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Real Property - Tenancy by the Entireties - Alienability of Right of Survivorship

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REAL PROPERTY—TENANCY BY THE ENTIRETIES—ALIENABILITY OF RIGHT OF SURVIVORSHIP—At an execution sale to satisfy a judgment against her, plaintiff's interest in certain lots which she and her husband held as tenants by the entireties was conveyed to *A* by sheriff's deed. Subsequently, plaintiff's husband joined *A* and his wife in a deed of their interest to *B*, who later conveyed to defendants. After the death of her husband, plaintiff instituted an action as surviving spouse for possession of these lots. The trial court entered a summary judgment for plaintiff, holding that the sheriff's deed conveyed only a severable one-half interest in use and profits of the land during the joint lives of the spouses, and not plaintiff's right of survivorship. On appeal, *held*, reversed. The purchaser from a tenant by the entireties acquires that tenant's right of survivorship.¹ *King v. Greene*, 30 N.J. 395, 153 A. (2d) 49 (1959).

The abolition by Married Women's Acts² of the fictional unity of spouses in property ownership has led several states to hold that the tenancy by the entireties can no longer be created.³ Of the states which continue to recognize this estate,⁴ the largest number have held that the Married Women's Acts equalized the rights of the spouses in the estate by burdening the husband with disabilities equal to those of his wife.⁵ Other states hold that the estate remains as at common law, with a limited power of alienation in

¹ While the principal case concerned the purchase at an execution sale, no distinction is drawn by the court between these facts and any other sale of the interest of one tenant in such an estate.

² E.g., N.J. Stat. Ann. (1940) §37:2-12.

³ E.g., *Lawler v. Byrne*, 252 Ill. 194, 96 N.E. 892 (1911); *Clark v. Clark*, 56 N.H. 105 (1875); *Walthall v. Goree*, 36 Ala. 728 (1860). See 141 A.L.R. 179 (1942).

⁴ A number of states have never recognized tenancies by entireties, finding them not in accord with American institutions. See, e.g., *Kerner v. MacDonald*, 60 Neb. 663, 84 N.W. 92 (1900); *Whittlesey v. Fuller*, 11 Conn. 337 (1836); *Sergeant v. Steinberger*, 2 Ohio 305 (1826).

⁵ For example, land held by the entireties can neither be conveyed by either spouse individually nor be reached for the individual debts of either spouse. See, e.g., *Stifel's Union Brewing Co. v. Saxy*, 273 Mo. 159, 201 S.W. 67 (1918); *Hurd v. Hughes*, 12 Del. Ch. 188, 109 A. 418 (1920); *Ohio Butterine Co. v. Hargrave*, 79 Fla. 458, 84 S. 376 (1920). But see *Hoffmann v. Newell*, 249 Ky. 270, 60 S.W. (2d) 607 (1932); *Cole Mfg. Co. v. Collier*, 95 Tenn. 115, 31 S.W. 1000 (1895) (holding that only the debtor spouse's right of survivorship, and not any present interest, is liable to execution).

the husband and with no such power in the wife.⁶ The remaining states, including New Jersey, applied the Married Women's Acts to increase the wife's prerogatives, the estate being treated as a tenancy in common for the spouses' joint lives with an indefeasible remainder in fee to the survivor.⁷ All the states in this last group, except New Jersey, have held that either spouse could alienate both his life estate in one half the use of the land during the joint lives of the spouses and his right of survivorship.⁸ But under New Jersey law prior to the principal case, the right of survivorship was inalienable, and so the purchaser at an execution sale under a judgment against one of the spouses in a tenancy by the entireties was entitled only to a severable one-half interest in the use of profits of the land during the joint lives of the spouses.⁹ In bringing New Jersey into accord, on the question of alienability of the right of survivorship, with other states sharing its view on the modern tenancy by entireties, the principal case serves to point up the anomalies of this estate. The inability of either spouse to affect the right of survivorship of the other is often the sole remaining incident of the original estate. Regardless of whether this incident has desirable results on which the tenancy's continued existence might be justified,¹⁰ there is considerable authority recommending the abolition of the estate.¹¹ From a practical point of view, preservation of the tenancy by the entireties is inadvisable. Shielding the fee from creditors of the individual spouses in those states holding the right of survivorship inalienable leads to fraudulent conveyances of individual property of the debtor spouse to the spouses jointly; the resulting frustration of creditors contravenes public policy.¹² And decisions such as that in the principal case, holding the right of survivorship alienable, when considered with other factors, render the estate an anomaly. For example, the estate commonly exists in property used as the residence of the tenants and, while protection of the homestead might be desirable, the impracticality of common use of the land by the non-debtor spouse and a stranger who purchases the debtor spouse's interest often results in the loss of the property by sale and partition. Also, when

⁶ See, e.g., *Hood v. Mercer*, 150 N.C. 699, 64 S.E. 897 (1909); *Morrill v. Morrill*, 138 Mich. 112, 101 N.W. 209 (1904); *Pray v. Stebbins*, 141 Mass. 219, 4 N.E. 824 (1886).

⁷ *Ganoe v. Ohmart*, 121 Ore. 116, 254 P. 203 (1927); *Branch v. Polk*, 61 Ark. 388, 33 S.W. 424 (1895); *Hiles v. Fisher*, 144 N.Y. 306, 39 N.E. 337 (1895); *Buttler v. Rosenblath*, 42 N.J. Eq. 651, 9 A. 695 (1887).

⁸ *Ganoe v. Ohmart*, *Branch v. Polk*, and *Hiles v. Fisher*, note 7 *supra*.

⁹ *Dworan v. Miloszewski*, 17 N.J. Super. 269, 85 A. (2d) 550 (1952); *Zanzonico v. Zanzonico*, 24 N.J. Misc. 153, 46 A. (2d) 565 (1946). See also *Zubler v. Porter*, 98 N.J.L. 444, 120 A. 195 (1922); *Schulz v. Zigler*, 80 N.J. Eq. 199, 83 A. 968 (1912).

¹⁰ E.g., safeguarding against the dissipation of the estate by an irresponsible spouse, simplifying administration by eliminating the difficulty of locating heirs, and eliminating the expense of probate.

¹¹ See, e.g., Niles, "Abolish Tenancy by the Entireties," 79 TRUSTS AND ESTATES 366 (1944).

¹² See *Dunn v. Minnema*, 323 Mich. 687, 36 N.W. (2d) 182 (1949), in which payment by an insolvent judgment debtor of his individual funds for purchase of lands as a tenant by entireties was held to be constructive fraud on the creditor.

a creditor's lien attaches to the debtor's interest in a tenancy by the entireties, and the non-debtor pre-deceases his spouse, the fee inures to the creditor. The result is that a transfer resembling a testamentary disposition is forced upon the non-debtor spouse. The contingency that a right of survivorship will vest in possession lessens its worth in an execution sale.¹³ If a right of survivorship is deemed desirable, it seems preferable to create via the joint tenancy,¹⁴ where one spouse's interest in at least one half the fee remains in his control, not subject to the actions of the other spouse or such other spouse's creditors. Thus, at least in states holding rights of survivorship in a tenancy by the entireties alienable, any purpose in preserving the estate's one remaining incident, a right of survivorship in each spouse indestructible by the unilateral acts of the other, seems to be overbalanced by the contradictions encountered in an estate which has outlived its usefulness.¹⁵

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¹³ Technically, the right of survivorship in an estate by the entireties is not a contingent interest, for the survivor, having owned the entire fee during the joint lives of the tenants, theoretically gains nothing new upon surviving his spouse. However, the policy against subjecting contingent interests to execution is based on the speculative nature of such an interest and would seem to apply to the right of survivorship as well.

¹⁴ The right of survivorship is an incident of the joint tenancy. The right is destroyed when either party severs the tenancy. A sale on execution works a severance. See 2 TRAFANY, REAL PROPERTY, 3d ed., §§424-425 (1939).

¹⁵ See note 11 supra.