership is one marked by certain incidents, the principal one being the right of survivorship. The precise use of the word "joint" implies something more than common ownership, and at a minimum, that something has the quality of survivorship, namely that the surviving joint tenant takes title to the entire property and that this passes to his heirs. Perhaps a more accurate statement would be joint ownership with a right of survivorship, but the repetition of this phrase is awkward and unnecessary, provided one remembers that it is implicit in the simple words, "joint ownership."[1]

Use of this meaning also simplifies consideration of the fact that a number of different statements as to title are possible, each with varying legal significance. Thus a deed to A *and* B or the survivor is different from a deed to A *or* B and the survivor. Or the deed might read "to A and B as joint tenants, with the right of survivorship." It is obvious that each of these is susceptible to different interpretation. The first might be construed as creating a tenancy in common during

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1 Ohio decisions have stressed survivorship as the essential quality of joint ownership; *e.g.*, see Rhorbacker v. Citizens Bldg. Assn, 138 Ohio St. 273, 34 N.E.2d 751 (1941); Sage v. Flueck, 132 Ohio St. 377, 7 N.E.2d 802 (1937).

the joint lives of A and B, with a contingent remainder to the survivor, or with a vested remainder to each, subject to being divested by prior death.[2] The use of the word "or," on the other hand, conceivably might be deemed to give ownership in the entire property to each one, subject to being divested by appropriation of the property by the other. More likely, however, it would be held that this too created a tenancy in common with a contractual legal right in each to appropriate the portion of the other by either physical taking or by disposition to another. The addition of the words "as joint tenants" raises additional questions. It is probably impossible to forecast the reaction of a court to such clauses generally, and each case would stand upon its own bottom. In the absence of the claimed joint tenancy, the question always is, "what was the contract of the parties?"[3]

None of this needs to disturb us, however, if we are to limit our understanding of joint ownership to any type of multiple ownership in which survivorship is involved. In estate planning we are interested primarily in the ultimate devolution of the property and in the tax effect of its being held in a particular form. The broader definition is therefore entirely satisfactory for consideration of the use of joint ownership in this field.

Tenancy by the entireties probably requires some specific elaboration, however, because of the limited nature of the tenancy, and the fact that many Ohio people will have residences in Florida or elsewhere, in the names of a husband and wife. Tenancy by the entireties is a tenancy peculiar to husband and wife and depends upon the continuation of the marital relationship. It may be doubted whether it can actually be created in Ohio in all its aspects, since many of these affect persons other than the owners themselves. So far as I know, the question has never been specifically determined. But in Florida and in many other states, a deed to real estate which recites simply that the two grantees are husband and wife is sufficient in itself to establish a tenancy by the entirety, and to create an indefeasible right of survivorship which will be effective so long as the marital relationship continues. It is wise to remember this, since frequently what is involved is a family residence, a type of property where the use of survivorship is peculiarly appropriate. This is a factor to be considered by the estate planner in connection with the acquisition or retention of, or change in title to such property.

Joint ownership with a right of survivorship has been a very ap-

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[2] For the effect of "and" in connection with joint ownership of personal property, see Bauman v. Walter, 160 Ohio St. 273, 116 N.E.2d 435 (1953).

[3] Rhorbacker v. Bldg. Ass'n, *supra* note 1; Berberick v. Courtade, 137 Ohio St. 297, 28 N.E.2d 636 (1940).

pealing concept to many people. They have supposed that it is relatively simple, that it avoids probating wills and administering property in the probate court, that it narrows the basis for executors' commissions and attorneys' fees and hence is economical, and that it even saves taxes.

This long list of supposed advantages has caused many ill-advised persons to use joint ownership as an alleged complete answer to their estate planning problems. After examining these advantages, however, some are real, some are more apparent than real, and some are complete illusions. Let us analyze them in detail.

One very apparent, and very real, advantage is that funds which are held in a survivorship account are ordinarily made available to the survivor without delay. The one prerequisite is the securing of a tax release from the Ohio Tax Commission, usually through the local county auditor. The general experience has been that this release can be procured with a minimum of "red tape" and delay. This very frequently does operate to alleviate hardship in the first few days or weeks following the death of the joint owner. And it is often a matter of great mental relief to the survivor that funds are made available for immediate and necessary expenses.

Another advantage, just as intangible as the peace of mind which the availability of funds may give to a widow, is the benefit to family relationships which may result from the joint ownership of property. Very frequently such an arrangement is felt to be a vote of confidence on the part of the husband or a father, a token of regard and affection which is much appreciated by the wife or child. Although not measurable in dollars, it is precisely this sort of benefit which should be considered and given due weight by every estate planner.

In the tangible realm of tax saving, there is one limited area in which a genuine saving of Ohio inheritance tax can be effected where the joint owners are husband and wife, and the deceased owner contributed all of the property or funds. In this case, under the Ohio statute, jointly held property is deemed to belong one-half to the survivor and one-half to the deceased for inheritance tax purposes. This would mean a savings of from ½% to 2½% tax on the amount of the jointly owned property.

It should be noted that this situation could be equally disadvantageous if the joint owner who died first were the one who had contributed *nothing* to the joint property. In such a case, one-half would be taxable to that person's estate "unnecessarily," and this is a possibility that must be remembered.

Another advantage of joint ownership is a reduction in administrative costs. Again this is much more limited than is ordinarily believed by property owners. In the first place, it would result primarily in a reduction in executors' or administrators' commissions, and this would represent a 2% savings. Ordinarily joint ownership would have little effect upon legal expenses, since lawyers' fees are generally based upon property subject to being taxed by the federal authorities, rather than limited to the probate estate itself. And even as to the administrators' or executors' commissions, it would apply only to personal property and not to real property, since the latter is not subject to charge for such commissions in the usual situation.

In connection with real estate, title in joint names also confers no particular advantage either as to availability of income or the passage of title, when compared with a dispositive will provision. In Ohio any real estate not specifically given to the executors passes forthwith to the devisee or the heirs and they are entitled to the income from the date of death.[4] The only possible difference would be the freedom to pass title to the real estate in less than six months, the waiting period for a will contest.

A final advantage sometimes urged on behalf of joint ownership is the resulting lack of publicity as to the decedent's estate. Since jointly-owned property is not listed in the inventory, it seldom receives the publicity which probate property does. While this is perhaps true, jointly-owned property is required to be listed in the inheritance tax proceedings, which are likewise open to public inspection. Anyone who is actually interested in knowing the extent of the estate can ultimately find from this source what the assets were even though not administered in the ordinary probate proceedings. The importance of this advantage would appear questionable.

On the other side of the ledger, there appear a number of very substantial objections to the widespread use of joint ownership. These objections do not apply in all cases, and limited use of joint ownership would seem to be often advisable. But the disadvantages are very real and in some cases prohibitive.

The most important practical objection to the use of joint ownership lies in the realm of federal estate taxation. The federal statute provides that all property held jointly by a decedent and another person or persons, with right of survivorship, is to be taxed in the decedent's estate, "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 or full consideration in money or in money's worth."[5] In effect this amounts to a rebuttable presumption that any property held

[4] Overturf v. Dugan, 29 Ohio St. 230 (1876).

[5] Int. Rev. Code of 1954, § 2040.

in joint ownership is taxable in the estate of the first joint owner to die. The burden is upon the surviving owner to prove two things, namely, that he or she contributed to the fund, and that the contribution made was not money or property which originated with the decedent.

This burden of proof usually poses extreme difficulties. At best, it means proving sources of substantial income to the surviving owner and some showing that this individual income could have been invested in the particular fund or property in question; also it might mean the necessity of identifying each deposit in a joint bank account or the tracing of specific funds entering into the purchase of property.

The courts have been divided as to the precise requirements for rebuttal of the presumption in these cases. Some courts have permitted a fairly general showing of income or earnings of the surviving owner, which for equitable reasons could be considered as invested in particular property held in joint ownership.[6] Other courts have denied the contribution of a surviving owner in the absence of clear evidence as to funds or property belonging individually to that owner, which were contributed to the jointly-owned fund in specific amounts and on specific dates.[7]

Inevitably, the commingling in joint ownership of funds or property belonging to separate individuals involves a serious tax hazard. The only sure answer would be to keep meticulous records of the contributions and their source and if possible to document these with outside information which could be verified by a revenue agent. The keeping of this sort of records is most unlikely and the best solution in the average case is for the estate planner to recommend separation of the property and continuation of its ownership in individual rather than joint names. This of course could include tenancies in common in real estate or other property.

This estate tax danger is probably the most concrete disadvantage inhering in joint ownership. The most general disadvantage, however, is that uninformed individuals have regarded joint ownership as a sound means of estate planning. One is continually confronted with situations in which people have placed their property in joint names and then sat back in the certainty that they had done all that is

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[6] Richardson, v. Helvering, 80 F.2d 548, 17 Am. Fed. Tax R. 76, 35-2 U.S.T.C. ¶ 9644 (D.C. Cir. 1935); Thompson Estate, 7 CCH Tax Ct. Mem. 142, 17 P-H Tax Ct. Mem. 118 (1948). Louis Bendet Estate, 5 CCH Tax Ct. Mem. 302, 15 P-H Tax Ct. Mem. 300 (1946).

[7] Heidt Estate, 8 TC 969, *aff'd per curiam*, 170 F.2d 1021, 37 Am. Fed. Tax R. 590, 48-2 U.S.T.C. ¶ 10,646 (9th Cir. 1948). Thomas R. Tenant Estate, 8 CCH Tax Ct. Mem. 143, 18 P-H Tax Ct. Mem. 135 (1949). See also the interesting opinion of Judge Clark in Fox v. Rothensies, 115 F.2d 42 (2d Cir. 1940).

necessary to conserve their estate and minimize otherwise oppressive tax burdens. Unfortunately their families often find that what has been done is perhaps the most expensive way of handling the property which could have been devised, and that by commingling funds there has been created an even heavier tax burden than otherwise would have existed.

Apart from the tax aspects of the matter, there is often a practical disadvantage in joint ownership. Where domestic difficulties arise and joint tenants become dissatisfied and unhappy with each other, there is always the possibility of substantial disagreement and discord in connection with joint ownership of property. The way is often open, by use of the term "or" or "either" in the creation of the joint ownership, for the owner who has not contributed anything to the property to appropriate it for himself, and this can intensify already existing discord. This again is one of those possibilities unrelated to the financial aspects of estate planning which, nevertheless, must be of primary interest to any good planner.

This brief discussion would not be complete without consideration of possible alternatives to joint ownership which could provide at least the same limited advantages. These alternatives are quite obviously in the form of transfers, either irrevocable, revocable, or effective for a limited term.

Irrevocable transfers clearly answer even more effectively the need for funds at death, if they are drawn to permit distribution as required at that time. There need be no delay or "red tape" of any nature, other than a written demand for the payment of funds, if cash is available in a personal account, or is held in trust for the purpose. Such a trust as a rule also provides for reduction of Ohio inheritance tax, with respect, not to one-half, but to the entire amount placed in trust. To this extent it is even more advantageous than the jointly-held property. Also such a transfer is equally effective to reduce administration costs, although if it is made in trust, the costs of trust administration cannot be overlooked as an offsetting factor. The other two suggested advantages, that of psychological benefit as an expression of esteem and affection, and of providing an unpublicized disposition of one's estate, are both probably better served by irrevocable gifts.

The one great disadvantage incurred in such a transfer is of course that from the date of the gift, the donor no longer has any power to appropriate the property transferred and use it for his own purposes. He has divorced himself completely from such control. This disadvantage in many instances is much more substantial than any disadvantage inhering in the joint ownership status.

Revocable transfers, however, can effectively do everything that the joint ownership can do, with one exception. Revocable transfers will *not* eliminate any part of the burden of the Ohio inheritance tax. But they do provide available funds, reduce administration costs, do not contribute to publicity, and afford the same psychological benefits in most cases. And of course, since they are revocable, the donor has not terminated his own power to make use of the funds or property until his death if he needs or desires to do so.

As a practical suggestion, it might be advantageous to place one-half of the property in an irrevocable trust which would thus have the benefit of all of the joint ownership advantages, including the Ohio inheritance tax benefit, and the other one-half in a revocable trust which would provide all the rest of the joint ownership advantages. The retention of the power to revoke as to the one-half might be of sufficient value to overcome the disadvantage as to the irrevocable gift in such a case.

A final alternative would be to set up ten-year trusts for the benefit of adult children to give them income during their lives. By careful tailoring, a trust for adult children might provide for accumulation of income during a ten-year period or until the death of the grantor, whichever first occurred, and thus provide for funds at the time of the grantor's death for the children. Also, if the grantor of the trust used his own principal to live on during this period, instead of the income which he otherwise would have received from the trust property placed in trust, he will have reduced his estate for the purpose of inheritance taxes by the amount of this income. This would give about the same Ohio inheritance tax advantage as joint ownership. This sort of arrangement would be most effective, of course, in circumstances where income tax considerations were a substantial factor.

Altogether, it appears that joint ownership of property is neither an important nor always an effective estate planning tool. Yet it cannot be entirely dismissed. In cases where no question of contribution by the surviving owner is involved, little harm can be done by joint ownership. Such ownership between husband and wife, assuming this matter of contribution not to be present, results in a definite Ohio inheritance tax savings and some administration cost savings. And with respect to the relatively small amount of cash required for immediate needs at the time of death, it likewise has value. On the other hand, revocable trusts or a combination of revocable and irrevocable trusts would appear to be even better and would accomplish substantially the same result in most cases, at least where substantial amounts are involved.