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A Surviving Joint Owner's Interest in Bank Account Is Not Taxable under Tex. Tax.

Anthony N. DeLuccia Jr.

an adoption by estoppel. The circuit court of appeals distinguished the instant case from *Cavanaugh* for two reasons: (1) The adoptive parents were not deceased and had formally adopted the child;[39] (2) there was not sufficient evidence against an agreement to adopt as found in *Cavanaugh.*

The court continued by noting additional factors that warranted a finding of equitable adoption: (1) the indicia of a parent-child relationship;[40] (2) the adoptive parents' intent to keep and support the children long before they instituted formal proceedings to adopt them; (3) the legal adoption occurring within a reasonable time after the agreement to adopt; (4) the existence of an adoptive relationship at the time appellant wage earner became entitled to disability benefits and; 5) the purpose of the Social Security Act requires a liberal construction in favor of coverage.[41]

In the past the Fifth Circuit Court of Appeals had denied child insurance benefits because of insufficient evidence of an equitable adoption. An inference could have been that the court would refuse to grant child benefits under the doctrine of adoption by estoppel. But, in the instant case, the court reaffirmed the doctrine and clarified the conditions under which it would grant coverage.

John Sifuentes

TAXATION—A SURVIVING JOINT OWNER'S INTEREST IN BANK ACCOUNT IS NOT TAXABLE UNDER TEX. TAX—GEN. ANN.—art. 14.01 (1969). *Calvert v. Wallrath*, 457 S.W.2d 376 (Tex. Sup. 1970).

Plaintiff with his separate funds opened a checking account and a savings account in his name and his sister's name. Both accounts were joint accounts with the right of survivorship. He and his sister signed the signature cards, but his sister made no deposits nor withdrawals in either account. Plaintiff's sister died, and the state assessed him $550.36 inheritance taxes on the interest he obtained by operation of the survivorship provision in the accounts. The plaintiff paid the taxes under protest, and then sued for a refund. The trial court held for the defendant; the court of civil appeals reversed and remanded. The plain-

39 The Texas civil court of appeals has held a child equitably adopted even though the adopted parents were deceased. Malone v. Dixon, 410 S.W.2d 278 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e.); Albright v. Bouldin, 394 S.W.2d 681 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.).

40 The court cited these cases: Cavanaugh v. Davis, 149 Tex. 573, 235 S.W.2d 972 (1951); Bigleben v. Stevens, 262 S.W.2d 785 (Tex. Civ. App.—San Antonio 1953, writ ref'd n.r.e.); Garcia v. Quiroz, 228 S.W.2d 953 (Tex. Civ. App.—San Antonio 1950, writ ref'd n.r.e.).

41 E. Polly v. Gardner, 364 F.2d 969 (6th Cir. 1966); Walston v. Gardner, 381 F.2d 580 (6th Cir. 1967); Combs v. Gardner, 382 F.2d 949 (6th Cir. 1967).

tiff and defendant were both granted writs of error to the Supreme Court of Texas. The question is whether in the case of a joint and survivorship bank account the surviving joint owner acquires any interest subject to inheritance taxation upon the death of the other joint owner. Held—*Modified and Affirmed.* A surviving joint owner's interest in bank account is not taxable under Tex. Tax—Gen. Ann. art. 14.01 (1969).

The form of co-ownership known as joint tenancy existed during the 13th century.[1] Joint tenancy is created when a conveyance to two or more grantees is considered a grant to one person as a fictitious unity.[2] Four unities are essential to the creation of joint tenancy: (1) unity of interest, (2) unity of title, (3) unity of time, (4) unity of possession.[3] In order to have unity of interest the shares of joint tenants, whatever their number, must be equal, and the duration of the estate must be the same.[4] The requisite of unity of title is that the joint estate arise out of one and the same devise and disseisin.[5] Unity of time exists when the estate of each joint tenant is created at the same moment.[6]

An essential element of the joint estate, known as the unity of possession, is that each joint tenant is seised of an undivided share of the whole estate, and not merely all of an undivided share of the whole.[7] The right of survivorship or *jus accrescendi* is the most important element of joint tenancy at common law.[8] The right of survivorship is inherent in joint tenancy and without which it does not exist.[9] At first joint tenancy under the common law involved only interests in land, but at an early date it was recognized as applying to personal property as well.[10] In Texas, the right of survivorship between joint tenants was abolished as early as 1840.[11] Today Article 46 of the Probate Code has abolished joint tenancy of real, personal, or mixed property.[12]

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1 2 AMERICAN LAW OF PROPERTY § 6.1 (A.J. Casner ed. 1952).

2 *Id.*

3 Le Bus v. Le Bus, 269 S.W.2d 506 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.).

4 2 W. BLACKSTONE, COMMENTARIES *181; 4 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1777 (J.S. Grimes repl. ed. 1961).

5 *Id.*

6 *Id.*

7 2 W. BLACKSTONE, COMMENTARIES *182; 4 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1777 (J.S. Grimes repl. ed. 1961).

8 4 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1779 (J.S. Grimes repl. ed. 1961).

9 Kleemann v. Sheridan, 256 P.2d 553 (Ariz. 1953).

10 *Id.*

11 TEX. LAWS 1840, AN ACT TO REGULATE THE DESCENT AND DISTRIBUTION OF INTESTATES' ESTATES § 17, at 135, 2 H. GAMMEL, LAWS OF TEXAS 309 (1898):

> When two or more persons hold an estate, real, personal, or mixed, jointly, and one joint tenant dies before severance, his interest in said joint estate shall not survive to the remaining joint tenant, or joint tenants, but shall descend to and be vested in the heirs or legal representatives of such deceased joint tenant, in the same manner as if his interest had been severed and ascertained.

12 TEX. PROB. CODE ANN. § 46 (1969). The present article has substantially the same wording as TEX. LAWS 1840, AN ACT TO REGULATE THE DESCENT AND DISTRIBUTION OF INTESTATES' ESTATES, § 17, at 135, 2 H. GAMMEL, LAWS OF TEXAS 309 (1898).

This article does provide for the creation of a tenancy in common with the right of survivorship attached, by an agreement in writing to that effect, signed by the joint owners of the property.[13] Since the 13th century the relationship of joint tenants has been a perplexing problem to lawyers and judges alike. At present the problem has grown in intensity especially where joint tenancy is coupled with the already complex taxing statutes of the different states and the Federal Government.

Three methods of taxation have been developed in this area of the law. The first method is the Federal Estate Tax.[14] This tax is an excise tax upon the value of the estate of the deceased. The value of the gross estate of the decedent includes all property in which he had an interest.[15] Therefore the gross estate includes property held in joint tenancy, and joint bank accounts with the right of survivorship. Property may be excluded from the value of the decedent's gross estate if: (1) such property or part thereof never originally belonged to the decedent; and (2) the property was never acquired from the decedent by the survivor for less than an adequate consideration in money or money's worth.[16] The value of property acquired by the survivor from the decedent for less than adequate consideration in money or money's worth, minus the proportionate amount of consideration given to the decedent by the survivor, is included in the decedent's gross estate.[17] If property is acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety[18] by the decedent and his spouse, then one-half is excluded from the computation of the decedent's gross estate.[19] If the decedent acquires property as a joint tenant by gift, bequest, devise, or inheritance, the fractional part, determined by dividing the value of the property by the number of joint tenants, is excluded from the decedent's gross estate.[20] The federal tax is then computed upon the net or taxable estate of the decedent after allowance for certain deductions from the gross estate.[21] The federal method is followed by a majority of states.[22]

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13 TEXAS PROB. CODE ANN. § 46 (1969):
Provided, however, that by an agreement in writing of joint owners of property, the interest of any joint owner who dies may be made to survive to the surviving joint owner or joint owners, but no such agreement shall be inferred from the mere fact that the property is held in joint ownership.
See Chandler v. Kountze, 130 S.W.2d 327 (Tex. Civ. App.—Galveston 1939, writ ref'd).

14 INT. REV. CODE of 1954, § 2040.

15 Est. of Peters v. Commissioner, 386 F.2d 404 (4th Cir. 1967); Est. of Richards v. Commissioner, 20 T.C. 904 (1953).

16 INT. REV. CODE of 1954, § 2040.

17 *Id.*

18 4 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1784 *et. seq.* (J.S. Grimes repl. ed. 1961).

19 INT. REV. CODE of 1954, § 2040.

20 *Id.*

21 *Id.* §§ 2051-2056.

22 ARIZ. REV. STAT. ANN. ch. 9, § 42-1511 (1956); ARK. STAT. ANN. ch. 1, § 63-102 (1947); FLA. STAT. ANN. ch. 198, § 198.01 (1958); HAWAII REV. STAT. ch. 236, § 236-13 (1968); IOWA CODE ANN. § 451.3 (1946); MISS. CODE ANN. § 9262.04 (Supp. 1968); N.M. STAT. ANN. ch. 31,

The next method of taxation of property owned by joint tenants is the New York method.[23] Property passing to the survivor or survivors is deemed a taxable transfer whereby the whole of such property belonged to the deceased, and passed to the survivor or survivors by will.[24] This is the opposite extreme to the position taken by the Federal Government. Under this method the survivor bears the burden of the tax on the whole value of the property he owned with the decedent as a joint tenant. Under the federal method the decedent's estate bears the burden of the tax, which in some instances may be the whole value of the property owned in joint tenancy.[25] Although the New York method was repealed in 1930,[26] today it is still used by two states.[27]

The third method, or "fractional method," is also a transfer tax paid by the survivor or survivors, but it is more moderate in its application. This method had its origin in the state of Pennsylvania.[28] The com-

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§ 31-16-5 (1953); N.Y. TAX LAW §§ 951-963 (McKinney 1966); N.D. CENT. CODE ANN. § 57-37-06 (Supp. 1969); OKLA. STAT. ANN. ch. 1, § 68-807 (Supp. 1969); CODE OF LAWS OF S.C. § 65-453 (1962); UTAH CODE ANN. § 59-12-5 (1953 repl.); CODE OF VA. § 58-152 (1950). The following states' statutes are similar to § 2040 of the INTERNAL REVENUE CODE of 1954 but apply the tax as a transfer tax. DEERING'S CALIF. CODE REV. & TAX CODE § 13671 (1939); DEL. CODE ANN. § 30-1305 (1953); IDAHO CODE § 14-402 (1947); IND. STAT. ANN. ch. 24, § 7-2401 (1953 repl.); KAN. STAT. ANN. ch. 79, § 79-1501 (1969); MINN. STAT. ANN. ch. 291, § 291-01 (1962); REV. CODES OF MONT. § 91-4405 (1947); REV. STAT. OF NEB. ch. 77, § 77-2002 (1943); N.J. STAT. ANN. ch. 34, § 54:34-1 (1960); ORE. REV. STAT. ch. 118, § 118.010 (Supp. 1970); GEN. LAWS OF R.I. ch. 22, § 44-22-7 (1956); S.D. COM. LAWS ch. 10-40, § 10-40-10 (1967); REV. CODE OF WASH. ch. 83-04, § 83-04-020 (1962).

23 N.Y. LAWS of 1915 ch. 60, § 220 amended by N.Y. LAWS of 1915 ch. 664 (repealed 1930). *See* MCKINNEY'S CONSOL. LAWS OF N.Y. ch. 60 TAX LAW § 220, modified by §§ 249m-249mm, modified by §§ 951-963.

24 N.Y. Laws of 1915 ch. 60, § 220.

> Whenever intangible property is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased tenant by the entirety, joint tenant or joint depositor and had been bequeathed to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons by such deceased tenant by the entirety, joint tenant or joint depositor by will.

25 INT. REV. CODE of 1954, § 2040.

26 N.Y. LAWS of 1915 ch. 60, § 220 amended by N.Y. LAWS of 1915 ch. 664 (repealed 1930). *See* MCKINNEY'S CONSOL. LAWS OF N.Y. ch. 60 TAX LAW § 220, modified by §§ 249m-249mm, modified by §§ 951-963.

27 N.H. REV. STAT. ANN. ch. 86, § 86.8 (1955); OHIO REV. CODE ANN. § 57-31-02. (Note that the Ohio statute has an additional provision taxing only one—half of the value of the property to the survivor, if the joint tenancy is between husband and wife.)

28 PA. STAT. ANN. ch. 2, § 2485-241 (1964):

> When any property is held in the names of two or more persons, or is deposited in a financial institution in the names of two or more persons, so that, upon the death of one of them, the survivor or survivors have a right to the immediate ownership or possession and enjoyment of the whole property, the accrual of such right, upon the death of one of them shall be deemed a transfer subject to tax under this act, of a fractional portion of such property to be determined by dividing the whole property by the number of joint tenants in existence immediately preceding the death of the deceased joint tenant.

putation of this tax is determined by dividing the value of the property by the number of owners immediately preceding the death of the deceased joint tenant. This method has been followed in various states.[29]

At present, Texas has no statute providing for the taxation of jointly owned property held by the survivor under a written survivorship agreement. However, persons are able to own property as joint tenants with a contractual right of survivorship.[30] The court in *Calvert v. Wallrath* reached its conclusions for obviously compelling reasons: (1) By virtue of the survivorship provision in bank accounts, the whole interest vests in the survivor by operation of the survivorship provision, and not by descent;[31] (2) Tax statutes command strict construction; if the right to tax is not plainly conferred by statute it cannot be extended by implication.[32]

The holding of the *Wallrath* case appears to present an opportunity for persons to avoid inheritance taxes on real, personal, or mixed property. For example, a husband could contract with his wife and children to the effect that his separate property would be owned by them as tenants in common with the right of survivorship. The end result of this contract is a passage of property to his descendants through a nontaxable survivorship contract. To halt this practice the legislature is faced with the necessity of passing specific legislation regarding the taxation of property to which such a survivorship agreement attaches.

The legislature has at least three possible choices to remedy this practice. Under the federal method[33] there is a presumption that all property held jointly with the right of survivorship belongs to the decedent; therefore it includes such property in the decedent's estate. This presumption is rebuttable by the survivor by showing evidence that certain portions never originally belonged to the decedent, or that the survivor acquired his portion of the property from the decedent for adequate consideration in money or money's worth. By allowing the survivor to admit evidence of his ownership of the property, the federal method is adaptable to all possible situations through which such property can be owned.

Examining the New York and Pennsylvania methods one sees that the presumptions contained therein are not as readily adaptable to particular circumstances in which jointly owned property can be held.

29 COLO. REV. STAT. ch. 138, § 138-3-8 (1963); CONN. GEN. STAT. ANN. ch. 216, § 12-343 (1958 Rev.) (Note that joint bank accounts are not taxable until they exceed $5,000.00.); D.C. CODE ANN. § 47-1602 (1966); ILL. STAT. ANN. ch. 120, § 120-375 (1968); KY. REV. STAT. ANN. ch. 140, § 140.050 (1969); ME. REV. STAT. ANN. ch. 559, § 36-3632 (1964) (Note that joint bank accounts are not taxable under this statute.); ANN. CODE OF MD. § 151 (1957); WIS. STAT. ANN. ch. 72, § 72-01 (1969).

30 TEX. PROB. CODE ANN. § 46 (1969).

31 Daniels v. Harney, 244 P.2d 773 (Cal. Dist. Ct. of App. 1952).

32 *In re* Gerling's Estate, 303 S.W.2d 915 (Mo. 1957).

33 INT. REV. CODE of 1954, § 2040.

The New York method's presumption is that the whole property passes to the survivor as though it passed to him by will. The Pennsylvania or fractional method presumes that the survivor's share is equal to the quotient reached by dividing the value of the property by the number of owners immediately preceding the decedent owner's death.

The following examples will illustrate the application of the three methods:

(1) A and B each contributed $1,000.00 into a joint bank account with the right of survivorship. Subsequently A dies.
(2) Same as (1) except A is the sole contributor of the $2,000.00.
(3) Same as (1) except B is the sole contributor of the $2,000.00.

The New York method in example (1) would, for inheritance tax purposes, tax B on the whole value of the property or $2,000.00. The end result would be that B is subject to inheritance tax on property he originally owned. The survivor is therefore treated as inheriting property which he originally owned, for tax purposes.

In example (2), B would be subject to inheritance tax on the $2,000.00, and properly so, since this is the end result the tax is to serve, *i.e.* halting evasion of inheritance tax through the use of a survivorship provision of a joint bank account. In example (3), B would be subject to tax on $2,000.00 but this property was originally owned by him. Hence, the presumption fails in this instance as it did in example (1), since no one can inherit property from himself.

The Pennsylvania method in example (1) would tax B only as to one-half of the property or $1,000.00. Therefore, this is a fair and just tax regarding this situation. In example (2), B would receive $2,000.00 as a result of the survivorship provision and pay the inheritance tax on $1,000.00. This result seems to be exactly what the statute is trying to prevent, namely, the tax free passage of property through use of a survivorship provision. In example (3) B would be paying inheritance tax on property he already owned. Again, this seems to be an untenable presumption, even for tax purposes, since no one can inherit property from himself.

Under the federal method in example (1), A's estate would include $1,000.00 for estate tax purposes. B would not be subject to any tax, by receiving the money as a result of the survivorship provision. In example (2), A's estate would include $2,000.00 for estate tax purposes. In example (3), A's estate would not include any of the value of the property for estate tax purposes. B would have no tax liability in either (2) or (3).

Due to its flexibility and just imposition of the estate tax, the federal method appears to be the best. Many states have already