

CHAPTER 12 – JOINTLY OWNED PROPERTY

Types of “jointly owned” property (both real property and tangible/intangible personal property):

- 1) Tenancy in common (TIC)
- 2) Joint tenancy with the right of survivorship (JTWROS)
- 3) Community property/between spouses (CP)
- 4) “Tenancy by the entirety” between spouses.

JTWROS Property – Estate Planning Objectives

1) A simple method for shifting property ownership at death. The “poor man’s will.”

2) Beyond the probate court’s jurisdiction.

Query: How (under local law) create JTWROS property ownership status? See Texas

Estates Code, §111.001 (p.3), and special Texas

Estates Code provision, §113.151 (p.3) re

survivorship bank deposits. Cf., convenience

accounts – how distinguish (see p.4, fn. 10)?

Effect of divorce? Negating survivorship. Fn. 9.

JTWROS Property – & Community Property?

Is JTWROS ownership status possible with community property?

Yes, see Texas Estates Code §112.051 (p.4).

Necessitated Texas Constitution amendment.

Note: Important to maintain community property status when transforming ownership into JTWROS property? Reason: §1014(b)(6) tax basis step-up at death for all of the property.

Spousal & Creditors' Rights & JTWRORS Interest

1) Assume: JTWRORS property held between the decedent and a person other than the spouse. Does the decedent's surviving spouse have rights to some/all of JTWRORS property?

Under UPC the surviving spouse has rights, i.e., the property is part of the "augmented estate."

2) Creditors rights: see Texas Estates Code §113.252 (p.5) re rights of creditors – estate obligations and secured creditors can collect against JTWRORS accounts of the decedent. Similar for CP survivorship property – Estates Code §112.252 (p.5).

Gift Tax on Creation of JTWRORS Interests p.6

Timing issues: Non-spousal situations – When is the gift completed if property is transferred into JTWRORS status? How is the transfer into JTWRORS status completed?

When transferred for gift tax purposes? Or, upon a later severance of the JTWRORS interest?

Relevance for filing federal gift tax returns.

What if both parties must agree to terminate the JTWRORS status? E.g., a “tenancy by entirety.”

JTWROS Interests & Subsequent Transfers p.7

Rev. Rul. 78-362 (p.7) concerning a co-tenant's (1) down payment and (2) monthly payments on JTWROS property with mortgage debt amortization (& interest and taxes – if escrow).

Each joint tenant may unilaterally sever.

Periodic gifts are made to other joint tenants.

Who gets the federal income tax deductions for the interest expense and taxes (e.g., when the property has 1/3 interest owners)?

Gift Tax on Creation of JTWRORS Interests, cont.

Spousal situations, where spouse is made a joint tenant in property held by other spouse. P. 8

Will a marital deduction be available; or is this a nondeductible terminable interest?

See §2523(d) concerning creating joint interests as completed spousal gifts and not precluding the marital transfer because the property might be returned to the first spouse (i.e., the terminable interest rule).

Estate Tax upon Joint Tenant's Death p.9

Code §2040 requires complete inclusion of JTWROS property in the gross estate of joint tenant – except for such portion as is contributed by the other joint tenant.

Planning objective when estate less than \$11.4 million (exclusion amount): Have asset completely in estate of deceased joint tenant to get basis step-up for income tax purposes?

Spousal situation – next slide.

Estate Tax & Joint Tenant's Spouse's Death

P. 9, See §2040(b) rule concerning $\frac{1}{2}$ inclusion (and $\frac{1}{2}$ exclusion) when spouses are the joint tenants.

Avoid applicability of this rule (e.g., when a tax basis step-up rule is applicable)?

Full inclusion & marital deduction gift & basis step-up?

Use a partition proceeding? Income tax realization upon the partition?

What is “Consideration” Paid for JTWRROS Property

Exclude portion attributable to the contribution by the surviving joint tenant – but that portion can not be attributable to money (or other property) originally sourced from decedent.

Bernice Anderson case (p.10): did the son contribute consideration? What is the importance of “sweat equity”? If earning a property interest through services then also an income tax inclusion issue for the son?

She claimed all the income tax deductions.

Rev. Rul. 79-372, p.18

Joint tenancy subsequently created by donee with proceeds of money (and appreciation) received from the decedent.

10x received by gift and invested and 100x proceeds of investment placed in joint account.

90x considered as the survivor's contribution to the joint tenancy.

What impact for donee's contributions to improvements?

Further “Consideration” Issues

p.18

Does consideration for this purpose (i.e., provided by decedent) include:

- 1) Property received by gift from the other joint tenant?
- 2) Ordinary income realized by the donee from the gift property?
- 3) After-tax sales proceeds of post-gift appreciation from the gift property used to acquire joint tenancy property with donor?

Rev. Rul. 79-372, p.18 (joint tenancy by donee).

Community Property

p.20

What is the essential concept of “community property” (CP)? State law differences?

What is the concept of a “manager” of the community? Which spouse can be manager?

What is the legal capacity of one spouse to transfer entire community at the time of death?

Note Rev. Rul. 67-383 (p.21) re (1) gross estate inclusion of $\frac{1}{2}$ (only) vested interest; and, (2) the (attempted) transfer by the decedent of the entire community property.

Community Property & Conflict of Laws p.23

- 1) Consider spouses moving (with property) from common law jurisdiction to a CP state.**
- 2) Consider spouses moving from a CP state to a common law property state.**
- 3) Other alternatives? Move from one CP state to another CP state having differing CP ownership rules.**
- 4) Note (p.23) Texas Family Code §3.63 re divorce – but what about rights at death? Note CP Uniform Act re rights at death re classifying property as separate or CP.**

CP and Income Tax Basis at Death p.25

Code §1014(b)(6) provides for basis step-up at death for the entire CP. *But, was not applicable in calendar year 2010 if electing out of estate tax.*

Rev. Rul. 87-98, p. 25: CP with title held in JTWRORS (a “common law estate”). Intention to retain property in CP status and not transmuted into separate property. Under §1014(b)(6) the tax basis of the entire property is stepped-up (or down). How retain CP status for this income tax basis step-up/down purpose?

Rev. Rul. 92-37, p.27

Cost Depletion Deduction

CP interests held by H & W in mineral property. A cost depletion allowance is determined separately for each spouse for federal income tax purposes.

The surviving spouse's cost basis is determined as stepped-up under §1014(b)(6) for cost depletion purposes. Cost depletion is then calculated based on the adjusted tax basis as of the end of surviving spouse's taxable year.

Note filing of joint return with different year ends when one spouse dies during the year.

Lifetime Gifts of CP and Retained Interest Status?

Spouse gives separate property to other spouse.
Assume: Applicable local CP law says income from separate property is CP (Texas?).

Does ½ of the income from the transferred property belong to the transferor spouse & then is this a §2036(a)(1) “retained life interest”?

See Rev. Rul. 81-221 (p.30), rejecting estate tax inclusion, based on Wyly case (correct result)?

Note: A Texas Constitution provision (all income belongs to the donee spouse). P.31.

The Widow's "Forced" Election p.31

What is the objective of the "forced" widow's election? Joint management? But, can one spouse give away the other spouse's property?

What are the relevant non-tax factors in requiring this election by spouse?

How is this "election" to be accomplished? P.31.

Who should be the legal counsel for the widow when she is making (or not-making) this "forced" widow's election?

Widow's Election and the Survivor's Estate Tax

1st spouse to die – inclusion in the gross estate for the CP ½ & a forced widow's election.

2nd spouse to die – is a §2043 offset available to prevent full inclusion in the 2nd gross estate?

Gradow case, p. 33, holding the widow transferred her entire interest (not merely the remainder interest in her CP, thereby excluding her life interest) in exchange for an income interest in his CP property.

Correct result in the Gradow case (p.35)?

Widow's Gift Tax Liability

p.36

Widow transfers her CP into trust and receives a life interest in his CP; children receive the remainder interest in her CP. Gift tax?

Is a “consideration offset” available under §2512?

Turman case (p.36): Surviving spouse transfers CP interest, less the value of her retained life interest; also reduce by the value of the life interest in all CP into trust? Yes (no gift). But, presently §2702 (in some situations)?

Widow's Income Tax

Consequences

p.42

Widow transfers (1) her remainder interest in CP in exchange for (2) a life interest in his CP.

1) A sale or exchange? But, §1014(b)(6).

2) Tax amortization of the life interest she received? See Gist, p. 42, permitting an amortization deduction.

But, note (subsequently) §167(e) re the disallowance of this income tax deduction.

Where does the income tax basis go?

Estate's Income Tax Consequences p.45

What is the income tax treatment to the decedent's estate on the sale(?) of (1) the life interest in the decedent's CP in exchange for (2) receipt of the spouse's CP remainder interest into the trust established under decedent's will? A basis step-up under Code §1014(b)(6) occurs. However, total gain recognition is required since a zero tax basis is allocated to the life interest in this situation. Code §1001(e).

What Alternative Structures?

P.45

A voluntary widow's election, rather than a "forced election"?

What order of income distributions from these trusts? I.e., first deplete her trust (since inclusion of these trust assets in her gross estate, but not the trust from the husband's estate)?

Retain assets in his trust (1st to die); but, income tax bracket issue if significant income to this trust. Distribute the current income to children/others?

Tenancy in common in Real Property P.46

Uniform Partition of Heirs Property Act