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JOINT TENANCIES AND TENANCIES BY THE ENTIRETY IN MICHIGAN—FEDERAL GIFT TAX CONSIDERATIONS

*Douglas A. Kahn**

THE establishment of joint tenancy¹ ownership of property, or the termination of such a tenancy, may have federal gift tax consequences to the co-owners of the property. Consequently, the gift tax is a factor to be weighed before embarking on either of these ventures. The gift tax consequences are determined by the nature of the property rights enjoyed by the joint tenants under the controlling state property law, and accordingly it is desirable, where Michigan property law is applicable, to consider the Michigan law and the significance of that law to the operation of the gift tax. However, before discussing Michigan property law, it may be helpful to review briefly the general principles controlling the applicability of federal gift taxes to joint tenancy interests.²

I. GIFT TAXATION OF INTERESTS IN JOINT TENANCIES

The creation of a joint tenancy constitutes a gift from the party who provided a disproportionate amount of the consideration for the jointly held property, except, as noted below, in some instances where real property is held jointly by a husband and wife. The value of that gift turns upon (1) whether a joint tenant acting alone can sever the joint tenancy as to his interest, and (2) the respective rights of the joint tenants to share in the income from the property.³

If a donor creates a joint tenancy between himself and another person or persons, and if the nature of the tenancy is that any joint tenant, without the consent of the other tenants, may terminate the survivorship rights of the other tenants in his interest, then the value of the gift is determined in the same manner as where the joint

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1. As used herein, the term "joint tenancy" refers to a co-ownership of property where the interest of a co-owner passes upon his death to the surviving co-owner or co-owners by operation of law. The term does not, therefore, include tenancies in common where there are no rights of survivorship, but may encompass tenancies by entirety.

2. For a fuller discussion of the gift tax issues concerning jointly-held property, see PROBLEMS OF FEDERAL TAXATION OF ESTATES—GIFTS—TRUSTS 127-32 (1966) (study outline published by the American Bar Association); C. LOWNDES & R. KRAMER, FEDERAL ESTATE AND GIFT TAXES 656-70 (2d ed. 1962).

3. Treas. Reg. § 25.2515-2(b) (1958).

interests in the property are held in a tenancy in common, that is, the survivorship rights of the joint tenants are ignored in valuing their respective interests. Thus, the value of the gift is the difference between the total value of the consideration provided by the donor and the value of the donor's percentage interest in the property as a co-tenant.⁴

Where a donor creates a joint tenancy in property between himself and one or more other persons, and the survivorship rights of the joint tenants cannot be terminated by one tenant acting without the consent of the others, then the value of the gift is determined in accordance with an actuarial computation based upon the respective life expectancies of the tenants.⁵

The following hypothetical example illustrates the operation of the gift tax: In 1956, John Donor was forty-five years of age, and his wife Mary was thirty-four years of age. In 1956, John purchased Winall, Inc., common stock for \$100,000 and had the stock transferred to himself and Mary as joint tenants. Under local law, John and Mary are entitled as joint tenants to share equally in the income from the stock. If either John or Mary could terminate the joint tenancy without the other's consent (for example, by selling his or her interest or by partition), then John made a gift of \$50,000 to Mary—that is, one-half of the value of the stock, since Mary received a one-half interest.⁶ However, if under local law neither John nor Mary, acting alone, could terminate the joint tenancy, then the valuation of their respective interests in the property must account for the possibility that each tenant might obtain the interest of the other by survivorship. Since Mary is younger than John and therefore has greater prospects of survival, her interest is more valuable than John's. Using Table IX of Internal Revenue Service Publica-

4. Treas. Reg. §§ 25.2511-1(h)(5) (1958); 25.2515-2(b)(1) (1958).

5. Treas. Reg. § 25.2515-2(c) (1958).

6. Of course, this gift may permit a marital deduction allowance of \$25,000 (INT. REV. CODE OF 1954, § 2523), a \$3,000 exclusion [INT. REV. CODE OF 1954, § 2503(b)], and a deduction of any unused lifetime exemption of donor (INT. REV. CODE OF 1954, § 2521). In practice, these deductions and exclusions must always be considered, but since they do not affect the questions here considered, they are not taken into account in determining the tax consequences of hypothetical situations set forth in this article.

The value of a fractional interest in real property may be less than the product of the fraction times the value of the property. In some circumstances, the value may be discounted because of the depressed value of a minority fractional interest; however, it is not likely that a discount will be granted unless the taxpayer can prove through expert testimony that it is appropriate. Compare *Estate of Campanari*, 5 T.C. 488 (1945), *non acquiescence*, 1947-1 CUM. BULL. 5, with *Adelaide McColgan*, 10 B.T.A. 958 (1928).

tion No. 11, "Actuarial Values for Estate and Gift Tax,"⁷ the actuarially determined factor for computing John's interest in the stock is .40111; therefore, the value of John's interest is \$100,000 times .40111, or \$40,111, and the amount of the gift to Mary is accordingly \$59,889.

Under the laws of several states, where a husband and wife own property as tenants by the entirety, the husband is entitled to all of the income from the property. Where applicable, this right of the husband must be taken into account in valuing the interest of the husband and of his wife.⁸

In certain circumstances, the creation of joint interests in property by a donor will not have any immediate gift tax consequences. If the transfer may be revoked by the donor without the consent of an adverse party, there is no completed gift for gift tax purposes, and the donor does not sustain any gift tax liability.⁹ For example, the creation of a joint bank account will not usually have any immediate gift tax consequences because the donor will customarily have the power to withdraw all of the funds from the account and thereby revoke the gift.¹⁰ Similarly, if John purchases a United States Savings Bond registered as payable to "John or Mary," there is no gift to Mary at the time of purchase.¹¹

Perhaps the most important exemption from gift tax liability for creating joint interests in property is set forth in Internal Revenue Code (Code) section 2515. Section 2515 permits a donor to elect whether real property acquired in the names of the donor and his or her spouse as tenants by the entirety shall be treated as a gift. For purposes of section 2515, a joint tenancy of a husband and wife with rights of survivorship is deemed to be a tenancy by entirety. This election applies only to (1) real property acquired as tenants by entirety after the year 1954; (2) improvements made after the year 1954 to real property held by the entirety; and (3) payments made after the year 1954 in reduction of an indebtedness on real property held by the entirety. It should be emphasized that this election is *not* applicable to personal property held by the entirety.

Where section 2515 is applicable, a donor must take affirmative

7. The tables included in IRS Publication No. 11 are reproduced in P-H FED. TAXES, ESTATE & GIFT TAXES, ¶ 120,319.1-19.

8. Treas. Reg. § 25.2515-2(c) (1958). See also ACTUARIAL VALUES FOR ESTATE AND GIFT TAX (IRS Publication No. 11) ch. 6, p. 27 (1959).

9. *Burnet v. Guggenheim*, 288 U.S. 280 (1933).

10. Treas. Reg. § 25.2511-1(h)(4) (1958).

11. *Id.*

action if he wishes the creation of a joint interest to be treated as a gift. If the donor takes no action, the transfer will not be so treated. In order to elect gift tax coverage, the donor must file a gift tax return for the calendar year in question, and he must declare the transfer as a gift on the return.¹²

The termination of a joint tenancy or tenancy by entirety may also have gift tax consequences. A joint tenancy or tenancy by entirety is terminated when, *inter alia*, (1) the property so held is sold, exchanged or otherwise disposed of,¹³ or (2) the tenants become tenants in common in the property. If there is an increase in indebtedness on the property, there is a termination of the tenancy to the extent of the increase;¹⁴ however, such an increase will not cause a termination to the extent that additions are made to the jointly held property within a reasonable period of time after such increase.

The gift tax consequences of a termination are dependent upon the manner of division of the property (or the division of the proceeds from the disposition thereof) among the joint tenants, and upon whether the creation of the joint tenancy had constituted a gift from one of the joint tenants to the others. If John created a joint interest in property between himself and Mary, and if the transfer were not deemed a gift for gift tax purposes, either because the transfer was incomplete or because of the operation of Code section 2515, then, upon termination of the joint tenancy, the property or the proceeds therefrom should be divided between John and Mary according to the percentage of contribution each tenant made, and a distribution to John of an interest or amount of a lesser value than the value of John's percentage of the property (as determined by reference to John's percentage of contribution) will constitute a gift of the difference by John to Mary.¹⁵ The computation of the percentage of consideration provided by the tenants can become complicated if the consideration was given at several different dates, since in such event the appreciation in value of the property between contribution dates must be treated as additional consideration provided by the parties according to their percentage of contribution at the time such appreciation occurred.¹⁶

12. INT. REV. CODE OF 1954, § 2515(c).

13. In some circumstances, where a husband and wife own real estate as joint tenants or tenants by entirety and either exchange that real estate for other realty similarly held or sell the real estate and purchase other realty similarly held, there may be no gift tax consequences, provided that the requisites set forth in Treas. Reg. § 25.2515-1(d)(2)(ii) (1958) are satisfied.

14. Treas. Reg. § 25.2515-1(d)(2)(i) (1958).

15. See Treas. Reg. § 25.2515-3 (1958).

16. Treas. Reg. § 25.2515-1(c)(2) (1958).

For example, if in 1958 John and his wife Mary purchased Blackacre for \$40,000, John providing \$30,000 of the consideration and Mary providing the balance, and if Blackacre were held by John and Mary as tenants by the entirety, and if John did not elect to treat his disproportionate contribution as a gift by filing a gift tax return, and if in 1966 the tenants sold Blackacre for \$60,000 and divided the proceeds equally, then John will have made a gift of \$15,000 to Mary in the year 1966; that is, John provided three-fourths of the consideration, and was therefore entitled to receive three-fourths of the proceeds.

If John created a joint tenancy or tenancy by entirety in property between himself and Mary (or if a third party transferred property to John and Mary as joint tenants or as tenants by the entirety), and if the transfer were deemed a gift for gift tax purposes, then upon termination of the joint tenancy or tenancy by entirety, each co-owner would be entitled to receive the equivalent value of his or her property interest, valued at the date of termination, and if John were to receive an amount less than the value of his property interest, he would be deemed to have made a gift to Mary.¹⁷ The value of a co-owner's property interest turns upon whether or not the co-owner, acting alone, could terminate the tenancy as to his interest; if so, the value of the co-owner's interest is the value of his percentage interest in the property without regard to survivorship rights. But, if the co-owner were powerless to terminate the tenancy as to his interest without the consent of the other tenants, then the value of the co-owner's percentage interest must be determined according to an actuarial valuation of the survivorship interests of the tenants at the date of termination of the tenancy; whether or not the tenants were entitled to share equally in the income from the property must also be taken into account.

The following hypothetical example illustrates the operation of the gift tax on the termination of a joint tenancy or tenancy by the entirety: In 1956, John Donor was forty-five years of age, and his wife Mary was thirty-four years of age. In 1956, John purchased Winall, Inc. common stock in the amount of \$100,000 and had the stock transferred to himself and Mary as joint tenants. In 1966, John and Mary sold the Winall stock for \$200,000 and divided the proceeds equally between them. Under local law, neither John nor Mary could terminate the joint tenancy without the other's consent, and they were entitled to share equally in the income from the

17. See Treas. Reg. § 25.2515-4(b) (1958).

stock. As noted above, John made a gift of \$59,899 to Mary when the joint tenancy was created. The sale of the stock in 1966 constituted a termination of the joint tenancy. At that date, John was fifty-five years of age and Mary was forty-four. Using the actuarial tables provided by the Internal Revenue Service, John's factor at the date of termination was .37258, and consequently the value of his interest in the stock was \$74,516. Since John actually received \$100,000 as his share of the proceeds of sale, Mary is deemed to have made a gift of \$25,484 to John in 1966.¹⁸

In many instances where real property is held jointly by a husband and wife, a portion of the consideration paid for the property may not be deemed a gift because of Code section 2515, and a portion of the consideration may constitute a gift. In that event, separate computations must be made.¹⁹

In sum, whether the creation or termination of a joint tenancy or tenancy by entirety has gift tax consequences depends upon the value of the property received by each party, and the value of the property is in turn dependent upon whether under local law a co-tenant unilaterally can terminate the survivorship rights in his interest and whether the co-tenants are entitled to share proportionately in the income from the property.

With this background in focus, it is appropriate to turn to Michigan property law.

II. MICHIGAN PROPERTY LAW APPLICABLE TO JOINT TENANCIES AND TENANCIES BY THE ENTIRETY AND FEDERAL GIFT TAX CONSIDERATIONS IN CREATING OR TERMINATING SUCH TENANCIES

Joint bank accounts constitute a separate and unique subject, and the analysis of bank accounts is not within the scope of this article.²⁰

A. Joint Tenancies

The estate of joint tenancy exists in Michigan²¹ both as to real

18. *Id.* Of course, if under local law only John were entitled to income from the stock, then the valuation of their respective interests should reflect that factor also. Treas. Reg. § 25.2515-2(c) (1958).

19. Treas. Reg. § 25.2515-4(c) & (d) (1958) describe the method of making that computation.

20. For a comprehensive analysis of that subject, see Wellman, *The Joint and Survivor Account in Michigan—Progress Through Confusion*, 63 MICH. L. REV. 629 (1965).

21. MICH. COMP. LAWS § 554.43 (1948); see *Rendle v. Wiemeyer*, 374 Mich. 30, 43,

property²² and as to personalty.²³ However, the estate of joint tenancy is not favored, and with certain specific exceptions, a deed or devise to two or more persons which does not clearly demonstrate the grantor's or testator's desire that the property be held in a joint tenancy will create an estate in common.²⁴ While Michigan Compiled Laws section 554.44 requires that a grant or devise expressly declare that the estate is a joint tenancy in order to be effective for that purpose, the Michigan courts have relaxed that rule slightly and permitted the estate to be proved by other language which clearly and convincingly demonstrates the intention of the transferor that the estate created be a joint tenancy.²⁵

Under Michigan law, a joint tenant can convey his interest to a third party and thereby terminate the joint tenancy as to his interest. The conveyance severs the interest of the assigning tenant, and his assignee holds that interest as a tenant in common.²⁶ Also, any joint tenant may compel partition.²⁷ However, where a deed or other instrument creating a joint ownership of property expressly provides a right of survivorship, or provides for ultimate distribution to a survivor, then the Michigan Supreme Court has held that the survivorship rights of the co-owners cannot be terminated by any tenant without the consent of the others. Thus, provisions such as "joint tenants with right of survivorship, and not as tenants in common,"²⁸ "joint tenants and not tenants in common, and to the survivor thereof,"²⁹ "to [A] and [B], or the survivor of them,"³⁰ or

131 N.W.2d 45, 51 (1964); *Taylor v. Taylor*, 310 Mich. 541, 552, 17 N.W.2d 745, 749 (1945); *Kemp v. Sutton*, 233 Mich. 249, 258, 206 N.W. 366, 369 (1925).

22. *Smith v. Smith*, 290 Mich. 143, 152-54, 287 N.W. 411, 414-15 (1939).

23. *Block v. Schmidt*, 296 Mich. 610, 619, 296 N.W. 698, 701-02 (1941); *Lober v. Dorgan*, 215 Mich. 62, 183 N.W. 942 (1921). The earlier decision of *Ludwig v. Bruner*, 203 Mich. 556, 169 N.W. 890 (1918), which declared that there can be no joint tenancy in personalty, has apparently been repudiated by the Michigan Supreme Court.

24. MICH. COMP. LAWS § 554.44 (1948). See *Smith v. Smith*, 290 Mich. 143, 287 N.W. 411 (1939).

MICH. COMP. LAWS § 554.45 (1948) excludes from the above provision, deeds, or grants to a husband and wife, or to executors, or made in trust. It also excludes mortgages.

25. *Rendle v. Wiemeyer*, 374 Mich. 30, 131 N.W.2d 45 (1964); *Kemp v. Sutton*, 233 Mich. 249, 206 N.W. 366 (1925). But see *Taylor v. Taylor*, 310 Mich. 541, 17 N.W.2d 745 (1945) (holding that the use of the word "jointly" in an introductory clause of a deed did not demonstrate that the grantor intended to create a joint tenancy).

26. *Rendle v. Wiemeyer*, 374 Mich. 30, 131 N.W.2d 45 (1964); *Smith v. Smith*, 290 Mich. 143, 155-56, 287 N.W. 411, 415-16 (1939).

27. *Smith v. Smith*, 290 Mich. 143, 287 N.W. 411 (1939); MICH. COMP. LAWS § 631.1 (1948).

28. *Mannausa v. Mannausa*, 374 Mich. 6, 130 N.W.2d 900 (1964); *Ballard v. Wilson*, 364 Mich. 479, 110 N.W.2d 751 (1961).

29. *Ames v. Cheyne*, 290 Mich. 215, 287 N.W. 439 (1939).

30. *Rowerdink v. Carothers*, 334 Mich. 454, 54 N.W.2d 715 (1952).

"to them and the survivor of them"³¹ have been held to create rights of survivorship that cannot be terminated by one co-owner unilaterally. The rationale for the Michigan court's ruling is that in such cases the co-owners actually have "joint life estates followed by a contingent remainder in fee to the survivor"³²

Thus, under Michigan law, where the instrument creating the joint tenancy makes no express reference to survivorship rights, a joint tenant can unilaterally sever the joint tenancy as to his interest; therefore, when such a joint tenancy is created or terminated, the valuation of a joint tenant's interest for gift tax purposes is made as if the co-owners were tenants in common: no value is attributed to survivorship rights. However, where the instrument creating a joint ownership of property expressly refers to survivorship, the rights of survivorship cannot be terminated unilaterally, and the value of a co-owner's interest must be determined actuarially in light of the possibilities of survival. It should not affect the gift tax consequences that the rationale for prohibiting the unilateral termination of survivorship rights is that the co-owners have a joint tenancy only in a life estate interest and that they have alternative contingent remainders in the balance,³³ for the actuarial factors given for measuring indestructible joint tenancies are intended to measure precisely that quantum of interest: the co-owners have a joint interest in income for life which must be valued, and each co-owner also has a possibility of obtaining the property *in fee* if he survives the others which also must be valued. Stating it differently, the federal tax law looks to local Michigan law to determine the rights, duties, powers, and liabilities of the co-owners, and the federal law then operates on the basis of the parties' legal interests without regard to the name or "tag" that local law employs to describe them.³⁴

It is unclear whether the gift of an interest in a joint tenancy which is created under Michigan law in such manner that neither tenant can unilaterally terminate the other's survivorship rights will qualify for the \$3,000 annual gift tax exclusion. Code section 2503(b) excludes from gift tax consequences the first \$3,000 of gifts made to any one donee in one year, except that gifts of "future

31. *Schulz v. Carothers*, 334 Mich. 454, 54 N.W.2d 715 (1952).

32. *Ballard v. Wilson*, 364 Mich. 479, 484, 110 N.W.2d 751, 753-54 (1961).

33. *Ballard v. Wilson*, 364 Mich. 479, 110 N.W.2d 751 (1961).

34. *United States v. Pelzer*, 312 U.S. 399 (1941); *Morgan v. Commissioner*, 309 U.S. 78, 80-81 (1940); *Union Planters Nat'l Bank v. United States*, 361 F.2d 662, 665 (6th Cir. 1966). See *Treas. Reg. § 25.2515-1(a)* (1958).

interests" do not qualify for this exclusion. A "future interest" is an interest, whether vested or contingent, that is "limited to commence in use, possession or enjoyment at some future date or time."³⁵ A joint tenant's interest in property is not a future interest where the joint tenant can unilaterally terminate the other tenants' survivorship rights, because the joint tenant thereby has the power, in himself alone, to commence the use, possession, and enjoyment of his interest. However, where Michigan law precludes the termination of survivorship rights in a joint tenancy interest unless all the joint tenants concur, a joint tenant will nevertheless have a present interest in his share of the income from the property, but it is quite possible that he possesses a future interest in his survivorship rights in the remainder;³⁶ and in that event, the annual gift tax exclusion would be limited to the value of the joint tenant's interest in the income.³⁷ The Michigan Supreme Court's characterization of these special joint tenancies (tenancies in which a tenant cannot unilaterally terminate survivorship rights in his interest) as "joint life estates followed by a contingent remainder in fee"³⁸ enhances the likelihood that such a tenant's survivorship rights do not qualify for the exclusion. In opposition to this contention, it is arguable that since a joint tenancy is not a trust and since the joint tenants possess all of the legal and equitable interests in the property, there is no occasion to subdivide the property into income and remainder interests.³⁹ Indeed, the apparent absence of any controversy in which

35. Treas. Reg. § 25.2503-3(a) (1958).

36. A property interest of a donee may be segregated into present and future interests, and the exclusion will be allowed only to the extent of the present interest. See Treas. Reg. § 25.2503-4(c) (1958); *Sensenbrenner v. Commissioner*, 134 F.2d 883 (7th Cir. 1943). An interest in income for life or a life estate is a present interest [Treas. Reg. § 25.2503-3(b) (1958)] and usually may be valued according to tables set forth at Treas. Reg. § 25.2512-5(f) (1958).

37. See *Spyros P. Skouras*, 14 T.C. 523 (1950), *aff'd*, 188 F.2d 831 (2d Cir. 1951), and *Ryerson v. United States*, 312 U.S. 405 (1941), which indicate that where a restriction is imposed on a donee's use of property (insurance policies in those cases) so that the donee cannot use and enjoy the property without the joint action of the donee and other persons, the donee has been given a future interest and no annual exclusion is allowed.

38. *Ballard v. Wilson*, 364 Mich. 479, 110 N.W.2d 751 (1961).

39. *But see* *Spyros P. Skouras*, 14 T.C. 523 (1950), *aff'd*, 188 F.2d 831 (2d Cir. 1951), in which the Tax Court held that the outright assignment of life insurance policies to five assignees in such manner that the policies could not be surrendered or borrowed upon without the consent of all five joint owners constituted an assignment of a future interest, that the payment of premiums thereon also constituted a gift of future interest, and consequently, that no exclusion could be allowed. The Second Circuit affirmed. It is significant that there was no trust established in *Skouras*, and the five assignees were the only owners of the life insurance policies, but assignments and payments of premiums were nevertheless deemed gifts of future interests.

the government has contended that such joint tenancy interests, or interests in an estate of entirety, fail to qualify, in whole or in part, for a gift tax exclusion suggests that the government has not yet sought to subdivide a co-tenant's interest for that purpose.⁴⁰ However, should the Internal Revenue Service choose to raise this issue, it could make a very strong case.

Finally, it is significant that in *Lober v. Dorgan*,⁴¹ the Michigan court recognized a joint tenancy in personalty only "where it is created by the express act of the parties." Arguably, such a "joint tenancy" is not a true joint tenancy but is actually a joint life estate with contingent remainders, in which event the survivorship interests would be indestructible and the gift tax valuation would be made accordingly.⁴² However, a more reasonable construction of the court's decisions is that a true joint tenancy can be created in personalty where the parties clearly evidence their intentions to create that estate, and consequently the gift tax valuation of joint tenancy interests in personalty is no different from the valuation of such interests in realty.

B. *Tenancies by Entirety*

Michigan statutory law provides that the only permissible estates in real property are "estates in severalty, in joint tenancy, and in

40. See C. LOWNDES & R. KRAMER, *FEDERAL ESTATE AND GIFT TAXES* (2d. ed.) 707 n.29. In *Estate of Buder*, 25 T.C. 1012 (1956), the Tax Court held that a gift of bonds by a third party to a husband and wife as tenants by entirety under Missouri law constituted a gift to each tenant to the extent of his or her interest and since earlier in the year the donor had exhausted his annual exclusions for gifts to the spouses by making gifts to them in excess of \$3,000, no additional exclusion could be allowed for the gift of the bonds. Thus, the *Buder* decision implies, but does not hold, that the creation of a tenancy by entirety may constitute a gift which can qualify for the annual exclusion, but it appears that the government never contended otherwise in that case.

41. 215 Mich. 62, 67, 183 N.W. 942, 944 (1921).

42. In several states which do not recognize the estate of joint tenancy the courts have construed a deed or grant of title in the names of two parties as "joint tenants with rights of survivorship" as a contractual arrangement under which each party has a joint life estate and a remainder interest contingent on surviving the other party. *E.g.*, *Bernhard v. Bernhard*, 278 Ala. 240, 177 S.2d 565 (1965). However, those cases require that the parties clearly evidence their intention that there be rights of survivorship in the joint owners. *E.g.*, *Teacher v. Kijurina*, 365 Pa. 480, 76 A.2d 197 (1950); *Equitable Loan & Sec. Co. v. Waring*, 117 Ga. 599, 44 S.E. 320 (1903). While it could be argued that in granting survivorship rights to personal property, the Michigan courts were merely enforcing the necessary implication in the words "joint tenancy" that the parties intended that the survivor take the property, it is more likely that the basis of the courts' decisions is that there is a presumption in Michigan against the estate of joint tenancy, but where the title to the property clearly evidences a desire to establish that estate, the property will be so held.

common.”⁴³ In *Dowling v. Salliotte*,⁴⁴ the Michigan Supreme Court declared that the above-mentioned statutory law abolished the estate of entirety. However, within the same year, the Michigan Supreme Court repudiated the statement made in *Dowling* by holding that the estate of entirety does exist in Michigan;⁴⁵ and one year later, the court expressly overruled the *Dowling* decision.⁴⁶ Since that date, the courts have uniformly sustained the existence of the estate of tenancy by entirety in Michigan at least as to real property.⁴⁷ The rationale for sustaining the existence of the tenancy by entirety in Michigan is that an estate of entirety is merely a special form of joint tenancy and is therefore included in the statutory provision enabling the creation of the latter tenancy.⁴⁸

It is noteworthy that while with certain exceptions a conveyance to two or more persons will not create a joint tenancy unless it is clearly indicated,⁴⁹ a conveyance to a husband and wife will create a tenancy by entirety unless a contrary intent is clearly demonstrated.⁵⁰ Indeed, this presumption is so great that a conveyance to a husband and wife as “joint tenants” was held to have created a tenancy by entirety.⁵¹

It is clear that the estate of tenancy by entirety also exists for certain kinds of personal property, but it is not resolved as to whether the estate exists for all personalty.⁵²

While Michigan Compiled Laws section 554.43 establishes the estate of joint tenancy for real property (and this has been construed to include tenancies by entirety), there is no comparable provision for personal property. However, as noted above, the Michigan courts have recognized that personal property can be held in joint tenancy, and there is no apparent reason why the estate of entirety should not

43. MICH. COMP. LAW: § 554.43 (1948). See also MICH. COMP. LAWS § 555.42 (1948).

44. *Dowling v. Salliotte*, 83 Mich. 131, 47 N.W. 225 (1890).

45. *Auditor General v. Fisher*, 84 Mich. 128, 47 N.W. 574 (1890).

46. *In re Lewis*, 85 Mich. 340, 48 N.W. 580 (1891).

47. *DeYoung v. Mesler*, 373 Mich. 499, 130 N.W.2d 38 (1964); *Budwit v. Herr*, 339 Mich. 265, 272-73, 63 N.W.2d 841, 844 (1954); *Hoyt v. Winstanley*, 221 Mich. 515, 191 N.W. 213 (1922).

48. *Id.*

49. MICH. COMP. LAWS § 554.44 (1948).

50. *Guldager v. United States*, 204 F.2d 487 (6th Cir. 1953); *Hoyt v. Winstanley*, 221 Mich. 515, 191 N.W. 213 (1922); *In re Lewis*, 85 Mich. 340, 48 N.W. 580 (1891). See MICH. COMP. LAWS § 554.45 (1948).

51. *DeYoung v. Mesler*, 373 Mich. 499, 130 N.W.2d 38 (1964); *Hoyt v. Winstanley*, 221 Mich. 515, 191 N.W. 213 (1922). See also *Dutcher v. Van Duine*, 242 Mich. 477, 219 N.W. 651 (1928) (where the words “jointly and not as tenants in common” did not preclude the creation of an estate of entirety).

52. See *Bienefeld, Creditors v. Tenancies by the Entirety*, 1 WAYNE L. REV. 105, 108-10 (1955).

also be available. At common law, there was no tenancy by entirety in personalty because the husband was deemed to own all of his wife's chattels, and thus there was no occasion for any form of joint ownership; however, with the enactment of a Married Women's Act permitting a wife to own property separately, the estate of entirety should be made applicable to personalty as well.⁵³

In *Wait v. Bovee*,⁵⁴ the Michigan Supreme Court held that the estate of entirety did not exist in personal property because to permit that estate would contravene the legislative purposes of the Married Women's Act.⁵⁵ The dubious reasoning of the *Wait* decision was repudiated in numerous subsequent decisions sustaining the existence of the estate of entirety as to real property,⁵⁶ and by several decisions holding that the Married Women's Act had no application to the estate of entirety.⁵⁷ The *Wait* decision further suggested that there could be no survivorship rights between parties except where expressly allowed by law, which presumably would preclude a joint tenancy in personalty as well as an estate of entirety, and while there was some initial acceptance of that view,⁵⁸ it was ultimately settled that a joint tenancy can be created in personal property.⁵⁹

The Michigan Supreme Court reiterated on at least one occasion that, with certain exceptions, the estate of entirety does not exist in personal property,⁶⁰ and the court has relied on the distinction between personalty and realty to distinguish the *Wait* case.⁶¹ In contradiction to those opinions, the court held in a decision some fifty-five years after *Wait* that a husband and wife could hold goods and chattels by the entirety if they so intended and agreed.⁶²

Thus, the question of the general application of the estate of entirety to personal property is in doubt. However, notwithstanding

53. 2 AMERICAN LAW OF PROPERTY § 6.6, at 30 (Casner ed. 1952).

54. 35 Mich. 425 (1877).

55. MICH. COMP. LAWS § 557.1-5 (1948).

56. Cases cited note 47 *supra*.

57. *Morrill v. Morrill*, 138 Mich. 112, 101 N.W. 209 (1904); *see Schram v. Burt*, 111 F.2d 557, 561 (6th Cir. 1940).

58. *Ludwig v. Bruner*, 203 Mich. 556, 169 N.W. 890 (1918).

59. *Block v. Schmidt*, 296 Mich. 610, 619, 296 N.W. 698, 701-02 (1941); *Lober v. Dorgan*, 215 Mich. 62, 183 N.W. 942 (1921).

60. *Scholten v. Scholten*, 238 Mich. 679, 214 N.W. 320 (1927). However, the court in *Scholten* nevertheless held that the property in question passed to the surviving spouse by survivorship.

61. *In re Lewis*, 85 Mich. 340, 48 N.W. 580 (1891).

62. *Frank v. Patton*, 251 Mich. 557, 232 N.W. 211 (1930). The personalty involved in *Patton* included furniture and a lease; the court refused to hold that they were held by the entirety because of insufficient proof of the parties' intention.

what the general rule may be, there can be no doubt that there are certain classes of personal property which may be held by the entirety. Where a husband and wife sell land held by the entirety, the proceeds of sale and any mortgages or notes taken as payment shall be held by the husband and wife as tenants by the entirety.⁶³ Also, Michigan Compiled Laws section 557.151 provides that all "bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidences of indebtedness" made payable to a husband and wife shall be held by them as joint tenants (unless a contrary intent is shown) in the same manner as they hold real estate.⁶⁴ Relying on that statute, the Michigan Supreme Court has held that a conveyance to a husband and wife of personal property of a type listed in section 557.151 creates a tenancy by entirety in the property unless the conveyance explicitly indicates that some other estate is intended.⁶⁵ Indeed, even use of the words "joint tenancy" in the conveyance is not sufficient to avoid the estate of entirety; if the parties do not wish to hold by the entirety, they must go so far as to include in the conveyance words such as "not as tenants by the entirety."⁶⁶ Thus, as to some highly important classes of personal property (for example, stocks, bonds, and evidences of debt), not only does an estate of entirety exist, but indeed it requires some effort for a husband and wife to avoid holding such properties by the entirety where they acquire them in joint ownership. Because the provisions of Code section 2515 are applicable only to tenancies in real property, the existence of an estate of entirety in personal property has far greater gift tax significance than does the existence of that estate in realty.

The interest of a spouse in an estate of entirety cannot be conveyed to a third party unless both tenants joint in the conveyance, nor can one tenant cause a partition of the property.⁶⁷ Moreover, a creditor of either the husband or wife alone cannot levy against the property or the income from the property.⁶⁸ A tenant

63. *Muskegon Lumber & Fuel Co. v. Johnson*, 338 Mich. 655, 62 N.W.2d 619 (1954); *Lappo v. Negus*, 362 Mich. 242, 106 N.W.2d 765 (1961). MICH. COMP. LAWS § 557.81 (1948).

64. MICH. COMP. LAWS § 557.151 (1948).

65. *DeYoung v. Mesler*, 373 Mich. 499, 130 N.W.2d 38 (1964).

66. *Id.*

67. *Hearns v. Hearn*, 333 Mich. 423, 53 N.W.2d 315 (1952); *Schultz v. Silver*, 323 Mich. 454, 35 N.W.2d 383 (1949); *Berman v. State Land Office Board*, 308 Mich. 143, 13 N.W.2d 238 (1944); *Jacobs v. Miller*, 50 Mich. 119, 15 N.W. 42 (1883).

68. *See, e.g., American State Trust Co. v. Rosenthal*, 255 Mich. 157, 237 N.W. 534 (1931).

by the entirety can sever the tenancy by conveying his interest to his or her spouse.⁶⁹ The tenancy is also severed by a divorce of the tenants.⁷⁰

Thus, the valuation of an interest in a Michigan tenancy by entirety for gift tax purposes must include an allowance for the possibilities of survival, since the rights of survivorship of the tenants cannot be defeated by one tenant alone.⁷¹ It is true that one spouse can terminate the tenancy by conveying his or her interest to the other tenant, but even that action is not truly unilateral, since the other tenant must accept the conveyance; and in any event, there is no justification for disregarding survivorship rights merely because *H* can give his co-tenant spouse, *W*, his interest in the property, thus causing *W* to own both life interests and both remainders, and thereby make *W*'s survival unnecessary. Similarly, the availability of divorce is not within the sole control of one spouse and does not affect the gift tax valuation.

Before a gift tax valuation of a tenancy by the entirety can be made, it must be determined whether the tenants are entitled to share equally in the income from the property.⁷² Regrettably, where a tenancy by entirety is created under Michigan law, the determination of that question for gift tax purposes is unclear. Moreover, the adoption of the Michigan Constitution of 1963 has further complicated the issue.

Under the common-law rule, a husband was entitled to the full use of all of the property held with his wife by the entirety and therefore was entitled to all of the income from such property.⁷³ However, in 1855, Michigan enacted the Married Women's Act which provided in section 1:

That the real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may

69. *Hearns v. Hearns*, 333 Mich. 423, 53 N.W.2d 315 (1952); MICH. COMP. LAWS § 557.101 (1948).

70. MICH. COMP. LAWS § 552.102 (1948). By its terms, this section applies to real property, but it is likely that its provisions—which were intended to provide for the disposition of property that was omitted from the award of a court in a divorce proceeding [*Witschi v. Witschi*, 261 Mich. 334, 246 N.W. 139 (1933)] and which could not be held by the entirety after a divorce—also apply to personalty held by the entireties. Moreover, this section was merely declaratory of existing law. *Allen v. Allen*, 196 Mich. 292, 162 N.W. 987 (1917).

71. It should be noted that the co-interest of the donee spouse will qualify for the marital deduction for gift tax purposes, even though the donee spouse's co-interest constitutes a terminable interest. INT. REV. CODE OF 1954, § 2523(d).

72. Treas. Reg. § 25.2515-2(c) (1958).

73. 2 AMERICAN LAW OF PROPERTY § 6.6, at 27-28 (Casner ed. 1952).

afterwards become entitled by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations and engagements of her husband and may be contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her in the same manner and with the like effect as if she were unmarried.⁷⁴

The above-quoted section 1 is very similar to section 5 of article XVI of the Michigan Constitution of 1850, which provision was carried forward as section 8 of article XVI of the 1908 Constitution. In *Morrill v. Morrill*,⁷⁵ the Michigan Supreme Court considered the effect of the Married Women's Act on the husband's common-law right to all of the income from property held by the entirety. While the court did not discuss section 5 of article XVI of the 1850 Constitution, since the language of the relevant section of the Married Women's Act was essentially the same as that of the constitutional provision, the reasoning of the court is equally applicable to the question of the effect of the constitution on the husband's common-law right. The court noted that in two sister states, New Jersey and New York, the courts had held that the husband's right to all of the use of and income from property held by the entirety was terminated when those states adopted a Married Women's Act.⁷⁶ The New York Court of Appeals had stressed in *Hiles v. Fisher*⁷⁷ that if the husband's right to the use of the property were an incident of the tenancy by entirety, that is if it were "one of its specific and essential characteristics," it would be difficult to deem it terminated by the Married Women's Act; but the New York court then held that the husband's right to the use of the property was not an incident of the tenancy, but rather was the product of the husband's common-law marital rights which operated on all property held by the wife and which right was terminated by the Married Women's Act. In *Morrill*, the Michigan court rejected the position taken by the New Jersey and New York courts and held that under Michigan law the husband continued to enjoy the right to use all of the property held by the entirety.⁷⁸ The court expressly declined

74. MICH. COMP. LAWS § 557.1 (1948).

75. 138 Mich. 112, 101 N.W. 209 (1904).

76. *Buttlar v. Rosenbluth*, 42 N.J. Eq. 651, 9 A. 695 (Ct. Err. & App. 1887); *Hiles v. Fisher*, 144 N.Y. 306, 39 N.E. 337 (1895).

77. 144 N.Y. 306, 39 N.E. 337 (1895).

78. Michigan is a minority jurisdiction in its law on this issue, but it is not alone. For example, Massachusetts and North Carolina also provide that the husband is entitled to all of the income from property held by the entirety. *Pineo v. White*, 320 Mass. 487, 70 N.E.2d 294 (1946); *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924).

to decide in *Morrill* whether the husband's right to the income and use of the property was an incident of the tenancy or an incident of his marital rights, because the court determined that in either event the right was not terminated by the Married Women's Act, which the court held did not affect the estate of entirety or the marital unity. However, nine years after the *Morrill* decision, the Michigan Supreme Court again considered this issue in *Way v. Root*,⁷⁹ and there determined that the rationale for granting the husband the income from the property was that his right was an attribute of the tenancy, and that this form of ownership was adopted in Michigan with all of its common-law incidents. In *Way v. Root*, the court said:

The rights of husband and wife in such an estate [a tenancy by entirety] are purely common law rights, to be tested and interpreted by the rules of that law as they existed before the wife was emancipated as to her individual property interests. By the common law the husband controlled his wife's estate, and had the usufruct, not only of real estate standing in both their names, but of that sole seized by his wife, whether in fee simple, fee tail or for life. It remains the law that, while coverture continues, the husband has the control, use, rents, and profits of an estate by entirety.⁸⁰

Subsequent to the decision in *Morrill*, the Michigan court has uniformly held that the husband is entitled to the full use of and all the income from property held by the entirety.⁸¹ Although, with one possible exception, all of the cases to date have dealt with real property,⁸² the same rule presumably would apply to personalty under the rationale of *DeYoung v. Mesler*⁸³ that a husband and wife's joint ownership of certain classes of personalty should not be treated differently from their ownership of realty.

Notwithstanding the uniformity of the Michigan decisions on this question, the issue became confused in 1935 when the Court of Appeals for the Sixth Circuit held in *Commissioner v. Hart* that, under Michigan law, the income from property held by the entirety

79. 174 Mich. 418, 140 N.W. 577 (1913).

80. *Id.* at 429-30, 140 N.W. at 581.

81. *Way v. Root*, 174 Mich. 418, 140 N.W. 577 (1913); *In re Thomas Estate*, 341 Mich. 158, 67 N.W.2d 85 (1954); *Dombrowski v. Gorecki*, 291 Mich. 678, 289 N.W. 293 (1939).

82. The possible exception is *Dombrowski v. Gorecki*, 291 Mich. 678, 289 N.W. 293 (1939), which involved, *inter alia*, the income from a grocery business conducted on realty held by the entirety.

83. 373 Mich. 499, 130 N.W.2d 38 (1964).

was shared equally by the two spouses and therefore that each was taxable on one-half of the income.⁸⁴ The Sixth Circuit grounded its decision on the erroneous conclusion that Michigan Supreme Court decisions holding that the creditors of a husband could not garnish the income from property held by the entirety constituted a repudiation of the earlier *Morrill* decision that the husband was entitled to all the income. The court apparently overlooked that the opinions in both the *Morrill* decision and the decision in *Way v. Root* expressly stated that the creditors of the husband could not levy on the income from property held by the entirety, and that this fact was not inconsistent with the husband's right to the income. In any event, subsequent to *Hart*, the Michigan Supreme Court has adhered to its holding in *Morrill*.⁸⁵ Notwithstanding the patent error of the *Hart* decision, the Tax Court has accepted its holding as a correct statement of Michigan law,⁸⁶ and the writer has been informed that the *Hart* decision is followed by both the local Michigan office and the national office of the Internal Revenue Service, who apply the income and gift tax laws on the premise that the income from Michigan property held by the entirety is to be divided equally between the spouses. The position of the Internal Revenue Service presents something of a dilemma to a taxpayer, since if he plans his affairs on the assumption that the gift tax valuation of an interest in a Michigan tenancy by the entirety must take into account the husband's right to all the income, he is subject to the risk that the Service, relying on *Hart*, will value the interests differently; and, on the other hand, there is no assurance that the Service will perpetuate the error of *Hart* indefinitely.

The question of the husband's right to all the income has been further clouded by the Michigan Constitution of 1963. Section 1 of article X of the 1963 Constitution is very similar to section 5 of article XVI of the 1850 Constitution and section 8 of article XVI of the 1908 Constitution, except for two sentences that were added in the 1963 provision. One, which is relevant to the issue at hand, reads: "The disabilities of coverture as to property are abolished." The impact (if any) of this constitutional provision on the husband's

84. *Commissioner v. Hart*, 76 F.2d 864 (6th Cir. 1935). The allocation of income between a husband and wife was a recurring income tax issue prior to the adoption in 1948 of a split income provision for spouses.

85. *In re Thomas Estate*, 341 Mich. 158, 67 N.W.2d 85 (1954); *Dombrowski v. Gorecki*, 291 Mich. 678, 289 N.W. 293 (1939).

86. *Oren C. White*, 18 T.C. 385, 386 (1952).

right to all of the income depends upon whether his right is a product of the common-law view of marital unity, or whether it is merely an attribute of a tenancy by entirety.

In *Morrill*,⁸⁷ the Michigan Supreme Court considered this issue, and expressly refrained from deciding which of the two possible rationales was correct. While the court did not believe that it was necessary to decide that issue in *Morrill*, it is difficult to see how it could be avoided. If the husband's right to the income stemmed from his common-law marital rights, which in turn were based on a wife's disability to own separate property, then the husband's claim to income would surely have been terminated by the adoption of the Married Women's Act and by the 1850 and 1908 Constitutions. The only reasonable defense to that contention is that the correct basis for the husband's right to income is that it is an attribute of the estate of entirety, rather than an attribute of coverture, and that the aforementioned provisions had no effect on the estate. The New York Court of Appeals recognized this question in its decision in *Hiles v. Fisher*,⁸⁸ and resolved it by holding that the husband's rights were an incident of his marital rights and therefore were terminated. In *Way v. Root*,⁸⁹ decided nine years after *Morrill*, the Michigan Supreme Court implicitly acknowledged the need to resolve this issue and accordingly held that the husband's right to income was an attribute of the estate of entirety.

Since, under the Michigan decisions, the husband's right is not grounded on any marital disabilities of his wife, the 1963 Constitutional provision expunging such disabilities is inapposite.⁹⁰

However, the resolution of the technical questions might be quite different if it could be shown that one purpose in adding the new sentence to the 1963 Constitution was to require that the spouses share equally in the income. The official record of the 1961-1962 Constitutional Convention not only fails to support that contention, but to the contrary strongly indicates that the delegates believed that the added sentence did not effect any change in existing law. As initially proposed, the new sentence read "The disabilities of coverture are abolished," but the delegates struck that

87. 138 Mich. 112, 101 N.W. 209 (1904).

88. 144 N.Y. 306, 39 N.E. 337 (1895).

89. 174 Mich. 418, 140 N.W. 577 (1913).

90. Even assuming *arguendo* that the 1963 constitution did terminate the husband's right to all the income, the federal Constitution may well preclude any change in the husband's rights in property acquired by the entirety prior to 1963. See note 94 *infra*.

sentence from the proposed constitution because they were uncertain of its meaning and fearful that it would change existing law.⁹¹ The sentence was then revised to read in its present form (limited to property) and re-offered as an amendment and adopted.⁹² In support of that amendment, one of the proponents for adoption of the sentence, Mr. Everett, stated that the disabilities of coverture had been eliminated in modern times and that the proposed sentence enunciated

as a principle that these common law disabilities may never again arise in the state of Michigan, and we are affording those who have some question about it the assurance that the legislature never can take it away. . . . [The legislature] would never have the nerve to take it away. But it doesn't change the fact that this is a historical declaration of women's freedoms⁹³

There can be no policy justification for disabling a wife from sharing in the income from property held by the entirety, but it appears that the present law in Michigan does so. Hopefully, the state legislature will soon change this anachronistic rule.⁹⁴ Legislative action is particularly appropriate here since the 1963 Constitution has raised doubts as to the continuing vitality of the rule, and the Sixth Circuit's decision in *Hart* has caused considerable confusion as to the gift tax valuation of interests in such estates.

The tax significance of the husband's right to all the income from property held by the entirety extends also to the question whether a gift to a woman of an interest in property as a tenant by the entirety constitutes a gift of a future interest and therefore does not qualify for the \$3,000 annual gift tax exclusion. As noted in the discussion above of certain joint tenancy interests, the disability of either spouse to terminate a tenancy by entirety without the other's consent might cause a spouse's survivorship rights to be treated as a future interest; consequently, albeit the government has not yet

91. 2 MICHIGAN CONSTITUTIONAL CONVENTION 1961-1962 (Official Record) 3001-03.

92. *Id.* at 3149-51.

93. *Id.* at 3150.

94. The legislature clearly is empowered to change the rule for property acquired by entirety after enactment of such a legislative change. However, in view of the Michigan Supreme Court's determination that the husband's right to all the income is a property right, there is a serious constitutional question as to whether the legislature could deprive the husband of his right to all the income from property acquired by the entirety prior to adoption of a legislative change. See *Ford & Son v. Little Falls Co.*, 280 U.S. 369 (1930); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Muhlker v. New York & H.R.R.*, 197 U.S. 544 (1905). A termination of the husband's right might constitute a taking of a property right without compensation in contravention of the fourteenth amendment.

asserted the position, a gift tax exclusion for gifts of such property interests would be limited in amount to the value of the donee spouse's right to the income from the property.⁹⁵ Where a wife has no right to income from property held by the entirety, she has no immediate right to the use, possession, or enjoyment of the property, and her entire property interest is thus a future one. Consequently, if the husband is entitled to all of the income from property held by the entirety under Michigan law, there is no justification for permitting *any* gift tax exclusion for gifts to a woman of property held by her and her husband as tenants by the entirety.⁹⁶ Unless the status of the husband's rights are clarified, a donor will have to assume the risk that his claim for an exclusion for such gifts will be contested.⁹⁷

95. See text accompanying notes 35-40 *supra*.

96. If the donor of the gift to the wife is her husband, he will be allowed a marital deduction. INT. REV. CODE OF 1954, § 2523(d).

97. The failure of the Internal Revenue Service to deny exclusions for such tenancies is not fully explained by the Service's misinterpretation of Michigan law, since the Service apparently has not denied the exclusion either in Massachusetts or North Carolina, where the husband is also entitled to all the income from property held by the entirety.