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Notes

The Proposed Change in the Minnesota State Inheritance Taxation of Jointly Owned Property

Minnesota imposes an inheritance tax on the right of a survivor to the possession and enjoyment of jointly owned property upon the death of a co-owner. The tax is based on the full value of the property less that portion which is shown to have originally belonged to the survivor. The application of this rule often imposes a difficult evidentiary burden on survivors to establish their original interests in jointly held property, and a correlative administrative burden on the state commissioner of taxation. The author of this Note discusses these difficulties and the advisability of proposed remedial legislation. He concludes by advocating the adoption of legislation providing for taxation only of the decedent's fractional interest in jointly owned property.

INTRODUCTION

Most jurisdictions impose a tax upon the “interest” of a decedent in property held in joint tenancy at the date of his death. This is done either by taxing the decedent’s interest—an estate tax—or by taxing the transfer of the decedent’s interest to the surviving joint tenant—an inheritance or succession tax. In

1. The federal government, the District of Columbia, and 42 states explicitly impose such a tax by statute. Vermont has imposed one by judicial construction. Alaska, Louisiana, Michigan, Missouri, Nevada, Texas, and Wyoming either do not recognize joint estates or do not impose an estate or inheritance tax upon a decedent’s interest in them. See 4 and 5 P-H INH. & TRANS. TAX SERV. (the unit for every state) ¶¶ 112, 113 (1965).

2. It is unlikely that the decedent’s interest in joint tenancies or tenancies by the entirety would be taxable at death under an estate or succession tax statute which did not provide expressly therefor. But see note 1 supra (Vermont). This arises from the fact that the survivor’s acquisition of the entire interest is technically founded not upon the death of the decedent, but upon the instrument which created the joint interest. Tyler v. United States, 281 U.S. 497, 502 (1930) (dictum). However, the Tyler case held the direct tax and due process clauses did not preclude the inclusion of jointly held property in
determining the extent of the decedent’s interest in the property, two methods are most commonly used. The federal government and a substantial number of states, including Minnesota, have adopted the “contribution” method. Broadly speaking, it provides that the decedent’s estate for federal estate tax purposes to the extent that contribution by the survivor was not shown, since “the death of one of the parties to the tenancy became the ‘generating source’ of important and definite accessions to the property rights of the other.” Id. at 504. Blackstone himself recognized the significance of the death of one joint tenant upon the rights of the survivor(s): “This right of survivorship is called by our ancient authors the jus acefescendi, because the right upon death of one joint-tenant, accumulates and increases to the survivors . . . .” 2 BLACKSTONE COMMENTARIES *184. (Emphasis added.)

Not all states recognize joint tenancies in personal property and even those which do would not usually recognize a joint tenancy in a joint bank account without specific statutory provision therefor. See Kepner, Five More Years of the Joint Bank Account Muddle, 26 U. CHI. L. REV. 376 (1959); Kepner, The Joint and Survivorship Bank Account—A Concept Without a Name, 41 CALIF. L. REV. 596, 598–603 & n.10 (1953).

4. Minn. Stat. § 291.01 (1961) provides in part as follows:

   Subd. 4. Jointly owned property. (1) Whenever any property, real or personal, is held in the joint names of two or more persons, or is deposited in banks or in other institutions or depositaries in the joint names of two or more persons payable to either or the survivor, upon the death of one of such persons the right of the survivor or survivors, to the immediate ownership or possession and enjoyment of such property, shall be deemed a transfer and subject to the inheritance tax imposed by this chapter, except such part thereof as may be shown to have originally belonged to the survivor or survivors and never to have been received or acquired by them from the decedent for less than an adequate and full consideration in money or money’s worth; in which case there shall be excepted only such part as is proportionate to the consideration furnished by the survivor or survivors. Provided, where any property has been acquired prior to April 29, 1935, by the decedent and spouse, as joint tenants, not in excess of one-half of the value thereof shall be taxable. Provided, further, where property has been acquired at any time by gift, bequest, devise, or inheritance, by the decedent and any other person or persons, as joint tenants, the taxable portion shall be the value of a fractional part of said property to be determined by dividing the value of the property by the number of joint tenants.

Eighteen other states have adopted a “contribution” system which is applied to all joint tenancies. Alabama, Arkansas, Florida, New York, and South Carolina closely follow the federal rule. Arizona, California, Delaware, Idaho, Iowa, Kansas, Mississippi, Nebraska, New Mexico, Oklahoma, Rhode Island, Tennessee and Washington adhere to the federal rule with some modifications. See 4 and 5 P-H INT. & TRANS. TAX SERV. (the units for the above states) ¶¶ 112, 113 (1965).
provides for taxation of that portion of the property which the survivor is unable to demonstrate that he contributed. Nine states and the District of Columbia utilize the “fractional” approach, under which only the decedent’s fractional interest in the jointly held property is taxed, regardless of the relative contributions of the owners. The remaining states which tax joint ownership interests employ various hybrids of these two methods.

During the 1963 session of the Minnesota Legislature, bills were introduced in both the house of representatives and the senate which, if enacted, would have altered the existing Minnesota rule in this area. The house proposal provided for the taxation of all joint interests under the fractional rule. The senate bill provided for the substitution of the fractional method only


7. Some states which generally follow the contribution system apply some variant of the fractional method to interests passing from spouse to spouse. They include Hawaii, Indiana, Massachusetts, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oregon, South Dakota, Utah, Vermont, and Virginia. 4 and 5 P-H INH. & TRANS. TAX SERV. (the units for the above states) ¶¶ 112, 113 (1965). The Minnesota statute provides that no more than one-half the value of property acquired by the decedent and his spouse in joint tenancy prior to April 29, 1935 shall be taxable. See Minn. Stat. § 291.01 subd. 4 (1961), quoted in note 4 supra.

8. “H.F. No. 588, A bill for an act relating to inheritance and transfer taxes and the assessment thereof; amending Minnesota Statutes 1961, Section 291.01, Subdivision 4.” (All large capitals in original.) The bill was read for the first time on February 13, 1963, and referred to the committee on taxes. JOURNAL OF THE HOUSE 297 (1963). The bill proposed to amend § 291.01 subd. 4 to read in part as follows (proposed changes in italics):

(1) Whenever any property, real or personal, is held in the joint names of two or more persons, or is deposited in banks or in other institutions or depositories in the joint names of two or more persons payable to either or the survivor, upon the death of one of such persons the right of the survivor or survivors, to the immediate ownership or possession and enjoyment of such property, shall be deemed a transfer taxable under the provisions of this act in the same manner as though a fractional part of the property to be determined by dividing the value of the entire property by the number of joint tenants, joint depositors or persons, belonged absolutely to the deceased joint tenant, joint depositor or person and had been devised or bequeathed to the surviving joint tenant or joint tenants, person or persons, by such deceased joint tenant or joint depositor by will.

The termination of a joint tenancy, when the transfer of the property is to the person to whom it originally belonged, shall not be deemed a transfer subject to the gift tax provisions of chapter 292, or
with respect to interests passing to a surviving spouse. Neither bill was ever reported out of committee and these or similar proposals have not been reintroduced during the 1965 legislative session. The function of this Note is to examine the desirability and implications of such a change in Minnesota law.

I. PRESENT MINNESOTA LAW

Minnesota Statutes, section 291.01 subd. 4, expressly applies the “contribution” test to all joint interests in property, including bank accounts, real estate, and personality, acquired on or after

the provisions of section 291.01, subdivision 1(3) provided that such transfer is made within a period of two years beginning on the effective date of this act.

9. “S.F. No. 683: A bill for an act relating to inheritance and transfer taxes and the assessment thereof; amending Minnesota Statutes 1961, Section 291.01, Subdivision 4.” (All large capitals in original.) The bill was given its first reading on February 19, 1963, and referred to the committee on the judiciary. JOURNAL OF THE SENATE 363 (1963). The bill proposed to amend § 291.01 subd. 4 to read in part as follows:

(1) (a) Except as to transfers between husband and wife, which are taxable under subsection (b) of this section in the manner therein provided, . . . [jointly held property shall be taxed as in the existing provision].

(b) Whenever property described in subsection (a) hereof is held in the joint names of husband and wife, or in the joint names of husband and wife and one or more other persons, upon the death of either the husband or wife the surviving spouse shall be deemed to have received a transfer taxable under this section to the extent of the increase in the value of the surviving spouse’s interest in such property resulting from the death of the deceased spouse. Such surviving spouse’s interest in such property shall be valued for purposes of this section, first, by dividing the value of the entire property at the death of the deceased spouse by the number of joint owners including such deceased spouse, and second, by dividing the value of the entire property at the death of the deceased spouse by the number of joint owners excluding such deceased spouse, and, third, by subtracting the first quotient from the second quotient. The remainder resulting from such subtraction shall be deemed a transfer from such deceased spouse to such surviving spouse, taxable in the same manner as though property equal in value to such remainder had belonged absolutely to such deceased spouse and had been devised or bequeathed to such surviving spouse by such deceased spouse by will.

The termination of a joint tenancy, when the transfer of the property is to the spouse to whom it originally belonged, shall not be deemed a transfer subject to the gift tax provisions of Chapter 292, or the provisions of section 291.01, subdivision 1 (8), provided that such transfer is made within a period of two years beginning on the effective date of this article.

10. Quoted in part in note 4 supra.
April 9, 1935. Joint tenancies between spouses created prior to that date are taxed on a fractional basis unless the survivor proves that he contributed over one-half the property, in which case the tax is imposed only on the value allocable to the remaining portion. Where a joint tenancy is created by gift from a third party, only the decedent’s fractional interest is subject to taxation.

The major difficulty with the contribution method lies in the uncertainty which exists as to the magnitude of the burden imposed upon the survivor to prove the size of his contribution. The Minnesota Inheritance Tax Regulations provide that the burden of proof rests upon the survivor, who must support his claim by an affidavit stating his proportionate contribution. Furthermore, he may be required by the commissioner to produce additional supporting records such as tax returns, receipts, cancelled checks, and bank books. The only two reported decisions relating to the sufficiency of the survivor’s evidence, Estate of Benham and Kochendorfer v. Commissioner, reveal that the determination in any given case whether the survivor has contributed and, if so, the extent of his contribution, will be controlled largely by the burden of documentary production that the commissioner chooses to impose and the fortuity that the survivor is or is not able to satisfy it.

In Estate of Benham, H and W opened a joint bank account when they were married, H contributing $50 and W an "unascer-

11. The statute applies to all property held jointly with right of survivorship. The “four unities” required for the creation of a common law joint tenancy need not be present. Since Minnesota does not recognize tenancies by the entirety, see Wilson v. Wilson, 43 Minn. 398, 45 N.W. 710 (1890), these interests are, of course, not covered by § 291.01 subd. 4. Nor does the statute apply to tenancies in common, since no right of survivorship is incident to that estate. Minnesota Inh. Tax Reg. 59(b), 4 P-H INH. & TRANS. TAX SERV. Minn. ¶ 112-A (1964).

12. This application of the fractional test relates only to “joint tenancies” and not to other property merely “held jointly,” such as joint bank accounts. See Minnesota Inh. Tax Reg. 58(a), 4 P-H INH. & TRANS. TAX SERV. Minn. ¶ 112-A (1964).

13. The commissioner was authorized to issue regulations by the 1963 session of the legislature. MINN. STAT. ANN. § 291.31 (Supp. 1964); see Minnesota Inh. Tax Regs. 58-60, 4 P-H INH. & TRANS. TAX SERV. Minn. ¶ 112-A (1964). See also MINNESOTA COMMISSIONER OF TAXATION, A REPRINT OF INHERITANCE TAX SUGGESTIONS AND GIFT TAX COMPENDIUM 18 (1956).

14. Minnesota Inh. Tax Reg. 59(c), 4 P-H INH. & TRANS. TAX SERV. Minn. ¶ 112-A (1964). This regulation apparently codified the existing administrative practice which was based on the rather obvious intent of § 291.01 subd. 4.


tained substantial amount.” W then financed the last two years of H's medical training. During their marriage she inherited $16,000, and H received a $2,000 gift. For 60 years prior to H's death, H and W had been jointly engaged in the real estate business, W originally having furnished the cash which enabled them to establish the business. They had assumed joint liability on all notes and mortgages. All property acquired during the marriage was held in joint tenancy. At H's death the commissioner found that W had not sufficiently proved that she had contributed to the acquisition of the jointly held property and consequently assessed an inheritance tax based upon the full value of that property. The Board of Tax Appeals reversed the commissioner's order and sustained W's claim of 50 percent contribution, relying solely on the evidence outlined above.

While W proved that she had made some contribution, she clearly did not establish its specific amount. The board failed to articulate its reasons for nevertheless finding contribution and valuing it at 50 percent. However it would seem to have held implicitly that strong probative evidence of the survivor's contribution is not required.

This inference was recently vitiated in Kochendorfer. In that case the decedent in 1946 induced the taxpayer to leave her employment and work for him by promising that she would be “much farther ahead” by doing so than if she continued her prior employment. During the next 13 years she worked for the decedent and lived in his household without being paid a salary. In 1951 decedent established a savings account in taxpayer's name and made an initial deposit of $5,000. Subsequent deposits increased the balance to over $10,000 by July, 1960, one month prior to the decedent's death. At that time, the decedent withdrew over $9,000 and placed it in a joint bank account in the names of the taxpayer and himself. On his death decedent held property worth over $42,000 in joint tenancy with taxpayer.

The taxpayer asserted principally that the joint tenancy property devolving upon her represented compensation for her services to the decedent, and that she therefore had contributed the consideration for all the property and owed no inheritance tax. Alternatively she argued that since she would have earned $23,000 during the period she worked for the decedent, had she continued in her former employment at her former rate of pay, she had contributed at least that amount to the value of the joint tenancy property. The commissioner found no contribution and assessed an inheritance tax on the entire $42,000. On appeal the Board of
Tax Appeals affirmed, except as to the $9,000 of joint tenancy property derived from the bank account opened in taxpayer’s name in 1951.

In reaching its decision the board relied heavily on the taxpayer’s failure to file income tax returns while working for the decedent. Furthermore, the taxpayer’s claim of contribution was supported only by her “mere” and “bare” assertions that she had in fact earned the property as compensation for her services. Finally, had taxpayer successfully asserted a claim for compensation for her services in probate court, “her claim of contribution might have some merit.”

The board’s reasoning is at best unpersuasive and inconsistent, reflecting very well the difficulties confronted in adjudicating contribution issues on the basis of a typically inadequate record. The inferences which the board draws from the taxpayer’s failure to file tax returns for the years 1946 through 1959 seems unfounded. On the one hand, the board relied on this omission as a basis for denying the larger portion of the taxpayer’s claim of contribution, presumably on the ground that it represented an admission by her that her services were not in fact rendered for compensation. Yet apart from the sums deposited in taxpayer’s savings account — from which $9,000 of the joint tenancy property was “contributed” — she received no taxable compensation until the transfers to her as joint tenant. It is not clear when these transfers were made, though it may be inferred from the board’s opinion that it was not until shortly before the decedent died in 1960. If so, it seems most likely — in view of the commissioner’s finding that the parties had entered into an employment relationship — that the absence of tax returns for the years 1946 through 1959 indicate not that the taxpayer’s services were rendered gratuitously, but that her compensation was deferred until decedent created the joint interests.\(^\text{17}\) On the other hand, the board obviously failed to give any consideration at all to the absence of tax returns in

\(^{17}\) Ibid. The validity of this suggestion seems doubtful. Assuming that the transfers into joint tenancy were intended by the parties to constitute full compensation for her services, taxpayer possessed no claim against the estate. Thus the Board seems to be suggesting that one who alleges for inheritance tax purposes that a joint property interest was created to satisfy a debt owed him must present a spurious claim against his former debtor’s estate in order to establish that fact.

\(^{18}\) No findings were made whether taxpayer filed a tax return for 1960 reporting the acquisition of some or all of the joint interests in question. Had she done so, the conclusion would have been inescapable that she had been working pursuant to a deferred income agreement and not gratuitously, thereby “contributing” to the acquisition of the joint interests.
finding the $9,000 contribution. But such a finding necessarily implies that decedent’s deposits in taxpayer’s savings account during the 1950’s constituted compensation for services rendered pursuant to their employment agreement, since this amount would not have been treated as a contribution if it were a gift.9

Thus, to be consistent with its treatment of the remainder of the joint tenancy property, the board ought to have inferred from the failure to file tax returns that the deposits were not compensation for services rendered and hence were not “contributed” by the taxpayer.

Although the board based its decision in Kochendorfer generally on the taxpayer’s failure to produce sufficient evidence to sustain her burden of showing contribution, it is hard to see what further evidence taxpayer could have adduced. Assuming that the case involved a classic oral contract to exchange nursing care and housekeeping services for the promise of an inheritance, it would indeed be extraordinary if the surviving promisee were able to offer more persuasive proof of the arrangement than did taxpayer in this case.20 Because the contribution method imposes on the survivor the burden of proving a specific contribution, while simultaneously requiring the commissioner to perform the onerous duty of distinguishing false from valid claims, cases such as Kochendorfer inevitably arise.

19. “The survivor must trace the cost of the jointly owned property to consideration furnished by him” to establish a valid claim of contribution. A gift from the decedent to the survivor does not qualify as a contribution to the cost of a subsequently purchased joint property interest. Minnesota Inh. Tax Reg. 59(d), Example 1, 4 P-H INH. & TRANS. TAX SERV. Minn. ¶ 112-A (1964).

20. Minnesota Inh. Tax Reg. 59(e), Example 2, 4 P-H INH. & TRANS. TAX SERV. Minn. ¶ 112-A (1964), provides that where H and W contribute equal amounts of capital to the establishment of a business and agree to share its profits equally and to cooperate in its management, it will not be inferred that W rendered her services gratuitously, and on H’s death W may claim a contribution of one-half the value of their joint holdings. The regulation requires, however, that “the existence of such an agreement . . . be clearly established.” Had the board chosen to do so, it could reasonably have analogized the facts of the Kochendorfer case to this example and concluded that since some agreement between decedent and taxpayer was shown to have existed, any inference that taxpayer left her former employment to work for decedent gratuitously was unwarranted. Valuing her services or determining the agreed upon compensation would have been the only remaining problem which, consistent with Minnesota Inh. Tax Reg. 59(c), ¶ 112-A (1964), should have been remanded to the commissioner for his determination from the information available. Regulation 59(c) is quoted in note 14 supra.
II. CONTRIBUTION v. THE FRACTIONAL METHOD

The contribution method is subject to strong attack on two related grounds. First, it may frequently be unrealistic and unreasonable to require, as was done in *Kochendorfer*, that the survivor sustain a substantial burden of proof that he made a specific contribution to the acquisition of jointly owned property, since business records adequate to do so may either never be made or be unavailable at the joint tenant’s death. Where two or more tenants of a joint bank account have made deposits and withdrawals, it would ordinarily be impossible to satisfy this burden. As a result, while the honest taxpayer may well be unable to present sufficient evidence to establish a valid claim, the dishonest taxpayer may be encouraged to contrive fraudulent records to support a fabricated claim. On the other hand, if the survivor is permitted to satisfy the burden with relatively meager evidence, as in the *Benham* case, there is an even greater danger of taxpayer fraud. Second, whether the burden of proof be substantial or slight, the contribution approach imposes on the commissioner the expensive and difficult administrative task of adjudicating the validity and amount of contribution claims on a case by case basis.

21. Interview With Louis Plutzer, Head of the Inheritance and Gift Tax Division, Minnesota Department of Taxation, in St. Paul, March, 1965. While the scope of this Note is confined to an examination of Minnesota’s experience, the unrealistic and often unreasonable burden of proving a specific contribution has apparently caused similar difficulty at the federal level. See, e.g., cases cited in P-H Fed. Tax Serv. (Estate & Gift Taxes) ¶ 120409-93.1 (1963).


23. Because its resources are limited, the Minnesota Inheritance and Gift Tax Division has been content to accept the valuation of the survivor’s contribution used for federal estate tax purposes. This approach is not entirely satisfactory in those cases where the federal interest, in contrast to that of the state, is insufficient to justify substantial investigation. Because of the marital deduction under the federal estate tax, federal administrators must find two dollars in exaggerated contribution claims to produce an additional dollar of taxable estate in those cases where the surviving owner is the decedent’s spouse. Moreover, federal administrators may accept contribution claims where they have no effect upon the amount of estate tax due. For instance, if $H$ dies leaving a $100,000 estate, with $W$ surviving, the $60,000 exclusion coupled with the marital deduction would eliminate any taxable estate with the result that the validity of a contribution claim would hold no federal tax significance. Although the Minnesota Inheritance and Gift Tax Division is aware of these deficiencies in the present procedure, there is no feasible alternative. Interview With Louis Plutzer, Head of the Inheritance and Gift Tax Division, Minnesota Department of Taxation, in St. Paul, March, 1965.
The fractional method eliminates these difficulties. By correlating inheritance taxation with the common law concept of joint ownership, administrative inquiry is limited to determining whether property is jointly owned. Claims and proof of contribution become irrelevant. Further, as applied to interspousal joint interests, the fractional method has the virtue of recognizing the equal interests of husband and wife as parts of a single economic unit. This is accomplished by permitting the spouses to arrange for the allocation of half of their property to the survivor for purposes of computing inheritance taxes.

This concept underlies other areas of tax law. In community property states, one half of the property acquired during marriage is deemed to belong to each spouse, regardless of which one acquired it or supplied the funds with which it was purchased. The federal and state joint income tax return and the marital deduction under the federal estate and gift taxes, expressly designed to equalize treatment of taxpayers in common law and community property jurisdic-

25. The Minnesota inheritance tax already provides for the exemption of certain amounts of property passing between close relatives. For example, exemption is provided for a homestead passing to the decedent's spouse to the extent of $30,000 of its appraised value, Minn. Stat. § 291.05(3) (1961), for up to $80,000 of property passing to the decedent's widow, Minn. Stat. § 291.05(5) (1961), and for up to $6,000 of property passing to the decedent's widower, Minn. Stat. § 291.05(5) (1961). Thus the adoption of the fractional method would affect the taxation of interspousal joint interests only after these exemptions had been exhausted.
26. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. 4 and 5 P-H Inh. & Trans. Tax Serv. (the units for the above states) ¶ 114 (1965).
27. See 2 American Law of Property §§ 7.1, .19, .20 (Casner ed. 1953); De Funia, Principles of Community Property §§ 1, 102, 113 (1943).
tions, may also be regarded as acknowledging this concept. If one does not regard the fractional method as justified by an equality of interest in each other's property on the part of husband and wife, support for it may be found in the substantiality of the interest received by the donee of a joint ownership interest. Included within these interests are the rights of survivorship, partition, and alienation. The substantiality of the interest is recognized by the imposition of both the Minnesota and federal gift taxes upon the transfer of property into joint tenancy.

33. 2 AMERICAN LAW OF PROPERTY § 6.1, at 3 (Casner ed. 1932); § 6.2. See also 2 TIFFANY, REAL PROPERTY § 419 (3d ed. 1939). The survivor's absolute ownership of the property upon his joint tenant's death is not subject to claims by creditors of the latter. Irvine v. Helvering, 99 F.2d 265, 269 (8th Cir. 1938). But see Park Enterprises v. Trach, 233 Minn. 467, 47 N.W.2d 194 (1951) (creditor of one tenant permitted to levy on entire joint bank account). For an example of valuation of an interest in a tenancy by the entirety, see Oregon Gift Tax Reg., art. 5(g), 5 P-H INH. & TRANS. TAX SERV. Ore. ¶ 4105 (1964).
34. See 2 TIFFANY, REAL PROPERTY § 475 (3d ed. 1939).
35. Alienation destroys the joint tenancy and results in the creation of a tenancy in common between the purchaser and the remaining tenant. See Partridge v. Berlinger, 335 Ill. 253, 156 N.E. 362 (1927); Smith v. Smith, 290 Mich. 143, 287 N.W. 411 (1939). See also 2 TIFFANY, REAL PROPERTY § 423 (3d ed. 1939).
36. MINN. STAT. § 292.01 (1961).
37. Treas. Reg. § 25.2511-1(h)(5) (1968). The value of the right of survivorship will depend upon the relative life expectancies of the cotenants. However, this factor is not considered in valuing the gift made by the dominant or sole contributor to the other tenant. Rather, the arbitrary measure of one-half the property value at the time of the gift is utilized. See ibid. But cf. Bouchard v. Commissioner, 285 F.2d 556 (1st Cir. 1961) (donative intent absent). The reason for disregarding the relative life expectancies of the tenants is the power of either to extinguish the right of survivorship by severing the joint tenancy.
38. However, both the Minnesota and federal gift tax statutes permit postponement of tax, unless an election to be taxed is made, where a husband and wife take title to real estate in joint tenancy and one was the major contributor. See MINN. STAT. § 292.01 subd. 7 (1961); INT. REV. CODE OF 1954, § 2515. The enactment of § 2515 arose from a belief that spouses transferring real estate into joint tenancy have no intention to make a gift and lack knowledge that they have done so. See ABA Subcomm. of Comm. on Trusts and Estates, Joint Tenancy and the Federal Tax Law, 101 TRUSTS & ESTATES 1038, 1039-40 (1963).
Any proposed change in the inheritance tax should be considered in light of its likely effect upon revenue. The contribution method would usually produce more revenue than would the fractional in those instances where the decedent contributed over 50 percent of the cost of the property. As a practical matter, however, the revenue loss accompanying adoption of the fractional scheme is unlikely to be significant, since few large estates are held in joint tenancy. Although the proposed change would create opportunities for tax avoidance, it is doubtful that they would be sufficiently attractive in enough cases to cause an appreciable shift to the joint tenancy form of ownership.

The advantages and disadvantages of joint ownership as a tax avoidance device may be clarified by an example. Suppose H gives a joint savings account or United States bonds or real estate to himself and W as joint tenants. No federal or state gift tax. The establishment of a joint bank account or purchase of a United States government bond in joint names is also a transfer into joint ownership which do not give rise to gift tax liability. Such transfers are not considered completed gifts since the donor, acting alone, may extinguish the donee's interest by withdrawing all funds from the bank account or cashing in the bonds. Thus no “gift” has been made until the donee actually receives the proceeds of the account or bond. See Treas. Reg. § 25.2511-1(h)(4) (1958). But see Estate of Schley, 271 Wis. 74, 72 N.W.2d 767 (1955). See also Department of Taxation v. Berry, 258 Wis. 544, 46 N.W.2d 757 (1951). See generally 1961 Wis. L. Rev. 150, 152.

39. However, the impact of this difference is mitigated somewhat by the provision that property subjected to an inheritance tax is exempt from subsequent inheritance taxation during the next five years. See Minn. Stat. § 291.06 (1961); cf. Int. Rev. Code of 1954, § 2013.

40. Interview With Mr. Louis Plutzer, Head of the Inheritance and Gift Tax Division, Minnesota Department of Taxation, in St. Paul, March, 1965.

41. However, adoption of the fractional method would not facilitate avoidance of inheritance taxation by transfers in contemplation of death. Those states which have adopted fractional treatment of spouses' joint interests usually scrutinize transfers into joint tenancy to preclude avoidance of inheritance taxation by such predeath transfers. See note 56 infra and accompanying text.

42. Insofar as the planning of large estates is dominated by federal tax considerations, the application of the contribution method on the federal level would probably discourage appreciable transfers into joint tenancy to gain state fractional treatment.

43. At common law, a joint tenancy could not be created by a conveyance from A to A and B, because the unities of time and title would not be present. However, a conveyance by A to X and a reconveyance by X to A and B as joint tenants was normally effectual. At present, this circuitous procedure is outmoded in many states by statutes permitting A to create a joint tenancy between himself and B by a direct conveyance. See generally 2 American Law of Property § 6.2, at 9 (Casner ed. 1952).
is payable on the initial transfer. If \( H \) predeceased \( W \), the entire value of the property would be subject to inheritance taxation under the contribution approach, but tax would be imposed on only half the value of the property under the fractional method. The advantage under the fractional method, however, depends on the donor predeceasing the donee. If the order of deaths were reversed, \( H \) would be taxed on one half the value of the property at \( W \)'s death, simply to return to his original status. The uncertainty usually involved in predicting the order of deaths may outweigh the value of the saving to be realized if one guesses correctly. To the extent, however, that some degree of certainty can be interjected by the use of mortality tables or the presence of failing health or a substantial age spread between the tenants, the fractional method may make joint tenancies attractive for tax purposes.

It has been argued that the contribution method ought to be retained, since it follows federal law out of which a large volume of interpretive rulings and decision have developed. Also, estates paying the federal estate tax would not have to make two computations. However, the relative simplicity of the fractional rule would seem to minimize these advantages.

III. THE MINNESOTA PROPOSALS

The 1963 house proposal would have applied the fractional method to all joint interests, while the senate bill would have changed only the treatment of spouses' joint holdings, retaining the present method for taxing all other joint interests. To the extent

44. See note 38 supra.

45. This conclusion assumes that the gift was not made in contemplation of death. See text accompanying note 56 infra. The fact that in this situation half the property passes to the surviving spouse tax-free, was pointed out in 1961 Wis. L. Rev. 150, 153, as a reason for Wisconsin to switch from the fractional to the contribution system. Prior to 1961, Wisconsin had twice considered making such a change, first in 1951, see Ludwig, Joint Tenancy and Taxes, 25 Wis. B. Bull., Oct. 1952, pp. 9, 14, and most recently in 1959, 1961 Wis. L. Rev. 150, 153 n.18.

46. It is doubtful that this possibility would lead to a significant increase in the number of adult-minor joint tenancies. Minors' trusts and custodianship arrangements are effective and more attractive means of completing tax free transfers to minors to the extent of the annual and aggregate gift tax exemptions. See Casner, Estate Planning 248-60 (3d ed. 1961).

47. See Ludwig, supra note 45; 10 Mont. L. Rev. 100, 109 (1949); 1961 Wis. L. Rev. 150, 153. See also Cruikshank, supra note 52, at 226-27.

48. See note 8 supra.

49. See note 9 supra.
that innovation is justified by a desire to ease the administrative burden placed on the commissioner by the present system, the house proposal seems preferable. On the other hand, if change is advocated to protect the surviving joint owner who has failed to make and preserve the business records necessary to prove contribution under present law, it may be reasonable to distinguish between spouses and other joint owners on the theory that the latter are more likely to keep records than are the former. However, to the extent that other intrafamilial joint owners are as unlikely as spouses to keep records, it may be that the senate bill should be broadened to accord fractional treatment to relatives generally, rather than merely spouses.50

A change of law which applied the fractional method to joint tenancies created prior to its enactment might work an unjust hardship on those persons who had relied on the existing rule.51 This would happen where a cotenant making little or no contribution predeceased the substantial contributor. The senate and house bills sought to provide a remedy for this situation by exempting from state gift taxation the termination of joint tenancies by transfer of the property, back to the tenant to whom it originally belonged, within two years of the enactment of the amendment.52 However, the terminating transfers would remain subject to the federal gift tax. Consequently, an amendment to the bill was suggested which would have permitted the spouses to elect within two years after passage of the amendment to be taxed under the contribution method.53 By making this election \( H \) could assure that his original expectations would be fulfilled.

50. At least one state which generally follows the contribution method but applies the fractional rule to interspousal joint ownership also accords fractional treatment to property transferred by right of survivorship from the decedent to his children. See Utah Code Ann. § 59–12–5 (1953). However, no more than $40,000 worth of property may pass tax free in this manner.

51. However, it seems unlikely that such retroactivity would be subject to successful attack on constitutional grounds. See Gwinn v. Commissioner, 287 U.S. 224 (1932).

52. See the last paragraphs of the extracts from the house and senate bills supra notes 8 and 9.

53. The amendment, which was suggested by Mr. Louis Plutzer of the Minnesota Department of Taxation, would have added the following provision to the proposed new § 291.01 subd. 4(1)(b) (quoted in note 9 supra):

Provided, however, That in the case of any joint tenancy created be-
IV. JOINT TENANCY AND CONTEMPLATION OF DEATH

Estate and inheritance tax statutes commonly provide for their applicability to gifts made by the decedent in "contemplation of death." However, under the contribution system there is no necessity to consider the applicability of such provisions to a decedent's predeath transfers to himself and another in joint tenancy, since the full value of the transferred property would be subject to tax even in the absence of a contemplation of death provision. This question does arise in jurisdictions using the fractional method where the decedent's proportionate contribution exceeds his fractional interest. It has been held in such jurisdictions that the amount by which the decedent's contribution exceeded his fractional share constituted a taxable gift in contemplation of death. This appears to be a sound result in view of the general purpose of the contemplation of death provisions to prevent evasion of death transfer taxes by inter vivos gifts immediately prior to death.

Neither of the fractional interest bills proposed in the Minnesota 1963 legislative session expressly states that notwithstanding their provisions, transfers in joint tenancy in contemplation

between husband and wife prior to the date of enactment of this subsection (b), the joint tenants may elect within two years after such date to pay the tax imposed by subsection (a) of this section in lieu of that imposed by subsection (b). The time and manner of such election shall be prescribed by the commissioner of taxation by regulation.

54. See, e.g., INT. REV. CODE OF 1954, § 2035; MINN. STAT. § 291.01 subd. 1(3) (1961).

55. The applicability of contemplation of death provisions to joint tenancies presents problems in a somewhat different context under the contribution system. One question relates to the treatment to be given the estate of a sole contributor who terminates a joint tenancy in contemplation of death. Arguably the entire value of the property should be includible, since it would have been had the tenancy not been terminated. However, it has been held that only half the property is includible since termination of a joint tenancy is a 'sale for consideration' and may be severed at the option of either tenant. See Sullivan's Estate v. Commissioner, 175 F.2d 657 (9th Cir. 1949); Estate of Brockway, 18 T.C. 488 (1952), acq., 1953-2 CUM. BULL. 4. But cf. United States v. Allen, 293 F.2d 916 (10th Cir.), cert. denied, 368 U. S. 944 (1961). See also Estate of Borner, 25 T.C. 584 (1955). See generally Note, 61 MICH. L. REV. 1335 (1963).

56. See, e.g., State Bd. of Equalization v. Cole, 122 Mont. 9, 195 P.2d 989 (1949); Estate of Simonson, 11 Wis. 2d 94, 104 N.W.2d 134 (1960), 1961 WIS. L. REV. 130. But see Osterloh's Estate v. Carpenter, 337 S.W.2d 942 (Mo. 1960), in which the contemplation of death statute was found inapplicable to joint tenancy property because such property is not expressly subjected to inheritance taxation. See note 1 supra.
of death will be taxed as such. However, both bills expressly pro-
vide that termination of a joint tenancy within two years after
enactment of the amendment shall not be taxed as a gift in con-
templation of death. One may therefore infer that the authors
intended that in all other respects the new statute would not af-
flect the taxation of tenancies created in contemplation of death.
It might be desirable to make that intention explicit.

CONCLUSION

Since the contribution method often results in the imposition
of an unrealistic and unpredictable burden of proof on surviving
contributors and an excessive burden of investigation and litiga-
tion on administrators, substitution of the fractional approach
appears highly desirable. Instead of allowing the outcome of cases
to depend upon the burden of proof which the commissioner and
board choose to require and the fortuity that the survivor can or
cannot meet it, the result would depend entirely on whether or
not the property was in fact held jointly, and if so, by how many
tenants. Issues of contribution would be irrelevant. And, since
there appears to be no weighty reason for limiting fractional treat-
ment to spouses, unlimited application would seem preferable. Of
course, manipulation to achieve tax free transfers would be possi-
ble. However, the likelihood of its being substantial is sufficiently
slight to be outweighed by the apparent advantages of change.

57. See the last paragraphs of the extracts from the house and senate bills,
supra notes 8 and 9.