Disclaimer of Joint Tenancy Interest—When Does the Nine-Month Time Limit in I.R.C. Section 2518 Begin to Run?

I. Introduction

In *Kennedy v. Commissioner*,[1] Frank Kennedy acquired 160 acres of Illinois farmland in 1953 and titled the property as joint tenants with right of survivorship between his wife and himself. Frank died in 1978. Within nine months of his death, his wife disclaimed the interest she had acquired in the farm by surviving Frank.[2] Not only in this case, but in all cases dealing with the disclaimer of joint tenancy interests under section 2518[3] of the Internal Revenue Code, the key issue is at what point did the transfer that created Mrs. Kennedy's interest occur—at the creation of the tenancy or at the death of her husband. In *Kennedy* the Seventh Circuit Court of Appeals held that, because of her husband's right to partition, the transfer of the survivorship interest took place at his death and Mrs. Kennedy's disclaimer was a qualified disclaimer (one that avoids the imposition of tax).[4] This holding is in direct conflict with the interpretative Treasury Regulation Section 25.2518-2(c)(4)(i) that was enacted in August of 1986 just shortly before the *Kennedy* decision.[5] The regulation states, "an interest or any portion of an interest in a joint tenancy . . . must be made no later than 9 months after the transfer creating the tenancy."[6] The *Kennedy* court held the regulation was inconsistent with the other regulations applicable to section 2518 disclaimers and chose not to apply it.[7]

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[1]804 F.2d 1332 (7th Cir. 1986).

[2]*Id.* at 1333.

[3]All section numbers used in this Note refer to the *Internal Revenue Code of 1986* as amended unless otherwise noted; *see infra* note 31 for language of I.R.C. § 2518 (1987).

[4]*Kennedy*, 804 F.2d at 1336. The court compared the survivorship right to that of a general power of appointment and found the regulations treatment of joint tenancy inconsistent with that of general power of appointment in Treasury Regulation Section 25.2518-2(c)(3). *See infra* text accompanying notes 162-81.

[5]Treas. Reg. § 25.2518-2(c)(4)(i) (1986); *see infra* text accompanying note 52 for language of regulation. A difference exists between interpretative regulations and legislative regulations, interpretative regulations having less weight. For full discussion *see infra* text accompanying notes 183-87.

[6]Treas. Reg. § 25.2518-2(c)(4)(i) (1986); *see infra* text accompanying note 52 for language of regulation.

[7]*Kennedy*, 804 F.2d at 1335-36.

This Note will show that the *Kennedy* decision recognizes the reality of modern joint tenancy property and is more in line with the Congressional intent behind section 2518 than the Treasury Regulation Section 25.2518-2(c)(4)(i).[8] The Congressional intent behind section 2518 is that the time period in the statute should run from the taxable transfer of the interest,[9] and that section 2518 was to provide a uniform federal disclaimer law which was not dependent on state or local law.[10] The *Kennedy* decision is also more in line with the broader Congressional intent of fairness behind the tax law that similarly situated taxpayers be treated the same,[11] and with other recent tax legislation that has eased the estate tax burden on farm families when passing their estates on to the next generation.[12]

The *Kennedy* court is the first court of appeals to address the issue of from which transfer the nine-month time period in Section 2518 begins to run.[13] The Eighth Circuit Court of Appeals, however, will be facing this issue in the spring of 1988 in *McDonald v. Commissioner.*[14] *McDonald* will give the Eighth Circuit a chance to side with the Seventh Circuit in holding against the Internal Revenue Service's (Service or IRS) interpretation of the Treasury regulation. However, if the Eighth Circuit chooses to accept the Service's interpretation, there will be a split between two circuits, and the United States Supreme Court may take the opportunity to decide the conflict.

Resolution of this conflict is important to the taxpayer because it can have a large impact on the amount of estate tax couples holding property as joint tenants will incur in passing their estates to the next generation. This impact will be demonstrated by example below.

II. The Relevancy of Allowing Disclaimer of the Survivorship Interest in Joint Tenancy Property Under Present Tax Law

The Economic Recovery Tax Act of 1981[15] dramatically changed the gift and estate tax consequences between spouses. The Act provided for an unlimited marital deduction, thus preventing any tax on any inter

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[8]Treas. Reg. § 25.2518-2(c)(4)(i) (1986); *see infra* text accompanying note 52 for language of regulation.

[9]*See infra* text accompanying notes 80-93.

[10]*See infra* text accompanying notes 94-107.

[11]*See infra* text accompanying notes 108-14.

[12]*See infra* text accompanying notes 115-16.

[13]Kennedy v. Commissioner, 804 F.2d 1332, 1333 (7th Cir. 1986).

[14]89 T.C. 293 (1987). *See infra* notes 192-98 and accompanying text.

[15]Pub. L. No. 97-34, 95 Stat. 172 (codified as amended in scattered sections of 26 U.S.C.).

vivos gift or bequest at death to one's spouse.[16] By increasing the unified gift and estate tax credit to $192,800, it also increased to $600,000 the amount that any one taxpayer can give during his life and pass at death without being subject to a tax.[17] Because of these changes, in estates where the combined assets in a husband and wife's estate are less than $600,000, the disclaimers of joint tenancy property would not affect the gift or estate tax paid by the couple.

In estates larger than $600,000, however, the right to disclaim the survivorship interest in jointly held property can have a major impact on the amount of estate tax a couple holding property as joint tenants will incur in passing their estates to the next generation. This can best be explained by illustration. Disclaimer of joint tenancy interests will be relevant in most states involving spousal property because of assets such as stocks, bonds, and personal homes which many times are owned as joint tenants with right of survivorship. However, the issue may be particularly important to agricultural estates, such as in *Kennedy*, where land held as joint tenants make up the major portion of the assets. Therefore, the following examples deal with land held by farm couples.

In both examples the couple's only property is assumed to be farmland worth 1.2 million dollars.[18] It is further assumed, for the sake of simplicity, that the deductions for debts, estate administration expenses, state death taxes and other expenses are zero. The annual rate of appreciation in land value is also assumed to be zero.

The first example shows the tax consequences when the couple own the land as joint tenants with right of survivorship and the Service's position on disclaiming of joint tenancy property is followed. The second example shows the tax consequences under similar ownership when the disclaimer of the survivorship interest is allowed as it was in *Kennedy*. Both examples illustrate the total federal estate taxes paid by husband and wife before the property is finally distributed to the next generation, assuming one spouse survives the other by at least ten years.

EXAMPLE 1. Disclaimer of Survivorship Interest Disallowed

Husband dies in 1987 and wife is not allowed to disclaim the survivorship interest in the farm, so husband's undivided one-half interest of $600,000 passes to her. Wife dies ten years later and the farmland, worth $1,200,000,

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[16]I.R.C. §§ 2056(a), 2523(a) (1987). Section 2056 allows all qualified property that will pass to the decedent's spouse to be deducted from the decedent's gross estate, thereby escaping federal estate taxes. Section 2523 provides that a donor may deduct all qualified gifts made to a spouse when computing taxable gifts, thereby escaping federal gift tax.

[17]I.R.C. § 2010(a), (b) (1987). The unified credit was phased-in. For decedents dying in 1987 and thereafter, the credit will be $192,800 (sheltering $600,000).

[18]The example is not unrealistic even with today's depressed land prices; it could represent a 1000 acre Illinois or Indiana farm worth $1200 per acre.

less the amount sold to pay husband's estate taxes, passes to heirs. The tax impacts are as follows:

Estate Tax Paid by Husband's Estate	$ -0-[19]
Estate Tax Paid by Wife's Estate	$ 235,000[20]
Combined Estate Tax Paid by Husband and Wife	$ 235,000

EXAMPLE 2. Disclaimer of Survivorship Interest Allowed

Husband dies in 1987 and wife is allowed to disclaim the survivorship interest in the farm. The husband's one-half undivided interest, worth $600,000 less the amount sold to pay death taxes, passes to heirs. Wife dies ten years later and her one-half undivided interest, worth $600,000 less the amount sold to pay her estate tax, passes to heirs. The tax impacts are as follows:

Estate Tax Paid by Husband's Estate	$ -0-[21]
Estate Tax Paid by Wife's Estate	$ -0-[22]
Combined Estate Tax Paid by Husband and Wife	-0-

With a combined estate of $1,200,000, disallowing the disclaimer of the survivorship interest results in a $235,000 higher tax liability. A

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[19]Husband's gross estate under I.R.C. § 2040(b) (1987) will be one-half the value of the joint tenancy property or, $600,000. Without disclaimer, husband's entire interest of $600,000 will be treated for tax purposes as if it passes to the surviving spouse.

However, under the marital deduction of I.R.C. § 2040(b) (1987) the entire $600,000 interest will qualify for the marital deduction and escape federal estate tax.

Gross Estate of Husband	$600,000
Marital Deduction	$600,000
Taxable Estate	$ -0-
Tax Payable upon Death of Husband	$ -0-

[20]Upon the death of the wife ten years later, her gross estate will total $1,200,000, the original value of the farmland. There is no allowable marital deduction, making the taxable estate worth $1,200,000.

The tentative tax of I.R.C. § 2001(c)(1) (1987) for a $1,200,000 estate equals $427,800.

The unified credit for decedents dying in 1987 will be $192,800. I.R.C. § 2010 (1987). The tax payable upon her death will then be $235,000.

Gross Estate of Wife	$1,200,000
Marital Deduction	-0-
Taxable Estate	$1,200,000
Tentative Tax	$ 427,800
Unified Credit	$ (192,800)
Tax Payable upon Death of Wife	$ 235,000

[21]The tentative tax on a $600,000 gross estate is $192,800. I.R.C. § 2001(c)(1) (1987). The amount is then reduced by the $192,800 unified credit applicable for decedents dying in 1987. I.R.C. § 2010 (1987). The result is a net tax of $-0-.

[22]The tentative tax on wife's $600,000 gross estate is $192,800. I.R.C. § 2001(c)(1) (1987). The amount is then reduced by the $192,800 unified credit applicable for decedents dying after 1987. I.R.C. § 2010 (1987). The result is a net tax of $-0-.

couple loses the benefit of the first spouse's unified credit[23] and incurs a higher effective tax rate because the value of the entire tenancy is taxed in the surviving joint tenant's gross estate.[24] Because the agricultural sector has been preoccupied with the current economic problems,[25] farm-couples may find, at the death of one spouse, that they have not done sufficient estate planning to ensure that their land and businesses can be passed on to the next generation with a minimum of estate tax. The ability to make a qualified disclaimer of a joint tenancy survivorship interest at the death of the first spouse, as in *Kennedy*, could be used as an effective post-mortem estate planning tool to help alleviate the tax burden of passing the estate on to the next generation and to avoid a possible forced sale of family property to pay estate taxes. To better understand the disclaimer issues raised by *Kennedy*, at this point a consideration of the development of federal disclaimer law is in order.

III. Background

A. *Brief Background on Federal Disclaimer Law*

Prior to the Tax Reform Act of 1976 (TRA 1976), the tax consequences of disclaimers were governed by section 2511, particularly Treasury Regulation Section 25.2511-1(c).[26] This regulation still governs disclaimers for interests created prior to 1977.[27] To be an effective

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[23]*See supra* note 19-22 and accompanying text.

[24]*Id.*

[25]Unlike the 1970's when the agricultural community was experiencing tremendous land value increases along with high commodity prices and estate planning was a major concern, the 1980's have brought decreases in land value of almost fifty percent as well as lower commodity prices. Farmers have become much more concerned with holding on to what they have and less concerned with proper estate planning.

[26]Treas. Reg. § 25.2511-1(c) (as amended in 1986) provides in pertinent part:

> [W]here the law governing the administration of the decedent's estate gives a beneficiary . . . a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent, . . . a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer . . . . Where the local law does not permit such a refusal, any disposition . . . constitutes the making of a gift.

For further explanation of prior TRA of 1976 disclaimer law and the changes made by the TRA of 1986, see Morris, *Disclaiming Joint Interests: One New Trick and No Longer a Dog?*, 1983 Ariz. St. L.J. 45, 58-62 (1983); Schain, *The Effective Disclaimer*, 34 Cath. U.L. Rev. 19, 20-25 (1984).

[27]Since I.R.C. § 2518 was enacted prospectively, § 2511 still applies to all interests created prior to January 1, 1977. Section 2518 of the Code applies to all interests created after December 31, 1976, while the ERTA amendment to the section can only be applied to disclaimers of interests created after December 31, 1981.

disclaimer under Treasury Regulation Section 25.2511-1(c), the refusal to accept must (1) be unequivocal, (2) be effective under local law, (3) occur before there is an acceptance, and (4) occur within a reasonable time.[28]

Due to its reliance on local law, Treasury Regulation Section 25.2511-1(c) raised several problems with the disparate treatment of federal disclaimers among the states.[29] What constituted a "reasonable time" under the regulation also created some confusion among the courts.[30] In an effort to resolve these issues, Congress enacted section 2518[31] to

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[28]Treas. Reg. § 25.2511-1(c) (as amended in 1986). *See supra* note 26 for language of regulation.

[29]*See* Hardenbergh v. Commissioner, 198 F.2d 63 (8th Cir.), *cert. denied*, 344 U.S. 836 (1952); *but see* Brown v. Routzahn, 63 F.2d 914 (6th Cir. 1933). For a discussion of these cases and their disparate treatment of disclaimers under their respective state law, see Morris, *supra* note 26, at 59; *see also* Schain, *supra* note 26, at 21-22.

[30]*See* Morris, *supra* note 26, at 59-60; Schain, *supra* note 26, at 23-25.

[31]I.R.C. § 2518 (1987) provides as follows:

> (a) GENERAL RULE.—For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.
>
> (b) QUALIFIED DISCLAIMER DEFINED.—For purposes of subsection (a), the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property but only if—
>
> (1) such refusal is in writing,
>
> (2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of—
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> (A) the date on which the transfer creating the interest in such person is made, or
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> (B) the day on which such person attains age 21,
>
> (3) such person has not accepted the interest or any of its benefits, and
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> (4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either—
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> (A) to the spouse of the decedent, or
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> (B) to a person other than the person making the disclaimer.
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> (c) OTHER RULES.—For purposes of subsection (a)—
>
> (1) DISCLAIMER OF UNDIVIDED PORTION OF INTEREST.—A disclaimer with respect to an undivided portion of an interest which meets the requirements of the preceding sentence shall be treated as a qualified disclaimer of such portion of the interest.
>
> (2) POWERS.—A power with respect to property shall be treated as an interest in such property.
>
> (3) CERTAIN TRANSFERS TREATED AS DISCLAIMERS.—A written transfer of the transferor's entire interest in the property—
>
> (A) which meets requirements similar to the requirements of par-

create uniformity with respect to the taxation of disclaimers for transfers after 1977.[32]

To be a qualified disclaimer under section 2518, similar to section 2511, the disclaimer must be an "irrevocable and unqualified refusal . . . to accept an interest in property."[33] Section 2518 also retains the requirement that the disclaiming party must not have accepted any benefits of the interest.[34] However, distinctions can be made between the two in that section 2518 added a requirement that the disclaimer be in writing,[35] and instituted a fixed nine-month time period to replace the "reasonable time" requirement of section 2511.[36] Also, unlike under section 2511, the nine-month time period under section 2518 runs from the creation of the interest regardless of whether the prospective disclaimant had knowledge of its existence.[37]

One of the most significant distinctions was Congress' intent not to have section 2518 depend on local law. This was demonstrated by the Congressional reports concerning the enactment of section 2518,[38] the absence of the language requiring compliance with local law in section 2518,[39] and Congress' amendment to section 2518 in the ERTA of 1981 by the addition of subsection c(3) to further alleviate dependency on local law.[40]

> agraphs (2) and (3) of subsection (b), and
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> (B) which is to a person or persons who would have received the property had the transferor made a qualified disclaimer (within the meaning of subsection (b)), shall be treated as a qualified disclaimer.

[32]*See* H.R. Rep. No. 1380, 94th Cong., 2d Sess. 66-67, *reprinted in* 1976 U.S. Code Cong. & Admin. News 3356, 3420-21 [hereinafter H.R. Rep. No. 1380].

[33]I.R.C. § 2518(b) (1987). *See supra* note 31 for text of the statute.

[34]*Id.* § 2518(b)(3). *See supra* note 31 for text of the statute.

[35]*Id.* § 2518(b)(1). *See supra* note 31 for text of the statute.

[36]*Id.* § 2518(b)(2). *See supra* note 31 for text of the statute. Moreover, if the disclaimant is a minor at the time the interest was created, he or she can defer the disclaimer decision until nine months after reaching 21 years of age. *Id.* § 2518(b)(2)(B).

[37]This result is mandated by the statute itself, which does not make a reference to the prospective disclaimant's actual knowledge of the existence of the instrument creating the disclaimed interest. *See* I.R.C. § 2518(b)(2)(A) (1987).

[38]*See* H.R. Rep. No. 1380, *supra* note 32, at 66-67.

[39]*See supra* note 31 and accompanying text.

[40]I.R.C. § 2518(c)(3) (1987). *See supra* note 31 for text of the statute. This amendment is effective only for disclaimers of interests transferred after 1981. Congress' intent was to finally devise a uniform standard for federal disclaimers totally independent from state law. S. Rep. No. 144, 97th Cong., 1st Sess. 142, *reprinted in* 1981 U.S. Code Cong. & Admin. News 108, 241-42 [hereinafter S. Rep. No. 144]. The Senate report provides that:

> Prior to the enactment of section 2518, the effect of a disclaimer, for Federal estate and gift tax purposes, depended on its validity under the applicable local law. When Congress enacted section 2518, it intended to create a uniform Federal

B. *IRS's Application of Section 2518 to Joint Tenancy Property*

1. Proposed Regulation Section 25.2518-2(d)(3).—Prior to enacting Treasury regulations for section 2518 in 1986,[41] the Service's position in applying section 2518 to joint tenancy property was reflected in its proposed regulation section 25.2518-2(d)(3). The regulation provided:

> To have a qualified disclaimer under section 2518 in the case of an interest in a joint tenancy (other than a revocable joint tenancy, such as a revocable joint bank account) or a tenancy by the entirety, the disclaimer—
>
> (i) Must be made with respect to the entire interest in property which is the subject of the tenancy,
> (ii) Must be made within 9 months of the creation of the tenancy, and
> (iii) Must meet each of the remaining requirements enumerated in section 2518(b).[42]

The premise upon which the proposed regulation is based is expounded upon in a private letter ruling concerning a surviving spouse's disclaimer of her deceased husband's interest in the couple's personal residence within nine months of his death in 1979.[43] The residence had been acquired in 1963 with title in the name of both as joint tenants with right of survivorship. The Service's position was that the disclaimer was invalid.[44] The Service adopted the view of the Oklahoma Supreme Court[45] in stating that, under Oklahoma law, the transfer took place at the creation of the tenancy because the husband had not transferred any interest in the jointly held property at his death.[46]

> standard so that a disclaimer would be effective for Federal . . . purposes whether or not valid under local law.
>
> Under section 2518, however, because the disclaimer must be effective to divest the disclaimant of ownership, and pass the interest without direction on the part of the [disclaimant], the disclaimer must still satisfy local law. Because applicable law varies from State to State, there is still no uniformity.
>
> The committee believes that a disclaimant should be able to perfect an otherwise valid disclaimer by directing that the interest pass to the person who would have received the property had the refusal been effective under local law.

See infra notes 99-100 and accompanying text for a discussion of the ERTA amendment in 1981. *See also infra* notes 104-07 and accompanying text for a general discussion of nonuniform treatment of Federal disclaimers.

[41] 51 Fed. Reg. 28,366 (1986).

[42] Prop. Treas. Reg. § 25.2518-2(d)(3), 45 Fed. Reg. 48,922, 48,927 (1980).

[43] Priv. Ltr. Rul. 81-400-11 (June 29, 1981).

[44] *Id.*

[45] Clovis v. Clovis, 460 P.2d 878 (Ok. 1969).

[46] Priv. Ltr. Rul. 81-400-11 (June 29, 1981).

The Service explained its position by using the language of the Oklahoma court that creation of a joint tenancy in property establishes a present estate in which both joint tenants are seised of the whole. Unity of time, title, interest, and possession are requisites for creation, with the principle characteristic of the estate created being the right of survivorship. Under this position, the right of survivorship does not pass anything from a deceased joint tenant to the survivor because, "by the very nature of joint tenancy[,] [t]itle of the joint tenant who dies first terminates at death and vests *eo instanti* in the survivor. Both cotenants being seised of the whole, the survivor's estate simply is a continuation, or extension, of the surviving tenant's existing estate."[47] The Service adopted the Oklahoma court's opinion that absent severance of the tenancy during the life of both tenants, a joint tenancy simply creates a present estate which assures the survivor joint tenant absolute ownership of the whole subject matter of the joint tenancy.[48]

The Service's premise raises issues with regard to the application of the nine-month time requirement and the acceptance of prior benefit provision under the statute. Under the Service's position the nine-month time period will begin to run at the creation of the tenancy, because under the Service's premise no transfer takes place at death; rather, transfer of all interest in the property, including the survivorship interest, takes place at creation.

As to acceptance of prior benefits, under its original premise, "if one joint tenant accepts any benefits from any part or portion of the property subject to the joint tenancy, that joint tenant has accepted benefits from the whole of the jointly owned property."[49] Because benefits have been accepted from the entire jointly owned property, an attempted disclaimer of any part of the jointly owned property will not be a qualified disclaimer.[50]

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[47]Priv. Ltr. Rul. 81-400-11 (June 29, 1981), quoting Clovis v. Clovis, 460 P.2d 878, 881 (Ok. 1969). *See generally* Morris, *supra* note 26, at 62-65; Uchtmann, *Disclaimers of Joint Tenancy Interests Revisited*, 18 CREIGHTON L. REV. 333, 337-44 (1985), for a further discussion of the IRS's position on disclaimers of joint tenancy property.

[48]Priv. Ltr. Rul. 81-400-11 (June 29, 1981).

[49]Uchtmann, *supra* note 47, at 339.

[50]*Id.* at 339 n.27, reads in part:

> I.R.S. Letter Ruls. 79-400-62, July 10, 1979 (acceptance based upon entering into a contract for sale); 79-120-49, Nov. 30, 1978 (accepting dividends from jointly-held corporate stock subsequent to its purchase and prior to disclaimer); 79-110-05, Nov. 29, 1978 (mere acquiescence in the establishment of joint tenancies of certificates of deposit and bank account); 78-290-08, April 14, 1978 (proceeds of jointly-owned maturities and securities deposited into joint checking account from which household and normal living expenses were paid).

The IRS later changed its position on the acceptance of benefits when it enacted Treasury regulations for section 2518. *See infra* text accompanying notes 57-58.

2. Enactment of Treasury Regulations for Section 2518.—The language of the enacted Regulation Section 25.2518-2(c)(4)(i) specifically concerning jointly held property differs in several respects from that of its predecessor, the proposed regulation 25.2518-2(d)(3).[51] The enacted regulation reads as follows:

> In general. Except as otherwise provided in paragraph (c)(4)(ii) of this section, a qualified disclaimer under section 2518(a) of an interest or any portion of an interest in a joint tenancy or a tenancy by the entirety must be made no later than 9 months after the transfer creating the tenancy. Thus, a surviving joint tenant cannot disclaim any part of the interest, including the survivorship interest, if more than 9 months have passed since the transfer creating the joint tenancy. In addition, a joint tenant cannot make a qualified disclaimer of any portion of the joint interest attributable to consideration furnished by that tenant.[52]

The enacted regulation quoted above did not contain the language of the proposed regulation which required that the entire interest subject to the joint tenancy had to be disclaimed for the disclaimer to qualify.[53] As one authority highlighted, the emphasis, under the premise that joint tenants own the whole and no transfer takes place at death, is arguably consistent with a requirement that a joint tenant must disclaim the whole interest[54] as was required by the proposed regulation.[55] By leaving out this requirement when enacting the proposed regulations, the IRS has begun to shift its premise and recognize that the survivorship interest is a separate interest.[56]

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[51]Prop. Treas. Reg. § 25.2518-2(d)(3), 45 Fed. Reg. 48,922 (1980). *See supra* text accompanying note 42 for language of regulation.

[52]Treas. Reg. § 25.2518-2(c)(4)(i). Subsection (c)(4)(ii) is the special provision for joint tenancy created between spouses between the years of 1976-82 and reads as follows:

> (ii) *Tenancies in real property between spouses created before 1982.* In the case of joint tenancies between spouses or a tenancy by the entirety in real property created after 1976 and before 1982 where no election was made under section 2515, the surviving spouse must make a qualified disclaimer no later than 9 months after the date of death of the first spouse to die. Such a qualified disclaimer will be effective for—
>
> (A) The entire joint interest (except any portion attributable to consideration furnished by the surviving spouse) if the date of death of the deceased spouse is before 1982; or
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> (B) One-half the value of the joint interest if the date of death of the deceased spouse is after 1981.

[53]*See supra* text accompanying note 42.

[54]Uchtmann, *supra* note 47, at 338.

[55]Prop. Treas. Reg. § 25.2518-2(d)(3), 45 Fed. Reg. 48,926 (1980). *See supra* text accompanying note 42 for language of regulation.

[56]In the Brief for Petitioner at 16-17, Kennedy v. Commissioner, 804 F.2d 1332 (7th

The Service's recognition that separate interests do exist can also be seen in Treasury regulation section 25.2518-2(d)(i). In this regulation, the IRS changed its earlier position that by accepting benefits from any part of the joint tenancy property, a person has accepted benefits from the whole of the jointly owned property.[57] The section reads in part:

> The acceptance of one interest in property will not, by itself, constitute an acceptance of any other separate interests created by the transferor and held by the disclaimant in the same property. In the case of residential property, held in joint tenancy by some or all of the residents, a joint tenant will not be considered to have accepted the joint interest merely because the tenant resided on the property prior to disclaiming his interest in the property.[58]

Although the Service did make minor revisions in the regulations regarding joint property, it retained its earlier position that a qualified disclaimer must be made within nine months of the creation of the tenancy.[59] This position is not consistent with the other changes made in the proposed regulations discussed above which neglected the IRS's recognition of the separateness of the survivorship interest. When enacting the regulations, the IRS noted that some authorities disagreed with its position that a qualified disclaimer must be made within nine months of the creation of the tenancy.[60] The IRS still retained its position, however, because of the holding in the Tax Court Memorandum Opinion of *Kennedy v. Commissioner*,[61] that "each joint tenant receives an interest in the entire property subject to the tenancy, as well as the rights of survivorship, at the time of the transfer creating the joint interest."[62] Three months after the regulations were enacted, the Seventh Circuit, in *Kennedy v. Commissioner*,[63] found the regulation concerning joint tenancy property to be inconsistent with the other regulations under

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Cir. 1986) (No. 33349-83), Petitioner's counsel argued the language in the proposed regulation requiring the entire interest to be disclaimed was inconsistent with § 2518(c)(1) which provided for the disclaimers of undivided interest in property. This argument highlighted one of the reasons why the language was left out of the enacted regulation.

[57] *See supra* notes 49-50 and accompanying text.

[58] Treas. Reg. § 25.2518-2(d)(1) (1986).

[59] *Id.* § 25.2518-2(c)(4)(i). *See supra* text accompanying note 52 for language of regulation.

[60] 51 Fed. Reg. 28,365, 28,366 (1986).

[61] Kennedy v. Commissioner, 51 T.C.M. (CCH) 232, *rev'd*, 804 F.2d 1332 (7th Cir. 1986).

[62] 51 Fed. Reg. 28,365, 28,366 (1986).

[63] 804 F.2d 1332 (7th Cir. 1986).

section 2518 and overruled the *Kennedy* memorandum opinion[64] upon which the Service had relied.[65]

3. Criticism of the Service's Current Position.—The Service's position has been criticized as being fundamentally flawed: "based on shadowy and intricate common law property concepts and ancient fictions that bear little relationship to contemporary property law and reality."[66] It is not too difficult to conceptualize that a surviving joint tenant acquires greater property interest at the death of the other joint tenant.[67] In 1932 the United States Supreme Court recognized this in *Gwinn v. Commissioner*,[68] where it held,

> Although the property here involved was held under a joint tenancy with the right of survivorship created by the . . . transfer, the rights of the possible survivor were not then irrevocably fixed, since under the state laws the joint estate might have been terminated through voluntary conveyance by either party, through proceedings for partition, [or] by an involuntary alienation under an execution . . . . The right to effect these changes in the estate was not terminated until the co-tenant's death . . . . The death became the generating source of definite accessions to the survivor's property rights.[69]

A joint tenant: must account to his co-tenants for any rent and profits exceeding his proportion;[70] can only lease his aliquot portion of

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[64]*Id.* at 1335-36.

[65]51 Fed. Reg. 28,365, 28,366 (1986).

[66]Uchtmann, *supra* note 47, at 339-40.

[67]*Id.* at 340-41.

[68]287 U.S. 224 (1932).

[69]*Id.* at 228-29 (citations omitted). In *Gwinn*, property was acquired as joint tenants in 1915. At that time there were no provisions for federal transfer tax on property passing at death. In 1916 such transfer taxes were enacted and later amended in 1924. One of the co-tenants died in 1924, four months after the enactment of 26 U.S.C. § 1094. The Commissioner of the Internal Revenue interpreted this statute to include the one-half interest the deceased co-tenant passed at her death to the surviving joint tenant in arriving at the value of the estate subject to transfer tax. The petitioner maintained that no interest passed at death, because all interest in the property had passed at creation, which was prior to the enactment of the 1924 or 1916 statutes—thus the statutes should not apply. The court rejected the petitioner's argument, recognizing that an interest did pass at the death of one joint tenant to the surviving joint tenant.

[70]Uchtmann, *supra* note 47, at 340 n.32, reads:

> *See, e.g.*, Graham v. Allen, 11 Ariz. App. 207, 463 P.2d 102 (1970); Swartzbaugh v. Sampson, 11 Cal. App. 2d 451, 54 P.2d 73 (1936); People v. Varel, 351 Ill. 96, 184 N.E. 209 (1932); Pistole v. Lanier, 214 Ky. 290, 283 S.W. 88 (1926); Kahnovsky v. Kahnovsky, 67 R.I. 208, 21 A.2d 569 (1941). *But see* Black v. Black, 91 Cal. App. 2d 328, ____ , 204 P.2d 950, 953 (1949) ("[T]here is no

property subject to the rights of co-tenants to enjoy the property;[71] and can technically encumber by mortgage only his proportional interest; and realistically may not be able to find a lender willing to accept such a mortgage.[72] To the extent that the surviving joint tenant's rights are greater as sole owner than as joint tenant, the survivor has acquired something upon the death of the other joint tenant. This reality is inconsistent with the position of the IRS that the joint tenant is seized of the whole at creation and nothing passes at death.[73] As shown by the *Gwinn* decision quoted above,[74] the recognition that there is an interest that passes at death is neither new nor novel. Justice Black also recognized this in the 1939 case of *United States v. Jacobs*[75] where he wrote:

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equity in the claim that the mere fact of being named as joint tenant entitles one to share in the revenues produced on the land as the result of the labor, management and money of him who is in sole possession when the claiming co-tenant has neither demanded possession, contributed to the expense of production nor previously made himself liable for possible losses").

[71]Uchtmann, *supra* note 47, at 341 n.33 reads:

The majority view is that a joint tenant may not bind more than that tenant's aliquot portion of the joint estate: *See, e.g.*, Graham v. Allen, 11 Ariz. App. 207, 209, 463 P.2d 102, 104 (1970); Swartzbaugh v. Sampson, 11 Cal. App. 2d 451, 458, 54 P.2d 73, 77 (1936). In Reiger v. Bruce, 322 Ill. App. 689, 54 N.E.2d 770 (1944), a non-signing joint tenant was allowed to bring an action of forcible entry and detainer to recover the property from the lessee. The lessee does not, however, lose its rights against the signing joint tenant. *See also* National Gas & Co. v. Rizer, 20 Ill. App. 2d 332, 335, 155 N.E.2d 848, 849 (1959).

[72]Uchtmann, *supra* note 47, at 341 n.34 reads:

There is conflicting authority as to whether a creditor's lien or mortgage actually severs a joint tenancy. The matter of severance and thus the outcome upon the death of the debtor-joint tenant depends upon whether the state follows a title, hybrid, or lien theory of mortgages. In a title jurisdiction, conveyance of a mortgage by the joint tenant will sever the tenancy and destroy the right of survivorship. In a lien jurisdiction, there is no severance of the joint interest, and the mortgagee holds only a lien which may "evaporate" if the mortgaging joint tenant is the first to die. Because of the disappearing lien problem in lien jurisdictions, a lender will be less likely to accept a mortgage or other security interest in joint tenancy property, and the ability to use the joint tenancy property as collateral essentially becomes unavailable to a joint tenant who does not desire to sever the joint tenancy and destroy the right of survivorship. For a discussion of creditors' and mortgagees' rights regarding joint tenancy property, *see* Uchtmann & Hartnell, *Qualified Disclaimer of Joint Tenancies: A Policy and Property Law Analysis*, 22 Ariz. L. Rev. 987, 1003-05 (1980) and Mattis, *Severance of Joint Tenancies by Mortgages: A Contextual Approach*, 1977 S. Ill. U.L.J. 27, 45-61.

[73]Uchtmann, *supra* note 47, at 341.

[74]*See supra* note 69 and accompanying text.

[75]306 U.S. 363 (1939).

> Upon the death of her co-tenant [the wife] for the first time became possessed of the sole right to sell the entire property without risk of loss which might have resulted from partition or separate sale of her interest while decedent lived. There was—at his death—a distinct shifting of economic interest, a decided change for the survivor's benefit.[76]

The Service's position does not recognize the reality that the surviving joint tenant receives a substantial economic benefit at the death of the other joint tenant. This position creates several areas of conflict with the Congressional intent behind section 2518.

C. *IRS's Position in Conflict with Congressional Intent Behind* § 2518

There are three areas of conflict that arise between the Service's position and the Congressional intent behind section 2518. The first and most significant conflict is in the definition of what constitutes the transfer which activates the nine-month time limitation in the statute.[77] The second conflict exists between the Congressional intent behind the enactment of section 2518, to provide a more uniform federal disclaimer law by alleviating reliance on state disclaimer laws, and the Service's interpretation of section 2518, which results in reliance on state law.[78] The third conflict arises between the Service's position, which discriminates against owners of joint tenancy property, and the broader goals of the tax law to treat taxpayers fairly.[79]

1. Definition of Transfer.—When commenting on the statutory requirement that "the written refusal must be received by the transferor of the interest . . . not later than nine months after the day on which the transfer creating the interest is made,"[80] the House Ways and Means Committee stated: "For purposes of this requirement, a transfer is considered to be made when it is treated as a *completed transfer for gift tax purposes* with respect to inter vivos transfers or *upon the date of the decedent's death* with respect to testamentary transfers."[81] The Conference Committee report reflected the same intent by stating: "The Conferees intend to make it clear that the 9-month period for making

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[76] *Id.* at 371.

[77] I.R.C. § 2518(b)(2) (1987). The exact language is reproduced in note 31 *supra*. *See infra* text accompanying notes 80-93 for further discussion.

[78] *See* H.R. Rep. No. 1380, *supra* note 32, at 66-67. *See infra* text accompanying notes 94-107 for further discussion.

[79] *See infra* text accompanying notes 108-16 for further discussion.

[80] *See* H.R. Rep. No. 1380, *supra* note 32, at 67 (emphasis added).

[81] *Id.*

a disclaimer is to be determined in reference to each *taxable transfer*."[82]

At the time of creation of a joint tenancy by a donor of property, the only tax that may occur is a gift tax on the value of the one-half interest conveyed to the donee to the extent the value of the one-half interest exceeds the donee's contribution.[83] The portion retained by the donor which would pass at his death to the donee, if the donee survives him, is never taxed at creation and only becomes a "taxable transfer" at the death of the donor.[84] If both parties contributed equally to the purchase of the joint tenancy property, there is no gift tax at creation. Also, in this case the only "taxable transfer" occurs at the death of one of the tenants when the surviving tenant receives the decedent's one-half interest.[85]

If the intent of Congress is that the transfer creating the interest means a *taxable transfer*, then the donee above would have nine months from creation of the tenancy to disclaim his one-half proportional interest in the property. But with respect to the accretive interest,[86] which would only pass at the death of the donor, he would have nine months from the donor's death to disclaim. Similarly in the case of equal contributions, the survivor would have nine months from the decedent's death to disclaim the accretive interest which would pass to him at the decedent's death.

This application of Congressional intent to joint tenancy disclaimer is supported by the fact that House Report 1380 defining "transfer"

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[82]*Joint Explanatory Statement of the Committee of Conference*, S. Rep. No. 1236, 94th Cong., 2d Sess. 607,623.24, *reprinted in* 1976 U.S. Code Cong. & Admin. News 4262, 4266 (emphasis added).

[83]I.R.C. §§ 2511, 2512 (1987).

[84]The value of the donor's interest in the joint tenancy property is included in the donor's estate at his death. I.R.C. § 2040 (1987). The transfer of the estate, which is defined to include the donor's interest in the joint property, occurs upon the donor's death and is a taxable transfer. I.R.C. at § 2001(a). Thus, the donee should have nine months from the time of this taxable transfer to disclaim the accretive portion (the donor's interest), which is nine months from the date of the donor's death.

I.R.C. § 2040(b)(1) (1987) provides in the case of a "qualified joint interest," only one-half of the value of the joint tenancy property is includible in the gross estate of the deceased joint tenant, without regard to which joint tenant paid for the property. In order to be a "qualified joint interest," the property must be held in joint tenancy by the decedent and his or her spouse at the time of the decedent's death; no other person may have an interest in the property. Further, the joint tenancy must have been created by the decedent, by the decedent's spouse, or by both. I.R.C. § 2040(b)(2) (1987).

[85]*See supra* note 80 and accompanying text.

[86]Uchtmann defined the proportional interest as that one-half interest which passes at the creation of the joint tenancy and the accretive interest as that interest which contains the survivorship one-half interest and passes at the death of the first tenant to die. Uchtmann, *supra* note 47, at 343.

also noted that "many professional study groups had recommended that definite rules be provided with respect to the treatment of disclaimers for estate and gift tax purposes."[87] It cited the American Bar Association Recommendation Number 1974-2, which states:

> Joint interests vesting as a result of survivorship may be disclaimed within nine months after the death of the deceased joint tenant to the extent that the interest is includible in the estate of the deceased joint tenant. To the extent that the property is not includible in the estate of the deceased joint tenant, the disclaimer must be made no later than nine months after creation of the joint tenancy.[88]

One of the Treasury Regulations enacted in 1986 is in line with Congressional intent on this issue and states, "[t]he rules described in §§ 25.2518-1 through 25.2518-3 apply to the qualified disclaimer of an interest in property which is created in the person disclaiming by a *taxable transfer* made after December 31, 1976."[89] The enacted regulations also have a specific section on "transfers" which includes almost verbatim the language of the House Ways and Means Committee concerning taxable transfers.[90] However, the regulation concerning jointly held property, which states that the time period begins to run at the creation of the tenancy,[91] ignores the taxable transfer as being the time at which the nine-month limitation begins to run. Therefore, it is inconsistent with the transfer section of the regulations[92] and Congressional intent.

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[87]*See* H.R. Rep. No. 1380, *supra* note 32, at 66 n.5.

[88]*American Bar Association Tax Section Recommendation No. 1974-2*, 27 Tax Law. 818, 820 (1973).

[89]Treas. Reg. § 25.2518-1(a)(1) (1986) (emphasis added). The Service's original position was contrary to this. It recognized this Congressional intent as to transfer in a private letter ruling, Priv. Ltr. Rul. 81-400-11 (June 29, 1981), but stated, "[w]hile this language is useful in determining Congressional intent as to when the 9-month period begins to toll under section 2518, it is not relevant for purposes of the effective date provisions." *Id.* The IRS determined that the transfer creating the decedent's interest was the creation of the tenancy in 1963 and held section 2511, rather than section 2518, governed the validity of the decedent's disclaimer. *Id.*

The House Ways and Means Committee defined the "transfer that created the interest" as being the taxable transfer at one point in their report. *See* H.R. Rep. No. 1380, *supra* note 32, at 67. Later in the same report, the Committee used the previously defined language in stating "[t]he amendments apply with respect to 'transfers creating an interest' in the person disclaiming made after December 31, 1976." *Id.* It appears odd that the Committee would have in mind a definition other than that of the taxable transfer.

[90]Treas. Reg. § 25.2518-2(c)(3) (1986). *See infra* note 166 for language of regulation.

[91]Treas. Reg. § 25.2518-2(c)(4)(i) (1986). *See infra* text accompanying note 52 for language of regulation.

[92]Treas. Reg. § 25.2518-2(c)(3) (1986). *See infra* note 166 for language of regulation.

The Seventh Circuit highlighted this discrepancy when it reversed the Tax Court in *Kennedy*.[93]

2. Uniform Federal Disclaimer Law That Was Not Dependent on Local Law.—Prior to the enactment of section 2518, a disclaimer had to be valid under local law to be effective for purposes of the federal estate and gift tax.[94] The legislative history behind the enactment of section 2518 states that "[w]hen Congress enacted section 2518, it intended to create a uniform Federal standard so that a disclaimer would be effective for Federal estate and gift tax purposes whether or not valid under local law."[95] In spite of this Congressional intent, the proposed regulation section 25.2518-1(c)(1) required that the disclaimer be effective under local law.[96] The proposed regulation reflected the fact that, by stating in section 2518(b)(4) that the interest must pass "without any direction"[97] on the part of the disclaimant, and by not providing a way to complete the transfer, Congress had made section 2518 dependent upon local law.[98] In the ERTA of 1981, in an effort to alleviate this dependency on local law, Congress amended section 2518 by adding subsection (c)(3).[99] The amendment permitted a direct transfer to qualify as a disclaimer for federal tax purposes if the grantee is the person who would have received the property had the grantor simply disclaimed the interest. The transfer must also meet the other requirements set down in section 2518(b).[100]

The conflicting proposed regulation was revised before being enacted in 1986 to reflect the Congressional intent stated above.[101] For transfers prior to 1982, the enacted form provided that one could make a qualified

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[93]Kennedy v. Commissioner, 804 F.2d 1332, 1335 (7th Cir. 1986).

[94]Treas. Reg. § 25.2511-1(c) (as amended in 1986). *See supra* note 26 for text of regulation.

[95]S. Rep. No. 144, *supra* note 40, at 142; H.R. Rep. No. 201, 97th Cong., 1st Sess. 190 (1981).

[96]Prop. Treas. Reg. § 25.2518-1(c)(1), 45 Fed. Reg. 48,922 (1980).

[97]I.R.C. § 2518(b)(4) (1987). *See supra* note 31 for text of statute.

[98]*See* Martin, *Perspectives on Federal Disclaimer Legislation*, 46 U. Chi. L. Rev. 316, 323-35 (1979).

[99]I.R.C. § 2518(c)(3) (1987), *added by* ERTA § 426(a). *See supra* note 31 for text of statute.

[100]I.R.C. § 2518(c)(3) (1987). *See supra* note 31 for text of statute. According to one authority the wording of § 2518(c)(3) seemingly limits its application to transfers for the transferor's "entire interest in the property." Curiously, however, § 2518(c)(1) creates an apparent discrepancy by making the qualification rules of subsection (b) applicable to an undivided portion of the interest, as well as to an entire interest. Irrespective of any minor ambiguities, one thing seems clear: Congress intended to create uniform tax treatment of disclaimer, and it is willing to take the necessary steps to achieve that goal. Morris, *supra* note 26, at 62 n.117.

[101]Treas. Reg. § 25.2518-1(c)(1)(i) (1986). *See also* 51 Fed. Reg. 28,366 (1986).

disclaimer under section 2518, regardless of whether the requirements of local law were met, "if, under local law, the disclaimed interest in property is transferred, as a result of attempting the disclaimer, to another person without any direction on the part of the disclaimant."[102] No regulation has yet been promulgated for an interest created after 1981, which would apply to the 1981 amendment by the addition of section 2518(c)(3).[103]

The efforts to make federal disclaimer law more uniform and less dependent on state and local law have not been successful.[104] One area in particular is the application of federal disclaimer laws to joint tenancy property. The majority of states now have disclaimer laws allowing the disclaimer of the accretive interest in joint tenancy property.[105] Where state law allows the disclaimer of the accretive interest in joint tenancy property, some courts have taken the view that the state disclaimer law changes the nature of the property ownership at death to that of tenants in common and, therefore, have allowed the disclaimer of the accretive interest as a qualified federal disclaimer.[106] Because courts may interpret differently the way state disclaimer laws affect property interest and the application of section 2518, the Treasury regulations for section 2518 have not provided for uniform treatment of federal disclaimers of joint tenancy property. In addition, some states do not have disclaimer laws for joint tenancy property.[107] Taxpayers in these states will not have the

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[102]Treas. Reg. § 25.2518-1(c)(1)(i) (1986).

[103]Treas. Reg. § 25.2518-1(c)(1)(ii) (1986).

[104]*See generally* Schain, *supra* note 26.

[105]Uchtmann, *supra* note 47, at 342, n.37, provides:

> *E.g.*, Ark. Stat. Ann. § 62-3202(d) (Supp. 1983); Conn. Gen. Stat. Ann. § 45-300 (West Supp. 1984); Hawaii Rev. Stat. § 560:2-801 (1976 & Supp. 1983); Idaho Code § 15-2-801(a) (1979); Me. Rev. Stat. Ann. tit. 18A, § 2-801(c) (1981); Mass. Gen. Laws Ann. ch. 191A, § 2 (West 1981); Neb. Rev. Stat. § 30-2352(a) (1979); S.D. Codified Laws Ann. § 43-4-30.1 (1983); Utah Code Ann. § 75-2-802(1)(a) (1978); Wash. Rev. Code § 11.86.020 (1984). Generally, all states have statutes allowing the disclaimer of property that would pass to the disclaimant by virtue of the state's statute of descent and distribution. For a detailed listing of these statutes, *see* Frimmer, *Disclaimers After the Tax Reform Act of 1976: Chaos Out of Disorder*, 31 U.S.C. Tax Inst. 811, 822 n.41 (1979). *But see* Comment, *Federal Taxation: Section 2518 Disclaimers-Anything But Uniform*, 31 U. Fla. L. Rev. 188, app. D, at 209-10 (1978).

[106]Hoffman v. United States, 85-2 U.S. Tax Cas. 90430 (CCH) (D. Neb. 1985); Ferguson v. United States, 48 A.F.T.R.2d (P-H) ¶ 148,472 (D. Ariz. 1981). These cases will be discussed further at text accompanying *infra* notes 117-32.

[107]As of 1984, Mississippi, New Hampshire and Vermont had no disclaimer statutes applicable to intestate interests. Uchtmann, *supra* note 47, at 342, n.37. North Carolina has no disclaimer statute applicable to joint tenancy interest. Estate of Dancy v. Commissioner, 89 T.C. 550 (1987). *See infra* note 199 for a discussion of *Estate of Dancy* which deals with the disclaimer of joint tenancy property.

option of using state disclaimer laws to change their joint property interest so that federal disclaimer law will apply, again creating more disparity in the application of federal disclaimer law.

3. The Service's Position Conflicts With Broader Goals of Tax Law.—The Service's position is also in conflict with several broader goals underlying the tax laws.[108] By its inconsistent position on disclaimers, the IRS treats similarly situated taxpayers differently.[109] It also makes the form of the transaction, rather than its substance, control the tax consequences.[110] The result is a tax structure that taxpayers will regard as unfair.[111] This is demonstrated by the Service's disparate treatment of joint tenants and tenants in common. If a couple owned a farm worth $1,200,000 as tenants in common, zero tax would accrue in passing the farm on to the next generation. This is assuming that the decedent left his one-half undivided interest in the tenancy in common property to the surviving spouse in his will, and that she disclaimed it under section 2518 within nine months of decedent's death.[112] The same farm owned as joint tenants, under the Service's position regarding joint tenancy property, would, in passing it to the next generation, result in a $235,000 estate tax (as shown by example earlier).[113] One authority questions the extent to which early common law distinctions between

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[108]*Federal Estate and Gift Taxation: Recommendations of the American Law Institute and Reporters' Studies* 78 (1969). They articulated seven goals in formulating recommendations for reform of the federal estate and gift tax system:

> In relation to any proposals in the gift and estate tax area, a decision must be made on the goals which tax legislation in this field is designed to accomplish. The goals which have guided this Study are as follows (not necessarily listed in the order of their importance):
> (1) to produce revenue;
> (2) to impose reasonable restrictions on the inheritance of wealth;
> (3) to guard against the destruction of incentives to accumulate wealth;
> (4) to reduce, if not eliminate, the circumstances under which the form of a transfer will affect the tax result;
> (5) to have a tax system that is readily understandable in the normal and routine transfer situations;
> (6) to treat taxpayers similarly situated in the same manner; and
> (7) to produce a tax structure that will be regarded as fair.

It is obvious that in some instances the achievement of some of these goals will call for solutions directly opposite to the achievement of other goals. In such instances, a decision has to be made as to which goals should predominate.

[109]*See supra* note 108 goal 6.

[110]*See supra* note 108 goal 4.

[111]*See supra* note 108 goal 7. For a discussion of these goals, see Uchtmann & Hartnell, *supra* note 72, at 989-92.

[112]The tax computations for such an estate would be the same as in example 2 given earlier in the text. *See supra* notes 21-22 for computations.

[113]*See supra* notes 19-20 for computations.

tenants in common and joint tenants have disappeared over time, and in light of this, whether a policy which discriminates between a tenant in common and a joint tenant regarding the right to disclaim an accretive undivided interest in property can be justified.[114]

The special use valuation section 2032A,[115] provides that, for tax purposes, qualifying farmland transferred in a decedent's estate can be transferred at its income-generating value rather than its market value. Congress has thus recognized the large estate tax burden faced by farmers when passing their family farms and businesses to the next generation. However, the significant tax saving under this section is not available for inter vivos transfers[116] and thus provides a strong incentive to hold on to farmland until death. The Service's position increasing the estate tax burden on farm couples who own their land as joint tenants is not in line with Congress' actions to help decrease the estate tax burden for farm couples. Because the special use valuation benefits for agricultural property of section 2032A are only available for transfers at death, the Service's position also would not allow farm couples to pass title to farmland to their children who may have joined the family business at the death of the first parent, but would force them to wait until the death of the second.

D. The Courts' Treatment of Disclaimers of Joint Tenancy Prior to Kennedy

The Service's position that the nine-month time period for disclaiming joint tenancy property begins to run at the creation of the tenancy and not at the death of one of the joint tenants, is based on a series of private letter rulings discussed earlier.[117] These letter rulings cannot be cited as precedent and are merely opinions of the IRS on specific issues raised by inquiring taxpayers.[118] Prior to *Kennedy* only two courts addressed the issue of disclaiming joint tenancy property interest. The first was the Federal District Court for the District of Arizona in *Ferguson v. United States.*[119] Because the creation of the joint interest, the death of one of the joint owners, and the attempted disclaimer by the surviving joint owner all occurred prior to 1977, the court applied pre-section 2518 law (section 2511). The court concluded that in light of the existing Arizona disclaimer statutes a new statutory basis for the existence of

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[114]Uchtmann, *supra* note 47, at 350. For examples of disparate tax treatment, see *id.* at 347-50.

[115]I.R.C. § 2032A (1987).

[116]*Id.*

[117]*See supra* notes 43-50 and accompanying text.

[118]I.R.C. § 6110(j)(3) (1987).

[119]48 A.F.T.R.2d (P-H) ¶ 148,472 (D. Ariz. 1981).

joint estates had replaced the common law, and that a joint tenant could make an effective disclaimer even though the renunciation came long after the creation of the joint estate.[120]

The court reasoned that the right of survivorship interest, not the joint interest itself, was the interest being disclaimed. It interpreted the state statute to mean that upon renunciation of a joint interest at the death of one co-tenant, the joint estate is destroyed and is replaced by a tenancy in common which arises at the time of the renunciation. The surviving tenant could then disclaim ownership in the deceased tenant's share, provided the survivor had not accepted any benefits of that interest he could not have accepted as a tenant in common.[121] The court's result implies that the statute has altered the common law of joint tenancy. If other statutory requirements were met, the court saw no difficulty in recognizing practical realities and permitting the disclaimer.[122]

Although in *Ferguson* section 2511 controlled because the transfer was prior to 1977, the same rationale as to the effect of state disclaimer law on the nature of joint tenancy property could easily be applied to post 1977 transfers under section 2518. In fact, prior to *Kennedy*, the only other case that addressed the issue of disclaiming joint interest, *Hoffman v. United States*,[123] applied section 2518 and used a very similar approach in allowing the disclaimer of the survivorship interest in joint tenancy property. In *Hoffman*, a husband and wife bought a quarter section of land in 1943, each making equal contributions and taking title as joint tenants with right of survivorship.[124] The husband died in 1979 and the wife made a written disclaimer of an undivided one-half interest in the jointly held property within seven months of his death. The *Hoffman* court decided that Treasury Regulation Section 25.2511-1(c) did not apply because the creation of the tenancy in 1943 was not the result of a transfer and the regulation applied only to "property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property)."[125]

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[120]*Id.*

[121]*Id.*

[122]*Id. See also* Morris, *supra* note 26, at 64. In his article, Morris proposes a new form of property ownership, "statutory tenancy," similar but yet distinct from joint tenancy. For a further discussion of this form of ownership as compared to joint tenancy and the property interest in *Ferguson* after applying state disclaimer law, see Morris, *supra* note 26, at 65-78.

[123]85-2 U.S. Tax Cas. (CCH) ¶ 90,430 (D. Neb. 1985).

[124]These facts differ slightly from those in *Kennedy* and *Ferguson* where only one spouse bought the property and then titled it as joint tenants with rights of survivorship, making a gift of the one-half undivided interest at the time. *Id.*

[125]*Id.*; *see also* Treas. Reg. § 25.2511-1(c) (as amended in 1986). *See supra* note 26 for text of regulation.

The question then became whether the change in title effected by the death of a joint tenant in Nebraska is included in the meaning of the language in section 2518, "transfer creating an interest," which was considerably broader than the previous regulation language, because it was not restricted to transfers from a decedent.[126] In examining Nebraska law on disclaimer of joint tenancy interest, the court found that the husband's death brought about a transfer that created an interest in the surviving spouse that she did not possess prior to his death; an interest which she could disclaim if done within nine months.[127] Under Nebraska law

> [T]he disclaimer, which relates back to the time of death, has the effect of severing the joint tenancy by destroying the right of survivorship and converting the estate into a tenancy in common between the survivor and the successor of the renounced interest; then, as a tenant in common, the survivor still has the right to possession of the entire property, subject to the same right of the other tenant.[128]

The disclaimer raised no questions concerning the acceptance of prior benefits. "The only benefits that could be accepted from the decedent's interest before it is renounced that are not merely benefits inherent in the survivor's own interest by means of the unity of possession common to both estates are those that could be obtained by assignment, conveyance, encumbrance, pledge or transfer of the property,"[129] none of which the surviving spouse had done.

In addition to using the *Ferguson* court's rationale as to the effect of state disclaimer law, the *Hoffman* court went on to make a comparison between disclaiming inheritance by intestate succession and disclaiming the survivorship right of joint tenancy property.[130] From this comparison the court made a very convincing argument that the two should be treated the same. The court reasoned that an heir after disclaiming her inheritance is left in the same position as before the intestate's death, except that now she no longer has an expectancy of inheritance. The court continued by pointing out that in either case (that of a joint tenancy or intestate succession) the prior interest holder could have done an inter vivos act "by making a will, in the case of inheritance, or by severing the joint tenancy unilaterally . . .—to defeat the heir's or co-

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[126]*Hoffman*, 85-2 U.S. Tax Cas. at 90,434.
[127]*Id.*
[128]*Id.*
[129]*Id.*
[130]*Id.* at 90,435.

owner's expectancy. And in each case the value of the decedent's interest is included in the gross estate for death tax purposes.''[131]

In both *Ferguson* and *Hoffman* the outcome was very dependent on state law. Such dependency is in direct conflict with one of Congress' main goals in passing section 2518—to make a uniform federal disclaimer law that was not dependent on state or local law.[132] Neither case addressed the issue of whether the transfer from which the time limit ran had to be taxable under section 2518, which was also an intent of Congress when it enacted the section. Both courts, however, did show a willingness to circumvent the Service's position that an effective disclaimer of a joint tenancy interest must be done within nine months of the creation of the tenancy.

IV. The Kennedy Case

A. *The Facts*

In 1953, Frank Kennedy acquired 160 acres of Illinois farmland. Frank then created a joint tenancy with the right of survivorship with his wife, Pearl Kennedy, by transferring a one-half undivided interest in the farmland to her.[133] Frank died in 1978 and within nine months of his death Pearl disclaimed the interest she had acquired in the farm by surviving Frank. Under the law of Illinois, this former interest of Frank's passed to the Kennedy's daughter, Marsha. The IRS believed that the disclaimer was ineffective under federal law resulting in the property vesting in Pearl and that by attempting to now disclaim the property under state law, Pearl was transferring her property to her daughter which resulted in a taxable gift.[134] Relying on the 1982 Supreme Court case of *Jewett v. Commissioner*,[135] the Tax Court agreed, holding that Pearl's time to make a ''qualified'' disclaimer (one that avoids the

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[131]*Id.* (citing I.R.C. § 2040(a); Treas. Reg. § 20.2040-1(a), -1(b)).

[132]*See supra* text accompanying notes 94-107.

[133]Kennedy v. Commissioner, 804 F.2d 1332, 1333 (7th Cir. 1986). Frank furnished all the consideration for the land. Therefore, under current law at that time, although no taxable gift was reported, one took place for the undivided one-half interest transferred to Pearl. The Internal Revenue Code was amended effective 1954 to create a special treatment of marital joint tenancies. *See* I.R.C. § 2515 (repealed effective 1982). It now allows a deduction equal to the value of gifts to a spouse. *See* I.R.C. § 2523(a) and (d) (1987). However, neither of these changes affect the principal case because the joint tenancy was created in 1953, prior to these changes.

[134]*Kennedy*, 804 F.2d at 1333.

[135]455 U.S. 305 (1982).

imposition of tax) had been running since 1953 and therefore had expired long before Frank died.[136]

The case was appealed and the Seventh Circuit became the first court of appeals to consider the appropriate treatment of disclaimed interests in real estate held through joint tenancies.[137] The Seventh Circuit disagreed with the lower tax court holding and its application of the *Jewett* case. Because Illinois state law allowed either joint tenant to partition the property at will, the Seventh Circuit held that Pearl Kennedy had acquired the family farm in two steps.[138] The first step was at the creation of the tenancy in 1953 when she acquired an undivided one-half interest in the property. The second step was the transfer of the survivorship interest which occurred at the death of her husband. "The time within which Pearl could disclaim the half of the property she received because of Frank's death started to run in 1978 and is therefore governed by the 1976 statute."[139] Having decided the timing issue and which statute applied, the court remanded the case for further proceedings by the Tax Court to determine whether Pearl had accepted any interest or benefits as the terms are used in section 2518 and the implementing regulations.[140] On March 9, 1987, the Commissioner filed a Memorandum on Remand stating that he "will not pursue the argument that the petitioner accepted any interest in, or benefit from, the property."[141]

B. *Analysis of the Court's Decision*

In reaching its holding the Seventh Circuit first distinguished *Jewett*. It agreed with the Supreme Court's holding in *Jewett* as it applied to contingent remainders, but disagreed with the tax court's application of the *Jewett* holding to survivorship interest in jointly held property.[142] Second, the Seventh Circuit compared the survivorship interest in states where joint tenants have a right to partition to a general power of appointment. From this the court found an inconsistency in the federal regulations' treatment of disclaimers of general power in appointments and disclaimers of joint tenancy interests, and reasoned that the provision for general power of appointments was the one most applicable.[143]

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[136]Kennedy v. Commissioner, 51 T.C.M. (CCH) 232, *rev'd*, 804 F.2d 1332 (7th Cir. 1986).

[137]*Kennedy*, 804 F.2d at 1336.

[138]*Id.*

[139]*Id.*

[140]*Id.*

[141]Memorandum of Commissioner on Remand (March 9, 1987), Kennedy v. Commissioner, 804 F.2d 1322 (7th Cir. 1986).

[142]*Kennedy*, 804 F.2d at 1334.

[143]*Id.* at 1335-36.

1. The Jewett Decision.—Because the *Jewett* case involved a trust and four generations of the Jewett family, its facts are rather complex. The court in *Kennedy* used Roman numerals to designate the different generations and described the trust as follows:

> Margaret Weyerhauser Jewett (Jewett I) died [in 1939], creating a trust in which her spouse and children (Jewett II) had a life estate. On the death of the last life tenant, the corpus of the trust would go to surviving members of generation III. If the last life tenant survived any particular member of generation III, then that member's share of the corpus would go to generation IV, the children of the deceased member of generation III—if necessary, to the descendants of generation IV per stirpes.[144]

In 1972, while one member of generation II was still alive, George Jewett, a member of generation III, disclaimed any interest in the corpus of the trust. His interest under state law then passed as if he had deceased, making his children (Jewett IV) the direct beneficiaries of his share, worth over $4 million.[145] The IRS proposed to levy a gift tax on the actuarial value of George's interest in the corpus of the trust. George argued that because it was not possible to know who would receive the corpus until the last life tenant died, he should not be charged with making a gift of such an uncertain amount to his children.[146] The Supreme Court held to the contrary. It held that George's interest in the corpus was created in 1939 when Jewett I died. Because he had not disclaimed within a "reasonable" time from that date, his interest in the corpus would be considered received by him and given to his children and therefore subject to a gift tax.[147]

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[144] *Id.* at 1333.

[145] *Id.* at 1334.

[146] *Id.*

[147] *Jewett*, 455 U.S. at 319-20. Prior to the Supreme Court decision in *Jewett*, the Eighth Circuit decision in *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973), was the prevailing view on disclaimers of contingent remainder interest. The court's holding was that an unequivocable disclaimer of a vested remainder subject to divestiture, filed within six months of the death of the life tenant, was made within a "reasonable time." The court said that remainder interests which are not subject to divestiture should be disclaimed within a reasonable time after the testator's death. Where a remainder interest is subject to divestiture, however, the reasonable time is measured from the death of the life tenant. *Id.* at 64. This position was generally approved by the Eighth Circuit in 1980 by *Cottrell v. Commissioner*, 628 F.2d 1127 (8th Cir. 1980).

In 1980 the Ninth Circuit held in *Jewett v. Commissioner*, 638 F.2d 93 (9th Cir. 1980), *aff'g* 70 T.C. 430 (1978), that the "reasonable time" tolls at the creation of the interest, not after the interest indefeasibly vests. *Id.* at 95-96. This decision created a conflict between the circuits, and the Supreme Court granted certiorari in *Jewett* on June 1, 1981. 452 U.S. 904 (1981).

The Seventh Circuit in *Kennedy* agreed that *Jewett* "shows that a belated disclaimer may be a taxable gift even though the person disclaiming has no current access to the money and may never receive it."[148] However, the Seventh Circuit disagreed with the IRS's conclusion that *Jewett* should apply to Pearl Kennedy's disclaimer. In *Jewett* the interests of the different generations of the Jewett family were fixed in 1939. The future interest of each generation had a present value which could have been calculated from the actuarial tables in 1939 or in 1972 to determine what the value of each person's share of the trust corpus was at that time.[149] This was not the case with Frank Kennedy's gift to his wife in 1953 with respect to the survivorship interest. The undivided one-half interest that Frank retained had no value to Pearl that could be ascertained in 1953 because Frank retained the right to partition the property.[150] He retained this right up until his death; therefore, it was not until his death in 1978 that the survivorship interest value could be ascertained.[151] If the survivorship component of a joint tenancy was treated as a valuable gift in 1953, then that would imply that Frank's retained interest was worth less than half of the total value of the farm because Frank's and Pearl's shares, when added together, could not be more than 100 per cent. However, Frank also had a right of survivorship, plus the half share that he could retain with certainty by partition.[152] The court found that the IRS's treatment of the transfer in 1953 implied both Frank and Pearl's interest was worth more than one-half and this suggested something was seriously wrong with the IRS's position.[153]

The petitioner in *Kennedy* argued in her brief that the issue in *Jewett* revolved around the Supreme Court's interpretation of "transfer."[154] She argued that the *Jewett* court's interpretation was that in order to trigger the time period the transfer had to be a taxable transfer. In *Jewett*, when Jewett I died in 1939, there was a taxable transfer at that time of a future interest to George Jewett (Jewett III); therefore, the reasonable time period under section 2511 began to run.[155] When Frank titled the property jointly with Pearl in 1953 he made a taxable gift of the undivided one-half interest she acquired at that time. However, the survivorship

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[148]*Kennedy v. Commissioner,* 804 F.2d 1332, 1334 (7th Cir. 1986).

[149]*Id.*

[150]*Id.* at 1335.

[151]*See* Estate of Lidbury v. Commissioner, 800 F.2d 649, 653-54 (7th Cir. 1986). A contract to make a gift is not a taxable gift when the value of the interest to be transferred is subject to diminution at the donor's pleasure.

[152]*Kennedy*, 804 F.2d at 1335.

[153]*Id.*

[154]Brief for Petitioner at 24, Kennedy v. Commissioner, 804 F.2d 1332 (7th Cir. 1986) (No. 33349-83).

[155]*Id.*

interest she acquired at that time in the one-half undivided interest he retained was not taxable under the gift tax laws until Frank died in 1978.[156] Therefore, because it was this latter interest Pearl was disclaiming, she argued that, according to *Jewett*, it was the taxable event of Frank's death in 1978 that triggered the nine-month time period and section 2518 should apply.[157]

The Congressional intent behind section 2518 supports the interpretation that it is the taxable transfer that triggers the time limit and determines whether section 2511 for transfers prior to December 1976, or section 2518 for those after December 1976 will apply.[158] The IRS has also enacted Treasury Regulations for section 2518 that reiterate that it is the taxable transfer that triggers the nine-month time limitation under section 2518.[159] The *Kennedy* court's holding is in line with both Congressional intent behind section 2518 and the Treasury Regulation's definition of what constitutes a transfer for purposes of section 2518.[160] Although the court's holding comports with both of these, it is in direct conflict with Treasury Regulation Section 25.2518-2(c)(4), which states that a disclaimer of a joint tenancy interest must be made within nine months of the creation of the tenancy.[161] Because the resolution of this conflict may affect a significant number of taxpayers, it is necessary to analyze the conflict and determine which approach should prevail.

2. Kennedy Court Finds the Treasury Regulations Inconsistent.— The court equated Frank's power of partition to a general power of appointment over Pearl's survivorship interest, "because by partitioning the property Frank could direct his half to his creditors and legatees of his choice rather than Pearl."[162] The court also found similarities in that current tax law pulls the value of the jointly held property into the estate of a contributing deceased joint tenant,[163] just as a general power of appointment pulls the value of a trust into the estate of the person who dies while holding the power.[164] With a general power of appointment the effective transfer occurs when the holder of the general power exercises it or allows it to lapse, and the time to disclaim then

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[156]*Kennedy*, 804 F.2d at 1335. *See* Gift Tax Regulations 108, §§ 86.2, 86.19(h) (1943); for treatment under current law, see *supra* note 84 and accompanying text.

[157]Brief for Petitioner at 24, Kennedy v. Commissioner, 804 F.2d 1332 (7th Cir. 1986) (No. 33349-83).

[158]*See supra* notes 80-81 and accompanying text.

[159]*See supra* notes 89-90 and accompanying text.

[160]*See infra* note 166 for language of regulation.

[161]For the complete language of Treas. Reg. § 25.2518-2(c)(4)(i), *see supra* text accompanying note 52.

[162]*Kennedy v. Commissioner*, 804 F.2d 1332, 1335 (7th Cir. 1986).

[163]I.R.C. § 2040(a) (1987).

[164]I.R.C. § 2041(a)(2) (1987).

begins.[165] The regulations under section 2518 support this treatment of the situation: "A person to whom any interest in property passes by reason of the exercise or lapse of a general power may disclaim such interest within a 9-month period after the exercise or lapse."[166] The court reasoned that Frank's right to partition, which was similar to a general power of appointment, lapsed at his death and, therefore, Pearl had nine months from that time to disclaim the survivorship interest in the farm.[167]

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[165]*Kennedy*, 804 F.2d at 1335.

[166]Treas. Reg. § 25.2518-2(c)(3). The full text reads as follows:

Transfer. For purposes of the time limitation described in paragraph (c)(1)(i) of this section, the 9-month period for making a disclaimer generally is to be determined with reference to the taxable transfer creating the interest in the disclaimant. With respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift. Thus, gifts qualifying for the gift tax annual exclusion under section 2503(b) are regarded as taxable transfers for this purpose. With respect to transfers made by a decedent at death or transfers which become irrevocable at death a taxable transfer occurs upon the date of the decedent's death. However, where there is a taxable transfer of an interest for Federal gift tax purposes and such interest is later included in the transferor's gross estate for Federal estate tax purposes, the 9-month period for making a qualified disclaimer is determined with reference to the earlier taxable transfer. In the case of a general power of appointment, the holder of the power has a 9-month period after the creation of the power in which to disclaim. A person to whom any interest in property passes by reason of the exercise or lapse of a general power may disclaim such interest within a 9-month period after the exercise or lapse. In the case of a nongeneral power of appointment, the holder of the power, permissible appointees, or takers in default of appointment must disclaim within a 9-month period after the original taxable transfer that created or authorized the creation of the power. If the transfer is for the life of an income beneficiary with succeeding interests to other persons, both the life tenant and the other remaindermen, whether their interests are vested or contingent, must disclaim no later than 9 months after the original taxable transfer. In the case of a remainder interest in property which an executor elects to treat as qualified terminable interest property under section 2056(b)(7), the remainderman must disclaim within 9 months of the transfer creating the interest, rather than 9 months of the date such interest is subject to tax under section 2044 or 2519. A person who receives an interest in property as the result of a qualified disclaimer of the interest must disclaim the previously disclaimed interest no later than 9 months after the date of the taxable transfer creating the interest in the preceding disclaimant. Thus, if A were to make a qualified disclaimer of a specific bequest and as a result of the qualified disclaimer the property passed as a part of the residue, the beneficiary of the residue could make a qualified disclaimer no later than 9 months after the date of the testator's death. See paragraph (d)(3) of this section for the time limitation rule with reference to recipients who are under 21 years of age.

[167]*Kennedy v. Commissioner*, 804 F.2d 1332, 1336 (7th Cir. 1986).

The *Kennedy* court noted that the regulations treated other interests, such as joint bank accounts, similarly.[168] The Commissioner treats a joint account between A and B, where A has provided all the funds, as a transfer to B only when it becomes irrevocable. The transfer becomes irrevocable when B withdraws the money or A dies. If B does not withdraw the funds during A's life, B has nine months after A's death to disclaim any interest in the account.[169]

The court also noted that the new regulation treated a survivorship interest in land as a completed, irrevocable gift on the date the tenancy itself was created.[170] The court found this "inconsistent with the Commissioner's treatment of general powers of appointment and joint bank accounts when, as is true in Illinois, either spouse may terminate the right of survivorship by partitioning the property."[171] Because of the prospect of partition, only the one-half undivided interest had been transferred irrevocably. The survivorship interest could have been withdrawn at will, just as funds in a joint account could have been. The court found that Pearl had no greater interest in Frank's half of the farm than she had in any funds Frank might have deposited in a joint checking account. "In either case Pearl would get the interest if she survived Frank, but only if Frank refrained from exercising his unfettered power to withdraw (or partition)."[172]

Based on this comparison of Frank's right to partition to that of a general power of appointment, the court held that Pearl had received the farm as the result of two separate transfers. The first was the transfer of the undivided one-half interest in 1953, and the second was the transfer of the survivorship interest at Frank's death in 1978. Therefore, the time period in which Pearl could disclaim the half of the property she received at Frank's death started to run in 1978 and was governed by section 2518.[173]

The court's holding can be viewed in two ways. First, upon finding an inconsistency in the Treasury regulations, the court chose to apply the regulation which discussed general power of appointments[174] because the court found it more applicable and in line with the purpose of the statute than the regulation discussing joint tenancy interest.[175] The second

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[168]*Id.* at 1335.

[169]Treas. Reg. § 25.2518-2(c)(5) (1986) Example 9.

[170]*Kennedy*, 804 F.2d at 1335. *See also* Treas. Reg. § 25.2518-2(c)(4)(i) (1986). *See supra* text accompanying note 52 for language of the regulation.

[171]*Kennedy*, 804 F.2d at 1335.

[172]*Id.*

[173]*Id.* at 1336.

[174]Treas. Reg. § 25.2518-2(c)(3) (1986). *See supra* note 166 for text of regulation.

[175]Treas. Reg. § 25.2518-2(c)(4)(i) (1986). *See supra* text accompanying note 52 for language of regulation.

interpretation is that the court sufficiently distinguished Pearl's survivorship interest, based on Frank's power to partition, to remove it completely from the joint tenancy regulation[176] and to place it strictly under the general power of appointment regulation.[177] If the second interpretation is accepted, the holding is not in conflict with Treasury Regulation Section 25.2518-2(c)(4)(i);[178] the regulation simply does not apply in this case.

Under the second interpretation the regulation applying to joint tenancy would probably never be used because the right to partition is one of the common law rights associated with joint tenancy property and is present in most states where property is held as joint tenants with right of survivorship.[179] Courts would almost always be able to make the comparison, made by the court in *Kennedy*, that the right to partition is equivalent to a general power of appointment and, therefore, would apply the regulation that discusses general power of appointments rather than the one that addresses joint property interest. Although this interpretation makes the holding less controversial, the first interpretation appears to be the practical effect of the court's holding.

If the first interpretation is accepted, the holding is in direct conflict with Treasury Regulation Section 25.2518-2(c)(4)(i), which states that a disclaimer of a joint tenancy interest must be made within nine months of the creation of the tenancy.[180] The *Kennedy* court questioned the appropriateness of Treasury Regulation Section 25.2518-2(c)(4)(i) when it recognized that the regulation did not discuss the effects of a power to partition.[181] Because of the effect the right to partition has on the survivorship interest, the court found this omission suggested something was seriously wrong with the IRS's position in the regulation discussing joint property interests.[182]

The *Kennedy* court did not address directly its power to disregard a Treasury regulation (which is, implicitly, what the court did if the first interpretation is accepted). There are two types of Treasury regulations, "interpretative" and "legislative." A regulation promulgated pursuant to the Secretary's general authority under I.R.C. section 7805(a)

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[176]*Id.*

[177]Treas. Reg. § 25.2518-2(c)(3) (1986). *See supra* note 166 for text of regulation.

[178]Treas. Reg. § 25.2518-2(c)(4)(i) (1986). *See supra* text accompanying note 52 for language of regulation.

[179]Gwinn v. Commissioner, 287 U.S. 224, 228-29 (1932). *See supra* text accompanying note 69.

[180]Treas. Reg. § 25.2518-2(c)(4)(i) (1986). *See supra* text accompanying note 52 for language of regulation.

[181]*Kennedy v. Commissioner*, 804 F.2d 1332, 1335 (7th Cir. 1986).

[182]*Id.*

to "prescribe all needful rules and regulations for the enforcement of [the revenue laws],"[183] is an interpretative regulation. One that is issued under a specific delegation of authority by Congress in the statute itself is a legislative regulation and has the same effect as a valid statute.[184] Because Congress did not give such authority to the Commissioner in section 2518, all regulations concerning the section are interpretative. When applying an interpretative regulation, the court may substitute its judgment for the agency's.[185] Therefore, the court in *Kennedy* had the power to challenge the Treasury regulation.

The United States Supreme Court has held, however, that deference is owed to a regulation that " 'implement[s] the congressional mandate in some reasonable manner.' "[186] The Court has also held that, when challenging an interpretative regulation, a court is required to

> look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. . . . Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.[187]

The *Kennedy* court found that the regulation in question was not in harmony with the statute, and that the regulation was inconsistent with the other regulations under the statute.[188] The regulation was also not in line with the Congressional intent that the transfer which triggers the nine-month time period was to be a taxable transfer.[189] This is demonstrated by the regulation's requirement that the time period for disclaiming the survivorship interest begins to run at the creation of the tenancy[190] regardless of the fact that the transfer of the survivorship interest is not taxable at that time.

The regulation in question had been enacted less than three months before the *Kennedy* decision was rendered, and the court was the first to address disclaimer of joint property interest under the new regulation.

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[183]I.R.C. § 7805(a) (1987).

[184]Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977).

[185]*See, e.g.*, General Electric Co. v. Gilbert, 429 U.S. 125 (1976); *Batterton*, 432 U.S. 416; *see also* DAVIS, ADMINISTRATIVE LAW TREATISE § 7.8, at 36-43 (2d ed. 1979).

[186]United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982), (quoting United States v. Correll, 389 U.S. 299, 307 (1967)).

[187]National Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 477 (1979).

[188]*Kennedy*, 804 F.2d at 1335.

[189]*See supra* text accompanying notes 80-81.

[190]Treas. Reg. § 25.2518-2(c)(4)(i) (1986). *See supra* text accompanying note 52 for language of regulation.

Because the regulation had been enacted so recently there were very few arguments to support the regulation when looking at the other relevant considerations suggested by the Supreme Court when challenging a regulation. Therefore, the court's challenge and disregard of the Treasury Regulation Section 25.2518-2(c)(4)(i) was proper under the guidelines set by the Supreme Court.[191]

The *Kennedy* case recognized the reality of modern joint tenancy property and the Congressional intent behind section 2518 that it should be the taxable transfer that triggers the nine-month time period. However, it still relied heavily on the state law of Illinois in defining the property right to be disclaimed. The case brought to the forefront the need for Congress to take action to clarify the disclaimer of joint property interest if its intent to have a uniform federal disclaimer law that is not dependent on state or local law is to become a reality.

V. Post Kennedy Decisions

As of November, 1987, the Seventh Circuit is the only court of appeals that has addressed this issue. However, the Eighth Circuit will address the disclaimer of joint tenancy survivorship interest in the spring of 1988 in a case that is being appealed from the United States Tax Court. That case, *McDonald v. Commissioner*,[192] held that the disclaimer of jointly held property received from a decedent was not valid because transfer of the interest occurred upon the creation of the joint tenancies and the disclaimer was not made within a reasonable time.[193] The facts of the case, for practical purposes, are the same as those in *Kennedy*. The majority in *McDonald* found that *Jewett* applied and that the court in *Kennedy* had not sufficiently distinguished *Jewett*.[194] Although it recognized that North Dakota law permitted partition or severance of joint tenancies, the court did not find this a persuasive basis on which to distinguish *Jewett*. Instead, the court stressed the fact that in this case the joint tenant had not exercised his right to partition, and the right under North Dakota law only permitted it in limited circumstances and "certainly not at the whim of a joint tenant."[195]

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[191]*See supra* text accompanying note 187.

[192]McDonald v. Commissioner, 89 T.C. 293 (1987) *rev'd*, 823 F.2d 1494 (8th Cir. 1988). Immediately preceding publication of this Note, the Eighth Circuit handed down its opinion reversing the Tax Court in *McDonald*. The court relied on the reasoning of the Seventh Circuit in *Kennedy* in holding that the nine-month time period in section 2518 begins to run at the death of the joint tenant rather than at the creation of the joint tenancy as held by the Tax Court.

[193]*Id.* at 301.

[194]*Id.* at 299.

[195]*Id.* at 300.

This reasoning is flawed. A joint tenant either does or does not have a right to partition. Just because he chooses not to exercise the right during his lifetime does not mean it did not exist and would not have affected the property if it had been exercised. Based on this reasoning, however, the majority held, as did the lower court in *Kennedy*, that the survivorship interest was a "contingency that [was] not . . . materially different than the contingency faced by the disclaiming taxpayer in *Jewett*."[196]

A strong dissenting opinion disagreed with the majority's application of *Jewett*.[197] They agreed with the Seventh Circuit's analysis in *Kennedy* and summarized it as follows:

> Jewett interests become *irrevocable* with the creation of the trust to Mrs. Jewett's death, whereas Frank Kennedy's gift to Pearl, i.e., the right of Pearl to receive Frank's interest when Frank died, was *revocable* until Frank's death, when it became *irrevocable*. Under section 2518(b)(2)(A), taxpayer then had 9 months within which to disclaim, which she did.[198]

McDonald will give the Eighth Circuit a chance to join the Seventh Circuit in recognizing the realities of modern joint tenancy property and also to continue to set precedent that will further the Congressional intent behind section 2518. If the Eighth Circuit chooses not to hold with the Seventh Circuit, then it will be for the Supreme Court to settle the dispute among the circuits concerning the disclaimer of joint property interest.[199]

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[196] *Id.* (quoting Kennedy v. Commissioner, 51 T.C.M. 232, 233, *rev'd*, 804 F.2d 1332 (7th Cir. 1986)). "A proper appeal in this case would lie in the Eighth Circuit not the Seventh Circuit. Accordingly, we are not bound by the Seventh Circuit's opinion in *Kennedy*." *McDonald*, 89 T.C. at 296 n.11.

[197] *McDonald*, 89 T.C. at 308 (Nims, J., dissenting). Six judges joined the dissent while there were ten siding with the majority. The second dissenting opinion of Judge Parr discussed briefly the treatment of tenants by the entirety. He wrote that because "divorce or annulment generally terminates the tenancy by the entirety and transforms it into a tenancy in common, with each spouse holding an undivided one-half interest," 4A R. Powell, The Law of Real Property, ¶ 624[3] (1986), he would treat both tenancies by the entirety and joint tenancies the same. *McDonald*, 89 T.C. at 310 (Parr, J., dissenting). This Note did not address disclaimers of tenancy by the entirety interest between spouses, but since they, too, can be partitioned by divorce or annulment, the same reasoning as applied in *Kennedy* would also apply to tenancy by the entirety interest.

[198] *McDonald*, 89 T.C. at 308-09 (Nims, J., dissenting).

[199] For another post *Kennedy* case addressing disclaimers of joint tenancy interest under section 2518, see Estate of Dancy v. Commissioner, 89 T.C. 550 (1987). This court disagreed with the *Kennedy* court and cited *McDonald* as authority. The case occurred in North Carolina, which has no state disclaimer laws for joint tenancy property, therefore making it distinguishable from *Kennedy* and limited by its facts. *See also* Estate of

VI. Conclusion

The *Kennedy* case has brought to the forefront the issue of when the time period begins to run for the disclaimer of the survivorship interest in joint tenancy property. By allowing such a disclaimer to be made by the surviving joint tenant within nine months of the deceased joint tenant's death,[200] rather than nine months from the creation of the tenancy as required by the Treasury Regulation,[201] the holding in *Kennedy* has given owners of joint tenency property an effective post mortem estate planning tool that will allow them to reduce their tax burden when passing their property to the next generation. Disclaimers of property at death to avoid taxes is not a new concept. The *Kennedy* holding merely dispenses with discrimination between similar property ownership forms, by allowing joint tenancy property owners the same rights that tenants in common property owners enjoy under present disclaimer laws. It is also in line with recent legislation to help alleviate the large estate tax burden on farm families when passing their farms on to the next generation.[202]

Congress made changes in the federal disclaimer law in 1976 and again in 1981. Three major goals in making these changes were: 1) to create a uniform federal disclaimer law that was not dependent on local or state law; 2) to substitute a nine-month period for the "reasonable time" period in the previous statute; and 3) to define the transfer from which this time period begins to run as a taxable transfer.[203] Despite Congress' efforts, there is still a lack of uniform treatment of federal disclaimer law among the courts, particularly with respect to joint tenancy property interest and what constitutes the transfer from which the nine-month time period begins.

The IRS is partly to blame, because in formulating Treasury Regulations under section 2518, it has failed to recognize the reality of modern joint tenancy property that an interest *does pass at death* to the surviving tenant,[204] and the Congressional intent that it is a taxable transfer from which the nine-month time period begins to run.[205]

Lamoureux v. Iowa Dept. of Rev., 412 N.W.2d 628 (Iowa 1987). This case only addresses Iowa disclaimer law. However, it cites *Kennedy* as support for interpreting their statute as allowing disclaimer of the survivorship interest by the survivor if made within nine months of the death of the deceased joint tenant.

[200]*Kennedy*, 804 F.2d at 1336.

[201]Treas. Reg. § 25.2518-2(c)(4)(i) (1986). *See supra* text accompanying note 52 for language of regulation.

[202]*See supra* text accompanying notes 115-16.

[203]*See supra* text accompanying notes 77-116.

[204]*See supra* text accompanying notes 66-76.

[205]*See supra* text accompanying notes 89-90.

The *Kennedy* court recognized the inconsistency of the regulation with respect to Congressional intent and the realities of modern joint tenancy property. The court chose not to apply the regulation, allowing Mrs. Kennedy's disclaimer of the survivorship interest within nine months of her husband's death.[206]

At this point, three possible forms of action can be taken to resolve this conflict created by the *Kennedy* decision. Congress could add amendments to section 2518 that specifically address joint tenancy property and make clear what its intended treatment of such interests are.[207] Second, but unlikely because of the present litigation in which the IRS is involved,[208] the IRS could issue a new regulation on joint property more in line with Congressional intent and the realities of modern joint tenancy property. Third, the conflict could be resolved by the courts. If the Eighth Circuit aligns itself with *Kennedy* in the *McDonald* case, although it might not settle the issue in favor of *Kennedy* in other circuits, it would certainly bolster the support for the *Kennedy* application of section 2518. If the Eighth Circuit holds against *Kennedy* in the *McDonald* case, there would be a split among the circuits. At that point, if Congress or the IRS has not taken any action, the Supreme Court would have the opportunity to address and settle the issue of when the nine-month time period in section 2518 begins to run when disclaiming the survivorship interest of a joint tenancy—at the creation of the tenancy or at the death of one of the joint tenants.

If the Supreme Court has the opportunity to decide this conflict, it should recognize the realities of modern joint tenancy property and the Congressional intent behind section 2518. In doing so, the Court should affirm the holding in *Kennedy* which allows the qualified disclaimer of the survivorship interest in jointly held property if made within nine months of the deceased joint tenant's death.

GARY L. CHAPMAN

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[206]*Kennedy v. Commissioner*, 804 F.2d 1332, 1336 (7th Cir. 1986).

[207]For a recommended draft of an amendment reflecting the view that the survivorship interest should be disclaimable within nine months of the deceased joint tenant's death, see Uchtmann, *supra* note 47, at 355.

[208]*See supra* text accompanying notes 192-99.