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Real Property - Elimination of the Straw Man in the Creation of Joint Estates in Michigan

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REAL PROPERTY — ELIMINATION OF THE STRAW MAN IN THE CREATION OF JOINT ESTATES IN MICHIGAN — That joint ownership is a popular form of holding title to real property is undeniable. A husband and wife are especially likely to consider this form of ownership as "natural" and desirable because it emphasizes the concept of marriage as a partnership and gives both partners control over and ownership in the family property.[1] In addition to these factors, joint ownership is popular because of the right of survivorship which is incident to it.[2] In this feature the layman sees, or thinks he sees, the opportunity to avoid a probate proceeding, the estate tax, and the lawyer's fee. It is not the purpose here to discuss the advantages and disadvantages of joint ownership but it is hardly rash to observe that the property owner cannot, by the simple strategem of taking title in his own name and that of his proposed beneficiary, evade either the tax collector or the lawyer and his fee. The entire value of property held in joint tenancy or by the entireties must be included in the estate of the decedent for federal estate tax purposes,[3] and unless the entire estate, both real and personal property, is jointly held, or is very small,[4] or is uncontested,[5] probate is inevitable.[6] Even if these hurdles are cleared, the death of the co-owner must still be proved and entered upon the records to clear the title,[7] thus bringing the lawyer into the

[1] In Michigan the husband retains considerable control over property held by the entireties though it is not subject to his individual debts. Arrand v. Graham, 297 Mich. 559, 298 N.W. 281 (1941).

[2] Though tenancy in common is also a form of joint ownership, the latter term is used here to refer only to joint tenancy and tenancy by the entireties.

[3] Many of the undesirable consequences of joint estates have been removed by the Internal Revenue Code of 1954. The creation of a tenancy by the entireties or a joint tenancy between the husband and wife creates no liability under the gift tax. I.R.C. (1954), §2515. The basis of the property to the survivor is now the fair market value of the property at the decedent's death adjusted by any amounts allowed the taxpayer for depreciation, obsolescence, depletion, etc., on such property before the death of the decedent. I.R.C. (1954), §1014(b)(9); Ervin, "Estate Planning Under the 1954 Internal Revenue Code," UNIV. OF SO. CAL. TAX INSTITUTE 811-813 (1955). However, the value of the property held jointly must be included in the estate of the decedent in computing the federal estate tax unless the survivor can prove contribution toward the creation of the joint estate. I.R.C. (1954), §2040.

[4] Mich. Comp. Laws (Supp. 1952) §708.39 provides for a simplified procedure when an estate is valued at less than $750.00 and there is no real estate. Mich. Comp. Laws (Supp. 1952) §708.41 provides for estates consisting of less than $500.00.

[5] 13 CALLAGHAN'S MICHIGAN PLEADING AND PRACTICE §101.01 (1948); Foote v. Foote, 61 Mich. 181, 28 N.W. 90 (1886); Engle v. Engle, 209 Mich. 275, 176 N.W. 547 (1920).

[6] Basye, "Dispensing with Administration," 44 MICH. L. REV. 329 (1945).

[7] Mich. Comp. Laws (1948) §702.116. Upon petition by an interested person giving proof of death, the probate judge in the county in which the land is situated will issue a certificate setting forth the fact of the death of the co-owner and other facts necessary

scene again. But given all these factors, joint ownership of property can still be a very valuable device and one which every lawyer will want to utilize at some time. It is in the interest of lawyer and layman alike that the process culminating in joint ownership be as simple as possible.

I. *Joint Estates and Their Creation at Common Law*

Joint ownership is a general term which encompasses three specific types of estates: the joint tenancy, the tenancy by the entireties, and the tenancy in common. Only the first two have the incident of survivorship and will be considered here. Blackstone defined joint tenancy as an estate created by a conveyance to two or more persons which required the "four unities" of time, title, interest, and possession.[8] This concept of "unity" led to the doctrine of survivorship which he characterized as the "grand incident of joint estates."[9] Joint tenancy is unique because at the death of one joint tenant the surviving joint tenants take the share of the decedent by force of the original deed which created the estate. Thus, the interest of a joint tenant cannot be devised, because upon death the decedent's share vests in the survivors. The estate may be severed, as when a joint tenant conveys his interest to a third party; but his grantee becomes a tenant in common because the conveyance violates the requirement of unity of time. The interest of a joint tenant can be reached by his creditors,[10] and the coveted right of survivorship, being an inherent incident of the estate, is destroyed by anything which destroys the estate.[11]

to the rights of the parties. This certificate is prima facie evidence of death and can be entered in the office of the register of deeds to clear the title to the land in the name or names of the surviving co-owner or co-owners.

[8] "The properties of a joint tenancy are derived from its unity, which is fourfold; the unity of interest, the unity of title, the unity of time, and the unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession." 2 BLACKST. COMM. *180; 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW, 3d ed. (1923).

[9] 2 BLACKST. COMM. *183; 2 TIFFANY, REAL PROPERTY, 3d ed., §419 (1939).

[10] Midgley v. Walker, 101 Mich. 583, 60 N.W. 296 (1894).

[11] If co-tenants do not take by the same conveyance a joint tenancy is not created because there is no unity of time. Any agreement by the co-tenants to hold portions of the land in severalty rather than an undivided interest in the whole results in a severance because the unity of possession ceases to exist. If one of two joint tenants for life should have his interest enlarged by devise or grant the estate would terminate because the unity of interest would be gone. Any conveyance by a co-tenant to a third party would break the unity of title and destroy the estate. See 2 BLACKST. COMM. *184-*185.

Tenancy by the entireties can be loosely characterized as a joint tenancy where the joint tenants are husband and wife.[12] It is different from the joint tenancy in that neither tenant can alienate without the other,[13] nor is the interest of either attachable by the creditors of one party only.[14] The estate is terminated by divorce.[15] Tenancy by the entireties is like joint tenancy in that its creation, at common law, required that the doctrine of the four unities be observed.[16]

The common law favored the joint tenancy over the tenancy in common because with the former the feudal duties due the lord were not split.[17] Therefore, the creation of a tenancy in common required express language to rebut the presumption in favor of joint tenancy.[18] This presumption has been reversed by statute in most states,[19] so that today the tenancy in common is the favorite of the law.[20]

It is the troublesome doctrine of the four unities which creates the problem for the conveyancer seeking to create a joint estate. This doctrine is of doubtful origin,[21] but it remains a part of our common law today.[22] It becomes more of a hindrance when com-

[12] Tenancy by the entireties was recognized by that name in Atcheson v. Atcheson, 11 Beav. 485, 50 Eng. Rep. 905 (1849). The word entireties is used to express the unity of husband and wife. Freeman v. Belfer, 173 N.C. 581, 92 S.E. 486 (1917).

[13] Way v. Root, 174 Mich. 418, 140 N.W. 577 (1913).

[14] In Michigan the interest of a person who holds title to land as tenant by the entireties can be reached by his creditors only if the money was applied to create the estate after the debt had been incurred, and then only to the extent of such application. Hiller v. Olmstead, (6th Cir. 1931) 54 F. (2d) 5.

[15] Mich. Comp. Laws (1948) §552.102.

[16] For a discussion of the differences between tenancy by the entireties and joint tenancy, see FREEMAN, COTENANCY AND PARTITION, 2d ed., §64 (1886).

[17] ". . . for the law loves not fractions of estates, nor to divide and multiply tenures." Fisher v. Wigg, 1 Salk. 391, 91 Eng. Rep. 339 at 340 (1700); 2 BLACKST., COMM. *193.

[18] COKE ON LITTLETON, 19th ed., §182a (1832); 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2d ed., 20 (1952).

[19] 2 TIFFANY, REAL PROPERTY, 3d ed., §421 (1939).

[20] In Michigan conveyances to two or more persons are presumed to create an estate in common unless there is an express declaration to the contrary. Mich. Comp. Laws (1948) §554.44. A conveyance to husband and wife, however, presumptively creates a tenancy by the entireties. Mich. Comp. Laws (1948) §557.81; Harper v. Lowe, 272 Mich. 331, 262 N.W. 260 (1935).

[21] The doctrine was apparently somewhat of an innovation with Blackstone. See the commentary on it in CHALLIS, REAL PROPERTY, 1st ed., 294 (1887). Before the Statute of Uses a conveyance, "to *B* for life, remainder to the children (born and to be born) of *C*," resulted, of necessity, in a tenancy in common among the children of *C* since they did not all take at the same time. However, after the Statute of Uses a conveyance, "to *B* for life, remainder to the children (born and unborn) of *C* as joint tenants," was possible, for there was no requirement of "unity of time" under the uses, and the Statute gave effect to these at common law. 1 HAYES, CONVEYANCING, 5th ed., 112-114 (1840).

[22] 2 TIFFANY, REAL PROPERTY, 3d ed., §421 (1939); 4 THOMPSON, REAL PROPERTY §1776 (1939).

bined with the common law rule which makes it impossible for a person to convey an interest to himself.[23] Given these rules, if *A* owns land in severalty and wishes to create a joint tenancy in himself and *B*, he is unable to do so directly; for to convey an undivided one-half interest to *B* expressing the intent that the land be held in joint tenancy would violate the unity of time necessary to the creation of that estate,[24] and if *A* conveyed to *A* and *B* as joint tenants, his purpose would be thwarted because the conveyance would violate the rule that a man may not convey an interest to himself.[25] Thus both these simple and direct methods were impossible at common law.[26]

To circumvent these rules, the common law lawyers developed the "straw man" technique of conveyancing which enabled them to create the estates of joint tenancy and tenancy by the entireties even though the grantor was also one of the grantees.[27] If *A*, owning in severalty, wished to create a joint tenancy or a tenancy by the entireties in himself and *B*, he first conveyed to *X*, the straw man, who then re-conveyed to *A* and *B*. This method of conveyancing has several disadvantages: (1) it requires two conveyances

[23] Mackintosh v. Barber, 1 Bing. 50, 130 Eng. Rep. 21 (1822); Deslaurier v. Senesac, 331 Ill. 437, 163 N.E. 327 (1928). See also 38 YALE L.J. 682 (1929). There was a further rule at common law prohibiting conveyance between spouses, based upon the concept of the unity of husband and wife. Thus, just as a man could not convey to himself, neither could he convey to his wife, who was thought of as a part of himself. COKE ON LITTLETON, 19th ed., 112a (1832). This rule could be avoided by a conveyance to another, to the use of the wife. This method was later made obsolete by a statute which permitted a direct conveyance. 44-45 Vict., c. 41, §50 (1881). A direct conveyance from husband to wife is possible in Michigan. Elson v. Elson, 245 Mich. 205, 222 N.W. 176 (1928).

[24] The result of this conveyance at common law would be a tenancy in common, each tenant holding an undivided one-half interest. Pegg v. Pegg, 165 Mich. 228, 130 N.W. 617 (1911).

[25] The result here would most likely be a tenancy in common between grantor and grantee. Hass v. Hass, 248 Wis. 212, 21 N.W. (2d) 398 (1945), noted in 44 MICH. L. REV. 1144 (1946); Wright v. Knapp, 183 Mich. 656, 150 N.W. 315 (1915), noted in 28 HARV. L. REV. 631 (1915); Deslauriers v. Senesac, 331 Ill. 437, 163 N.E. 327 (1928); 62 A.L.R. 514 (1929). A possible result is a tenancy in common for life with a contingent remainder in fee in *B*. Dutton v. Buckley, 116 Ore. 661, 242 P. 626 (1926), noted in 24 MICH. L. REV. 726 (1926); Anson v. Murphy, 149 Neb. 716, 32 N.W. (2d) 271 (1948); 1 A.L.R. (2d) 247 (1948). It has also been held that a conveyance by *A* to *A* and *B* would vest the entire fee in *B*. Hicks v. Sprankle, 149 Tenn. 310, 257 S.W. 1044 (1923).

[26] The situation would be the same if an attempt were made to create a tenancy by the entireties between husband and wife if *H* owned in severalty and conveyed a one-half interest to *W* expressing the intention that there be a tenancy by the entireties. However, if *H* conveyed to *H* and *W* as tenants by the entireties, the objective might be achieved since at common law the husband and wife were considered a separate entity. Therefore a conveyance by *H* to *H* and *W* is not a conveyance to himself but to another being consisting of himself and his wife. See the dissent in Matter of Klatzl, 216 N.Y. 83, 110 N.E. 181 (1915), noted in 29 HARV. L. REV. 201 (1915); Boehringer v. Schmid, 133 Misc. 236, 232 N.Y.S. 360 (1928).

[27] WILLIAMS, REAL PROPERTY, 24th ed., 239-240 (1926).

to accomplish what is essentially a single transaction; (2) it unnecessarily clutters up already overflowing recording offices; (3) it is unnecessarily expensive to the landowner; and (4) if *X* (the straw man) uses a warranty deed in making his conveyance, he may render himself liable on the covenants for title even though he was the owner only momentarily and was never intended to have any beneficial interest.[28] This cumbersome technique was transplanted from England, through Blackstone, into the common law of our states and persists to this day.[29] Thus, today, the unity of time requirement works to defeat the intention of grantors, and its acceptance violates the general policy of the courts to give effect to the clearly expressed intent of a grantor unless that intent contravenes public policy.[30] There is no reason to require two conveyances where one would be sufficient. The requirement has been abrogated by statute in several states,[31] and by judicial decision in others,[32] but elsewhere it remains in force.

II. *New Michigan Legislation Which Eliminates the Straw Man*

The creation of a joint tenancy or a tenancy by the entireties where the grantor is also one of the grantees is now possible in Michigan by direct conveyance:

> "Conveyances in which the grantor or one or more of the grantors are named among the grantees therein shall have the same force and effect as they would have if the conveyance were made by a grantor or grantors who are not named among the grantees. Conveyances expressing an intent to create a joint tenancy or tenancy by the entireties in the grantor or grantors together with the grantee or grantees shall be effective

28 Smith, "Eliminating the Straw Man," 38 MICH. S.B.J. 28 (Aug. 1954).

29 This cumbersome technique was abolished completely in England by the Conveyancing Act of 1881 which authorized direct conveyances. 44-45 Vict., c. 41, §50 (1881).

30 Edmonds v. Commissioner of Internal Revenue, (9th Cir. 1937) 90 F. (2d) 14.

31 Ala. Code (Supp. 1953) tit. 47, §19; Ark. Stat. (1947) §50-413 (applies to the creation of tenancy by the entireties only); Cal. Civ. Code (Deering, 1949) §683; Colo. Rev. Stat. Ann. (1953) c. 118, §118-2-1; Fla. Stat. (1953) §689.11 (applies to entireties only); Ill. Ann. Stat. (Supp. 1954) c. 76, §1b; Me. Rev. Stat. (1954) c. 168, §13; Mass. Laws Ann. (1955) c. 184, §8; Mo. Rev. Stat. (Supp. 1954) §442.025; Neb. Rev. Stat. (1950) c. 76, §76-118; Nev. Comp. Laws (Hillyer, Supp. 1941) §3710; 46 N.J. Stat. Ann. (Supp. 1954) §46.3-17.1; 49 N.Y. Consol. Laws (McKinney, 1945) §240-b; N.D. Rev. Code (1943) tit. 47, §47-1023; Okla. Stat. (1941) tit. 60, §74; Pa. Stat. Ann. (Purdon, Supp. 1954) tit. 69, §541; R.I. Gen. Laws (1938) c. 435, §17; S.D. Code (Supp. 1952) tit. 51, §51.0212; Tenn. Code Ann. (Williams, Supp. 1952) §7605.1 (applies to entireties only); Utah Code Ann. (1953) tit. 57, §57-1-5; Va. Code (1950) tit. 55, §55-9; Wis. Stat. (1953) c. 230, §230.45.

32 See 62 A.L.R. 514 (1929); 137 A.L.R. 348 (1942); 166 A.L.R. 1026 (1947).

> to create the type of ownership indicated by the terms of the conveyance."[33]

The first sentence applies to situations in which the whole interest in the land is conveyed. The second sentence applies to instances in which an undivided interest is conveyed with the expressed intent that the grantee or grantees and the grantor or grantors should hold as tenants by the entireties or joint tenants.[34]

III. *Suggested Language for Deeds under the New Legislation*

The new statute eliminates the necessity for two conveyances when creating joint estates but it does not eliminate the need for careful draftsmanship. The conveyancer must still state specifically the type of interest sought to be conveyed, for although the intent of the grantor is no longer subverted by a mechanical rule of law it can still be thwarted by inept terminology.

It is submitted that the following language would be appropriate under the new statute for the direct creation of joint tenancy and tenancy by the entireties.[35]

(1) Where *A* or *B*, or both, convey the entire interest to *A* and *B*, or to *A*, *B*, and *C*, as joint tenants:

> "To *A* and *B* (or *A*, *B*, and *C*) as joint tenants,[36] and not as tenants in common."[37]

[33] Act No. 3, Pub. Acts 1955, approved by the Governor, February 25, 1955.

[34] See Smith, "Eliminating the Straw Man," 33 MICH. S.B.J. 28 (Aug. 1954), for a list of the variety of situations in which the statute is applicable.

[35] Mich. Comp. Laws (1948) §565.151. The short statutory form for a warranty deed in Michigan may consist simply of "*A.B.* conveys and warrants to *C.D.* (description of property) for the sum of (consideration)." It is unnecessary to use the words "heirs and assigns" to create a fee. Mich. Comp. Laws (1948) §565.153. Recording of the deed should suffice to satisfy the requirements of delivery in the case of a conveyance by *A* to *A* and *B*. BASYE, CLEARING LAND TITLES §13 (1953); 9 WIGMORE, EVIDENCE, 3d ed., §2520 (1940).

[36] Describing the grantees as joint tenants should be sufficient to rebut the presumption in favor of tenancy in common in Michigan. See Mich. Comp. Laws (1948) §554.44. To describe the grantees as taking "jointly" is equivocal since the terms could include all three forms of joint ownership. See 43 MICH. L. REV. 1180 (1945); 37 MICH. L. REV. 1318 (1939). Language of survivorship should be avoided because of the decision in Ames v. Cheyne, 290 Mich. 215, 287 N.W. 439 (1939), noted in 38 MICH. L. REV. 875 (1940), in which the court interpreted words of survivorship as creating a joint estate for life with a contingent remainder in fee to the survivor. See COKE ON LITTLETON, 19th ed., 191a (1832). It was argued that since survivorship is inherent in joint tenancy, if words of survivorship are used in addition to the words "joint tenancy," it is indicative of an intent on the part of the grantor to create something other than a mere joint tenancy. A joint life estate with a contingent remainder in fee to the survivor is quite different from a joint tenancy because one co-tenant cannot cause a severance by conveying an undivided interest in fee simple; he has instead the power to convey only an undivided interest measured by the shortest of the life tenants, and a possibility of the fee. The contingent remainders extant in the other joint life tenant, or tenants, make the interest of any one far less alienable

(2) Where *H* or *W* conveys to *H* and *W* as tenants by the entireties:

"To *H* and *W*, as tenants by the entireties."[38]

(3) Where *A* conveys to *B* an undivided interest; or *A* and *B* convey an undivided interest to *C* (or to *C* and *D*) with the intent to create a joint tenancy:

"To *B*, an undivided one-half interest, *A* and *B* hereafter to hold as joint tenants and not as tenants in common.[39]

"To *C*, an undivided one-third interest, *A*, *B*, and *C* hereafter to hold as joint tenants and not as tenants in common.

"To *B* and *C*, each an undivided one-fourth interest, *A*, *B*, *C*, and *D* hereafter to hold as joint tenants and not as tenants in common."

(4) Where *H* or *W* conveys to *H* and *W* with the intent that there be a tenancy by the entireties:

"To *H* (or *W*), an undivided one-half interest, *H* and *W* hereafter to hold as tenants by the entireties."[40]

Although any of these forms should be adequate, it would seem preferable to have the deed convey the whole interest of the present

than would be the case with a joint tenancy where there could be a severance. This construction makes the right of survivorship indestructible without the consent of all joint tenants and is probably not contemplated by the average grantor who uses words of survivorship. This approach has been taken to create a right of survivorship which the "four unities" doctrine would otherwise have defeated. Language of survivorship used in the creation of a joint tenancy can probably best be explained as an attempt to rebut the presumption in favor of tenancy in common, hence it should not be taken as indicative of an intention to create an indestructible remainder. However, Ames v. Cheyne is the law in Michigan today. See also Jones v. Snyder, 218 Mich. 446, 188 N.W. 505 (1922); Rowerdink v. Carrothers, 334 Mich. 454, 54 N.W. (2d) 715 (1952).

[37] Language negating tenancy in common is probably not absolutely essential since the phrase "as joint tenants" will usually be given its technical meaning, but it is added as a precaution to make certain that the statutory preference for tenancy in common is rebutted. It has been argued that a description of the takers as "joint tenants" or as taking "jointly" is sufficient under a statute which directs that the "true intent" of the grantor control. Neb. Rev. Stat. (1943) c. 76, §76-205. Wilson, "Words Necessary for the Creation of a Joint Tenancy," 34 NEB. L. REV. 67 (1954). The express negation of tenancy in common is desirable under the Michigan statute which prefers tenancy in common "unless expressly declared to be in joint tenancy." Mich. Comp. Laws (1948) §554.44.

[38] The phrase "tenancy by the entireties" is a technical one used only by lawyers and hence there is little danger that the courts will give it any but the technical meaning. If a joint tenancy between husband and wife is desired, the phrase "and not as tenants by the entireties," should be added to negate the presumption in favor of that estate. Goethe v. Gmelin, 256 Mich. 112, 239 N.W. 347 (1931); Dutcher v. Van Duine, 242 Mich. 477, 219 N.W. 651 (1928).

[39] This language should be adequate to meet the directive that the intention of the grantor to create an estate of less than a fee simple should be expressed in the deed. Mich. Comp. Laws (1948) §565.153. See also notes 34 and 35 supra.

[40] See note 38 supra.

owners and to name as grantees all of the persons intended to hold as joint tenants or tenants by the entireties. In other words, the procedure in forms (1) and (2) suggested above is preferred because of its simplicity and brevity.

IV. *Conclusion*

Michigan now has a statute which reforms the common law and makes superfluous the cumbersome and obsolete "straw man" technique of conveyancing. It remains only for the lawyer to employ the simple and direct method now available.

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