

JOINT INTERESTS

## THE YOKE OF A JOINT INTEREST

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*This article reviews the various tax implications of joint interests both at their creation and at the death of a joint owner.*

People often yoke their legal interests in property together with a joint tenancy, tenancy by the entirety, or bank account in joint names and payable to the survivor. By holding property jointly, the owners are bound to each other. A joint interest causes the owners to move in the same direction with respect to jointly held property like a wood yoke around the necks of draught animals causes them to move in the same direction when pulling a load.

The yoke of a joint interest weighs heavily on a joint tenant due to the tax implications of creating a joint interest and death of a joint tenant. Importantly, **I.R.C. Section 2040** generally requires inclusion of the *entire* value of a joint interest in the gross estate. The fact that a deceased joint tenant holds a one-half interest in a joint tenancy prior to death is not determinative of the amount included in the gross estate. **1** Only exceptions to the general rule take underlying economics into account and, in the case of spouses, the underlying economics are not considered at all.

The yoke of a joint interest is a potential tax trap for the unwary. This is a burden that many bear due to typical estate planning advice. For those seeking probate avoidance, advisors often recommend holding title as joint tenants with rights of survivorship. Although it is generally understood that this avoids probate, few also advise on the gift, estate, and income tax implications that follow. All, a part, or none of the value of jointly held property is included in the gross estate regardless of the value of the deceased joint tenant's interest prior to death. **2** A risk also exists that records are not adequately maintained to satisfy the burden of proof for favorable exceptions.

This article sets forth the tax implications of a joint interest. After taking tax implications into account, many, particularly those with a taxable estate, may wish to throw off or avoid the yoke of a joint interest.

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## What is a Joint Interest?

More than one person can own an interest in the same property, and more than one form of concurrent ownership is available. An analysis of tax implications begins with a review of state law because state law creates legal interests and federal law determines when and how the interests are taxed. 4

### Joint interests.

**Section 2040** applies to joint interests in the form of joint tenants with rights of survivorship, tenants by the entirety, and property deposited with a bank in joint names and payable to either or the survivor.

#### **Joint tenants with rights of survivorship and tenants by the entirety.**

Joint tenants with rights of survivorship and tenants by the entirety are classic joint interests. In most states, two or more persons can hold property as joint tenants with rights of survivorship. 5 In some states, spouses may hold property as tenants by the entirety. 6

Joint tenants with rights of survivorship and tenants by the entirety share three distinguishing characteristics relevant for taxation. 7 The first is with respect to how a joint interest is created. The transfer with respect to the creation of a joint interest occurs presently, rather than at the death of a joint tenant in the future. Pursuant to the present transfer theory, the creation of a joint interest effects a present transfer of a nonpossessory future interest from a person, and the time of possession or enjoyment is postponed until he or she dies. 8 The Restatement refers to this as a "shift" outside of probate to the surviving joint tenant. 9

The second characteristic is with respect to what is owned by the joint tenants. A joint tenancy is a property right owned by two or more persons, but as only one owner and in only one estate. 10 In effect, each owns an undivided 100% interest. Each joint tenant is seized with an undivided interest in the entire estate as of the day the property is first acquired. 11

The third and most distinguishing characteristic is the right of survivorship. 12 On the death of a joint tenant, property held with rights of survivorship passes outside of probate to a surviving joint tenant. 13 A deceased joint tenant's interest thus disappears or extinguishes at death. When a joint tenant dies, property held in joint tenancy is treated as no longer owned by a deceased joint tenant. 14

Because of these characteristics, joint tenants with rights of survivorship and tenants by the entirety are viewed as will substitutes and used as probate avoidance tools. 15 A will substitute is an arrangement

established by a person during life where the person retains substantial lifetime rights of dominion, control, possession, or enjoyment, and, at his or her death, the right of possession or enjoyment shifts outside of probate to another person. [16](#) A will substitute serves the function of a will, but without being a will and without execution in accordance with will formalities. [17](#)

#### **Bank account with rights of survivorship.**

A bank account with rights of survivorship is another form of a joint interest. The survivorship feature causes the balance on hand in the account at death to pass outside of probate to the surviving account owner. [18](#)

### **Other interests.**

Not all interests involving multiple persons or rights of survivorship are considered a joint interest under [Section 2040](#).

#### **Payable (or transfer) on death arrangement.**

A bank account with a payable (or transfer) on death arrangement is not a joint interest. Such account is carried in the name of the depositor and payable on the death of the depositor to a designated beneficiary. [19](#) Like a joint tenancy, a payable on death arrangement functions as a will substitute. [20](#) Unlike a joint tenancy, however, a beneficiary having a payable on death designation has no right to sums on deposit during the lifetime of the owner. [21](#)

Other forms of payable (or transfer) on death arrangements exist. One is a bond taken in the name of the bondholder, and payable on death to another person. [22](#) Another is a stock registered in the name of the stockholder, with "transfer on death" to a designated beneficiary. [23](#)

#### **Tenants in common.**

A tenancy in common is not a joint interest. In many states, two or more persons holding interests in the same property do so presumptively as tenants in common. [24](#) Although a tenancy in common involves multiple owners, each owner does not hold an undivided 100% interest or have rights of survivorship. Instead, each owner has a distinct and separate interest, and the right of possession is common to all owners. [25](#) Each tenant owns a fractional share of undivided property. [26](#) Further, a tenancy in common does not provide rights of survivorship. [27](#)

#### **Community property.**

Community property is similar to a tenancy in common because each spouse owns an undivided one-half interest in community property. [28](#) In effect, each spouse owns an undivided 50% interest. On the death of a spouse, death results in partition of community property. The deceased spouse's one-half interest generally passes in accordance with his or her will, or the applicable laws of descent and

distribution. **29** Further, community property does not provide rights of survivorship. **30** Today, however, many states now permit married couples to hold community property with rights of survivorship. **31**

## Tax Implications of Creating a Joint Interest

The creation of a joint interest results in imposition of gift tax on the person who transfers a joint interest. For the person who receives a joint interest, gross income excludes the gift, basis is the same as in the hands of the donor, and the holding period tacks.

### Gift tax imposed.

A federal gift tax is imposed by **Section 2501(a)(1)** on the transfer of property by gift. Pursuant to **Section 2511(a)**, the gift tax applies whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. **32** The tax is a primary and personal liability of the donor, and is an excise on the act of making the transfer. **33** A gift is complete when the donor parts with dominion and control as to leave the donor with no power to change the disposition of the property, whether for the donor's own benefit or for the benefit of another. **34** If, however, upon the transfer of property the donor reserves any power over its disposition, then the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending on the facts. **35**

If a person creates a joint bank account with another person (or similar type of ownership where the person can withdraw the entire fund without the other person's consent), then there is a gift to the other person when the other person draws upon the account for his or her own benefit, to the extent of the amount drawn without any obligation to account for the proceeds. **36** Similarly, if a person purchases a bond and registers it as payable to the person or another person, then there is a gift to the other person when the other person surrenders the bond for cash without any obligation to account for the proceeds. **37** The same rules apply for a married couple. **38**

*Example.* A and C are not married. A opens a checking account with \$50,000 in the name of "A and C, as joint tenants with rights of survivorship." Under state law, both A and C can withdraw any and all amounts from the account. A does not make a gift transfer on creation of the account. A gift occurs when C withdraws funds from the account. **39**

For other property, such as real property, the creation of a joint tenancy is treated as a complete gift. The amount of the gift depends on whether the joint tenants have the right to sever interests. **40** If a person purchases property with his or her own funds and has title conveyed to him or her with another person as joint tenants with rights of survivorship, and such rights may be defeated by either party severing the interests, then there is a deemed gift to the other person in the amount of one half of the value of the property. **41** If, however, neither party can alone defeat the joint interest, then the amount of the gift is determined actuarially. **42**

*Example.* A and C are not married. A purchases real property for \$50,000 and takes title in the name of "A and C, as joint tenants with rights of survivorship." Under state law, either A or C can partition the property. A gift occurs on acquisition of the property, and the amount of the gift is \$25,000 ( $50,000 / 2 = 25,000$ ). [43](#)

*Example.* A and C are not married. A purchases real property for \$50,000 and takes title in the name of "A and C, as joint tenants with rights of survivorship." Under state law, neither A nor C can partition the property. A gift occurs on acquisition of the property, and the amount of the gift is determined actuarially. [44](#)

A similar result is reached where the joint tenants are married. [45](#) If property is purchased and registered in the names of a married couple as joint tenants with rights of survivorship, then a taxable gift is made to the spouse that does not contribute a proportionate share. [46](#) The burden of proving the amount of contributions rests on the joint owners, and if accurate records are not maintained, then an estimate is made from the best available sources. [47](#)

*Example.* A and B are married to each other. A purchases real property for \$50,000 and takes title in the name of "A and B, as joint tenants with rights of survivorship." Under state law, either A or B can partition the property. A gift occurs on acquisition of the property, and the amount of the gift is \$25,000 ( $50,000 / 2 = 25,000$ ). [48](#)

*Example.* A and B are married to each other. A purchases real property for \$50,000 and takes title in the name of "A and B, as joint tenants with rights of survivorship." Under state law, neither A nor B can partition the property. A gift occurs on acquisition of the property, and the amount of the gift is determined actuarially. [49](#)

## Income tax.

A federal income tax is imposed by [I.R.C. Section 1](#) on taxable income, which is defined under [Section 63\(a\)](#) as gross income minus allowed deductions. Pursuant to the broad inclusion rule of [Section 61\(a\)](#), gross income means all income from whatever source derived. [Section 102](#) provides an exclusion rule for gifts so that gross income does not include the value of property acquired by gift. Thus, property received as a gift is not included in gross income. [50](#)

Property acquired by gift has a transferred basis and tacking of the holding period. For basis, [Section 1015\(a\)](#) generally provides that the basis of property acquired by gift is the same as in the hands of the donor. [51](#) For the holding period, [Section 1223\(2\)](#) provides that, in determining the period for which the taxpayer has held property however acquired there is included the period for which the property is held by any other person if the property has the same basis in whole or in part in the hands of the donee as it has in the hands of the donor. [52](#) Thus, if property has a transferred basis under [Section 1015](#), then the period that the property is held by the donor is included in determining the period that the property is held by the donee. [53](#)

*Example.* A and C are not married. In 2022, A purchases real property for \$50,000. A's adjusted basis is cost, which is \$50,000. **54** Two years later, the property increases in value to \$100,000 and A executes a deed so that title to the property is in the name of "A and C, as joint tenants with rights of survivorship." Under state law, either A or C can partition the property. A makes a gift when A executes the deed, and the amount of the gift is \$50,000 ( $100,000 / 2 = 50,000$ ). **55** C's gross income excludes the joint interest. **56** C's basis in the property is \$25,000 ( $50,000 / 2 = 25,000$ ). **57** C's holding period includes the two years that A held the property. **58**

## Tax Implications of Death of a Joint Tenant

The estate tax treatment of a joint interest is unique compared to other property. Results do not depend on the extent of the decedent's interest therein. Instead, the entire value of a joint interest is generally included in the gross estate, regardless of the decedent's interest therein. This may come as a surprise and, thus, be a potential tax trap for the unwary where a person takes title to property as a joint tenant rather than as a tenant in common.

**Section 2001** imposes federal estate tax on the transfer of a taxable estate, which is determined under **Section 2053** by deducting certain expenses from the gross estate. **Section 2033** provides that the gross estate includes the value of all property to the extent of the decedent's interest therein at the time of death. For a joint interest, however, **Section 2040** generally requires inclusion of the entire value of a joint interest. In contrast to **Section 2033**, **Section 2040** does not operate to include the interest of a deceased joint tenant, which is typically a one-half undivided interest. **59**

The statutory framework for a joint interest is as follows. **Section 2040(a)** sets forth the general rule for inclusion of a joint interest in the gross estate. **Section 2040(a)** also sets forth exceptions with respect to property originally belonging to a surviving joint tenant, consideration furnished by a surviving joint tenant, and joint interests acquired by joint tenants via gift, bequest, devise, or inheritance. For spouses, **Section 2040(b)** sets forth an additional exception with respect to a qualified joint interest.

### General rule under **Section 2040(a)** .

The general rule under **Section 2040(a)** includes the entire value of a joint interest in the gross estate in three situations. First, **Section 2040(a)** provides that the gross estate includes the value of all property to the extent held by a decedent and another person as joint tenants with rights of survivorship. **60** Second, **Section 2040(a)** provides that the gross estate includes the value of all property to the extent held by a decedent and his or her spouse as tenants by the entirety. Third, **Section 2040(a)** provides that the gross estate includes the value of all property deposited with a bank in joint names and payable to either the decedent or the survivor. Thus, the general rule under **Section 2040(a)** includes a deceased joint tenant's interest in the gross estate, as well as a surviving joint tenant's interest.

The general rule of [Section 2040\(a\)](#) is subject to four exceptions. [61](#) Three of the exceptions are set forth in [Section 2040\(a\)](#) . The fourth exception applies to certain joint interests held by spouses and is set forth in [Section 2040\(b\)](#) .

## Exceptions under [Section 2040\(a\)](#) .

The general rule of [Section 2040\(a\)](#) is subject to exceptions in three situations, which are also set forth in [Section 2040\(a\)](#) : (1) where property originally belonged to a surviving joint tenant; (2) where consideration is furnished by a surviving joint tenant; and (3) where a joint interest is acquired by joint tenants by gift, bequest, devise, or inheritance.

### **Property that originally belonged to a surviving joint tenant.**

The first exception applies where property held as joint tenants originally belonged to a surviving joint tenant. [Section 2040\(a\)](#) provides that the gross estate does not include the part of a joint interest that originally belonged to a surviving joint tenant. [62](#) Thus, the entire value is included in the gross estate, except the part that originally belonged to a surviving joint tenant. This exception is limited, however, when a gift is involved. [Section 2040\(a\)](#) provides that the originally belonged exception does not apply where a surviving joint tenant acquires the joint interest from a deceased joint tenant for less than an adequate and full consideration in money or money's worth.

### **Consideration furnished by a surviving joint tenant (aka the contribution rule).**

The second exception applies where a surviving joint tenant furnishes consideration to acquire a joint interest. [Section 2040\(a\)](#) provides that the gross estate does not include the part of a joint interest as is proportionate to the consideration furnished by a surviving joint tenant. Thus, the entire value of jointly held property is included in the gross estate, except the part attributable to the amount of consideration in money or money's worth furnished by a surviving joint tenant. [63](#) Such part is the portion of the entire value at death which the consideration furnished by a surviving joint tenant bears to the total cost of acquisition and capital additions. [64](#) In determining the consideration furnished by a surviving joint tenant, there is taken into account only the portion of consideration shown to not be attributable to a deceased joint tenant. [65](#)

Courts and the Service often refer to the consideration furnished exception as the "contribution rule" or "contribution test." [66](#) In order to keep a portion of jointly held property out of the gross estate, the joint tenants track the amount each contributes to the purchase of the property. [67](#) [Section 2040\(a\)](#) mandates inclusion of 100% of the value of a joint interest except to the extent that the estate establishes that a surviving joint tenant contributed to the acquisition of the property. [68](#) If contribution is established, then the portion of the entire value included is decreased to reflect the portion of the value of the property attributable to a surviving joint tenant's contribution. [69](#)

The burden of proof lies with the executor. The entire value of jointly held property is included in the



gross estate unless the executor submits facts sufficient to show that the property was not acquired entirely with consideration furnished by a deceased joint tenant. **70** By requiring that the entire value of jointly owned property is included in the gross estate, **Section 2040** has the effect of imposing on the executor the burden of showing that not all of the jointly owned property is subject to taxation. **71** The Tax Court recognizes this as a strict and difficult burden. **72**

### **Interests of joint tenants acquired by gift, bequest, devise, or inheritance.**

The third exception applies where joint tenants acquire their interests by gift, bequest, devise, or inheritance, and depends on whether the property is held as joint tenants with rights of survivorship or tenants by the entirety.

Where property is held as joint tenants with rights of survivorship, **Section 2040(a)** provides that the gross estate includes a joint interest acquired by gift, bequest, devise, or inheritance to the extent of the value of a fractional part determined by dividing the value of the property by the number of joint tenants. A deceased joint tenant's fractional share of the property is included in the gross estate. **73** For example, if a deceased joint tenant and two brothers acquire property from their parents as a gift and take title as joint tenants with rights of survivorship, then one third of the value of the property is included in the gross estate. **74**

Where property is held as tenants by the entirety, **Section 2040(a)** provides that the gross estate includes a joint interest acquired by gift, bequest, devise, or inheritance to the extent of one half of the value of the property. For example, if a deceased joint tenant and his or her spouse acquire property from the decedent's parents as a gift and take title as tenants by the entirety, then one half of the value of the property is included in the gross estate. **75**

Like the consideration furnished exception, the burden of proof for the gift, bequest, devise, or inheritance exception also lies with the executor. The entire value of jointly held property is included in the gross estate unless the executor submits facts sufficient to show that the property is acquired by a deceased joint tenant and surviving joint tenant by gift, bequest, devise, or inheritance. **76**

### **Exception for a qualified joint interest under **Section 2040(b)** .**

A fourth exception exists under **Section 2040(b)** and applies where spouses hold a qualified joint interest. **77 Section 2040(b)(1)** provides that the gross estate includes one half of the value of a qualified joint interest. The term "qualified joint interest" means any interest held by spouses as joint tenants with rights of survivorship (but only if the spouses are the only joint tenants) or as tenants by the entirety. **78**

Where spouses with a qualified joint interest are involved, the exceptions under **Sections 2040(a)** and (b) overlap. As a result, **Section 2040(b)** eliminates the contribution rule and its tracing requirement in the context of a qualified joint interest. **79** The effect of **Section 2040(b)** makes inclusion of only half of



a qualified joint interest in the gross estate automatic and, thus, relieves the executor from the burden of proof otherwise required under [Section 2040\(a\)](#) .

## Joint interests subject to [Section 2040](#) .

[Section 2040](#) specifically covers property held as joint tenants with rights of survivorship, property held as tenants by the entirety, and a deposit of money or bond or other instrument that provides for payment to the surviving concurrent owner. [80](#) The Code and Regulations do not define the terms "joint tenants with rights of survivorship" or "tenants by the entirety." Property ownership is instead determined by state law, consistent with the overarching principle that state law determines how rights and interests so created are taxed. [81](#)

[Section 2040](#) applies to all classes of property, whether real or personal, and regardless of when a joint interest is created. [82](#) It makes no difference that a surviving joint tenant takes the entire interest in the property by rights of survivorship and that no interest therein forms a part of the deceased joint tenant's estate for administration purposes. [83](#)

[Section 2040](#) does not cover property held as tenants in common. [84](#) Instead, a tenancy in common is subject to [Section 2033](#) .

## Reporting.

A joint interest is reported on Schedule E of Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. The schedule categorizes joint interests depending on whether an interest is a qualified joint interest or not. Schedule E, Part 1, lists qualified joint interests under [Section 2040\(b\)](#) . [85](#) The total amount is entered on line 1(a), and one-half is entered on line 1(b). Schedule E, Part 2, lists all other joint interests under [Section 2040\(a\)](#) . Information regarding a surviving joint tenant is entered on line 2, and the total amount is entered on line 3.

Discounts, such as a discount for a fractional interest or lack of marketability, are not applicable in determining the amount included in the gross estate under [Section 2040](#) . [86](#)

A risk of double taxation of a joint interest exists on the death of a deceased joint tenant because [Section 2040](#) applies regardless of whether imposition of gift tax follows creation of the joint interest. To mitigate the risk, [Section 2012](#) provides that if gift tax has been paid on a joint interest and the joint interest is thereafter included in the gross estate of the donor, then an estate tax credit calculated under [Section 2012](#) is permitted for the amount of gift tax previously paid. [87](#) This credit is relatively immaterial today because it applies to gifts made before 1977. [88](#)

A risk of double taxation of a joint interest also exists on the death of a surviving joint tenant because [Section 2033](#) applies to property held by the surviving joint tenant to the extent of his or her interest

therein. To mitigate the risk, [Section 2013](#) provides that if estate tax has been paid on a joint interest and the deceased joint tenant dies within ten years before the surviving joint tenant, then an estate tax credit calculated under [Section 2013](#) is permitted for the amount of estate tax previously paid.

## Income Tax.

Income tax implications for the death of a joint tenant are more typical.

### No gross income.

Curiously, there appears to be an absence of primary authority at this time on the issue of whether death of a joint tenant results in gross income under [Section 61](#) for a surviving joint tenant, or exclusion for gifts and inheritances under [Section 102](#) . Presumably, the issue should be resolved in favor of a surviving joint tenant because, taking the present transfer theory into account, the creation of a joint tenancy effects a transfer of a nonpossessory future interest with the time of possession or enjoyment postponed until the donor's death and, on the death of a deceased joint tenant, his or her interest is extinguished. [89](#)

### New basis under [Section 1014](#) .

The determination of basis in jointly held property hinges on the portion included in the gross estate. [90](#) The portion of jointly held property included in the gross estate is considered acquired from a decedent under [Section 1014\(b\)\(9\)](#) and receives a new basis under [Section 1014\(a\)](#) equal to the fair market value of the interest on the date of death, unless an election for alternate or special use valuation is made. [91](#) An exception applies, however, for a gift made within one year of death. Pursuant to [Section 1014\(e\)](#) , the basis of appreciated property in the hands of a surviving joint tenant is the same as the basis in the hands of a deceased joint tenant immediately before death if the property is acquired by the deceased joint tenant by gift from the surviving joint tenant during the one-year period ending on the date of death.

Conversely, the portion of jointly held property that is not included in the gross estate retains a surviving joint tenant's basis. [92](#)

### Tacking of holding period.

A surviving joint tenant benefits from a special rule for holding period that allows him or her to sell property promptly without holding the property for more than one year to qualify for long-term capital gain treatment. [93](#) [Section 1223\(9\)](#) provides that, in the case of a person acquiring property, or to whom property passes, from a decedent within the meaning of [Section 1014\(b\)](#) , the person is considered to hold the property for more than one year if the property has a basis in the hands of the person determined in whole or in part under [Section 1014](#) and is sold or otherwise disposed of by the person within one year after the decedent's death. [94](#) If a surviving joint tenant acquires property by rights of survivorship and sells or otherwise disposes of the property within one year of a deceased joint tenant's

date of death, and the basis of the property in the hands of a surviving joint tenant is determined in whole or in part under **Section 1014** , then the property is considered to have been held by a surviving joint tenant for more than one year. **95**

## Historical Interaction Between **Section 2040** and **Section 1014**

The unique estate tax rules for a joint interest are foundational to the Code and have remained substantially unchanged. **96** Congress enacted the federal estate tax as part of the Revenue Act of 1916. **97** In order to include property held by a decedent in joint tenancy in the gross estate, Congress enacted section 202(c) of the Revenue Act of 1916. **98** The section was amended in 1919, 1921, 1924, 1939, and, in 1954, became **Section 2040(a)** . **99**

From inception, a disconnect existed between the imposition of the estate tax under **Section 2040** and the new basis under **Section 1014** for income tax. Although the gross estate includes the value of a joint interest under **Section 2040** , the property passes pursuant to rights of survivorship rather than by bequest, devise, or inheritance under **Section 1014(b)(1)** . Therefore, under prior law, the new basis under **Section 1014(a)** was inapplicable. Double taxation resulted because the estate tax is first imposed on the transfer of the gross estate of a deceased joint tenant, and the income tax is later imposed on the disposition of the property by a surviving joint tenant. The Supreme Court recognized this issue in 1933 as an unfair burden to the taxpayer but held that the remedy is with Congress and not with the courts. **100** Congress responded in 1954 by enacting **Section 1014(b)(9)** , which provides that property included in the gross estate is considered acquired from a decedent. **101**

The combination of **Section 2040(a)** with **Section 1014(b)(9)** incentivized spouses in some situations to intentionally refrain from providing proof of any consideration furnished by the surviving spouse. **102** Therefore, under prior law, the entire joint interest held by spouses was included in the gross estate under **Section 2040(a)** , considered acquired from a decedent under **Section 1014(b)(9)** , and received a new basis under **Section 1014(a)** . **103** In 1976, 1978, and 1981, Congress amended **Section 2040** by adding **Section 2040(b)** , which provides an exception for a qualified joint interest so that only half of the value is included in the gross estate, rather than the entire value under **Section 2040(a)** . **104** As a necessary corollary, the surviving spouse is entitled to only half of the fair market value as an adjusted basis in the property. **105**

Disputes with the Service thereafter arose with respect to the effective date of this new rule and its application. In *Gallenstein*, a husband and wife acquired a farm before 1977 derived from the husband's earnings and held title as joint tenants with rights of survivorship. **106** Following the husband's death after 1981, the wife took the position that the entire value of the farm is included in the husband's gross estate under **Section 2040(a)** , and that the entire farm receives a new basis under **Section 1014(a)** and (b)(9). The Service disagreed, taking the position that only half of the value of the farm is included in the gross estate under **Section 2040(b)** , and that only half of the farm receives a new basis under **Sections 1014(a)** and (b)(9). The Sixth Circuit agreed with the wife, holding that **Section 2040(b)** does

not apply to a joint interest created before 1977.

A similar result was reached in the Fourth Circuit. In *Patten*, a husband inherited real property before 1977 and later held title with his wife as tenants by the entirety. **107** Following the husband's death in 1981, the wife took the position that the entire value of the farm is included in the husband's gross estate under **Section 2040(a)**, and that the entire property receives a new basis under **Sections 1014(a)** and (b)(9). The Fourth Circuit agreed, holding that **Section 2040(b)** does not apply.

The Tax Court also reached the same result. In *Hahn*, a husband and wife acquired apartment shares with the husband's funds before 1977 and held title as joint tenants with rights of survivorship. **108** Following the husband's death after 1981, the wife took the position that the entire value of the apartment shares is included in the husband's gross estate under **Section 2040(a)**, and that the entire apartment shares receive a new basis under **Sections 1014(a)** and (b)(9). The Tax Court agreed, holding that **Section 2040(b)** does not apply.

The Service disagreed with the result in *Gallenstein* and recognized that the *Gallenstein* decision places the Service in a whipsaw position so that neither spouse has an incentive to establish contributions inconsistent with the most favorable reporting. **109** On one hand, if the primary contributor to the acquisition of a pre-1977 joint interest is the first to die and **Section 2040(b)** does not apply, then the entire property is included in the gross estate under **Section 2040(a)** and a greater than 50% step up in basis is claimed. **110** On the other hand, if the noncontributing spouse is the first to die, then half of the value is included in the gross estate under **Section 2040(b)** and the survivor claims a 50% step up in basis. **111** Nevertheless, the Service announced in 2001 that it will no longer litigate whether **Section 2040(b)** applies to a joint interest created before 1977 and where a deceased joint tenant dies after 1981. **112**

## Examples.

The following examples illustrate various arrangements. Dramatically different estate and income tax results following the death of an owner depending on the arrangement selected and whether the burden of proof is met.

### One owner.

One owner without a payable on death designation is the simplest arrangement and provides a benchmark for an analysis comparing the tax implications of various arrangements. In that situation, **Section 2033** applies, and the gross estate includes the value of property to the extent of the decedent's interest therein.

*Example.* A and C are not married. A purchases a bond for \$50,000 and registers it in the name of A. Fifteen years later, A dies when the value of the bond increases to \$100,000. A's will bequeaths the bond to C. The gross estate includes the value of the bond (\$100,000). **113** C's basis in the bond is

\$100,000. [114](#)

*Example:* A and C are not married. A purchases a bond for \$50,000 and registers it in the name of C. Fifteen years later, A dies when the value of the bond increases to \$100,000. The gross estate does not include the value of the bond. [115](#) C's basis in the bond remains \$50,000. [116](#)

#### **Payable (or transfer) on death arrangement.**

Property subject to a payable (or transfer) on death arrangement is also subject to [I.R.C. Section 2033](#) .

*Example.* A and C are not married. A opens an account with \$50,000. A designates C as beneficiary so that the account is payable to C on A's death. Fifteen years later, A dies when the account increases to \$100,000. The gross estate includes the value of the account (100,000). [116.1](#) C's basis in the property of the account is \$100,000. [117](#)

*Example.* A and C are not married. C opens an account with \$50,000. C designates A as beneficiary so that the account is payable to A on C's death. Fifteen years later, A dies when the account increases to \$100,000. The gross estate does not include the property of the account. [118](#) C's basis in the property of the account remains \$50,000. [119](#)

#### **Account with rights of survivorship.**

[Section 2040\(a\)](#) applies where property is deposited with a bank in joint names and payable to either or the survivor.

*Example.* A and C are not married. A opens an account with \$50,000 in the name of "A and C, with rights of survivorship." Fifteen years later, A dies when the account increases to \$100,000. The gross estate includes the value of the account (100,000). [120](#) C's basis in the property of the account is \$100,000. [121](#)

*Example.* A and C are not married. C opens an account with \$50,000 in the name of "A and C, with rights of survivorship." Fifteen years later, A dies when the account increases to \$100,000. The gross estate generally includes the value of the account (100,000), subject to the originally belonged exception. [122](#) It is assumed that the executor does not meet the burden of proof. Thus, the gross estate includes \$100,000. C's basis in the property of the account is \$100,000. [123](#)

#### **Joint tenants with rights of survivorship.**

Property held by two or more persons (not married to each other) as joint tenants with rights of survivorship is subject to [Section 2040\(a\)](#) when a joint tenant dies. [Section 2040\(a\)](#) generally requires inclusion of the entire value in the gross estate, rather than the decedent's interest therein.

*Example.* A and C are not married. A purchases a bond for \$50,000 and registers it in the name of "A or C" or "A and C, as joint tenants with rights of survivorship." Fifteen years later, A dies when the value of the bond increases to \$100,000. The gross estate includes the entire value of the bond (100,000). [124](#)

C's basis in the bond is \$100,000. **125**

The general rule of **Section 2040(a)** is subject to three exceptions under **I.R.C. Section 2040(a)**. The first is with respect to property that originally belonged to a surviving joint tenant.

*Example.* A and C are not married. C purchases real property for \$50,000. C later executes a deed with the grantee in the name of "A and C, as joint tenants with rights of survivorship." Fifteen years later, A dies when the value of the property increases to \$100,000. The gross estate includes the entire value of the real property (100,000), except the part that originally belonged to C ( $100,000 \times 50,000 / 50,000 = 100,000$ ). **126** It is assumed that the executor meets the burden of proof. Thus, the gross estate includes \$0 ( $100,000 - 100,000 = 0$ ). C's basis remains \$50,000. **127**

The second exception under **Section 2040(a)** is for consideration furnished by a surviving joint tenant, also known as the contribution rule or contribution test. **Section 2040(a)** reduces the amount otherwise included in the gross estate by the amount of consideration furnished by a surviving joint tenant. If the decedent furnishes the entire purchase price of a jointly held property, then the value of the entire property is included in the gross estate. **128**

*Example.* A and C are not married. A purchases a bond for \$50,000 and registers it in the name "A or C" or "A and C, as joint tenants with rights of survivorship." Fifteen years later, A dies when the value of the bond increases to \$100,000. The gross estate includes the entire value of the bond (100,000), except the part attributable to consideration furnished by C (0), which is \$100,000 ( $100,000 - 0 = 100,000$ ). **129** C's basis in the bond is \$100,000. **130**

If the decedent furnishes no part of the purchase price of jointly held property, then no part of the value of the property is included in the gross estate. **131**

*Example.* A and C are not married. C purchases a bond for \$50,000 and registers it in the name of "A or C" or "A and C, as joint tenants with rights of survivorship." Fifteen years later, A dies when the value of the bond increases to \$100,000. The gross estate includes the entire value of the bond (100,000), except the part attributable to consideration furnished by C ( $100,000 \times 50,000 / 50,000 = 100,000$ ), which is \$0 ( $100,000 - 100,000 = 0$ ). **132** It is assumed that the executor meets the burden of proof. C's basis in the bond remains cost (50,000). **133**

If the decedent furnishes only a part of the purchase price, then only a corresponding portion of the value of the property is included in the gross estate. **134**

*Example.* A and C are not married. They purchase a bond for \$50,000 with consideration furnished equally by both of them. The bonds are registered in the name of "A or C" or "A and C, as joint tenants with rights of survivorship." Fifteen years later, A dies when the value of the bond increases to \$100,000. The gross estate includes the entire value of the bond (100,000), except the part attributable to consideration furnished by C ( $100,000 \times 25,000 / 50,000 = 50,000$ ), which is \$50,000 ( $100,000 - 50,000 = 50,000$ ). **135** It is assumed that the executor meets the burden of proof. C's basis in the bond is cost (25,000) for the part acquired by purchase plus a new basis for the part acquired from a decedent

(50,000), which is \$75,000 ( $25,000 + 50,000 = 75,000$ ). **136**

*Example.* A and C are not married. C purchases real property for \$50,000. A later transfers \$25,000 to C, and C executes a deed with the grantee in the name of "A and C, as joint tenants with rights of survivorship." Fifteen years later, A dies when the value of the property increases to \$100,000. The gross estate includes the portion of the value of the property attributable to the consideration paid by A, which is \$50,000 ( $100,000 \times 25,000 / 50,000 = 50,000$ ). **137** It is assumed that the executor meets the burden of proof. C's basis in the property is cost (25,000) for the part acquired by purchase combined with a new basis for the part acquired from a decedent (50,000), which is \$75,000 ( $25,000 + 50,000 = 75,000$ ). **138**

The consideration furnished exception under **Section 2040(a)** also applies where a joint interest is held by spouses with another person. The exception under **Section 2040(b)** does not apply in that situation because a joint interest held by spouses and a nonspouse is not considered a qualified joint interest.

**139**

*Example:* A and B are married and have two children, C and D. A and B purchase a bond for \$50,000 with consideration furnished equally by both of them. The bond is registered in the name of "A, B, C, or D" or "A, B, C, and D, as joint tenants with rights of survivorship." Fifteen years later, A dies when the value of the bond increases to \$100,000. The gross estate includes the entire value of the bond (100,000), except the part attributable to consideration furnished by B ( $100,000 \times 25,000 / 50,000 = 50,000$ ), which is \$50,000 ( $100,000 - 50,000 = 50,000$ ). **140** It is assumed that the executor meets the burden of proof. **141**

Additional rules apply where consideration furnished by a surviving joint tenant is received as a gift from a deceased joint tenant. If a deceased joint tenant gratuitously transfers property to a surviving joint tenant and he or she subsequently transfers the property to a joint tenancy with the deceased joint tenant, then such consideration furnished by the surviving joint tenant is considered furnished by the deceased joint tenant notwithstanding the appreciation in value during the survivor's individual ownership. **142** However, when the transfer to the joint tenancy consists of proceeds realized by a surviving joint tenant upon a sale of property acquired with monies transferred from a deceased joint tenant, the sale proceeds attributable to appreciation in value during the survivor's ownership of the acquired property are considered the survivor's individual contribution to the joint tenancy for purposes of **Section 2040**. **143**

*Example.* A and C are not married. A makes a gift transfer of \$50,000 to C, which C subsequently uses to purchase a bond. The bond is registered in the name of "A or C" or "A and C, as joint tenants with rights of survivorship." Fifteen years later, A dies when the value of the bond increases to \$100,000. The gross estate includes the entire value of the bond (100,000), and the consideration furnished by C is considered furnished by A. **144** C's basis in the bond is \$100,000. **145**

*Example.* A and C are not married. A makes a gift transfer of \$50,000 to C, which C subsequently uses to purchase income producing property. C later sells the property for a profit and uses the proceeds to



purchase a bond for \$75,000. The bond is registered in the name of "A or C" or "A and C, as joint tenants with rights of survivorship." Fifteen years later, A dies when the value of the bond increases to \$100,000. \$25,000 represents C's contribution to the bond. The portion of the fund contributed by A towards the acquisition of the bond is 66.67%, which is the value at the time of the gift of the property given by A to C (50,000) over the purchase price of the bond (75,000) ( $50,000 / 75,000 = 66.67\%$ ). Thus, A is deemed to have contributed 66.67% towards the purchase of the bond. Therefore, the amount of the bond included in the gross estate is \$66,667 ( $100,000 \times 0.6667 = 66,667$ ). **146**

The third exception under **Section 2040(a)** applies where joint tenants acquire their joint interests by gift, bequest, devise, or inheritance.

*Example.* P is the parent of A and C. P purchases a bond for \$50,000 and registers it in the name of "A or C" or "A and C, as joint tenants with rights of survivorship." Fifteen years later, A dies when the value of the bond increases to \$100,000. The gross estate includes a fractional part of the joint interest, which is \$50,000 ( $100,000 / 2 = 50,000$ ). **147**

*Example.* P is the parent of A, C, and D. P is sole owner of real property worth \$50,000. P dies, and P's will bequeaths the property equally to A, C, and D, who take title as "A, C, and D, as joint tenants with rights of survivorship." Fifteen years later, A dies when the value of the property increases to \$100,000. The gross estate includes a fractional part of the joint interest, which is \$33,333 ( $100,000 / 3 = 33,333$ ). **148**

For former spouses, either **Section 2040(a)** or **Section 2033** applies rather than **Section 2040(b)**.

*Example.* A and B are married to each other. A purchases a bond for \$50,000 and registers it in the name of "A or B" or "A and B, as joint tenants with rights of survivorship." A and B later divorce, and the divorce decree is silent as to the disposition of the bond. Pursuant to state law, title remains with A and B as joint tenants. Fifteen years later, A dies when the value of the bond increases to \$100,000. The gross estate includes the entire value of the bond (100,000). **149** C's basis in the bond is \$100,000. **150**

*Example.* A and B are married to each other. A purchases a bond for \$50,000 and registers it in the name of "A or B" or "A and B, as joint tenants with rights of survivorship" or "A and B, as tenants by the entirety." A and B later divorce, and the divorce decree is silent as to the disposition of the bond. Pursuant to state law, title converts into a tenancy in common. Fifteen years later, A dies when the value of the bond increases to \$100,000. The gross estate includes the value of the bond to the extent of A's interest therein (50,000). **151**

### **Joint interests of spouses.**

Joint interests held by a married couple are potentially subject to an exception under **Section 2040(b)**. In the case of any qualified joint interest, **Section 2040(b)** provides that only half of the value is included in the gross estate.

*Example.* A and B are married to each other. A purchases real property for \$50,000 with A's funds and

takes title in the name of "A and B, as joint tenants with rights of survivorship" or "A and B, as tenants by the entirety." Fifteen years later, A dies when the value of the property increases to \$100,000. A's interest in the property is a qualified joint interest. The gross estate includes half of the value of the property, which is \$50,000 ( $100,000 / 2 = 50,000$ ). **152**

The exception under **Section 2040(b)** applies to a qualified joint interest regardless of whether the surviving spouse furnishes consideration. **Section 2040(b)** eliminates the tracing concept of the consideration furnished exception under **Section 2040(a)**.

*Example.* A and B are married to each other. B purchases real property for \$50,000 with B's funds and takes title in the name of "A and B, as joint tenants with rights of survivorship" or "A and B, as tenants by the entirety." Fifteen years later, A dies when the value of the property increases to \$100,000. A's interest in the property is a qualified joint interest. The gross estate includes half of the value of the property, which is \$50,000 ( $100,000 / 2 = 50,000$ ). **153**

*Example.* A and B are married to each other. A and B purchase real property for \$50,000 with consideration furnished equally by both of them. Title is taken in the name of "A and B, as joint tenants with rights of survivorship" or "A and B, as tenants by the entirety." Fifteen years later, A dies when the value of the property increases to \$100,000. A's interest in the property is a qualified joint interest. The gross estate includes half of the value of the property, which is \$50,000 ( $100,000 / 2 = 50,000$ ). **154**

Similarly, the exception under **Section 2040(b)** applies to a qualified joint interest regardless of whether the deceased spouse acquires the joint interest by gift, bequest, devise, or inheritance.

*Example.* A and B are married to each other. P is the parent of A. P purchases real property for \$50,000. P dies when the value of the property remains \$50,000, and P's will bequeaths the property to A. At that time, A executes a deed that places title in the name of "A and B, as joint tenants with rights of survivorship." Fifteen years later, A dies when the value of the property increases to \$100,000. A's interest in the property is a qualified joint interest. The gross estate includes half of the value of the property, which is \$50,000 ( $100,000 / 2 = 50,000$ ). **155**

*Example.* A and B are married to each other. C purchases real property for \$50,000. C later makes a gift of the property to "A and B, as tenants by the entirety." Fifteen years later, A dies when the value of the property increases to \$100,000. A's interest in the property is a qualified joint interest. The gross estate includes half of the value of the property, which is \$50,000 ( $100,000 / 2 = 50,000$ ). **156**

Most community property states now permit community property to be held with rights of survivorship. **157** Income tax implications are more favorable in a community property state compared to other states because the surviving spouse's interest is also considered acquired from a decedent under **Section 1014(b)(6)** and, thus, receives a new basis under **Section 1014(a)**. Only half of the value of a qualified joint interest that is community property is included in the gross estate under **Section 2040(b)** when a spouse dies, but the entire property receives a new basis under **Section 1014(a)** because the deceased spouse's interest is considered acquired from a decedent under **Section 1014(b)(9)** and the surviving

spouse's interest is also considered acquired from a decedent under [Section 1014\(b\)\(6\)](#) . This is a rare situation where an interest in property receives a new basis under [Section 1014](#) without corresponding inclusion in the gross estate.

*Example.* A and B are married and domiciled in a community property state. A and B purchase real property for \$50,000 with community funds, and title is taken in the name of "A and B, as joint tenants with rights of survivorship." Under state law, the property is considered community property with rights of survivorship. Fifteen years later, A dies when the value of the property increases to \$100,000. A's interest in the property is a qualified joint interest. The gross estate includes half of the value of the property, which is \$50,000 ( $100,000 / 2 = 50,000$ ). [158](#) B's basis in the bond is \$100,000. [159](#)

## Conclusion

The yoke of a joint interest weighs heavy. Creation of a joint interest results in imposition of gift tax, and the death of a joint tenant results in inclusion of the entire value in the gross estate under [Section 2040\(a\)](#) unless an exception under [Sections 2040\(a\)](#) or (b) applies and the burden of proof is met. Tax implications are not intuitive because underlying economics are largely ignored. After considering the tax implications, many, particularly those with a taxable estate, may wish to throw off or avoid the yoke of a joint interest.

[1](#) FSA 633.

[2](#) Id.

[3](#) Disclaimer or severance of a joint interest is outside the scope of this article.

[4](#) *Burnet v. Harmel*, 287 U.S. 103 (1932); [Rev. Rul. 78-166, 1978-1 CB 283](#) .

[5](#) Restatement Third, Property (Wills and Other Donative Transfers) section 7.1, cmt. e; Tex. Est. Code section 111.001(a) (Two or more persons who hold an interest in property jointly may agree in writing that the interest of a joint owner who dies survives to a surviving joint owner or owners.).

[6](#) Restatement Third, Property (Wills and Other Donative Transfers) section 7.1, cmt. e (On the death of a spouse, property held as tenants by the entirety passes outside of probate to the decedent's surviving spouse.); [Treas. Reg. 25.2515-1\(a\)\(3\)](#) (An estate by the entirety in real property is essentially a joint tenancy between husband and wife with rights of survivorship.).

[7](#) Joint tenancy is classically characterized by "four unities" - the unity of interest, the unity of title, the

unity of time, and the unity of possession.

**8** Restatement Third, Property (Wills and Other Donative Transfers) section 7.1, cmt. a.

**9** Restatement Third, Property (Wills and Other Donative Transfers) section 7.1(a) (The right to possession or enjoyment of the property shifts outside of probate to the donee at the donor's death.).

**10** [Rev. Rul. 78-166, 1978-1 CB 283](#) .

**11** *Id.*

**12** [Rev. Rul. 78-166, 1978-1 CB 283](#) ; *Young v. Comm'r*, [110 T.C. 297](#) (1998) (The right of survivorship is the chief characteristic that distinguishes a joint tenancy from other interests in property.).

**13** Restatement Third, Property (Wills and Other Donative Transfers) section 7.1, cmt. e.

**14** *Young v. Comm'r*, [110 T.C. 297](#) (1998) (The surviving joint tenant does not secure that right from the deceased joint tenant, but from the devise or conveyance by which the joint tenancy was first created. At the time of decedent's death, decedent's interest in the property is extinguished, with the joint tenancy automatically passing to the surviving joint tenant by the operation of law, avoiding the need for probate.).

**15** Restatement Third, Property (Wills and Other Donative Transfers) section 7.1, cmt. e. Other forms of will substitutes exist, such as a revocable inter vivos trust, life insurance, retirement account, payable (or transfer) on death arrangement, and annuity with death benefits. Restatement Third, Property (Wills and Other Donative Transfers) section 7.1, cmt. a.

**16** Restatement Third, Property (Wills and Other Donative Transfers) section 7.1(a); Uniform Probate Code section 6-101 (A provision for a nonprobate transfer on death is nontestamentary. This includes a provision for money controlled by or owned by a decedent before death and paid after death to a person whom the decedent designates in a writing, and any property controlled or owned by the decedent before death and passes to a person the decedent designates in writing.).

**17** Restatement Third, Property (Wills and Other Donative Transfers) section 7.1, cmt. a; Uniform Probate Code section 6-101, cmt. (Because the modes of transfer are nontestamentary, the instrument does not have to be executed in compliance with the formalities for wills, nor does the instrument have to be probated, nor does the personal representative have any power or duty with

respect to the assets.).

**18** Restatement Third, Property (Wills and Other Donative Transfers) section 7.1, cmt. f; Uniform Probate Code section 6-203(a) (A multiple party account may be with or without rights of survivorship between the parties.); Uniform Probate Code section 6-212(a) (On the death of a party, sums on deposit in a multiple party account belong to the surviving party or parties.); Tex. Est. Code section 113.151(a) (Sums remaining on deposit on the death of a party to a joint account belong to the surviving party or parties against the estate of the deceased party if the interest of the deceased party is made to survive to the surviving party or parties by a written agreement signed by the party who dies.); Tex. Est. Code section 113.151(b) (An agreement is sufficient to confer an absolute right of survivorship on parties to a joint account if the agreement contains a statement substantially similar to the following: "On the death of one party to a joint account, all sums in the account on the date of death vest in and belong to the surviving party as his or her separate property and estate.").

**19** Restatement Third, Property (Wills and Other Donative Transfers) section 7.1, cmt. g; Uniform Probate Code section 6-201(8).

**20** Restatement Third, Property (Wills and Other Donative Transfers) section 7.1, cmt. g.

**21** Uniform Probate Code section 6-211(c).

**22** Restatement Third, Property (Wills and Other Donative Transfers) section 7.1, cmt. g.

**23** *Id.*

**24** See, e.g., Tex. Est. Code section 101.002. Termination of a joint tenancy converts title to a tenancy in common. *Stewart v. Comm'r*, **79 T.C. 1046** (1982). In some states, divorce triggers termination of a tenants by the entirety and conversion into a tenancy in common. **Rev. Rul. 80-241, 1980-2 CB 273**, situation 1; **GCM 38338**.

**25** PLR 8516040.

**26** PLR 8301008.

**27** *Id.*

**28** *Young v. Comm'r*, **110 T.C. 297** (1998); PLR 8301008. Nine states provide for community property: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and

Wisconsin. Additionally, Tennessee and South Dakota have passed elective community property laws.

**29** See, e.g., Tex. Est. Code section 251.002(a); Tex. Est. Code section 201.003(a) (If a person dies intestate and leaves a surviving spouse, then the community estate of the deceased spouse passes as provided in this section.); Tex. Est. Code section 201.003(b) (The community estate of the deceased spouse passes to the surviving spouse if (1) no child or other descendants of the deceased spouse survives the deceased spouse; or (2) all of the surviving children and descendants of the deceased spouse are also children or descendants of the surviving spouse.); Tex. Est. Code section 201.003(c) (If a person dies intestate and leaves a surviving spouse and the deceased spouse is survived by a child or other descendant who is not also a child or other descendant of the surviving spouse, then the deceased spouse's undivided one-half interest in the community estate passes to the deceased spouse's children or other descendants.).

**30** PLR 8301008.

**31** Compare, Restatement Third, Property (Wills and Other Donative Transfers) section 7.1, cmt. e; Tex. Const., Article XVI, section 15 (Spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse.); Tex. Est. Code section 112.051 (At any time, spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of a spouse.); Ariz. Rev. Stat. section 33-431(c); Cal. Civ. Code section 682.1; Idaho Code section 15-6-201; Nev. Rev. Stat. section 111.064(2); N.M. Stat. section 40-3-8(B); Wash. Rev. Code section 26.16.120; Wis. Stat. section 766.60; with, *Young v. Comm'r*, **110 T.C. 297** (1998) (Under prior California law, a husband and wife may hold property as joint tenants, tenants in common, or as community property. However, property cannot be both joint tenancy and community property, as these two types of interests are mutually exclusive.); *Black v. Comm'r*, **T.C. Memo. 1984-136** (1984), *rev'd*, 765 F.2d 862 (9th Cir. 1985) (Under prior Arizona law, a joint tenancy with rights of survivorship between a husband and wife is a separate property estate, not community property.).

**32** Treas. Reg. 25.2511-1(a) .

**33** Treas. Reg. 25.2511-2(a) .

**34** Treas. Reg. 25.2511-2(b) .

**35** Id.

**36** Treas. Reg. 25.2511-1(h)(4) .

**37** [Treas. Reg. 25.2511-1\(h\)\(4\)](#) ; [Rev. Rul. 68-269, 1968-1 CB 399](#) .

**38** Before repeal in 1981, special rules for spouses were set forth in [I.R.C. Section 2515](#) , I.R.C. Section 2515A, and [Treas. Reg. 25.2515-1](#) through [Treas. Reg. 25.2515-4](#) so that creation of a tenancy by the entirety by a spouse was not generally treated as a gift.

**39** [I.R.C. Section 2511\(a\)](#) ; [Rev. Rul. 68-269, 1968-1 CB 399](#) , situation 5 (bonds); P.L.R. 5807231560A (bonds).

**40** Restatement (First) of Property section 72 (When two or more persons have possessory estates in fee simple conditional, as tenants in common, or as joint tenants or as tenants by the entirety, each has the same power to compel the making of a partition thereof, as is possessed, in the state wherein the land is located, by each of the persons who has an estate in fee simple absolute held in like manner.); Restatement (Second) of Property section 4.5, cmt. a (The statutory law in the various states makes provision for one tenant in common or one joint tenant to compel partition of land held in one or the other of these forms of concurrent ownership. If the land held jointly is not capable of physical division among the concurrent owners, a forced sale of the land will be the result of the partition proceedings, and the proceeds of the sale will be divided among the concurrent owners.).

**41** [Treas. Reg. 25.2511-1\(h\)\(5\)](#) ; [Rev. Rul. 78-362, 1978-2 CB 248](#) .

**42** [Treas. Reg. 25.2511-1\(e\)](#) .

**43** [I.R.C. Section 2511\(a\)](#) ; [Rev. Rul. 78-362, 1978-2 CB 248](#) ; PLR 7817032; PLR 8640074 (stock); PLR 8805019.

**44** [I.R.C. Section 2511\(a\)](#) ; PLR 7732052 (securities); PLR 7745045; PLR 7746023; PLR 7746061; PLR 7805025; PLR 7817091; PLR 7821133; PLR 7910034; PLR 7948085; PLR 7952107; PLR 8038186; PLR 8041107; PLR 8046057; PLR 8051152; PLR 8105121; PLR 8123037 (stock); PLR 8130093; PLR 8213153; PLR 8252056; PLR 8301016; PLR 8316030; PLR 8324023; PLR 8417097; PLR 8434021; PLR 8443099; PLR 8447022; PLRR 8618024.

**45** Before repeal in 1981, special rules for spouses were set forth in [I.R.C. Section 2515](#) , I.R.C. Section 2515A, and [Treas. Reg. 25.2515-1](#) through [Treas. Reg. 25.2515-4](#) so that creation of a tenancy by the entirety by spouses was not generally treated as a gift.

**46** PLR 7830151.



47 *Id.*

48 **I.R.C. Section 2511(a)** ; PLR 7830151 (securities); PLR 9551014.

49 **I.R.C. Section 2511(a)** ; *McDonald v. Comm'r*, **89 T.C. 293** (1987).

50 **Treas. Reg. 1.102-1(a)** .

51 **I.R.C. Section 1015(a)** & (b); **Treas. Reg. 1.1015-1(a)(1)** ; **Treas. Reg. 1.1015-2(a)(1)** . The general rule is subject to limitation in the case of property with built in loss at the time of gift. **I.R.C. Section 1015(a)** .

52 **Treas. Reg. 1.1223-1(b)** .

53 *Id.*

54 **I.R.C. Section 1012** .

55 **I.R.C. Section 2511(a)** .

56 **I.R.C. Section 102** .

57 **I.R.C. Section 1015(a)** .

58 **I.R.C. Section 1223(2)** .

59 FSA 633. Taxpayers have challenged the constitutionality of **I.R.C. Section 2040** . The Supreme Court, however, has held that such a challenge is without merit. *Tyler v. U.S.*, 281 U.S. 497 (1930).

60 **Treas. Reg. 20.2040-1(a)(2)** .

61 Additionally, **I.R.C. Section 2040** does not apply where the deceased joint tenant is the victim of a felonious homicide committed by the surviving joint tenant. **Rev. Rul. 78-166, 1978-1 CB 283** ; **Rev. Rul. 78-167, 1978-1 CB 288** ; **GCM 36679** .

62 *Peters v. Comm'r*, **46 T.C. 407** (1966), *aff'd*, 386 F.2d 404 (4th Cir. 1967).

**63** [Treas. Reg. 20.2040-1\(a\)\(2\)](#) ; *Gallenstein v. U.S.*, 975 F.2d 286 (6th Cir. 1992); *Hahn v. Comm'r*, **110 T.C. 140** (1998).

**64** [Treas. Reg. 20.2040-1\(a\)\(2\)](#) .

**65** *Id.*

**66** *Gallenstein v. U.S.*, 975 F.2d 286 (6th Cir. 1992); *Hahn v. Comm'r*, **110 T.C. 140** (1998); FSA 633. The Code and Regulations use the term "consideration furnished" rather than "contribution rule" or "contribution test."

**67** *Gallenstein v. U.S.*, 975 F.2d 286 (6th Cir. 1992).

**68** FSA 633.

**69** *Id.*

**70** [Treas. Reg. 20.2040-1\(a\)](#) , flush language; *Magill v. Comm'r*, **T.C. Memo 1982-148** (1982), *aff'd*, 729 F.2d 496 (7th Cir. 1984) (The burden of proof under [I.R.C. Section 2040](#) was not met where the evidence provided is testimony of the executor. There is no reliable evidence to indicate how much a surviving joint tenant contributed, or that they intended transferred funds to be used in the acquisition of jointly held property.).

**71** *Madden v. Comm'r*, **52 T.C. 845** (1969), *aff'd*, 440 F.2d 784 (7th Cir. 1971).

**72** *Madden v. Comm'r*, **52 T.C. 845** (1969), *aff'd*, 440 F.2d 784 (7th Cir. 1971) (Obviously, it is frequently difficult to trace the source of funds used to purchase jointly owned property.); *Young v. Comm'r*, **110 T.C. 297** (1998) (Normally, [I.R.C. Section 2040\(a\)](#) starts with the full inclusion of the value of the joint tenancy in the gross estate of the first joint tenant to die. In order to reduce this inclusion, there is a strict tracing of contributions by the surviving joint tenant.).

**73** [Treas. Reg. 20.2040-1\(a\)\(1\)](#) .

**74** [Treas. Reg. 20.2040-1\(c\)](#) (ex. 8).

**75** [Treas. Reg. 20.2040-1\(c\)](#) (ex. 7) .

**76** [Treas. Reg. 20.2040-1\(a\)](#) , flush language.

**77** If, however, the surviving spouse is not a citizen of the United States, then [I.R.C. Section 2040\(b\)](#) does not apply. [I.R.C. Section 2056\(d\)\(1\)\(B\)](#) ; PLR 9521031; PLR 9551014.

**78** [I.R.C. Section 2040\(b\)\(2\)](#) .

**79** FSA 636.

**80** [Treas. Reg. 20.2040-1\(b\)](#) .

**81** State law creates legal interests and the federal statute determines when and how an interest is taxed. *Burnet v. Harmel*, 287 U.S. 103 (1932); *Stewart v. Comm'r*, **79 T.C. 1046** (1982).

**82** [Treas. Reg. 20.2040-1\(b\)](#) .

**83** *Id.*

**84** *Id.*

**85** PLR 8613031.

**86** *Young v. Comm'r*, **110 T.C. 297** (1998); FSA 633 (There is no provision authorizing any further reduction in the portion of the value of the entire property included in the gross estate for reasons other than contribution, such as fractional discounts, etc.); PLR 8034005 (Further, we note that in its amendments to [I.R.C. Section 2040](#) , Congress clearly indicates that where property is held by two individuals in a joint tenancy or a tenancy by the entirety arrangement, no discount is allowed with respect to the inclusion of a one half share in the gross estate. This indicates that discounts are not called for in co-tenancy interests.).

**87** [GCM 36647](#) .

**88** [Treas. Reg. 20.2012-1\(a\)](#) ; but, see, [I.R.C. Section 2001\(b\)](#) .

**89** Restatement Third, Property (Wills and Other Donative Transfers) sections 7.1, cmt. a & e. See, *McDonald v. Comm'r*, **89 T.C. 293** (1987) (With respect to whether a disclaimer by a surviving joint

tenant is timely, the Tax Court concluded that the transfer of a joint interest occurs at creation of the joint tenancy.).

**90** *Hahn v. Comm'r*, **110 T.C. 140** (1998).

**91** **Treas. Regs. 1.1014-2(b)(1)** & (2); *Hahn v. Comm'r*, **110 T.C. 140** (1998); **Rev. Rul. 56-215, 1956-1 CB 324** (The rule set forth in **I.R.C. Section 1014(b)(9)** applies to that portion of jointly held property included in the gross estate under **I.R.C. Section 2040** .); **Rev. Rul. 56-519, 1956-2 CB 123** ; **Rev. Rul. 58-130, 1958-1 CB 121** ; PLR 5602174990A; AOD 1967 WL 16310. Before enactment of **I.R.C. Section 1014(b)(9)** in 1954, there was no step up of basis for jointly held property, even though the property is included in the gross estate. *Madden v. Comm'r*, **52 T.C. 845** (1969), *aff'd*, 440 F.2d 784 (7th Cir. 1971).

**92** *Hahn v. Comm'r*, **110 T.C. 140** (1998).

**93** **Treas. Reg. 1.1223-1(j)** .

**94** *Id.* **I.R.C. Section 1223(9)** was formerly designated as **I.R.C. Section 1223(11)** .

**95** *Id.*

**96** *Young v. Comm'r*, **110 T.C. 297** (1998).

**97** *Id.*

**98** *Id.*

**99** *Id.* (In 1919, section 202(c) was renumbered as section 402(d). In the Revenue Act of 1921, Congress added language to remove uncertainties in the existing law relating to the interests held jointly or as tenants in the entirety. In 1924, the provision was renumbered to section 302(e), and it was reworded to secure greater clarity. In the 1939 Code, the provision became section 811(e)(1). Then, in 1954, the provision became **I.R.C. Section 2040(a)** .)

**100** *Lang v. Comm'r*, 289 U.S. 109 (1933) (If the legislation here under review results in imposing an unfair burden upon the taxpayer, the remedy is with Congress and not with the courts. Unless there is a violation of the Constitution, Congress may select the subjects of taxation and tax them differently as it sees fit, and if it does so in plain words, as it has done here, the courts are not at liberty to modify the act by construction in order to avoid special hardship.).

**101** *Madden v. Comm'r*, **52 T.C. 845** (1969), *aff'd*, 440 F.2d 784 (7th Cir. 1971).

**102** *Madden v. Comm'r*, **52 T.C. 845** (1969), *aff'd*, 440 F.2d 784 (7th Cir. 1971) (As a result of the enactment of **I.R.C. Section 1014(b)(9)** , providing a step up in basis for jointly owned property included in the gross estate, it may now be to the advantage of some surviving joint tenants not to seek a reduction of the estate tax by establishing that part or all of the jointly owned property originally belonged to the survivor.); *Normoyle v. Comm'r*, **T.C. Memo 1969-199** (1969) (In a case involving spouses before 1981, petitioner intentionally refrained from introducing evidence relating to the consideration, if any, furnished by either petitioner or his deceased wife for the acquisition of real property.).

**103** *Madden v. Comm'r*, **52 T.C. 845** (1969), *aff'd*, 440 F.2d 784 (7th Cir. 1971); *Normoyle v. Comm'r*, **T.C. Memo 1969-199** (1969).

**104** *Patten v. U.S.*, 116 F.3d 1029 (4th Cir. 1997). In 1978, I.R.C. Sections 2040(c), (d), and (e) were added to provide an election so that a joint interest created prior to 1977 is treated as a "qualified joint interest." In 1981, Congress repealed I.R.C. Sections 2040(c), (d), and (e).

**105** *Patten v. U.S.*, 116 F.3d 1029 (4th Cir. 1997).

**106** *Gallenstein v. U.S.*, 975 F.2d 286 (6th Cir. 1992).

**107** *Patten v. U.S.*, 116 F.3d 1029 (4th Cir. 1997).

**108** *Hahn v. Comm'r*, **110 T.C. 140** (1998).

**109** FSA 636.

**110** *Id.*

**111** *Id.*

**112** AOD 2001-006.

**113** **I.R.C. Section 2033** .

**114 I.R.C. Sections 1014(a) & (b)(1), Rev. Rul. 68-269, 1968-1 CB 399** , situations 1 & 3.

**115 I.R.C. Section 2033** .

**116 I.R.C. Section 1015** , **Rev. Rul. 68-269, 1968-1 CB 399** , situations 4 & 7.

**116.1 I.R.C. Section 2033** .

**117 I.R.C. Section 1014(a), I.R.C. Section 1014(b)(9)** , **Rev. Rul. 68-269, 1968-1 CB 399** , situation 2 (bonds).

**118 I.R.C. Section 2033** .

**119 I.R.C. Section 1012** .

**120 I.R.C. Section 2040(a)** .

**121 I.R.C. Sections 1014(a) & (b)(9)**.

**122 I.R.C. Section 2040(a)** .

**123 I.R.C. Sections 1014(a) & (b)(9)**; But, see, *Madden v. Comm'r*, **52 T.C. 845** (1969), *aff'd*, 440 F.2d 784 (7th Cir. 1971) (A surviving joint tenant made no attempt, either in the estate tax return or in the proceeding, to show that any portion of jointly held property is excludable from the gross estate of the deceased joint tenant. In those circumstances, the Tax Court held that the surviving joint tenant fails to prove that one half of the value of the jointly held property is required to be includible in the gross estate and that he is entitled to a step up in the basis of the property by reason of such an inclusion.); *and*, *Normoyle v. Comm'r*, **T.C. Memo 1969-199** (1969) (Petitioner intentionally seeks a stepped up basis for two parcels of real property upon the sole premise that, being jointly and severally held by him and his wife, the value thereof is included in the gross estate at her death by her executors who chose not to make any showing that the consideration therefor was paid in whole or in part by anyone other than her. The Tax Court found the premise to be so slender a reed as not to withstand pressure of the Service's determination that the value of the property is nevertheless not required to be included nor shown to be includible in the gross estate.).

**124 I.R.C. Section 2040(a)** .

**125 I.R.C. Sections 1014(a) & (b)(9); Treas. Reg. 20.2040-1(c)(1) ; Rev. Rul. 68-269, 1968-1 CB 399** , situation 5 (bonds); **Rev. Rul. 80-142, 1980-1 CB 197** (stock); **GCM 37893** (stock); **GCM 37496** (real property and account); PLR 5610241590A (bonds); PLR 5807231560A (bonds); PLR 7741042 (bonds owned by spouses before 1981); TAM 6908061650A (real property owned by spouses before 1981).

**126 I.R.C. Section 2040(a) .**

**127 I.R.C. Section 1012 .**

**128 Treas. Reg. 20.2040-1(c)(1) .**

**129 I.R.C. Section 2040(a) .**

**130 I.R.C. Sections 1014(a) & (b)(9); Treas. Reg. 20.2040-1(c)(1) ; Magill v. Comm'r, T.C. Memo 1982-148** (1982), *aff'd*, 729 F.2d 496 (7th Cir. 1984); *Gallenstein v. U.S.*, 975 F.2d 286 (6th Cir. 1992) (spouses before 1981); *Patten v. U.S.*, 116 F.3d 1029 (4th Cir. 1997) (spouses before 1981); *Hahn v. Comm'r*, **110 T.C. 140** (1998) (spouses before 1981); **Rev. Rul. 66-60, 1966-1 CB 221** (simultaneous death of spouses before 1981); **Rev. Rul. 76-303, 1976-2 CB 266** (simultaneous death of spouses before 1981) (In a situation involving the simultaneous deaths of joint tenants, a portion of the jointly held property is included in a joint tenant's estate under **I.R.C. Section 2033** .).

**131 Treas. Reg. 20.2040-1(c)(3) .**

**132 I.R.C. Section 2040(a) .**

**133 I.R.C. Section 1012 ; Treas. Reg. 20.2040-1(c)(3) ; Rev. Rul. 76-303, 1976-2 CB 266** (simultaneous death of spouses before 1981) (In a situation involving the simultaneous deaths of joint tenants, a portion of the jointly held property is includible in a joint tenant's estate under **I.R.C. Section 2033** .).

**134 Treas. Reg. 20.2040-1(c)(2) .**

**135 I.R.C. Section 2040(a) .**

**136 I.R.C. Section 1012 ; I.R.C. Sections 1014(a) & (b)(9); Treas. Reg. 20.2040-1(c)(2) ; Rev. Rul. 56-519, 1956-2 CB 123** (farm and apartment owned by spouses before 1981); **Rev. Rul. 68-269,**



**1968-1 CB 399** , situation 6 (bonds); **Rev. Rul. 76-112, 1976-1 CB 276** (mortgage owned by spouses before 1981); **Rev. Rul. 79-302, 1979-2 CB 328** (residence owned by spouses before 1981); **Rev. Rul. 81-183, 1981-2 CB 180** (residence owned by spouses before 1981); **Rev. Rul. 81-184, 1981-2 CB 181** (residence owned by spouses before 1981); FSA 633 (real property); PLR 5602174990A (farm and apartment owned by spouses before 1981); PLR 7509070080A (mortgage owned by spouses before 1981); PLR 7907018 (farm owned by spouses before 1981); PLR 9551014 (real property); **GCM 37381** ; **GCM 38609** .

**137 I.R.C. Section 2040(a)** .

**138 I.R.C. Section 1012** ; **I.R.C. Sections 1014(a)** & (b)(9); **Treas. Reg. 20.2040-1(c)(6)** .

**139 TAM 9140005** (The decedent and the spouse of the decedent must be the only joint tenants.).

**140 I.R.C. Section 2040(a)** .

**141** PLR 9224010 (account).

**142 Rev. Rul. 79-372, 1979-2 CB 330** .

**143** Id.

**144 I.R.C. Section 2040(a)** .

**145 I.R.C. Section 1014(a)** & (b)(9); **Treas. Regs. 20.2040-1(c)(4)** & (c)(5); PLR 7953013 (residence owned by spouses before 1981).

**146 I.R.C. Section 2040(a)** ; **Rev. Rul. 79-372, 1979-2 CB 330** (account); **GCM 37674** (spouses before 1981).

**147 I.R.C. Section 2040(a)** ; **Rev. Rul. 68-269, 1968-1 CB 399** , situation 7 (bonds); **GCM 35853** (real property owned by spouses before 1981).

**148 I.R.C. Section 2040(a)** ; **Rev. Rul. 68-269, 1968-1 CB 399** , situation 7 (bonds).

**149 I.R.C. Section 2040(a)**

**150 I.R.C. Sections 1014(a) & (b)(9); Rev. Rul. 80-241, 1980-2 CB 273** , situation 2; **GCM 38338** .

**151 I.R.C. Section 2033** ; **Rev. Rul. 80-241, 1980-2 CB 273** , situations 1 & 2; **GCM 38338** .

**152 I.R.C. Section 2040(b)** ; **Rev. Rul. 82-159, 1982-2 CB 210** , situation 3; PLR 8613031.

**153 I.R.C. Section 2040(b)** .

**154 I.R.C. Section 2040(b)** .; PLR 8346040 (securities); PLR 8613031; PLR 9113011 (brokerage account); PLR 200025032 (brokerage account); **TAM 200104008** .

**155 I.R.C. Section 2040(b)** ; FSA 636.

**156 I.R.C. Section 2040(b)** ; **Treas. Reg. 20.2040-1(c)(7)** .

**157** Compare, Restatement Third, Property (Wills and Other Donative Transfers) section 7.1, cmt. e; Tex. Const., Article XVI, section 15 (Spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse.); Tex. Est. Code section 112.051 (At any time, spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of a spouse.); Ariz. Rev. Stat. section 33-431(c); Cal. Civ. Code section 682.1; Idaho Code section 15-6-201; Nev. Rev. Stat. section 111.064(2); N.M. Stat. § 40-3-8(B); Wash. Rev. Code section 26.16.120; Wis. Stat. section 766.60; with, *Young v. Comm'r*, **110 T.C. 297** (1998); *Black v. Comm'r*, **T.C. Memo. 1984-136** (1984), *rev'd*, 765 F.2d 862 (9th Cir. 1985).

**158 I.R.C. Section 2040(b)** ; The Service has not yet provided guidance on whether community property with rights of survivorship is a qualified joint interest. Prior to 1981, the consideration furnished exception under **I.R.C. Section 2040(a)** applied. *Black v. Comm'r*, **T.C. Memo. 1984-136** (1984), *rev'd*, 765 F.2d 862 (9th Cir. 1985); **Rev. Rul. 78-418, 1978-2 CB 236** (When property held in joint tenancy by spouses is purchased with community property funds in which the spouses had vested equal interests, each spouse is regarded as having contributed half of the consideration for the jointly held property for purposes of **I.R.C. Section 2040** .).

**159 I.R.C. Sections 1014(a)** , (b)(6) & (b)(9); **Rev. Rul. 87-98, 1987-2 CB 206** .

