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CREATION OF A TENANCY BY THE ENTIRETY WITHOUT
THE USE OF A STRAWMAN

What does a lawyer do for his client who wishes to create a tenancy by the entirety¹ in real property which he now separately owns? To many lawyers the answer seems apparent—have the husband deed the land to some strawman (his secretary) who in turn will convey it back to the client and his wife as tenants by the entirety. But to other lawyers this method seems cumbersome. They prefer to eliminate the deed to and from the strawman. Instead, they have their client convey the property *directly* to himself and his wife as tenants by the entireties. However, because of the lack of law on this subject in Wyoming, the impatient lawyer who uses this latter method must always concern himself over such things as—will other lawyers accept this in their abstract examinations or will it create an estate valid enough to escape the individual creditors of either spouse? Certainly this concern is not unjustified. Estates by entireties are being used more and more,² not only because of their immunity from the creditors of individual spouses, but also because of the ease in side-stepping the probate statute (with its inheritance tax) and avoiding the expense of a will. Anything the well-meaning lawyer may do to defeat such aims becomes an injustice to the client as well as to his own reputation. It therefore, will be the object of this note to examine the common law rules on this subject, the general trends in other states, and then the Wyoming case and statutory law. Finally, an attempt will be made to reconcile the Wyoming law with these trends and to affix Wyoming's position.

Under old English Common Law, in order to impose the right of survivorship upon jointly-owned property, the Doctrine of Unities developed. It was necessary that the joint owners derived their interests at the same time and from the same instrument. It was also required that their interests were co-extensive in duration and entitled them to ownership of the whole.³ Additionally, in the case of a tenancy by the entirety, it was necessary that a valid marriage be in existence.⁴ If any of these elements were lacking, tenancy in common resulted.⁵ Under this latter form of ownership, each would own only an undivided part of the whole instead of each owning the whole itself. This, in turn, meant that there could be no survivorship if one of the tenants died.⁶ Such technicalities

1. A tenancy by the entirety can be created in the following states: Arkansas, Delaware, District of Columbia, Florida, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia and *Wyoming*. Phipps, Tenancy by Entireties, 25 Temp. L.Q. 24 (1951).

2. See Article, 9 Ark. L. Rev. 330 (1955).

3. *Peters v. Dona*, 49 Wyo. 306, 54 P.2d 817 (1936); Burby, Real Property 185 et. seq. (2d ed. 1953).

4. *Id.*

5. *Hammond v. McArthur*, 30 Cal.2d 512, 183 P.2d 1 (1947).

6. Burby, Real Property § 196 (2d ed. 1953).

resulted in a subterfuge. The grantor would convey his interest to a trusted third party who then would deed the premises back to him and his wife. Thus the unities were satisfied.⁷ Each owned the whole and survivorship resulted when one of the joint tenants died.

With the adoption of the common law in our states, the Unities Doctrine traveled to the United States.⁸ Here the mobility of our society caused a great increase in the alienation of property. Furthermore, women came to be regarded as responsible property owners. The necessary result was strife. One side was the grantor wishing to give his wife a present interest in his property. On the other was feudal inflexibility. Some courts, in order to give as much effect as possible to his intent, began to look for a more practical interpretation of the unities. Others chose to disregard them altogether. Still others continued to hold rigidly to the feudal concept and to disregard the grantor's wishes. The result was a three-way split.

The most rigid view held that the grantor's attempt to convey to himself and his wife rendered the conveyance only partially effective.⁹ Since one could not convey to himself at common law, the courts reasoned that the grantor was incapable of receiving any interest as a grantee.¹⁰ But, because he clearly intended by the grant in the deed to convey all his interest in the realty, and because his wife was the only capable grantee, she became sole owner of the land.¹¹ Thus the husband became even more generous than had originally intended.

Less inequitable but equally oblivious of the grantor's intent was the second view.¹² There the tenor of the deed was not so strictly construed. The courts held that while one may not convey to himself, he should be held to have parted with only partial ownership. Under this outlook, his wife received an undivided half interest and became merely a tenant in common with no right of survivorship. This was so because she took her interest at a different time and from a different instrument than her husband.

With the idea that the intent of the grantor should be given effect, the New York courts generated a more modern theory.¹³ Here, they reasoned, was a conveyance to a husband and wife. Under common law, the husband and wife were considered a distinct entity. True, the Married Women's Acts had removed any common law restraint on the wife's ability to receive and convey property separate and apart from her husband, but

7. See *Howell v. Wicas*, 232 Mich. 227, 205 N.W. 55 (1925).

8. § 8-17, W.S. 1957.

9. *Cameron v. Steves*, 9 New. Br. 141 (1858).

10. *Deslauriers v. Senesac*, 331 Ill. 437, 163 N.E. 327 (1928).

11. See *Wright v. Knapp*, 183 Mich. 656, 150 N.W. 315 (1915).

12. *Michigan State Bank v. Kern*, 189 Mich. 467, 155 N.W. 502 (1915).

13. *In re Klatzl's Estate*, 216 N.Y. 83, 110 N.E. 181, reargument denied, 218 N.Y. 734, 113 N.E. 406 (1915), Judge Collin's opinion; *Boehringer v. Schmid*, 133 Misc. 236, 232 N.Y.S. 360, aff'd without op., 238 App. Div. 881, 239 N.Y.S. 922 (1930), aff'd per curiam op., 254 N.Y. 355, 173 N.E. 220.

had these laws also destroyed the marriage entity of husband wife? New York said, "No." With this basis they then held that a husband in conveying to himself and his wife is not really conveying to two individuals. He is instead conveying to the marriage entity. It is as members of this entity that husband and wife derive their interests. Such reasoning allowed the court to comply with the unities requirement and yet to give effect to the grantor's intention. Other states followed suit.¹⁴

This theory was still subservient to the unities requirement. Other courts, rather than strain to fit two people into one mold, decided to ignore the unities altogether. If the husband wanted his property in the joint ownership of himself and his wife, his desire was paramount. All he needed to do was express his intent in the instrument.¹⁵

Also significant were the developments in giving effect to the grantor's intent in the field of joint tenancies. As one might expect, New York again took the lead.¹⁶ Without the marriage entity to rely on, the New York courts had to look to the estate itself. They reasoned that when one conveys all his property to himself and another as joint tenants, he, in effect, erases his former estate in the property and creates a new estate in the property—one of joint ownership. From this conveyance he derives his interest as a joint tenant at the same time and from the same instrument as the other joint tenant or tenants. In other words, they all take their interests as joint tenants at the same instant. Again the unities are satisfied and the grantor's intent is carried out. Thus it is evident that the mere presence of the marriage entity which converts the joint tenancy into a tenancy by the entirety, should not preclude application of this theory to a tenancy by the entirety.¹⁷

With such a variety of theories from which to choose, the question becomes which are most applicable to Wyoming's situation. In order to arrive at a conclusion, an examination of the sparse Wyoming law on this subject is necessary.

In the cases of *Peters v. Dona*¹⁸ and *Terry v. Hensen*,¹⁹ the Wyoming State Supreme Court recognized that a tenancy by the entirety had been created because all of the necessary unities were present—including the marriage entity. This entity was stressed heavily, with the court rejecting any contention that it had been destroyed by the Wyoming Married Women's Acts.²⁰ The court explained that these acts had removed

14. *Ebrite v. Brookyser*, 219 Ark. 676, 244 S.W.2d 625 (1951); *Johnson v. Landefeld*, 138 Fla. 511, 189 So. 666 (1939); *Cadgene v. Cadgene*, 17 N.J. Misc. 332, 8 A.2d 858, aff'd on op. below, 124 N.J.L. 566, 12 A.2d 635 (1939); *Wollard v. Smith*, 244 N. C. 489, 94 S.E.2d 466 (1956).

15. *Creek v. Union Nat. Bank*, ____ Mo. ____, 266 S.W.2d 737 (1954); *Therrien v. Therrien*, 94 N. H. 66, 46 A.2d 538 (1946).

16. *Colson v. Baker*, 42 Misc. 407, 87 N.Y.S. 238 (1904).

17. See also, *Brown v. Jackson*, 35 N.M. 604, 4 P.2d 1081 (1931); *Lang v. Wilmer*, 131 Md. 215, 101 Atl. 706 (1917).

18. *Peters v. Dona*, 49 Wyo. 306, 54 P.2d 817 (1936).

19. 75 Wyo. 444, 297 P.2d 213 (1956).

20. §§ 20-22 et. seq., W.S. 1957.

only the restraints on the power of a woman to convey and receive property in her own right. They had not destroyed the marriage entity which was necessary to create the tenancy.

Concerning the weight to be given the grantor's desires, the Wyoming Supreme Court, in substance, has indicated there is a presumption that any conveyance to unmarried persons will be deemed a tenancy in common, but it is possible for the grantor to create a joint tenancy if he expresses his intent in the deed.²¹ Similarly, a conveyance to a married couple will be deemed to result in a tenancy by the entirety unless there is again this appropriate expression of intention.²² All of this can be taken as meaning that the court believes the intent of the grantor should prevail, if he will just express it in the deed.²³ This obviously is not obstructed by Wyoming's allowance of transfers between spouses.²⁴

With these considerations in mind, it is pactical to conclude that Wyoming, by subjecting itself to the Unities Doctrine, by recognizing the marriage entity and by attempting to carry out the intent of the grantor has created a compatible environment for both of the New York views. Wyoming either can hold that the unities are satisfied by conveying to the separate marriage entity or it can hold that a new estate has been created in which the husband and wife derive the same interest at the same instant. Both avoid the need for a strawman.

There is still another way whereby the desires of the grantor can be given effect. That, of course, is by statute. Other states, such as Tennessee,²⁵ have passed legislation allowing people to create joint estates in themselves and others with the incident of survivorship. Needless to say, such a statute is needed in Wyoming.

However, the present absence of any tangible law in this subject in Wyoming should serve as a warning to the prudent lawyer to use the strawman technique. By doing this he will assure his client effective joint ownership and himself peace of mind.

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21. See, *Binning v. Miller*, 55 Wyo. 478, 102 P.2d 64, rehearing denied, 56 Wyo. 129, 105 P.2d 278; *Edwards v. Willson*, 30 Wyo. 275, 219 Pac. 233 (1923); see 3 Wyo. L.J. 66 ().
 22. *Peters v. Dona*, 49 Wyo. 306, 54 P.2d 817 (1936); *Amick v. Elwood*, 77 Wyo. 264, 314 P.2d 944 (1957).
 23. *Balch v. Arnold*, 9 Wyo. 17, 59 Pac. 434 (1899); *Sharples Corporation v. Sinclair Wyoming Oil Co.*, 62 Wyo. 341, 168 P.2d 565, rehearing denied, 62 Wyo. 370, 168 P.2d 565 (1946).
 24. *Arp v. Jacobs*, 3 Wyo. 489, 27 Pac. 800 (1891); In § 34-53, W.S. 1957, where it is stated that conveyances and encumbrances of homesteads are void unless the spouse joins, the following language appears: "The foregoing provisions shall not be applicable to nor shall compliance therewith be required for full legal effectiveness of any conveyance of property directly from Husband to Wife."
 25. *Tenn. Code Ann. § 64-109 (1955)*: "Any married person owning property or any interest therein in his or her own name, desiring to convert his or her interest in such property, into an estate by the entireties with his or her spouse, may do so by direct conveyance to such spouse by an instrument of conveyance which shall provide that it is the grantor's intention by such instrument to create an estate by the entireties in and to the entire interest in such property previously held by the grantor." Massachusetts, Michigan and Oregon are states which also have statutes allowing such transfers.