Estate Planning With Tenancy by the Entireties Property

by David Pratt and Lisa Z. Hauser

> This article addresses estate and tax planning techniques involved with tenancy by the entireties property, specifically focusing on post-mortem disclaimers.

Estate planners were given one more reason to celebrate last New Year's Eve when the IRS issued its final regulations under I.R.C. §2518 regarding disclaimers of tenancy by the entireties property. What we were too jubilant to see at first glance, however, is that there is yet one more problem that must be resolved before a survivorship interest in tenancy by the entireties property can be disclaimed by a surviving spouse in Florida.

The purpose of this article is to address the various transfer tax consequences involved with tenancy by the entireties property and to identify both pre-mortem and post-mortem estate planning opportunities with such property. We will also briefly summarize the history of disclaimers, including the recently promulgated final regulations. Furthermore, we will point out a significant problem under state law and a potentially viable solution that may allow us to take advantage of the IRS' belated holiday gift.

Gift Tax and Estate Tax Consequences

Generally, there are no gift tax consequences upon the creation of a joint tenancy between spouses (either as a tenancy by the entireties (TBE) or as a joint tenancy with rights of survivorship (JTWROS)) because of the unlimited marital deduction.[1] This may not be true if the donee spouse is not a United States citizen because the gift tax marital deduction is not available for gifts made to a noncitizen spouse.[2] While the gift tax marital deduction is disallowed when a gift is made to a noncitizen spouse, the annual exclusion is increased from $10,000 to $100,000 for such gifts.[3]

Upon the first spouse's death, one-half of the value of the jointly held property is included in the deceased spouse's gross estate.[4] However, no estate taxes result due to the corresponding estate tax marital deduction.[5] The surviving spouse receives a step-up in basis for one-half of the property and a carryover basis for the remaining one-half of the property.[6] When the surviving spouse later dies, the entire value of the property owned at such time by the surviving spouse is included in his or her gross estate for estate tax purposes.

There is an exception to these estate tax and basis step-up consequences if the joint tenancy between the spouses was created before 1977 and if the deceased spouse furnished all or some of the consideration for the property. According to *Gallenstein v. U.S.*, 975 F.2d 286 (6th Cir. 1992), all or a proportionate share of the jointly held property is included in the gross estate of the first spouse to die, and the property then passes by operation of law to the surviving spouse, who receives a full or proportionate step-up in basis. *Gallenstein* has been followed frequently in recent decisions, including *Baszto v. U.S.*, 80 AFTR2d 97-7740 (M.D. Fla. 1997), a case which adopted the same rationale as *Gallenstein* in late 1997.[7]

Fiduciaries of estates that include a spousal joint tenancy created before 1977 should consider taking advantage of the increased basis step-up for as much of the value of the property for which the deceased spouse furnished consideration for the purchase. For estate tax returns already filed, fiduciaries should consider filing supplemental estate tax returns.[8] In these situations, the property would be reported on Part 2 of Schedule E of Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, as opposed to Part 1, which is used to report qualified joint interests under §2040(b).

Asset Protection

TBE property can only exist between a husband and wife, and, as opposed to JTWROS property, spouses holding TBE property are treated legally as one person in Florida.[9] Neither spouse holds an individual share of TBE property,

but rather, upon the death of the first spouse, the surviving spouse *continues* to hold the entire property.[10]

One distinct advantage to TBE property over JTWROS property is that TBE property may not be used to satisfy either spouse's *individual* debts.[11] A creditor typically would have to be able to sue both spouses on the same cause of action to reach the TBE property, or the tenancy would have to be set aside for fraud.[12] However, according to a decision by the Bankruptcy Court, *In re Planas*, 199 B.R. 211 (Bankr. S.D. Fla. 1996), a creditor of one spouse holding TBE property may be able to find relief in another way.[13] In *Planas*, the court held that if there is at least one joint creditor in existence who could have levied the TBE property when the bankruptcy petition was filed, then the TBE property may be liquidated in favor of *all* creditors, both joint and individual.[14] Furthermore, the creation of TBE property does not divest creditors of preexisting debts attached to one spouse's interest in the property prior to such property's conversion to TBE property.[15]

As this article was submitted for publication, *Planas* had not been followed by any other court. In fact, a 1997 decision by the Bankruptcy Court explicitly disagreed with the holding in *Planas*.[16] Thus, assuming that *Planas* is limited to its unique set of facts, TBE property should continue to be used by spouses as an asset protection technique.

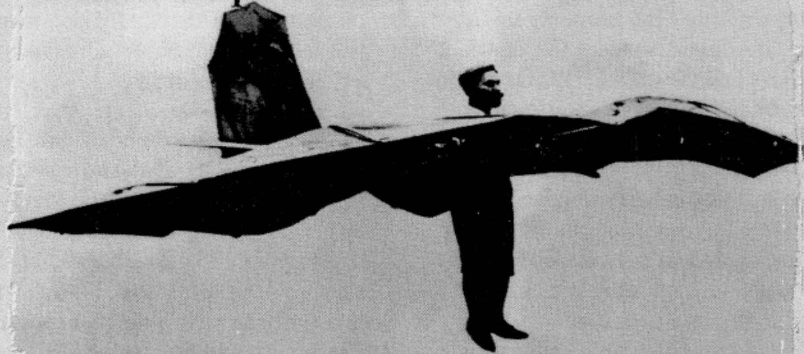
Estate Planning

Prior to the enactment of the Taxpayer Relief Act of 1997, estate planners typically advised their married clients that each spouse should own, individually, at least $600,000 of assets,[17] as opposed to owning such assets jointly.[18] Upon the first spouse's death, a credit shelter trust (CST) would be funded with the $600,000 of solely owned assets, which would ensure that such spouse's unified credit would not be wasted. The remaining jointly held property, if any, would pass directly to the surviving spouse by operation of law, with no resulting estate tax because of the estate tax marital deduction. Spouses with generation-skipping transfer (GST) tax concerns were advised that each spouse should individually own at least $1,000,000 in assets so that GST trusts could be established upon each spouse's death.[19]

In order to take advantage of post-mortem tax planning techniques, spouses also may be advised that each spouse should own one-half of their total assets individually, avoiding virtually all joint ownership. Specifically, upon the first spouse's death, a CST and a qualified terminable interest property (QTIP) trust could be established, again resulting in no estate tax upon the first death. Alternatively, the personal representative of the first dying spouse's estate could "split the brackets" by making a partial QTIP election (or none at all)[20] and paying some estate tax on the first death, resulting in lower combined estate taxes in both estates. Furthermore, the surviving spouse may be in a position to plan for the use of the previously taxed property credit[21] (PTP credit), a planning technique that seems to be overlooked all too frequently.[22]

These "division of assets" techniques with regard to property held jointly by spouses are no longer as critical for pre-mortem planning because of the new disclaimer opportunities with regard to TBE property, which can be done post-mortem. Thus, couples no longer must divide their jointly held property to ensure the use of each of their estate and gift tax, and GST tax exemptions. This will be of particular importance for couples that may need the additional asset protection afforded by TBE property.

Disclaimers are one of the most useful post-mortem estate planning tools. Upon the death of the first spouse to die, the surviving spouse may make a disclaimer in order to 1) take full advantage of the deceased spouse's unified credit; 2) take full advantage of the deceased spouse's GST tax exemption; or 3) fund a QTIP trust in contemplation of splitting



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the brackets or planning to receive a PTP credit in the survivor's estate.

Disclaimers: Historical Overview

Before 1977, the state law governing the administration of a decedent's estate applied to determine whether a valid disclaimer was made.[23] A pre-1977 disclaimer did not constitute a gift from the disclaimant to the ultimate beneficiary of the property if the disclaimer was "made within a reasonable time after knowledge of the existence of the transfer."[24]

Section 2518 was added to the Internal Revenue Code by the Tax Reform Act of 1976.[25] Regulations regarding the disclaimer of jointly held property were proposed in 1980[26] and finally promulgated in 1986.[27] The 1986 regulations specifically provided that a joint tenant of JTWROS or TBE property could not "disclaim any part of the interest, including the survivorship interest, if more than nine months have passed since the transfer creating the joint tenancy."[28]

An exception was carved out for TBE real property created after 1976 and before 1982.[29] If a §2515 election[30] was not made, the surviving spouse could make a qualified disclaimer of the TBE property no later than nine months after the death of the first spouse to die.[31] While §2515 was effective, when a spouse created TBE property, there were no gift tax consequences unless an election was made.[32] If no such election was made, the transfer creating the surviving spouse's interest in the property was not treated as occurring until the purchasing spouse's death.[33]

From 1986 until 1990 the IRS took the position that, for purposes of the disclaimer regulations, JTWROS property was created at the time of the acquisition of the property by the tenants or the transfer from donor tenant(s) to donee tenant(s). Thus, a disclaimer of JTWROS property had to be made no later than nine months after this date. Three circuit courts, however, held otherwise.[34] The Seventh and Eighth circuits found the power of each tenant to partition jointly held real property to be the equivalent of a general power of appointment and, therefore, the survivorship interest could be eliminated at any time by either tenant.[35] Thus, the survivorship interest in JTWROS property, for purposes of making a valid disclaimer, was created only when a tenant died without having partitioned the property.[36] Similar analysis was applied by the Fourth Circuit with regard to the right of one tenant to partition personal property.[37] In AOD 1990-06, the IRS finally acquiesced and advised that it would revise the regulations accordingly.

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Revisions were issued on August 21, 1996, in the form of proposed regulations.[38] Under the proposed regulations, the one-half survivorship interest in JTWROS or TBE property could be disclaimed within nine months after the death of the first tenant to die *only* if such survivorship interest was unilaterally severable.[39] In most states, including Florida, TBE is not unilaterally severable.[40] Thus, under the proposed regulations, TBE property could not be disclaimed.[41]

Comments to the proposed regulations unanimously suggested that the "unilaterally severable" requirement be removed, noting that when parties purchase property, they often do not make an informed decision regarding whether to hold the property as JTWROS or TBE.[42] Additionally, the commentators noted that most purchasers are not aware that the choice of tenancy could affect the ability to disclaim the survivorship interest after the death of the first joint tenant.[43]

Thankfully, on December 31, 1997, almost one and one-half years after issuing the proposed regulations, the IRS promulgated final regulations with regard to disclaiming joint tenancies.[44] Under the final regulations, the survivorship interest in JTWROS and TBE property can be disclaimed within nine months of the date of death of the first joint tenant to die, *regardless* of whether such survivorship interest is unilaterally severable.[45] Generally, the survivorship interest is deemed to be a one-half interest in the property, "regardless of the portion of the property attributable to consideration furnished by the disclaimant and regardless of the portion of the property that is included in the decedent's gross estate under §2040."[46]

The Florida Roadblock

These new regulations expand the surviving spouse's post-mortem tax planning options by liberalizing the disclaimer rules applicable to TBE property. It is no longer necessary for spouses to divide their jointly held property during life for estate planning reasons. Such division, if necessary, can be made with a post-mortem disclaimer. A surviving spouse should be able to execute and file a written disclaimer within the nine-month deadline.[47] Furthermore, if properly advised, a surviving spouse can take the appropriate steps so that he or she does not accept any of the benefits of the property.[48]

It is the fourth requirement of a qualified disclaimer that may be troublesome under Florida law. Section 2518(b)(4) requires that the disclaimed interest *pass*; thus, the interest must validly pass under state law. This is the roadblock that seems virtually impossible to overcome in Florida with regard to TBE property because F.S. §689.21(5), which addresses the disclaimer of interests in property passing under certain nontestamentary instruments, requires a disclaimer to be filed:

within 12 months after the effective date of the nontestamentary instrument creating the interest or, if the disclaimant is not then finally ascertained as a beneficiary or [the disclaimant's] interest has not then become indefeasibly fixed both in quality and quantity, such disclaimer shall be filed not later than 12 months after the event which would cause [the disclaimant] so to become finally ascertained and [the disclaimant's] interest to become indefeasibly fixed both in quality and quantity.

A spouse's interest in TBE property becomes indefeasibly fixed and the beneficiary is finally ascertained at the time the tenancy is created.[49] Thus, spouses who have acquired TBE property together by deed may only execute a valid disclaimer *for state law purposes* within one year of the date of the deed, regardless of the date of death of the first spouse to die.

A potentially viable way to bypass the Florida law roadblock may be found in §2518(c)(3), which provides for certain "transfer-type" disclaimers to be treated as qualified disclaimers. This section provides that "[a] written transfer of the transferor's entire interest in the property . . . and which is to a person or persons who would have received the property had the transferor made a qualified disclaimer . . . shall be treated as a qualified disclaimer."[50] The transfer must be made within the nine-month period of §2518(b)(2), and the transferor must not have accepted the interest or any of its benefits as provided in §2518(b)(3).[51]

The problem with a §2518(c)(3) transfer type disclaimer, however, is that the transferor's "entire" interest must be transferred. For a surviving spouse of TBE property, does "entire" mean 100 percent of the property, or merely 100 percent of the *survivorship* interest in the property? Arguably, the term "entire" means the former because under Florida law each spouse is considered to own 100 percent of the TBE property from the inception of the tenancy, and the surviving spouse is merely continuing his or her ownership when the first spouse dies.[52] On the other hand, there also is a valid argument for the latter, because, as specifically provided in the final regulations, the survivorship interest (deemed to be a one-half interest in the property) is the entire interest that is disclaimable under §2518.[53]

In PLR 9135043, the IRS applied §2518(c)(3) in an analogous situation involving real property held by husband (*H*) and wife (*W*) as JTWROS. When *W* died, *H* wanted to convey, by deed, his one-half survivorship interest in the jointly held property to his daughter (*D*). If *H* had made a qualified disclaimer of the property, under *W's* will, *D* would have received the property. *H's* conveyance by deed of his one-half undivided interest would be a valid transfer under applicable state law, and would be a transfer of his entire interest in that portion of the property. The conveyance would be in writing, would be timely made, and by the conveyance the interest would pass to *D*, the person to whom the property would have passed if *H* had validly disclaimed the interest. Thus, the IRS treated the transfer as a qualified disclaimer for purposes of §2518. Note that the "entire" interest in this ruling was the one-half undivided survivorship interest. Previously, this ruling was only applicable to JTWROS property which was unilaterally severable, but with the advent of the final regulations, the ruling may now be equally applicable to TBE property, but for the argument that TBE property is not unilaterally severable for state law purposes.

Florida estate planners should utilize this transfer type disclaimer, not only with respect to real property, but also with respect to TBE personal property where the tenancy was created via a nontestamentary instrument more than 12 months before the first spouse's death.[54] Keep in mind, however, that disclaimers are barred if the disclaimant is insolvent at the time of the event triggering the disclaimer.[55]

Proposals to Expand Disclaimer Provisions

Help may be on the way. The Taxpayer Relief Act of 1997 included many changes to the estate and gift tax provisions. Unfortunately, §1304

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of the House bill, which would have clarified §2518(c)(3), did not make the final cut.[56] Section 1304 would have allowed §2518(c)(3) to apply to an "undivided portion" of the transferor's interest in the property, as opposed to the current "entire" interest requirement. This proposal was presented again as part of President Clinton's Fiscal Year 1999 Budget Proposal earlier this year.[57] If passed, the problem of making a transfer type disclaimer, that is via a deed, of an undivided portion of TBE property in Florida would be solved. ❑

[1] I.R.C. §2523(a) (1998).

[2] I.R.C. §2523(i).

[3] I.R.C. §2523(i)(2). Interestingly, the Taxpayer Relief Act of 1997 did not increase the annual exclusion of $100,000 for gifts made to a noncitizen spouse, even though the $10,000 annual gift tax exclusion will be indexed for inflation beginning in 1999. *See* I.R.C. §2503(b)(2).

[4] I.R.C. §2040(b).

[5] I.R.C. §2056(a),(c)(5). *But see* I.R.C. §2056(d)(1) (providing that the marital deduction is disallowed and §2040(b) does not apply if the surviving spouse is not a United States citizen).

[6] I.R.C. §1014.

[7] *See also Patten v. U.S.*, 97-2 T.C. ¶60,279 (4th Cir. 1997); *Wilburn v. U.S.*, 97-2 T.C. ¶50,881 (D. Md. 1997); *Anderson v. U.S.*, 96-2 T.C. ¶60,235 (D. Md. 1996).

[8] Treas. Reg. §20.6081-1(c).

[9] *Murray v. Sullivan*, 376 So. 2d 886, 889 (Fla. 1st D.C.A. 1979); *Quick v. Leatherman*, 96 So. 2d 136, 138 (Fla. 1957) ("An estate by the entirety is a peculiar type of tenancy enjoyable only by a husband and wife. Each owns and controls the whole."). *See U.S. v. One Single Family Residence*, 894 F.2d 1511, 1514 (11th Cir. 1990); *Smith v. Hindery*, 454 So. 2d 663, 669–70 (Fla. 1st D.C.A. 1984).

[10] *Gerson v. Broward County Title Co.*, 116 So. 2d 455, 456 (Fla. 2d D.C.A. 1959).

[11] *In re Wincorp*, 185 B.R. 914, 918 (Bankr. S.D. Fla. 1995); *Sharp v. Hamilton*, 520 So. 2d 9, 10 (Fla. 1988); *Neu v. Andrews*, 528 So. 2d 1278 (Fla. 4th D.C.A. 1988); *Teardo v. Teardo*, 461 So. 2d 276 (Fla. 5th D.C.A. 1985); *Sheeler v. U.S. Bank of Seminole*, 283 So. 2d 566 (Fla. 4th D.C.A. 1973). *See Sitomer v. Orlan*, 660 So. 2d 1111 (Fla. 4th D.C.A. 1995) (suggesting that a bank account may be TBE property and, thus, protected from one spouse's creditors).

[12] *Konrad & Assoc. v. McCoy*, 1998 WL 5423 (Fla. 1st D.C.A. 1998) (As of the date this article was submitted for publication, this opinion was not yet released for publication and was still subject to revision or withdrawal.).

[13] *See* Steven B. Chaneles, *Tenancy by the Entireties: Has the Bankruptcy Court Found a Chink in the Armor?*, 71 FLA. B.J. 22 (Feb. 1997).

[14] *In re Planas,* 199 B.R. at 215–17.

[15] *Rosenfield v. Rosenfield*, 404 So. 2d 188, 189 (Fla. 4th D.C.A. 1981).

[16] *In re Monzon*, 214 B.R. 38, 38, 44–48 (Bankr. S.D. Fla. 1997) (holding that a bankruptcy trustee "may administer only that amount of entireties property equal to the amount of the joint debts"). *See also In re Campbell*, 214 B.R. 411, 415 (Bankr. M.D. Fla. 1997) (holding that "a trustee can only administer property held as tenants by the entirety if the creditor has a judgment against both the debtor and the non-filing spouse.").

[17] It is assumed, for purposes of this article, that the unified credit amount is still $600,000. Under the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §501(a)(1)(B) (1997), the applicable credit amount was increased to $625,000 for 1998, and will gradually be increased to $1,000,000 by the year 2006.

[18] It is assumed that the spouses had not used any portion of their $600,000 exemptions during their lives and had a combined net worth of at least $1,200,000.

[19] It is assumed that the spouses had not used any portion of their $1,000,000 GST exemptions during their lives and had a combined net worth of at least $2,000,000.

[20] I.R.C. §2056(b)(7).

[21] I.R.C. §2013.

[22] For an in-depth look at maximizing the PTP credit, *see* Robert J. Stommel & Lester B. Law, *Planning to Maximize the §2013 Credit*, 72 FLA. B.J. 66 (Jan. 1998).

[23] Treas. Reg. §25.2511-1(c)(2) (as amended by T.D. 8095, 1986-2 C.B. 160, 164).

[24] *Id.*

[25] Tax Reform Act of 1976, Pub. L. No. 94-455, §2009(b), (90 Stat. 1893) (1976).

[26] 45 Fed. Reg. 48922 (1980).

[27] Treas. Reg. §25.2518-2 (as added by T.D. 8095, 1986-2 C.B. 160, 166-70).

[28] Treas. Reg. §25.2518-2(c)(4)(i) (as added by T.D. 8095, 1986-2 C.B. 160, 166).

[29] Treas. Reg. §25.2518-2(c)(4)(ii) (as added by T.D. 8095, 1986-2 C.B. 160, 166-67).

[30] I.R.C. §2515(a),(c) (repealed 1981).

[31] During the period when the repealed version of §2515 was effective, when a spouse or spouses created TBE real property there were no gift tax consequences unless an election was made. I.R.C. §2515(a) (repealed 1981). If such an election was *not* made, then upon the termination of the tenancy (by any reason *other* than the death of a spouse) gift tax consequences would potentially arise. I.R.C. §2515(b) (repealed 1981). An election could be made by including the creation of the tenancy in the gift tax return of the donor for the calendar quarter in which the tenancy was created, and timely filing such return. I.R.C. §2515(c)(1) (repealed 1981).

[32] I.R.C. §2515(a) (repealed 1981).

[33] Treas. Reg. §25.2518-2(c)(5), *Example (7)* (as added by T.D. 8095, 1986-2 C.B. 160, 167).

[34] *Dancy v. Comm.*, 872 F.2d 84 (4th Cir. 1989); *McDonald v. Comm.*, 853 F.2d 1494 (8th Cir. 1988); *Kennedy v. Comm.*, 804 F.2d 1332 (7th Cir. 1986).

[35] *McDonald*, 853 F.2d at 1500; *Kennedy*, 804 F.2d at 1335–36.

[36] Note 35, *supra*.

[37] *Dancy*, 872 F.2d at 87.

[38] 61 Fed. Reg. 43197 (1996).

[39] Prop. Treas. Reg. §25.2518-2(c)(4)(i), 61 Fed. Reg. 43197 (1996).

[40] *See* notes 9 and 10, *supra,* and accompanying text.

[41] *See* Prop. Treas. Reg. §25.2518-2(c)(4)(ii), 61 Fed. Reg. 43197. An exception also was included in the proposed regulations for joint tenancies between spouses created on or after July 14, 1988, where the donee spouse was not a United States citizen. Prop. Treas. Reg. §25.2518-2(c)(4)(iii), 61 Fed. Reg. 43197. *See also* I.R.C. §2523(i)(3).

[42] T.D. 8744, 62 Fed. Reg. 68183.

[43] *Id.*

[44] *Id.*

[45] Treas. Reg. §25.2518-2(c)(4)(i).

[46] *Id. See also* §25.2518-2(c)(5), *Example (10)* (surviving spouse of a residence held as TBE could make a qualified disclaimer of an undivided one-half interest in the residence within nine months of the date of death of the first spouse to die). *But see* §25.2518-2(c)(4)(ii) (regarding exception for certain tenancies of real property between spouses created on or after July 14, 1988).

[47] I.R.C. §2518(b)(1), (b)(2).

[48] I.R.C. §2518(b)(3).

[49] *See* notes 9 and 10, *supra,* and accompanying text.

[50] I.R.C. §2518(c)(3).

[51] I.R.C. §2518(c)(3)(A).

[52] *See* notes 9 and 10, *supra,* and accompanying text.

[53] *Supra* note 47 and accompanying text.

[54] FLA. STAT. §689.21(1)(d) (1998) (defining the "interest in property" that may be disclaimed as including real *or* personal property).

[55] FLA. STAT. §689.21(6) (1998).

[56] David Pratt, *The Missing Estate, Gift, and GST Tax Changes in TRA '97*, 87 J. TAX'N 319 (Nov. 1997).

[57] JCT Description of Revenue Provisions Contained in the President's Fiscal Year 1999 Budget Proposal (April 1998).

David Pratt *is a shareholder in the West Palm Beach law firm of Jones, Foster, Johnston & Stubbs, P.A., where he concentrates in pre- and post-mortem tax planning. He has an LL.M. degree in taxation from New York University.*

Lisa Z. Hauser *is an associate with the law firm of Jones, Foster, Johnston & Stubbs, P.A. She has an LL.M. degree from the University of Florida.*

This column is submitted on behalf of the Tax Law Section, J. Bob Humphries, chair, and Michael D. Miller and Lester B. Law, editors.