Marquette Law Review

Volume 42
Issue 4 *Spring 1959*

Article 9

Decedents' Estates: Liability for Payment of Joint Mortgage Debt as Between Estate of Deceased Co-Owner and Survivor

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Rule 18 (a) permits the joinder of independent claims would not change the result. The usual principles of jurisdiction must be met in relation to any claim that is joined. As said in MOORE'S FEDERAL RULES:[21] "It should be borne in mind that Rule 18 is only a procedural rule relating to joinder of claims and remedies; and that under Rule 82[22] jurisdiction and venue are not affected. . . ."

The dismissal of a supplemental bill joining the cause of action for wrongful death could be avoided in Wisconsin by substituting a citizen of Illinois as administrator to continue the litigation. Unlike Virginia, Wisconsin does not require the administrator to be a citizen of this state. A duly appointed administrator of a foreign jurisdiction may prosecute the action for wrongful death. The basis appears to be that full faith and credit should be given to the judicial proceedings of the foreign jurisdiction appointing the party as administrator of the decedent's estate.[23]

Grady v. Irvine illustrates the interrelation of principles of Federal jurisdiction, the Federal Rules of Civil Procedure and the law of the state where the District Court is sitting which the pleader must consider in charting his course when a person has commenced an action in the Federal District Court for personal injuries and dies as a result of the injuries while the action is pending.

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Decedents' Estates: Liability for Payment of Joint Mortgage Debt as Between Estate of Deceased Co-Owner and Survivor—Real estate was conveyed to husband and wife as tenants by the entireties. Thereafter both husband and wife executed a joint and several bond secured by a mortgage on the realty. The husband died testate before any mortgage payments were made. His will contained numerous bequests, including a bequest to the widow of $35,000, plus a direction for the order of payment in case the funds were insufficient to meet all bequests.[1] The document also contained a general provision directing the executors to pay "all my just debts." During administration, it became evident that estate assets were insufficient to pay all bequests plus the mortgage debt. The executors sought instructions as to the percentage of the debt for which the estate was liable, the widow contending that the estate must pay the entire debt or at least contribute fifty percent if she paid it. The lower court refused to award contribution to the wife and held she was solely responsible

[21] MOORE'S FEDERAL RULES AND FORMS 128 (1956).

[22] FED. R. CIV. P. 82, 28 U.S.C. Rule 82 "Jurisdiction and Venue Unaffected. These rules shall not be constructed to extend or limit the jurisdiction of the United States District Courts or the venue or the actions therein."

[23] Robertson v. C., St. P., M. & O. R. Co., 122 Wis. 66, 74, 99 N.W. 1135 (1904).

[1] In re Keil's Estate, 140 A. 2d 139 (Orph's Ct. Del. 1958).

for the debt upon realty.[2] On appeal, *Held*: The widow is entitled to fifty percent contribution from the estate of her deceased husband when she pays the debt. *In Re Keil's Estate,* 145 A.2d 563 (Del. 1958).

There were several preliminary problems which confronted the court before the contribution issue was reached. Among these was the application of the common law doctrine of exoneration. According to tradition, it was the obligation of the personal representative of the deceased to exonerate from mortgage debt any realty which passed through the estate of the deceased either by will or by intestacy.[3] The personalty of the estate has always been considered the primary source for exoneration of the realty under these circumstances.[4] The doctrine operated to free realty in the hands of devisees or heirs from the personal debts of the decedent. Generally, the justification for its use was that the estate of the decedent had been enriched by the proceeds acquired when the debt was placed upon the property. Therefore, the estate should equitably pay this debt. This was deemed to be the intention of the testator.[5]

The application of the common law doctrine was limited in two ways. First, if the testator expressly stated that the realty should pass *cum onere,* the estate had no duty to exonerate. Any exoneration would have been contrary to the intention of the testator.[6] Secondly, if the debt was not a personal debt of the decedent, his estate had not been enriched by its proceeds and consequently had no equitable duty to exonerate the realty.[7] The personal estate was not considered enriched if the debt was incurred in purchasing the realty or in making improvements to it.[8]

The doctrine of exoneration has fallen into disfavor under modern law.[9] It is seldom applied unless the testator expressly directs that a specific piece of realty be exonerated. Most states, by statute, permit the realty to bear the primary responsibility for the debt upon it. The courts construe these statutes as to relieve them from the necessity of implying testator's intent to exonerate. Application of the doctrine appears dependent upon express direction of the testator.[10]

The court in the present case refused to apply exoneration. It considered the general testamentary direction to pay debts insufficient evidence of testator's intent to exonerate any particular piece of realty.[11] Furthermore the realty did not pass through the estate of the husband.

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[2] *Ibid.*
[3] ATKINSON, WILLS §137 (2nd ed. 1953).
[4] ROLLISON, WILLS §306 (1939).
[5] See *supra* note 3, 4 AMERICAN LAW OF PROPERTY 296-297 (Casner ed. 1952).
[6] ATKINSON, WILLS §135 (2nd ed. 1953).
[7] *Ibid.*
[8] See *supra* note 3.
[9] See *supra* note 3, 4 PAGE, WILLS 306-307 (3rd ed. 1952).
[10] See *supra* note 4.
[11] See *supra* note 3.

This result also appears justified by the fact that the debt was placed upon the property for improvement purposes; it was not solely the personal obligation of the decedent since the widow joined in the execution of the bond. The estate of the decedent was not enriched in any way. The writer has been unable to find any instance where a court has applied exoneration, without an express direction from the testator, to a non-probate asset.[12]

A second problem which follows closely upon the heels of exoneration is that of abatement; *i.e.* the order in which the assets of the estate are used to pay the decedent's debts. This question was considered in the decision of the lower court.[13] It was not considered on appeal. Neither court found it necessary to apply the doctrine. The widow contended that the circumstances surrounding the mortgage, coupled with the testator's language which gave her bequest of $35,000 priority over other legacies and bequests, showed an intent that the testator considered the mortgage his personal debt. Had the court agreed with this contention, they would have been faced with the problem of deciding which legacies and bequests were to give way towards payment of the debt. A general testamentary direction that testator's debts are to be paid is considered a mere formality and standing alone has no bearing upon the order of abatement. Here, however, the testator gave specific instructions as to the order in which his gifts were to be paid if the funds were insufficient to pay them all in full. The result was that the court had to determine the extent of his *just* debts and then follow the order for payment of the gifts which the testator directed.[14]

The line of cases which awards fifty percent contribution to the party paying the debt approach the problem through an examination of the nature of the debt which the parties placed upon the property. The obligation is that of joint and equal principals and the right to contribution exists between them in this relationship.[15] The main case cited by the court in its decision is *Cunningham v. Cunningham.*[16] The case concerned property held by husband and wife by the entireties. The controversy arose over payment of a purchase money mortgage which they had jointly placed upon the realty. The court refused to apply exoneration and stated generally that the doctrine did not apply

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[12] See *supra* note 1. "The problem before the Court arises out of the relationship between the debtors on account of their creation of a debt secured by a mortgage on land held by the entireties. This problem is not solved by any general requirement that debts of a deceased be paid by his estate." *Ibid* at 141.

[13] *Ibid.*

[14] No authority has been found upon which to predicate abatement of estate assets to pay the debt upon a non-probate asset in the absence of some direct and express application by the testator himself.

[15] 67 A.L.R. 1176 (1930).

[16] 158 Md. 372, 148 Atl. 444 (1930).

where the parties who placed the mortgage held the realty by the entireties. The court stated the following:

> The survivor has no interest in her deceased husband's estate as dowress, heir, or devisee, or in any other capacity which entitles her to have the land acquired by her as a tenant by the entireites exonerated, by payments out of the personal assets, from the mortgage indebtedness contracted for its purchase.[17]

The court then awarded contribution of fifty percent between the parties because of their relationship as co-principals upon the note which secured the mortgage. This was decided to be the only equitable solution to the problem.

Several other cases cited by the widow in the principal case to support her contention for contribution from the personal estate proceed upon the same reasoning. In *In Re Kershaw's Estate,* Justice Stern said:

> . . . the controlling fact is that he, together with his wife, was personally liable on the bond; that liability continued after his death and therefore constituted a debt of his estate.[18]

In the case of *Magenheimer v. Councilman,* the court said:

> They were joint principals each liable for the whole debt and the husband's administrator having paid the note as a claim against the husband's estate, was entitled to contribution for the estate.[19]

Underwood v. Ward[20] also applied equitable contribution of fifty percent between husband and wife who were jointly and severally liable for a debt placed upon their property.

The decision of the lower court, reversed on appeal, rested upon the reasoning that the nature of the obligation of the deceased spouse is to be considered in the light of the incidents of ownership of the property which is security for the debt. The nature of the debt is considered to be subordinated to the nature of the tenancy by which the parties hold the land. Under a tenancy by the entireties both own the whole interest and the courts which advocate this theory consider that they both mortgage the whole as individuals. The obligation of contribution and the debt of the one simply disappears when, by his death, he loses all his interest in the property under the principal of survivorship. According to this view the death of one holder eliminates any basis for an award of equitable contribution.

The leading case cited for this latter view is *Lopez v. Lopez.*[21] This Florida case was decided upon the same facts as the principal

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[17] *Ibid.*

[18] 352 Pa. 205, 42 A. 2d 538 (1945).

[19] 76 Ind. App. 583, 125 N.E. 77 (1919).

[20] 239 N.C. 513, 80 S.E. 2d 267 (1954).

[21] 90 So. 2d 456 (Fla. 1956).

case except that the debt was for purchase money rather than improvements. The court said:

> The husband and wife simultaneously each own the whole of the estate and the burden of the mortgage follows the security. . . . It is inequitable for the law to take from one his interest in lands but yet to hold him responsible for a part of the purchase price thereof which remains unpaid.

Two other cases cited also came to the same conclusion regarding the nature of the tenancy. The court said in *In Re Dell's Estate*:

> The wife joined in both the bond and the mortgage, so that the debt became her debt as well as that of her husband and, upon the latter's death, the mortgage was no longer upon his estate in land, for there was none.[22]

It cannot be denied that the peculiar incidents of survivorship under a tenancy by the entireties seem to have an important place in these decisions. This even more apparent when the final decision of *Ratte v. Ratte*[23] is examined. Here the tenancy of husband and wife was joint rather than by the entireties but the court reached the same conclusion as the *Lopez* case. The court said:

> The right to contribution arises when and not before a debt is paid by one debtor for the benefit of all joint debtors. By payment of the mortgage after the death of the wife, the husband no longer benefited her since at her death he became the sole owner of the property.

It is significant that this case appears to give weight to the incident of survivorship which is present in joint tenancy situations.

The two views expressed by the above lines of cases do not seem to lend themselves to reconciliation. They are simply two divergent approaches to the same problem. One considers the nature of the debt as a starting point while the other uses a property approach. The courts of any state which face this situation must make their own decision as to the best method of approach. It is probable that the public policy of the state and the statutory provisions dealing with tenancy and debts will materially affect their decision.

Wisconsin does not recognize a tenancy by the entireties.[24] By statute, if realty is conveyed to husband and wife during coverture they hold as joint tenants.[25] However, there appears to be a significant

[22] 154 Misc. 216, 276 N.Y.S. 960 (1935).
[23] 260 Mass. 165, 156 N.E. 870 (1927).
[24] Wallace v. St. John, 119 Wis. 585, 97 N.W. 197 (1903).
[25] WIS. STATS. §230.44 (1957) "All grants and devises of land made to two or more persons, except as provided in section 230.45, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy."
WIS. STATS. §230.45(1) (1957) "Section 230.44 shall not apply to mortgages nor to devises or grants made in trust, nor made to executors, or to husband and wife."

difference in the joint tenancy of husband and wife in homestead property when compared with a tenancy in non-homestead property. In the former, survivorship cannot be destroyed by one tenant's action alone as it can in a normal joint tenancy of non-homestead property.[26] This is true at least as long as the property continues to be used as a homestead.[27] It would seem that there is a similarity between the incident of survivorship of a tenancy by the entireties and the Wisconsin joint tenancy of homestead property by husband and wife. This similarity might lend some weight to an application of the rule of the *Lopez* case to a similar situation in Wisconsin, if it were not for a broad statutory provision which seems to commit Wisconsin to the principal of equitable contribution between joint debtors.[28] The Wisconsin Supreme Court has not been confronted with the problem of applying this statute to a joint debt secured by a lien on realty owned by the debtors as joint tenants. Existing decisions have been limited to tenants in common and partnerships.[29] However, the wording of the statute is such that it could easily be applied to the facts of the principal case, and it is extremely doubtful that a joint tenancy in the property securing the debt would justify a refusal to apply the statute. Hence, if the testator wishes such property to pass to the surviving tenant debt-free, his will should be carefully worded to express this intention. The statute does not appear to prohibit a testator from achieving this result if he so desires. Mortgage insurance would also achieve the desired result.

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Constitutional Law: Loyalty Oath — Tax Exemption—In an attempt to effectuate a provision of the California Constitution which requires that tax exemption be denied all persons who advo-

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[26] WIS. STATS. §235.01(2) (1957) "No mortgage or other alienation by a married man of his homestead, exempt by law from execution, or any interest therein, legal or equitable, present or future, by deed or otherwise, shall be valid without his wife's consent, evidenced by her act of joining in the same deed, mortgage or conveyance, except a conveyance from husband to wife." WIS. STATS. §235.01(3) (1957) "No mortgage or other alienation by a married woman of any interest legal or equitable, present or future, by deed or otherwise, in a homestead held by her and her husband as joint tenants, shall be valid without her husband's consent, evidenced by his act of joining in the same conveyance or mortgage or executing a separate conveyance from wife to husband."

[27] Siegel v. Clemons, 266 Wis. 369, 63 N.W. 2d 725 (1954).

[28] WIS. STATS. §313.12 (1957) "When two or more persons shall be indebted on any joint contract or upon a judgment founded on a joint contract and either of them shall die his estate shall be liable therefor, and the claim may be allowed by the court as if the contract had been joint and several or as if the judgment had been against him alone, and the other parties to such joint contract may be compelled to contribute or to pay the same if they would have been liable to do so upon payment thereof by the deceased."

[29] McLaughlin v. The Estate of Curtis, 27 Wis. 644 (1871); W. E. Smith Lumber Co. v. Estate of Fitzhugh, 167 Wis. 355, 167 N.W. 455 (1918).