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Real Property - The Joint Tenancy in Wisconsin

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COMMENTS

REAL PROPERTY—THE JOINT TENANCY IN WISCONSIN

The law of real property has acquired an interesting precedent in the recently decided case of *Hass v. Haas.** The question involved arose in the construction of a deed. One Bertha Hass owned certain real property, and in 1944 she engaged a realtor to draw the deed in question for her. The deed was prepared on a printed form bearing across its top the label: "Warranty Deed to Husband and Wife as Joint Tenants." The granting clause provided that Bertha Hass for a consideration, gives, grants, etc., "unto the said parties of the second part, (Bertha Hass and her son Herbert Hass) a life estate as joint tenants during their joint lives and an absolute fee forever in the remainder to the survivor of them . . ." Following a description of the property is this sentence: "The purpose of this conveyance is to vest the title to the above described property in the grantees herein named as joint tenants and none other." The habendum clause and the material part of the warranty again refer to the grantees as joint tenants. In an action by the administrator of the grantor for construction of the deed, it was held that the instrument created in the parties a tenancy in common for their joint lives and a vested remainder in fee to the survivor.

Discussion of this question invites consideration of the exact nature of the different estates of co-ownership. A brief reference will be made to the nature and characteristics of the different estates involved, namely: estates in joint tenancy, estates in common, and estates by the entirety.

Joint Tenancy

Estates in joint tenancy are created by purchase, exist in two or more persons, and have the following characteristics:[1]

(1) Unity of time — the joint tenants must acquire the property at the same time.

(2) Unity of title — the joint tenants must acquire their estate through the same source and legal act.

(3) Unity of interest — each tenant must have exactly the same quantity of interest and estate. One cannot have a life estate and the other a fee.

(4) Unity of possession — each co-owner is entitled to possession and to his share of the income, and when one or more cotenants are actually in possession of the land, in the absence of contradicting evidence, all of them are deemed to be in possession.

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* 248 Wis. 212, 21 N. W. (2d) 398, noted 44 Mich. L.R. 1144 (1946).

1. Reeves on Real Property, Chapter XLVIII, Vol. 11.

(5) Suvivorship — upon the death of any joint tenant the estate goes to the other joint tenant (s) by virtue of the original conveyance. No interest descends to the heirs of the deceased joint tenant. Because the survivor takes the estate by virtue of the original conveyance, he takes free of dower or curtesy, and the liens of creditors of the deceased tenant.

In Wisconsin the law of joint tenancy has undergone some changes from the English common law. Section 230.44[2] creates an estate in common unless joint estates are expressly provided.[3] Section 230.45[4] excepts transfers to husband and wife, to executors, or in trust from the presumption created by Section 230.44. The presumption may be rebutted by a statement in the conveyance that a joint tenancy is intended. These statutes have changed the common law in at least two respects. For the first, the presumption has been changed. At common law it was presumed as long as the unities were present a jointure[5] necessarily arose. Under these statutes as to grantees other than those expressly enumerated it is presumed an estate in common arises even where the unities exist unless otherwise specifically provided. For the second, the statute has dispensed with the unities of time and title in conveyances between husband and wife. With the exception of these changes indicated in the statutes,[6] Wisconsin follows the common law rules regarding estates in joint tenancy and estates in common. The unities of time and title were strict requirements at

2. Wis. Stat. (1945), 230.44 ESTATE IN COMMON. 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.
3. Fries v. Kracklauer, 198 Wis. 547, 224 N. W. 717 (1929). Use of the word jointly did not indicate a sufficient intention on the part of grantor to create a joint tenancy. Weber v. Nedin, 210 Wis. 39, 246 N. W. 307, 246 N. W. 686 (1933). Use of the word survivor evinced a sufficient intention that the grantor intended to create a joint estate, the word having no equivocal meaning and being an incident of a joint tenancy..
4. Wis. Stat. (1945) 230.45 JOINT TENANCIES. (1) Section 230.44 shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife.
(2) Any deed, transfer or assignment or real or personal property from husband to wife or from wife to husband which conveys an interest in the grantor's lands or personal property and by its terms evinces an intent on the part of the grantor to create a joint tenancy between grantor and grantee shall be held and construed to create such joint tenancy, and any husband and wife who are grantor and grantee in any such deed, transfer or assignment heretofore given shall hold the property described in such deed, transfer or assignment as joint tenants.
(3) Any deed to two or more grantees which, by the method of describing such grantees or by the language of the granting or habendum clause therein evinces an intent to create a joint tenancy in grantees shall be held and construed to create such joint tenancy.
5. A jointure strictly signifies a joint estate limited to both husband and wife, and such was its original form. 2 Bl. Comm. 137; 1 Steph. Comm. 255.
6. Sections 230.44 and 230.45, *supra.*

common law.[7] It was impossible for A, the owner of an interest in lands or personalty, to create a joint tenancy in himself and B by a direct conveyance of a half-interest to B. Equally ineffective was a conveyance by A as grantor, to A and B as grantees, for A would continue to hold under his original title, by virtue of the doctrine that a person cannot grant title to himself. The technical requirements could be satisfied only by a conveyance from A to C, who would then reconvey to A and B as joint tenants.[8] Wisconsin has always recognized the common law unities, and the statute discussed[9] was enacted to change the operation of the common law rule as between husband and wife. Public policy demanded the change to avoid the necessity of an intervening third party to create a joint tenancy, so frequently desired because of relationship between the parties.

Estates in Common

Estates in common are estates in which the property is owned concurrently by two or more persons, without right of survivorship, and with no unity except that of possession.[10] The trend of present day law prefers a tenancy in common among the concurrent estates and brings it into being whenever some other form of co-tenancy is not expressly called for by the language of the parties or the circumstances of the transaction.[11]

Estates By The Entirety

Estates by the entireties[12] are vested in husband and wife by virtue of title acquired by them jointly after marriage;[13] are based on the

7. 2 Blackstone Commentaries, 180-187, 193; 33 Corpus Juris 903-909; 2 Thompson on Real Property (1924) sections 1710-1717; 1 Tiffany, Real Property 2d. ed. (1920) section 191; 2 Tiffany, Real Property 3rd. ed. section 421.
8. This strict requirement has led to legislation in several states which has recognized that the common law unities existed and expressly provides for their abrogation.
   Mass. General Laws (1921) c. 184: "Real estate including any interest therein, may be transferred by a person to himself jointly with another person in the same manner in which it may be transferred by him to another person."
   Rhode Island General Laws (1933) c. 298, s. 20: "In deeds hereafter made, lands, tenements, and hereditaments, or a thing in action, may be conveyed by a person to himself jointly with another person, and may in like manner be conveyed by a husband alone or jointly with another person."
   Under the laws of Arizona, a "joint tenancy" may be created by a conveyance from one to himself and another as joint tenants. Rev. Code Ariz. 1928, sec. 986; Greenwood v. Commissioner of Internall Revenue, 134 F (2d) 915.
9. Section 230.45, (2) *supra.*
10. Reeves on Real Property, Chapter L, Vol. II.
11. *Ibid.*, page 970.
12. Reeves on Real Property, Chapter LI, Vol. II.
    Thompson on Real Property, Permanent Edition, Vol. 4, sections 1803-1826.
13. Federal. Breneman v. Corrigan, 4 Fed. (2d) 225 (1925); Arizona. Blackman v. Blackman, 45 Ariz. 374, 43 Pac. (2d) 1011 (1935); Florida, Bailey v. Smith, 89 Fla. 303, 103 So. 833 (1925); Newman v. Equitable Life Assur. Soc., 119

common law fiction that husband and wife are one,[14] and, therefore, there can be but one estate and, in contemplation of law, but one person owning the whole.[15] Upon the death of either the husband or wife the entire estate and interest belongs to the other, not by virtue of survivorship, but by virtue of the title that vested under the original limitation. Tenancies by the entirety have three distinctive features: first, such tenancies can be created only when the parties taking title stand in the relationship of husband and wife at the time of the grant or devise to them;[16] second, in addition to the unities of a joint tenancy a fifth unity of persons is added;[17] and third, one of the tenants, acting alone, cannot sever the estate.[18] Practically the only method of destroying this estate is by an absolute divorce, or by a voluntary partition or joint conveyance to a third party. Creditors usually cannot create liens on the land.[19] The effect of the Married

Fla. 641, 160 So. 745 (1935); Iowa. Fay v. Smiley, 201 Iowa 1290, 207 N. W. 369 (1926); Maryland. Cunningham v. Cunningham, 158 Md. 372, 148 Atl. 444, 67 A. L. R. 1176 (1930); Massachusetts. Bernatavicius v. Bernatavicius, 259 Mass. 486, 156 N. E. 685, 52 A. L. R. 886 (1927); Michigan. Dutcher v. Van Duine, 242 Mich. 477, 219 N. W. 651 (1928); Missouri. Ahmann v. Kemper, 342 Mo. 944, 119 S. W. (2d) 256 (1938); Clinton County Trust Co. v. Metzger, 219 Mo. App. 365, 271 S. W. 1008 (1925); New Jersey. Luebbers v. Luebbers, 97 N. J. Eq. 172, 127 Atl. 83 (1925) (Tenancy by entirety not created); Central Trust Co. v. Street, 127 Atl. 82 N. J. 1923) (instrument determines rights of parties); New York Armondi v. Dunham, 221 App. Div. 853, 225 N. Y. S. 87 (1927); North Carolina. Southern Distributing Co. v. Carraway, 189 N. Car. 420, 127 S.E. 427 (1925) (Tenancy in common); Oregon. Klorfine v. Dole, 121 Ore. 76, 252 Pac. 708 (1927); Schafer v. Schafer, 122 Ore. 620, 260 Pac. 206, 59 A.L.R. 707 (1927); Wyoming. Peters v. Dona, 49 Wyo. 306, 54 Pac. (2d) 817 (1927).

14. Lang v. Commissioner of Internal Revenue, 289 U. S. 109, 77 L. Ed. 1066, 53 Sup. Ct. 534 (1933); Stanley v. Powers, 123 Fla. 359, 166 So. 843 (1936); Fay v. Smiley, 201 Iowa 1290, 207 N. W. 369 (1926); Licker v. Gluskin, 265 Mass. 403, 164 N. E. 613, 63, 63 A.L.R. 231 (1929).
15. Bailey v. Smith, 89 Fla. 303, 103 So. 883 (1925); Stanley v. Powers, 123 Fla. 359, 166 So. 843 (1936); Fay v. Smiley, 201 Iowa 1290, 207 N. W. 369 1926); Voight v. Voight, 252 Mass. 582, 147 N. E. 887 (1925) Schafer v. Schafer, 122 Ore. 620, 260 Pac. 206, 59 A.L.R. 707 (1927).
16. Hurd v. Hughes, 12 Del. Ch. 188, 109 Atl. 418 (1920); Bernatavicius v. Bernatavicius, 259 Mass. 486, 156 N. E. 685, 52 A.L.R. 886 (1927); McNitt v. McNitt, 230 Mich. 303 N. W. 66 (1925); Armond v. Dunham, 221 App. Div. 679, 225 N. Y. S. 87 (1927).
17. Parrish v. Parrish, 151 Ark. 161, 235 S. W. 792 (1921); Hoyt v. Winstanley, 221 Mich. 515, 191 N. W. 213 (1926); Davis v. Bass, 188 N. Car. 200, 124 S. E. 566 (1924); Schafer v. Schafer, 122 Ore. 620, 260 Pac. 206, 59 A.L.R. 707 (1927).
18. Bailey v. Smith, 89 Fla. 303, 103 So. 833 (1925); Fay v. Smiley, 201 Iowa 1290, 207 N. W. 369 (1926); Marble v. Treasurer & Receiver General, 245 Mass. 504, 139 N. W. 442 (1923); Voight v. Voight, 252 Mass. 582, 147 N. E. 887 (1925); Nurmi v. Beardsley, 275 Mich. 328, 266 N. W. 368 (1936); Lopez v. McQuade, 151 Misc. 390, 273 N. Y. S. 34 (1934);. Under the statutes of Illinois either tenant may sever the estate by conveying his or her interest to a stranger: Liese v. Hentze, 326 Ill. 633, 158 N. E. 428 (1927).
19. Taylor v. Carraway, 282 Fed. 878 (1922); A. Hupfel's Sons v. Getty, 299 Fed. 939 (1924); Hiller v. Olmstead, 54 Fed. (2d) 5 (1931); Hurd v. Hughes, 12 Del. Ch. 188, 109 Atl., 418 (1920); American Wholesale Corp. v. Aronstein, 56 App. D. C. 126, 10 Fed. (2d) 991 (1926); Ohio Butterine Co. v. Hargrave, 79 Fla. 458, 84 So. 376 (1920); Gorelick v. Shapero, 222 Mich. 381, 192 N. W. 540 (1923); Turner v. Davidson, 227 Mich. 459, 198 N. W.

Women's Property Acts on this estate has presented some difficulty. Generally it has been held that such Act does not destroy the estate.[20] It is held in this country that the Act is limited to the separate property of married women, leaving unaffected and unimpaired the former law regarding the creation, existence, and essential attributes and consequences of estates by entireties.[21]

Estates by the entireties are abolished by statute in Wisconsin. Justice Cassoday in 1903[22] reached this conclusion after a discussion of the history of the statutes.[23] Section 230.43 of the statutes enumerates the different estates recognized, namely: estates in severalty, in joint tenancy, and in common. Since an enumeration is presumed to be inclusive, estates by the entirety are abolished simply because of their exclusion.

The question before the court in the instant case was how to give effect to the intent of the parties to have survivorship where a joint tenancy was impossible. The grantor used a form deed drawn to fit the husband and wife statute, and conveyed to herself and her son with the express intention of creating a joint tenancy. Although the express intention was present, the unities of time and title were lacking. A tenancy in common was the only legally possible result. The concept of a tenancy in common for the life of the parties with vested cross remainders gave substantial effect to the intention of the parties without resort to the estate which the parties had in mind.

A recent Nebraska case illustrating the problem is *Stuehm v. Mikulski.*[24] There the husband conveyed to himself and his wife describing the grantees "as joint tenants, and not as tenants in common." In the conveyance the grantor provided the property was to vest in the survivor. In construing the deed the court held it created a tenancy in common. Justice Carter, in his concurring opinion, stated the

886 (1924); Mahen v. Ruhr, 293 Mo. 500, 240 S. W. 164 (1922); Crawford v. Kansas City Bolt and Nut Co., 278 S. W. 373 (1925 Mo.); Davis v. Bass, 188 N. Car. 200, 124 S. E. 566 (1924); Johnson v. Leavitt, 188 N. Car. 682, 125 S. E. 490 (1924); Southern Distributing Co. v. Carraway, 189 N. Car. 420, 127 S. E. 427 (1925); Corey v. McLean, 100 Vt. 90, 135 Atl. 10 (1926).

20. Jooss v. Fey, 129 N. Y. 17, 29 N. E. 136 (1891); Hiles v. Fisher, 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. 762 (1895); Bennett v. Child, 19 Wis. 362, 88 Am. Dec. 692 (1865).

21. Blount v. United States, 47 S. Ct. 20, 273 U. S. 769, 71 L. Ed. 883 (1926); Morrill v. Morrill, 138 Mich. 112, 101 N. W. 209, 110 Am. St. 306 (1904); Armondi v. Dunham, 221 App. Div. 679, 225 N. Y. S. 87 (1926) (holding that a divorce terminates the tenancy); In re Ray's Will, 188 Wis. 180, 205 N. W. 917 (1925).

22. Wallace v. St. John, 119 Wis. 585, 99 N. W. 197 (1903).

23. Wis. Stat. (1945) 230.43: SEVERALTY, JOINT TENANCY, IN COMMON. Estates, in respect to the number and connection of their owners, are divided into estates in severalty, in joint tenancy and in common; the nature and properties of which, respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of these statutes. Wis. Stat. (1945) 230.44, 230.45.

24. Stuehm v. Mikulski, 297 N. W. 595, (Neb. 1941).

reason why the court insisted on strict adherence to common law requirements, when he said:[25]

> "It is essential that titles, and estates in land be definite and certain. It is not a field in which the court should undertake to establish that it is liberal and modernistic in keeping pace with changing conditions. The creation of hybrid estates unknown to common law is to be deplored. It can only bring about uncertainty, confusion and want of stability in estates and their attributes. Carried to an absurd conclusion, there would eventually be as many different kinds of estates as there are tracts of land. The plain duty of this court is in the opposite direction. Many states have made changes by legislative action and this is entirely proper. Other states have made such changes by judicial fiat which have resulted in all the varied and conflicting decisions cited in the dissent. I submit that it is the obligation of this court to adhere to the landmarks of the common law on this subject until we are directed by competent authority to deviate therefrom."

Some state courts, however, have held to the contrary upon similar fact situations.[26] In a New York case[27] tenants in common of land made a deed directly to one of the tenants and a third person as joint tenants. The court held a jointure was created. The court in its opinion stated:[28]

> "In all references to the "four unities" requisite to create a joint tenancy, I find nothing that prevents their existence or creation by the act of the grantor for himself and another as well as by his act for two other persons. In Thomas' Coke on Littleton (vol. 1, p. 732), it is stated: If a man make a feoffment in fee to the use of himself and of such wife as he should afterwards marry for the terms of their lives and after he taketh a wife, they are joint tenants; and yet they come to their estates at several times — citing Brent's Case, 3 Dyer, 230. Here the joint tenancy in the use is created by the act of the feoffer for himself and another. If this were an exception to the general rule, or peculiar to husband and wife, or the law of uses, some mention would be made of it by Coke or Blackstone, as it is cited in the chapter on joint tenancy."

In Blackstone's Commentaries it is stated[29] that "where a feoffment was made to the use of a man and such a wife as he should afterwards marry for a term of their lives, and he afterwards married;

25. *Ibid.*, page 603.
26. Colson v. Baker, 42 Misc. 407, 87 N. Y. S. 238 (1904); Saxon v. Saxon, 46 Misc. 202, 93 N. Y. S. 191 (1905); Lawton v. Lawton, 48 R. I. 134, 136 A. 241 (1927); Ames v. Chandler, 265 Mass. 428, 164 N. E. 616 (1929); Dutton v. Buckley, 116 Or. 661, 242 P. 626 (1926); Coon v. Campbell, 138 Misc. 567, 240 N. Y. S. 772 (1930); Boehringer v. Schmid, 254 N. Y. 355, 173 N. E. 220. (1930). In some of these cases a statute had changed the common-law rule.
27. Colson v. Baker, 42 Misc. 407, 87 N. Y. S. 238 (1904).
28. *Ibid.*, page 239.
29. Blackstone's Commentaries by Chittey, Vol. 1, Chapter XII.

in this case it seems to have been that husband and wife had a joint estate, though vested at different times; because the use of the wife's estate was in abeyance and dormant till intermarriage; and then being awakened, had relation back, and took effect from the original time of the creation." The New York court took this as a general rule at common law. However, it would seem that the phrasing Blackstone used, and the fact that special mention was made of this case, and effort was made to justify it by straining a fiction of law, is enough to indicate that this is not the general rule, but the exception.

It appears that some courts are willing to disregard the common law unities and recognize joint tenancy where such was the parties' intent. A glance at federal tax cases dealing with the question might prove of interest. It should be noted however that regard for such common law concepts as the unities requisite for joint tenancy is not likely to be high where taxation is the issue. Two recent cases cases are *U. S. v. Jacobs*,[30] and *Edmonds v. Commissioner of Internal Revenue*.[31] In *U. S. v. Jacobs* the difference between tenancies by the entirety and joint tenancies was urged upon the court as basis for subjecting but one half of the interest in the real property held in joint tenancy to a death duty. The Supreme Court of the United States stated:[32]

> "The constitutionality of an exercise of the taxing power of Congress is not to be determined by such shadowy and intricate distinctions of common law property concepts and ancient fictions."

In *Edmonds v. Commissioner of Internal Revenue* the equitable owners of trust property joined with a trust company in a declaration of trust declaring it was their intention that said property should be held by them as joint tenants with right of survivorship. The court stated:[33]

> "In California, to create a joint tenancy there must be (1) unity of interest; (2) unity of title; (3) unity of time; (4) unity of possession. (Cases cited.) Petitioner argues that a person cannot convey title to himself, because he is unable to make delivery to himself; that if a person conveys property to himself and another as joint tenants, what he has done is to convey an undivided half interest; that since the grantor and grantee acquire their respective interests at different times, and that of the grantor, when acquired, was not the same as that which the grantee acquired, there is neither unity of title, nor unity of time, and therefore no joint tenancy. This technical view is

30. U. S. v. Jacobs, 306 U. S. 363, 59 S. Ct. 551, 553 L. Ed. 763 (1939).
31. Edmonds v. Commissioner of Internal Revenue, 90 F. (2d) 14 (1937).
32. U. S. v. Jacobs, *supra*, p. 369.
33. Edmonds v. Commissioner of Internal Revenue., *supra*, p. 16.

followed in Breitenbach v. Schoen, 183 Wis. 589, 198 N. W. 622, and in Deslauriers v. Senesac, 331 Ill. 437, 163 N. E. 327, 62 A. L. R. 511."[34]

"However, the weight of authority is opposed to that view. (Cases cited.) We believe the technical view should give way to the intention of the parties, and hold that a joint tenancy may be created by conveyance from one to himself and another, as joint tenants."

The amazing thing about the instant case is really the device used by the court to effectuate the intent of the parties. This makes the decision unique. The Wisconsin court did not strain the common law joint tenancy as did the New York court[35] in giving way to the intention of the parties, nor did it disregard the fundamental natures of the common law estates as did the Federal Courts in the tax cases. The court recognized at the outset no joint tenancy was created and could not be under the common law or the statutes. There was no doubt about this, and little argument about it. But the court obtained the legal effect of a joint tenancy by superimposing upon the tenancy in common, vested cross remainders, dependent or contingent upon survivorship. Here is the unique device, survivorship imposed upon a tenancy in common by the device of vested cross remainders. And it is more than survivorship, because the court says expressly that all the legal attributes of remainders follow. These rights of survivorship are vested and cannot be destroyed through severance by a conveyance by one or more of the tenants, as is the case with the rights of survivorship in a joint tenancy.

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34. Breitenbach v. Schoen, 183 Wis. 589, 198 N. W. 622 (1924) cited in the instant case (Hass v. Hass) was overruled by the Wisconsin court in 1935 in Estate of Starver: Wimmer v. Starver, 218 Wis. 114, 260 N. W. 655 (1935); Estate of Skilling, 218 Wis. 574, 260 N. W. 660 (1935).

35. Colson v. Baker, *supra.*, note 27.