Wyoming Law Journal

Volume 18 | Number 1 Article 5

December 2019

Wambeke v. Hopkin - A New Lesson in Wyoming Property Rights

Michael J. Sullivan

WAMBEKE V. HOPKIN – A NEW LESSON IN WYOMING PROPERTY RIGHTS*

Wambeke v. Hopkin,[1] decided by the Wyoming Supreme Court in June of 1962 in an opinion by Justice McIntyre, established precedent for an old, unsettled and recurring problem, and established new precedent in an area supposedly well-settled (if lack of litigation can be of any indication).

In reversing the District Court on both issues, the Supreme Court held that a widow, who succeeded to the title to the family home by reason of survivorship in an estate by the entirety, is not entitled to a homestead allowance from her husband's estate (in the absence of property exempt from creditors claim).[2] Secondly, a promissory note payable to the widow and her husband, which did not designate them as husband and wife and which was executed for the payment of property purchased from the husband, was not held by the husband and wife with any right of survivorship in the proceeds. The widow was allowed therefore, only one-half the value of the balance of the note on the theory there was a gift of an undivided one-half interest in the note.

The Homestead Exemption

Under the provisions of Wyoming Statutes Section 2-213,[3] it has been generally assumed when the estate of the decedent did not contain real property which was used by the family as a homestead under the exemption laws of this state, and even when it did contain such property in some cases,[4] the surviving spouse was entitled to the $4000 allowance. The

*This article is written in partial performance of requirements for an award presented to a second year law student by the *First National Bank of Casper* for research in the field of Trusts and Estate Planning.

1. 372 P.2d 470 (Wyo. 1962).

2. Wyo. Stat. § 2-213 (1957).
When any resident of this state dies leaving a widower or widow, or minor children, the court shall set over to such widower or widow, if any, and if none, to such minor children, as their absolute property, all property of said decendent exempt from execution under the exemption laws of this state, including the homestead, and such property shall not be subject to the payment of debts of said decedent, and funeral expenses, in cases where there is not other property in said estate sufficient to pay said expenses; and in case decedent shall not have any or all of the property specified under said exemption laws, such widower, widow or minor children, as the case may be, shall be entitled to the value of such exempt property either in money or other property as they may prefer. Provided that, if such surviving spouse is not the parent of all or any such minor children, one-half of said property shall be set over to such surviving spouse and the other one-half to said minors who are not children of said survivor and a guardian shall be appointed for them as in any other cases of estate property descending to a minor. The right of a widower or widow to any of the property specified in this section shall in no case be affected by his or her renouncing or failing to renounce the benefit of the provisions made for him or her in the will of said decedent.

3. Wyo. Stat. §§ 1-498 to 1-503 (1957).

4. In re Dixon's Estate, 66 Wyo. 197, 207 P.2d 510 (1949), 73 Wyo. 236, 278 P.2d 277 (1954). (The widow received in addition to the home ranch the homestead allowance which was set that time $2500, although the court did not consider the question of homestead allowance.)

court in the instant case (with the exception of Justice Harnsberger dissenting) did not take such a view. But said:[5]

> Section 2-213, as a part of our probate code, does not contemplate a probate homestead different from the homestead contemplated under the exemption laws. . . . Since it must be regarded as the settled law of Wyoming, under the rule of stare decisis, that a homestead right can be acquired upon an undivided interest in land, and that it is immaterial in whom the legal title is vested, it necessarily follows that the right of homestead will attach to realty held by a husband and wife as tenants by the entirety and occupied by them as a residence.

The court then said it would be inconsistent with their prior holding, that a husband can claim a homestead in property transferred to his wife,[6] to say that title must come from the husband's estate before it can be said that he had a homestead. The court concluded by saying that if the legislature had meant the property for the homestead exemption of the surviving spouse to come from the estate of the decedent they would have said so. Instead says the court, they meant this to be determined by ascertaining whether the decedent had a homestead at the time of his death.

This decision reached a very practical result, accomplishing the furtherance of the purpose for which the so-called "probate homestead" was originated. That purpose is to insure the wife and family special protection by providing them a home.[7] In this instance that had already been accomplished and the widow, by receiving an additional allowance, would have been receiving what amounted to a gift of $2000. However, in reaching the preferable result in this case, the court may have clouded the waters for future cases.

The court, by its decision, has seen fit to consider the homestead allowance granted a surviving spouse no different from the debtor's homestead exemption. Taking this view, the court quashed the popular conception that to qualify for the homestead in 2-213 the property must not only meet the requirements of the homestead set out in Sections 1-498 and 1-499 W.S. 1957, but must also be included in the estate of the decedent.[8]

---

5. 372 P.2d at 472.
6. Altman v. Schuneman, 39 Wyo. 414, 273 Pac. 173 (1929).
7. In re Stanger's Estate, 75 Ariz. 399, 257 P.2d 593 (1953), 40 C.J.S. Homestead, § 239.
8. In re Bergman's Survivorship, 60 Wyo., 355, at 377, 151 P.2d 360 at 368 (1944). the Court said,
   A homestead if the title is in the name of the deceased, is a part of his estate but is set aside as exempt through favor of the statue to the surviving spouse and minor children. . . . but an estate by the entirety is created by deed. The property becomes the absolute property of the survivor upon the death of the spouse and is not a part of the estate of the latter.
   Baker, The Homestead Exemption in Wyoming, 16 Wyo. L.J. 81 at 84. Where it was said,
   Unlike the homestead right with regard to creditors, the homestead exemption allowed from a decedent's estate does not necessarily have to be a residence. Under Title 2 statutes, if the decedant's estate should not contain all of the property exempt from execution then the persons or persons entitled to the exempt property may have other property to the value of the exemption set over or may take the value of the exemption in money.

This view is also contrary to the view of many courts and of former Chief Justice Blume when he said by way of dictum in *Delfelder v. Teton Land and Investment Co.*[9]

> The only right not waived is that to which she was entitled by virtue of the statues in our probate code (Rev. St. 1931, Sects. 88-101 to 88-4103). That, it is true, is to some extent at least, under our peculiar system of acquiring homesteads by occupancy (not considering a case when property is selected in lieu of a homestead), dependent upon the right acquired before the decedents death. Hence the two rights are not easily separable, and the only way, apparently, by which they can be separated in the case at bar, *is to treat the homestead right under the Probate Code as a new and conditional one,* dependent upon the fullfillment of the steps required to be taken under the statute, and, as will be seen more fully hereafter, the necessity to see that these steps were taken would seem to be upon the person entitled to the right. (emphasis supplied)

Nor did the court consider distinguishable the fact that the decedent's exemption is not transferred but rather the surving spouse or children or both are granted a fee simple in the property or an allowance of $4000 when there is no property fulfilling the homestead requirements. As Justice Harnsberger stated in his dissent, "The only thing the first named statute has in common with the latter is that they both exempt property from execution."[10]

The apparent result of this case is that when a surving widow has title to homestead property, either by way of sole ownership prior to husband's death or as a result of the survivorship feature of a tenancy, she will not be allowed the additional allowance provided by Section 2-213 W.S. 1957. The problems which appear inevitable if the probate homestead is identical with the deceased's homestead rights include the question of what allowance will be given the minor issue of a deceased's previous marriage. Such a situation was present in the *Wambeke* case but the children's share was not put in issue. Under the construction of the *Wambeke* case there could be no money allowance since the decedent did have a homestead within the contemplation of the statute. Surely such children would not be allowed a lien against the wife's property. Other similar problems would arise where the deceased had at the time of his death a homestead in a life estate, in property held by joint tenancy with a person other than his spouse, or in partnership property. Under the *Wambeke* case what could the surviving spouse claim? The decedent had homestead property at the time of his dealth but it is not in his estate nor is the title in his widow or children. The surviving spouse would be precluded from any homestead allowance whatsoever, unless given an enforceable right against the owner of the property. The latter approach would

9. 46 Wyo. 142, 24 P.2d 702 at 707 (1933).
10. 372 P.2d 472, at 478 (1962).

strongly resemble a return to the concept of dower which is statutorily abolished.[11]

The surviving widow in *Wambeke v. Hopkin* was precluded from receiving a $2000 windfall, which was not needed to set up immediate housekeeping. However, in accomplishing this the Supreme Court may have given birth to further litigation in the area of homestead allowance. Whether the above problems will materialize is a question which can only await further developments.

The Grabbert Note

The additional decision of the court concerning the Grabbert promissory note makes worthwhile a reconsideration of the present status of joint estates and tenancy by the entirety in the State of Wyoming. The Supreme Court in two previous cases declined to decide whether tenancy by the entirety would be recognized in personal property.[12]

However, very strong dictum in the instant case makes it apparent that Wyoming will recognize joint tenancies, including the entireties estate, in personal property. There Justice McIntyre said:[13]

> The foregoing logic and reasoning bring us to this conclusion: In order to create in Wyoming a joint tenancy or tenancy by the entirety, in personal property, there must exist one of the following requirements:
>
> 1. Each of the four unities of interest, time, title and possession must be present, with the added unity of person for a tenancy by the entirety; or
> 2. In the absence of one of more of the first four unities, it must be evident from the language of the instrument itself that the parties thereto intended to create a right of survivorship.

The impact of this language, construed with that of other recent Wyoming cases, can be realized by considering the changes which are effected in the Wyoming law.

From this language, the Supreme Court has seen fit to adopt the view of the majority of American jurisdictions, wherein the question has been considered, that personal property can be owned in joint tenancy or tenancy

---

11. Wyo. Stat. § 2-37 (1957).
12. Hill v. Breeden, 53 Wyo. 125, 79 P.2d 482 (1938), Hart v. Brimmer, 74 Wyo. 338, 287 P.2d. 638 (1955).
13. 312 P.2d. at 475.
14. Cooper v. Cooper, 225 Ark. 626, 284 S.W.2d 617 (1955); Ciconte v. Barba, 19 Del. Ch. 6, 161 Atl. 925, (1932); Re Lyon's Estate, 90 So.2d 39, 64 A.L.R.2d 1 (1955 Fla); Temple v. Bradley, 119 Md. 602, 87 Atl. 394 (1913); Childs v. Childs, 293 Mass. 67, 199 N.E. 383 (1935); Moore v. Chase, 25 Tenn. App. 239, 156 S.W.2d 84 (1941). Contra: Abshire v. State, 53 Ind. 64 (1876); Scholten v. Scholten, 238 Mich. 679, 214 N.W. 320 (1927) (except that a Michigan statute allows tenancies by the entirety in bonds, certificates of stock, mortgages, promissory notes, debentures and other evidences of indebtedness payable to husband and wife); Wyckoff v. Y.W.C.A., 37 N.J. Super 274, 117 A.2d 162 (1955); Bowling v. Bowling, 243 N.C. 515, 91 S.E.2d 176 (1956).

by the entirety.[14] This supplements the decision in *Hill v. Breeden,*[15] and *Hart v. Brimmer*[16] where, as previously noted, the court found it unnecessary to make a decision although apparently approving the rule.

The court also quoted with approval the following language from *Hart v. Brimmer.*[17]

> Numerous cases subscribe to the view that where from the language of the instrument it is evident that the parties thereto intended to create the common-law joint tenancy or tenancy by the entirety. though the instrument, by reason of the absence of one or more of the four unities of interest, time title, and possesesion, did not create the common-law joint tenancy or tenancy by the entirety.

Hence, the Wyoming Supreme Court has accepted the "modern view" which rejects the necessity of using a "straw man" in transfers of realty or personalty attempting to set up a survivorship feature.[18] Under the older view necessitating a "straw man," the court said the unity of time and title were not created by a conveyance from a husband to himself and his wife as tenants by the entirety, regardless of his intention.[19] This view is still maintained today by a number of courts,[20] but it would seem such courts are disregarding the change in the legal status of the spouses,[21] and are failing to adapt their rules of conveyancing to modern conditions.[22]

Another interesting feature of the *Wambeke* case and other recent cases in this field, is the determination of Wyoming's position as to the presumption or lack thereof of a joint tenancy when there is no indication of the intention of the parties. At common law, where the unities are present, the parties take as joint tenants unless the intent that they shall hold as tenants in common is affirmatively established, as it is when a separate and distinct equal share is given to each individually.[23] This common law presumption is now in disfavor in the United States however, and most jurisdictions have by statute[24] abrogated this presumption to one of a tenancy is common unless otherwise expressly provided. The reason-

15. Supra note 12.
16. Supra note 12.
17. Supra note 12 at 641.
18. Illinois Trust and Eavings Bank v. Van Vlack, 310 Ill. 185, 141 N.E. 546 (1923) (joint bank account); Switzer v. Pratt, 237 Iowa 788, 23 N.W.2d 837 (1946); Mitchell v. Federick, 166 Md. 42, 170 Atl. 733, 92 A.L.R. 1412 (1934); Therrien v. Therrien, 94 N.H. 66, 46 A.2d 538, 166 A.L.R. 1023 (1946).
19. 14 Am. Jur. Cotenancy, § 11.
20. Deslauriero v. Senesac, 331 Ill. 437, 163 N.E. 327 (1928); Stone v. Culver, 286 Mich. 263, 282 N.W. 142, (1938); Pegg v. Pegg, 165 Mich. 228, 130 N.W. 617 (1911); Stuehm v. Mikulski, 139 Neb. 374, 297 N.W. 595 (1941).
21. At common law husband was incapable of transferring property to his wife.
22. Ward Terry & Co. v. Henson, 75 Wyo. 444, 297 P.2d 213, (1956); Wyo. Stat., §§ 20-22 to 28, (1957); 14 Wash. & Lee L. Rev. 296.
23. 2 American Law of Property, § 6.5 (Casner ed. 1952).
24. E.g., Ariz. Rev. Stat. § 33-431 (1956); Ark. Stat. Ann. § 50-411 (1947); Cal. Civ. Code, § 686 (Deering 1941); Colo. Rev. Stat. 118-2-1 (1953); Mont. Rev. Code, 67-308, 67-313 (1947).

ing given is said to be that the policy of American Law is opposed to survivorship.[25]

Wyoming has no statutes rebutting the common law presumption and has in fact expressly adopted the common law where not overruled by legislation or judicial decision.[26] Therefore, as stated by Justice McIntyre in the *Wambeke* case,[27] Wyoming has not joined those states which have seen fit to abolish joint tenancies or establish a legal presumption against such tenancies.[28] It would therefore appear to be a valid conclusion that the common law presumption is retained and where a grant is to two persons jointly without designation of intention, they would take as joint tenants with rights of survivorship. As valid as this conclusion may seem, it is clouded by another recent case finding survivorship between grantees of a deed.[29] The court found survivorship upon the basis of words of survivorship in the deed although the four unities were clearly present. The decision was clearly predicated upon the rationale that the intent to create a joint tenancy must be expressed in the deed.

In relation to realty, Wyoming has adopted the rule that a conveyance to husband and wife without designation as such constitutes a tenancy by the entirety.[30] Although it would seem this would be equally true in a conveyance of personalty, Justice McIntyre stated the authorities were in conflict[31] and by-passed making any decision on this issue[32] in the absence of one of the unities. The inference is that the estate would be created if all were present.

Instead, after establishing that joint tenancy and an estate by the entirety would be recognized in personalty, and that Wyoming retained the presumption favoring joint tenancies with the right of survivorship, the court then said as to this promissory note one essential was lacking: the unity of possession. Hence, after finding in favor of the survivorship at every turn, the court decided the case on an aspect which certainly is debatable,[33] that the promissory note being a chose in action, is incapable

25. 98 A.L.R. 773, 14 Am. Jur. Cotenancy, § 12.
26. Wyo. Stat., § 8-17 (1957).
27. 312 P.2d at 475.
28. This statement is supported by the court in the decision of Peters v. Dona, 49 Wyo. 406, 54 P.2d 817 (1936) and Hill v. Breeden, infra note 12.
29. Hudley v. Neeley, 365 P.2d 196, (Wyo. 1961).
30. Amick v. Elwood, 77 Wyo. 269, 314 P.2d 944 (1957).
31. 372 P.2d at 475.
32. Cases holding entirety estates arise even though not designated as husband and wife. Terral v. Terral, 212 Ark. 221, 205 S.W.2d 198, 1 A.L.R. 2d 1092, (1947); Ciconte v. Barba, 19 Del., Ch. 6, 161 Atl. 925 (1932); Re Lyon's Estate, 90 Co. 2d 39, 64 A.L.R. 2d 1 (1955 Fla.); Tyler v. United States, 28 F.2d 887, (1928 DC Md.), revd. on other grounds. Contra, Frank v. Patton, 251 Mich. 557, 232 N.W. 211 (1930).
33. Dupont et al. v. Jonet et al., 165 Wis. 600, 162 N.W. 664, (1917). Court held tenancy by the entirety created in a bank deposit saying at 162 N.W. 666. No reason is perceived why a husband may not deposit money in a bank and take a certificate therefore in the names of both himself and his wife, payable to either, and thus make a gift to her of an undivided interest in the fund, and create a tenancy by the entireties therein. Inasmuch as the thing given is a joint interest it is only logical that the possession given should be a joint possession.

of possession. Since, said the court, the decision of *Hill v. Breeden*[34] established that a promissory note was payable to either party if held jointly, this was utterly at variance with the essential unity of possession required by common law.

The court's rfeerence to cases involving joint bank accounts[35] results in some confusion. In its opinion in *Lesburg v. Lane*[36] decided only three months earlier, the court sustained the right of survivorship in a joint-bank deposit and expressly recognized that one joint owner might have exhausted the whole fund before she died, but that the other joint owner did have an interest in the joint account as created by contract. Such language can only be interpreted by defining the interest created as being contractual in nature, which by the terms of joint contract with the bank gives either depositor the right to withdraw funds freely during their joint lives and to suceed to exclusive ownership to what is left in the account. Such a proposition does not remove the question of fact of whether the sole depositor did intend to give such an interest so as to constitute a valid and effective donative transaction. However, the contract is strong evidence of such an intent.

The foregoing comments can only help to illustrate the difficulties that arise in the many jurisdictions that have attempted to apply the four unities, initially applied to real property, to personal property. But the *Wambeke* decision does clearly invite attempts to rationalize the existence of the four unities with respect to automobile titles, TV sets, etc., so as to determined is tribution of property on death, to invalidate transfers of property where both husband and wife did not join, and to deny creditor's attachments when the debt cannot be based upon the obligation of husband and wife. As in the instant case, the court may deny the presence of the four unities, so that no such tenancy will be present as a matter of law, in the absence of a clear cut expressed intent.

With respect to the creation of a right of survivorship between co-owners, there appears to be no valid reason why such a constractual arrangement should not be honored in view of existing policy strongly recognizing freedom to contract. Rights in personal property have at times been resolved with analogies to rights in real property to determine whether public policy should limit the creation of rights. Unless an act of the legislature intervenes, the concept of survivorship is firmly established.

However, the approval of the court given to freedom of the parties to create a form of co-ownership goes further than just the incident of survivorship. By permitting parties to expressly create a tenancy by the entirety with respect to personal property, the court would apparently

---

Such a possession is appropriate to and characteristic of joint ownership, just as individual possession is appropriate to and characteristic of individual ownership.

34. Supra note 12.
35. 372 P.2d at 476.
36. 369 P.2d 533 (Wyo. 1962).

then ascribe the additional traditional consequences of such ownership existing with respect to real property, i.e., the inability of one co-owner to voluntarily transfer any interest therein without the consent of the other, and the freedom of the property from claims of creditors of one of the parties. Apparently any limitation or change with respect to such entirety ownership will have to come from the legislature.

The case of *Wambeke v. Hopkin* can through its dictum and holding, teach a good lesson in Wyoming pdoperty law. The elements of this lesson can be summarized as follows:

A. A widow is not entitled to an allowance in lieu of homestead from her husband's estate if she acquired the family home by survivorship.

B. In contrast to the modern trend there is in Wyoming no legal presumption against joint-tenancies.

C. The presence of the four unities of time, title, interest, and possession gives rise to a joint tenancy (or a tenancy by the entirety when grantees are husband and wife).

D. Personal property may be held by husband and wife as tenants by the entirety.

E. Joint tenancy or tenancy by the entirety may arise in the absence of the four unities when the languages of the instrument indicates such an intent.

F. A chose in action is not property capable of being possessed and the unity of possession cannot therefore exist.

G. It is no longer necessary to use a strawman to create survivorship.

MICHAEL J. SULLIVAN