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THE CREATION OF JOINT TENANCIES—COMMON LAW TECHNICALITIES VS. THE GRANTOR'S INTENT

Can the owner of a piece of real property in West Virginia create a joint tenancy in himself and another by making a direct conveyance if the requisite intent to create a joint tenancy with right of survivorship\(^1\) is expressed? Or does a tenancy in common result due to the lack of the unities of time and title?

The general rule is that except in the situation where the parties to the conveyance are husband and wife, a direct conveyance from one to himself and another as joint tenants results in a tenancy in common despite the express contrary intent of the grantor. This article will examine relevant common law and statutory provisions in West Virginia and other jurisdictions in order to discover the rationale underlying this rule and to aid in suggesting appropriate legislation to eliminate its unnecessary harshness.

JOINT TENANCIES AT COMMON LAW

Four types of concurrent ownership existed at common law: tenancy in coparcenary,\(^2\) tenancy in common,\(^3\) tenancy by the en-

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\(^1\) Survivorship is the primary characteristic of a joint tenancy. H. TIFFANY, THE LAW OF REAL PROPERTY § 188 (1970). For purposes of brevity, joint tenancy with right of survivorship is hereinafter shortened to joint tenancy.

\(^2\) Where several persons took equal shares in land by descent from the same ancestor, they took as tenants in coparcenary. Coparcenary arose under the common law when a person seised of fee simple or fee tail died and his property descended to his female heirs because no male heirs survived; it also arose when by local custom property descended to all the male heirs in equal degree. 2 W. BLACKSTONE, COMMENTARIES *187. There was no right of survivorship incident to this estate, and upon the death of each coparcener, his undivided share passed to his heirs at law. Id. at *188.

\(^3\) Where property was held by several persons such that each had a separate undivided share, a tenancy in common existed. 2 W. BLACKSTONE, supra note 2, at *194. The concept of distinct but undivided ownership formed the basis for the characteristic of the tenancy in common that, upon the death of a tenant in common the tenant’s interest passed to his heirs, there being no right of survivorship incident to the estate. Id. The only unity required for a tenancy in common is the unity of possession—each tenant in common is entitled to possession of the whole estate. Id. at *191. Thus, unlike a joint tenancy, it was not necessary to a tenancy
tirety and joint tenancy. Although this article is primarily concerned only with joint tenancy, most of the points discussed are also applicable to tenancy by the entirety where it still exists.

Joint tenancy and tenancy in coparcenary existed as early as the thirteenth century. Every conveyance of an estate of freehold to two or more persons in fee, in fee tail, or for life created a joint tenancy, given the presence of the requisites of such an estate, and absent any express words negating this presumption. Further, if the grantees were husband and wife the conveyance created a tenancy by the entirety. This common law preference for joint tenancies over the other types of concurrent ownership probably arose from the feudal relation. The right of survivorship prevented the division of tenures, with the consequent multiplication of feudal services and the weakening of the feudal relation between the lord and his tenants, since ownership remained in the surviving joint tenants.

in common that the tenants acquire their titles simultaneously, or from the same person, or even that they hold the same quantum of estate. Id. at *191-92. At common law, a tenancy in common arose in two ways: by the severance of an existing joint tenancy or by express words of severance in a grant to several persons. Id. at *192. See infra note 7 and accompanying text.

A tenancy by the entirety is a joint tenancy with the additional unity of marriage. It can exist only where the tenants are husband and wife at the time they take title to the property. H. Tiffany, supra note 1, ¶ 195. At common law, husband and wife were considered to be a unity, to constitute only one person; therefore, each tenant was considered to be the owner of all the property and was said to hold per tout et non per my, i.e., by all and not by half. 2 W. Blackstone, supra note 2, at *182. Neither tenant could alienate the property without the consent of the other. Id. On the death of one of the tenants, the entire property accrued to the survivor in the same manner as in a joint tenancy. Id.

See infra note 81.

2 American Law of Property § 6.1 (A. J. Casner ed. 1952) [hereinafter referred to as Casner].

Id.

Id.

H. Tiffany, supra note 1, ¶ 190. "With the practical abolition of tenures, the reason for such policy ceased, and courts of equity, regarding the right of survivorship as unjust because it made no provision for posterity, inclined to construe an instrument as creating a tenancy in common, and not a joint tenancy." Id. The courts in this country followed suit, e.g., Westcott v. Cady, 5 Johns. Ch. 334 (N.Y. 1821), and many states adopted statutes which reverse the common law presumption and treat all instruments as creating tenancies in common unless a contrary intent is expressed. See, e.g., W. Va. Code §§ 36-1-19, -20 (1966); infra notes 83-84, and accompanying text. One state, Georgia, has abolished joint tenancies altogether. Ga. Code Ann. § 85-1002 (1978).
By the early fourteenth century, whenever one or more of the unities was lacking at the creation of the joint estate, or was later severed, a tenancy in common, which required only the unity of possession, would result. The survivorship right was destroyed upon creation of the tenancy in common, and each tenant owned an undivided, inheritable share.\(^{10}\)

At common law, the four unities necessary to create an estate in joint tenancy were: the unity of interest, the unity of title, the unity of time, and the unity of possession.\(^{11}\) First, the joint tenants had to have one and the same interest. One joint tenant could not be entitled to a period of duration or quantity of interest in lands different from that of the other joint tenant.\(^{12}\) Second, all the joint tenants had to acquire title to their estates by one and the same conveyance or will or by a joint adverse possession, on the rationale that if each tenant could hold under a different title, one might prove bad and one good, thereby destroying the jointure.\(^{13}\) Third, the interests of all the joint tenants had to vest at the same time. Fourth, all the joint tenants shared possession of the whole; each had an "undivided moiety of the whole, and not the whole of an undivided moiety."\(^{14}\)

The primary feature of joint tenancy is the right of survivorship, the *jus accrescendi*.\(^{15}\) Upon the death of one joint tenant, the entire estate remains to the others. The heirs at law or devisees of the deceased joint tenant take no interest in the property through him, because only the last surviving joint tenant has an estate of inheritance in the property. The survivors, however, take no new

\(^{10}\) Casner, supra note 6, § 6.2.

\(^{11}\) 2 W. Blackstone, supra note 2, at *180; H. Tiffany, supra note 1, § 187.

\(^{12}\) 2 W. Blackstone, supra note 2, at *181.

\(^{13}\) Id.

\(^{14}\) Id. at *182.

\(^{15}\) Id. at *183-84. The right of survivorship could attach to a tenancy in common at common law. Doe ex dem. Borwell v. Abey, 105 Eng. Rep. 160 (K.B. 1813). "A tenancy in common with ... survivorship ... may exist, without being a jointenancy ... ." Id. at 163. The effect of the survivorship right that attached to a tenancy in common, however, was quite different than that incident to a joint tenancy. The most significant difference between a tenancy in common right of survivorship and a joint tenancy was that the former was destructible only with the consent of all the co-tenants. This was because the gift to the survivor in a tenancy in common was considered to take effect by virtue of the original conveyance and not by virtue of something involved in a limitation of joint tenancy. Taaffe v. Conmee, 11 Eng. Rep. 949 (H.L. 1862).
title from the deceased joint tenant; the survivors take their whole interest, including the survivorship interest, by and through the original conveyance or devise.\textsuperscript{18}

A joint tenancy can only arise by an act of the parties, \textit{i.e.}, by grant or devise, never by act of law. A joint tenancy is never created when the owner of land dies intestate; here the heirs at law take as tenants in common.\textsuperscript{17} Although at common law, it was also possible for a joint tenancy to arise from adverse possession,\textsuperscript{18} it probably cannot be created in this manner today in West Virginia and those states which have reversed the common law presumption of joint tenancy.\textsuperscript{19}

Although a joint tenant does not have an inheritable or devisable interest in the estate, his interest is freely alienable, and an alienation by one joint tenant of his interest severs the joint tenancy to at least some extent. For example, if one of two joint tenants conveys his interest to a third person, the joint tenancy is severed and the remaining joint tenant and the grantee each hold a one-half, undivided interest as tenants in common, because they hold by different titles.\textsuperscript{20} If one of three joint tenants conveys his interest to a fourth person, the grantee takes a one-third undivided interest as a tenant in common with the two remaining joint tenants who, as between each other, continue to hold a two-thirds undivided interest as joint tenants with right of survivorship.\textsuperscript{21}

Similarly, whenever one of the four unities was originally lacking, a joint tenancy could not be created, and any attempt to do so resulted in a tenancy in common. Therefore, an owner of property could not at common law create a joint tenancy in himself and someone else either by conveying a one-half interest in the property to another to hold with him as joint tenant, or by conveying the whole of the property to himself and another as joint tenants. Both of these "direct" methods of attempting to create a joint

\textsuperscript{18} Hernandez v. Becker, 54 F.2d 542 (10th Cir. 1931); J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 98 (1975); Brown, Some Aspects of Joint Ownership of Real Property in West Virginia, 63 W. VA. L. REV. 208 (1961).
\textsuperscript{17} 2 W. BLACKSTONE, supra note 2, at *180.
\textsuperscript{18} 2 H. TIFFANY, REAL PROPERTY § 422 (1939).
\textsuperscript{19} Brown, supra note 16, at 209-11; see infra notes 83-84, and accompanying text.
\textsuperscript{20} 2 W. BLACKSTONE, supra note 2, at *185.
\textsuperscript{21} Brown, supra note 16, at 211.
tenancy resulted in a tenancy in common, because two of the unities, those of time and title, were not present.22

A joint tenancy between the owner and another could be achieved, however, by making two conveyances instead of one. If the owner conveyed his property to a third person, a "straw party," who then reconveyed the property to the desired grantees as joint tenants, a valid joint tenancy resulted, because the four unities were then present.23

In addition to the requirement of compliance with the four unities, there were other obstacles to the creation of a joint tenancy or a tenancy by the entirety in the owner and another by a direct conveyance at common law. First, one could not convey to himself.24 Second, a husband and wife could not convey to each other since they were a legal unity.25 These requirements also led to the use of, and were satisfied by, intermediary straw party conveyances.

CREATION OF JOINT TENANCIES TODAY

It is still impossible in many states for a person to convey real property that he owns to himself and another as joint tenants without first conveying to a straw party.26 The trend of judicial decisions and legislative enactments, however, is clearly towards allowing a joint tenancy to be created in one conveyance.

Judicial Decisions

Courts in several jurisdictions have held that the common law

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22 Casner, supra note 6, § 6.2.
23 For purported disadvantages of the use of straw party deeds, see infra note 51 and accompanying discussion in text.
25 McCord v. Bright, 44 Ind. App. 275, 87 N.E. 654 (1909). At common law, a tenancy by the entirety was created by a deed or other instrument from a third person to the spouses and could not be created from a husband directly to his wife or from a wife directly to her husband no matter what intention was expressed. H. Tiffany, supra note 1, § 195. The oneness of husband and wife has been largely dissolved in all jurisdictions today by married women's property acts. Id.; Note, Joint Tenancy and Tenancy by the Entirety Four Unities Requirement, 36 Ky. L. J. 202 (1948).
26 Casner, supra note 6, § 6.2.
requirement of the four unities does not prevent the creation of a joint tenancy by a direct conveyance from the owner of property to himself and another. They have reached this result upon one of three rationales: (a) that the unities of time and title requirements are satisfied, (b) that the grantor's expressed intent should prevail over technical common law requirement, or (c) that it is absurd not to allow something which can be done indirectly to be done directly.

a.) Unidades of time and title are satisfied

The first case in an American jurisdiction which dealt with the question of whether joint tenancies could be created by a direct conveyance was Colson v. Baker. In this case, the New York court held that a conveyance by two persons who held the land as tenants in common to one of them and a third person as joint tenants created a valid joint tenancy, against contentions that the unities of time and title were not present. In examining what was meant by the requirement that the four unities be present to create an estate of joint tenancy, the court specified that it was the estate of joint tenancy, not ownership in general, which must be created by the same act or instrument and arise in each tenant at the same time. In other words, a joint tenancy cannot be created by act of law or through descent, but when the owner of the fee attempts to create a joint tenancy for himself and another by a direct conveyance, the joint tenancy is created for both joint tenants at the same time and by the same act.

A second type of direct conveyance (the fee owner conveys a one-half undivided interest to the grantee with the intention ex-

27 Greenwood v. Commr., 134 F.2d 915 (9th Cir. 1943); Switzer v. Pratt, 237 Iowa 788, 23 N.W.2d 837 (1946); Haynes v. Barker, 239 S.W.2d 996 (Ky. 1951); Therrien v. Therrien, 94 N.H. 66, 46 A.2d 538 (1946).

28 The only earlier case was Cameron v. Steves, 9 N.B. 141 (1858), which held that a man could not convey land to himself, although he could reserve to himself an equal undivided interest if he attempted to create a tenancy in common. In this case, however, the owner had conveyed the land to himself and two others as trustees, which under the applicable statute automatically created a joint tenancy; therefore, the whole estate vested in the other two grantees as joint tenants.

29 42 Misc. 407, 87 N.Y.S. 238 (1904).

30 Id. A second New York case decided a year later, Saxon v. Saxon, 46 Misc. 202, 93 N.Y.S. 191 (1905), also held that a deed from a husband to himself and his wife, for their joint lives, and upon the death of either, to the survivor, created a valid joint tenancy.
pressed that they hold as joint tenants) was approved twelve years later in Matter of Horler.\textsuperscript{31} There, the New York court upheld such a joint tenancy upon the same rationale as was used in Colson. Although the grantor was not also a grantee, the court still disregarded the source and time of the original acquisition of his interest and looked to his interest in the joint estate, which, the court said, arose out of the conveyance from him to the grantee, and therefore arose at the same time and from the same source as the grantee's.\textsuperscript{32}

b.) Grantor's express intent should prevail

Courts have held that the deed in question created a valid joint tenancy (or tenancy by the entirety) in a second group of cases on the basis that the requirement that the four unities be present is a technicality of the common law and the lack of some or all of them should not prevail over the grantor's express intent.

In Switzer v. Pratt,\textsuperscript{33} the husband-owner and his wife had conveyed his property to themselves as "joint tenants and not as tenants in common, with the right of survivorship."\textsuperscript{34} The wife, as survivor, entered into a contract with defendants to sell the property to them; they then declined to accept title to the property claiming that the deed from plaintiff and her husband to themselves did not create a joint tenancy and that plaintiff did not have full and complete title to the property under that deed. The court held that a valid joint tenancy had been created, stating that "the intention of the parties should prevail over the technical common law rules."\textsuperscript{35}

Similarly, most federal decisions which have held that a joint tenancy may be created by an owner conveying to himself and another have reached this result by ignoring the common law rules.\textsuperscript{36} In Greenwood v. Commr.,\textsuperscript{37} the Ninth Circuit, citing its

\begin{itemize}
\item \textsuperscript{31} 180 A.D. 608, 168 N.Y.S. 221 (1917).
\item \textsuperscript{32} Id.
\item \textsuperscript{33} 237 Iowa 788, 23 N.W.2d 837 (1946).
\item \textsuperscript{34} Id. at 790, 23 N.W.2d at 838.
\item \textsuperscript{35} Id. at 791-92, 23 N.W.2d at 839.
\item \textsuperscript{36} Greenwood v. Commr., 134 F.2d 915 (9th Cir. 1943); Irvine v. Helvering, 99 F.2d 265 (8th Cir. 1938); Edmonds v. Commr., 90 F.2d 14 (9th Cir. 1937), cert. denied, 302 U.S. 713 (1937).
\item \textsuperscript{37} 134 F.2d 915 (9th Cir. 1943).
\end{itemize}
earlier decision in *Edmonds v. Comr.*, 38 upheld a joint tenancy created in a safety deposit box. The court reaffirmed its position that "the technical view should give way to the intention of the parties, and . . . a joint tenancy may be created by conveyance from one to himself and another as joint tenants." 39

c.) Requirement of indirect conveyancing absurd

One of the leading cases judicially abrogating the requirement that the four unities be present to create a valid joint tenancy is *Therrien v. Therrien*, 40 wherein the wife conveyed an estate she owned to her husband, stating in the granting clause, "To be held by him with this grantor in joint tenancy with full rights of ownership vesting in the survivor." 41 The habendum clause read, "to him the said grantee as joint tenant." 42 In holding that the deed created a joint tenancy, the court based its decision upon two factors. First, the court looked at the intent of the parties and said that the "interest created is that which the parties intended to create, without regard to rules or titles coming down from feudal times." 43 Next, the court examined the requirement of the four unities and held that "[t]he necessity of requiring an extra deed makes a fetish out of form and compels the parties to the instrument to employ an indirect manoeuvre of the eighteenth century merely to satisfy the outmoded unities rule . . . . Neither public policy, statutes or reason prevent the parties from doing directly that which they may accomplish through a straw man indirectly." 44

At the time of the *Therrien* decision, however, New Hampshire had a statute45 which permitted direct conveyances between husband and wife of any conveyance that could lawfully be done through a third party. The court expressed doubt that this statute included joint tenancies because, the court stated, a married woman's right to make any conveyance to her husband had not been judicially determined at the time of its enactment (1899). At

38 90 F.2d 14 (9th Cir. 1937).
39 134 F.2d at 921.
41 Id.
42 Id.
43 Id. at 67, 46 A.2d at 538.
44 Id. at 68, 46 A.2d at 539.
45 N.H. REV. LAWS c. 340, § 5 (current version at N.H. REV. STAT. ANN. § 460:5 (1968)).
common law, however, a married woman could convey her property to a straw party and have it conveyed back to her and her husband as joint tenants. Therefore, the words of the statute do seem sufficiently broad to support the court's holding, so that the court's rationale based on intent should be characterized as mere dictum.

A Connecticut case, Curtis v. Smithers, cited Therrien in concluding that the deed in dispute therein did create a joint tenancy. The court held that

since it is plain that an owner may create a joint tenancy or a tenancy by the entirety in himself or another by the use of a straw man, and in such case no interest or estate of any sort remains in the intermediary, it ought logically to follow that the unities of time and title so obtained are precisely those secured by a direct conveyance.

The Curtis court also held that even if the rule that the four unities be met was applied, it was reasonable to conclude that they were all present. The court stated that an estate in joint tenancy or one by the entirety differs from an estate held by tenants in common or by a sole owner, and therefore, that

it would seem not illogical, and not a departure from technical concepts, to consider that where a sole owner conveys property to another and himself as joint tenants, or as tenants by the entirety, he is intending to create a new estate in himself as well as in the other person, and consequently that in such a case the unities of time and of title are in fact present, since their title comes into existence by such conveyance.

Problems with, and the inconvenience of using, a straw party have also been reasons frequently given by scholars for allowing joint tenancies to be created by direct conveyances from the landowner to himself and another. Often cited disadvantages of using the straw party method include: (1) it requires two conveyances to accomplish a single transaction; (2) it unnecessarily clutters up

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46 "Real estate may be conveyed directly by husband to wife, or wife to husband, in all cases where the same thing might lawfully be done through the intervention of a third person." N.H. REV. STAT. ANN. § 460:5 (1968).
47 Note, 23 NOTRE DAME L. 103 (1947).
49 Id. at 327, 134 A.2d at 579, citing Annot., 44 A.L.R. 2d 598 n.9 (1955).
50 Id.
overflowing recording offices; (3) the second deed is an unnecessary expense to the landowner; (4) the straw party may refuse to reconvey the property to the real owner; and (5) it may create additional problems that frustrate the intent of the parties. For example, the straw party may have a judgment against him which will attach to the land, or he may be married so that his spouse obtains a dower interest in the property, or if he gives a warranty deed in making his conveyance, he may render himself liable on the covenants, even though he was owner only momentarily and was never intended to have any beneficial interest.\textsuperscript{51} No cases involving any of these problems, however, were discovered in this writer's research.

The thrust of the argument against straw party deeds is that their use is merely a formality since the creation of joint tenancies is not illegal \textit{per se}, and since under the Statute of Uses joint tenancies could be created by a single instrument even though the interests arose at different times,\textsuperscript{52} or through a single conveyance to a trustee.\textsuperscript{53}

d.) \textit{Common law requirements are valid}

While it is true that requiring straw party deeds is not consistent with simplified modern conveyancing techniques, to decide \textit{judicially} that the presence of the four unities is not necessary to the creation of a joint tenancy strikes down more than just a technicality and leaves unconsidered other problems, such as the severance of joint tenancies. Consequently, courts in most of the jurisdictions which do not have statutes permitting a landowner to convey to himself have held that the attempt to create a joint tenancy by a direct conveyance fails due to the lack of the unities of time and title or because one cannot convey to himself.\textsuperscript{54} Most

\begin{footnotesize}
\item[52] Brent's Case, 3 Dyer 340a, 73 Eng. Rep. 766 (1575). In this case an enfeeftment to the use of the wife and on her death to the use of the feoffor and his wife that he should thereafter marry was held to create a joint tenancy in the feoffor and his second wife. See H. TIFFANY, supra note 18, at 197.
\item[53] See 32 Iowa L. Rev. 155 (1946).
\end{footnotesize}
courts have held that such a deed will create a tenancy in common in the grantees, because this estate requires only the unity of possession and the grantor is considered to be retaining an interest in himself rather than conveying something to himself.\(^{55}\)

In *Wright v. Knapp*,\(^{66}\) the Michigan court held that the deed of a homestead from a husband-landowner to himself and his wife jointly, "the survivor to have full ownership of the same place,"\(^{57}\) created neither a joint tenancy or a tenancy by the entirety because the four unitities were not present, but did create a tenancy in common, with both parties owning an undivided half interest that would descend to their respective heirs at their deaths.

In *Deslauriers v. Senesac*,\(^{68}\) the decedent had been the sole owner of a lot. After her marriage to her husband (plaintiff), they executed a deed purporting to convey the property to themselves as joint tenants: "Said grantors intend and declare that their title shall and does hereby pass to grantees not in tenancy in common but in joint tenancy."\(^{58}\) The husband survived, but in examining this deed to determine if he was the sole owner, the Illinois court held that no joint tenancy had been created. The court stated that the decedent could not by the deed executed convey an interest in the property to herself, but since it was manifest from the deed that she did not intend to convey the whole and entire interest to her husband, she retained an equal share or interest. But, the court stated, because the decedent and her husband had not acquired their interests in the property by the same title or at the same time, the unitities of time and title were lacking, and a tenancy in common, not a joint tenancy, was created. In response to the husband's argument that the grantors clearly intended to create a joint tenancy, the court stated that the intention of the parties is given effect whenever legally possible but that "[t]he operation of a deed on the legal title is not controlled by the intention of the parties but is governed by law."\(^{60}\)

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\(^{55}\) Deslauriers v. Senesac, 331 Ill. 437, 163 N.E. 327 (1928); Strout v. Burgess, 144 Me. 263, 68 A.2d 241 (1949); Wright v. Knapp, 183 Mich. 656, 150 N.W. 315 (1915); Cameron v. Steves, 9 N.B. 141 (1859); Note, *Joint Tenancy and Tenancy by the Entirety Four Unitities Requirement, 36 Ky. L.J. 202 (1948).*

\(^{56}\) 183 Mich. 656, 150 N.W. 315 (1915).

\(^{57}\) *Id.* at 657, 150 N.W. at 316.

\(^{58}\) 331 Ill. 437, 163 N.E. 327 (1928).

\(^{59}\) *Id.* at 438, 163 N.E. at 328.

\(^{60}\) *Id.* at 441, 163 N.E. at 329.
In *Stuehm v. Mikulski*, the Nebraska court also noted that the parties' intent had been to create a joint tenancy in a conveyance from the owner directly to himself and his wife, but held that the creation as well as the continued existence of a joint tenancy in Nebraska required the presence of the four unities and therefore only a tenancy in common had been created. The defendant had argued that Nebraska's "intent statute" should control, but the court said that the statute was only a rule of construction and emphasized that the statute itself limited its application to cases where "intent is consistent with the rules of law."

The result in other cases involving a conveyance from one person to himself and another has been that the entire fee vests in the other or that the other has a half interest with a remainder in the other half of the property. In *Hicks v. Sprankle*, the Tennessee court reasoned that since the instrument purported to convey the entire fee and since one cannot take under her own deed, the effect was to vest the title in the grantee who was capable of taking. The Oregon court, in *Dutton v. Buckley*, gave effect to a specific

Two subsequent Illinois cases in which the intent to create a joint tenancy by a direct conveyance from the owner to himself and another was clearly expressed also held that only tenancies in common had been created. The first, *Porter v. Porter*, 381 Ill. 322, 45 N.E.2d 635 (1942), was another case involving a husband and wife as grantors and grantees and relied on the rationale in *Deslauriers*. In the second, *Dolley v. Powers*, 404 Ill. 510, 89 N.E.2d 412 (1949), a father who owned property conveyed it to himself and his son "not as tenants in common but as joint tenants, so that upon the death of one all the entire fee simple title shall vest in the survivor." *Id.* at 512, 89 N.E.2d at 413. The court stated that "[w]hile it was clearly the intention of the parties that the title vest in the grantees as joint tenants, the deed was not legally effective to create an estate in joint tenancy." *Id.* at 514, 89 N.E.2d at 414. In holding that the deed created a tenancy in common, the court stated that

[t]he reason that the grantees did not take title in joint tenancy is not because the intention of the grantor could not be ascertained, but because, under the law, a joint tenancy could not be created in the manner attempted. The operation of a deed on the legal title is not necessarily controlled by the intention of the parties but is governed by law.

*Id.* at 514, 89 N.E.2d 414-15.

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61 139 Neb. 374, 297 N.W. 595 (1941).
62 Neb. COMP. STAT. § 76-109 (1929) (current version at Neb. REV. STAT. § 76-205 (Reissue Revised Statutes 1943).
63 139 Neb. at 381, 297 N.W. at 599.
64 149 Tenn. 310, 287 S.W. 1044 (1924).
65 116 Ore. 661, 242 P. 626 (1926).
provision for survivorship, although it said a joint tenancy had not been created.

One of the reasons given to support decisions that uphold the common law is that judicial abrogation of the four unities requirement deals with only part of the whole picture: the common law unities have become criteria not only in the *creation* of joint estates, but also in their *severance*. Because the presence of the four unities became a requirement for the creation of joint tenancies, destroying one or more of the unities developed as the means to sever these estates and thereby destroy survivorship in the estate between the parties. "The well-established rule that a joint tenant may sever the joint character of his title in real or personal property is based on the theory that such conveyance destroys the unities of time and title."66 It is difficult to see how a joint tenancy, created by intent without regard to the four unities, can be terminated by a destruction of one of the unities. The abrogation of the unities requirement therefore creates some difficulty in determining what effect a transfer by one joint tenant to a third party would have upon the form of ownership of the other tenant and the transferee. These problems, as well as others, could be better handled by careful legislative consideration and an inclusive statute than by case-by-case adjudication.

**Legislative Enactments**

The requirement that the four unities be present to establish a joint tenancy in England was abolished by the Conveyancing Act of 1881,67 which authorized direct conveyances.

Legislatures in a number of states have also enacted statutes which permit the owner of real property to create a joint tenancy by conveying to himself and others.68 Some of this legislation has

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66 Bassler v. Rewodlinski, 130 Wis. 26, 109 N.W. 1032 (1906).
been the direct result of judicial decisions holding that such conveyances created only tenancies in common.\(^6\) Most of the statutes allow conveyances in which one or more of the grantors are among the grantees to have the same effect as if the grantor(s) were not also grantees, or as if the conveyance had been made through a straw party; some are expressly retroactive or have been applied by the courts to deeds made prior to the statutory effective dates.\(^7\)

In addition to the various state statutes, other attempts to abolish the common law requirements of the four unities\(^8\) and to alleviate the need for courts to make fine distinctions or reinterpret common law in order to prevent injustice\(^9\) have been made. The first came in 1925 when the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Model Interparty Agreement Act.\(^10\) The Act, which has been adopted by four states,\(^11\) relates to transactions between a person acting on his own behalf and the same person acting jointly with others. Section 1 of the Act provides that "[a] conveyance, release or sale may be made to or by two or more persons acting jointly and one or more, but less than all, of these persons acting


\(^6\) Nebraska adopted the Uniform Property Act within ten weeks of the Stuehm decision; see supra note 61 and accompanying text.

\(^7\) E.g. Kluck v. Metsger, 349 S.W.2d 919 (Mo. 1961), in which the Missouri court applied a statute enacted in 1953 to a deed executed in 1943 to uphold a tenancy by the entirety.

\(^8\) Uniform Property Act, Commissioners' Prefatory Note, 9B Uniform Laws Annotated 630.

\(^9\) Model Interparty Agreement Act, Commissioners' Prefatory Note, 9B Uniform Laws Annotated 302.

\(^10\) Id. It was originally a Uniform Act, but was redesignated a Model Act at the 1943 Conference of Commissioners on Uniform State Laws.

either by himself or themselves or with other persons; and a contract may be made between such parties." This section has been interpreted to enable one person to make a conveyance of his land to another person jointly with himself.

The second uniform act which permits a person to convey to himself and others as joint tenants is the Uniform Property Act, approved in 1938. Section 18 of the Act is "intended as a recognition of a declaration of intention between parties with reference to their ownership in property." It provides:

(1) Any person or persons owning property which he or they have power to convey, may effectively convey such property by a conveyance naming himself or themselves and another person or persons, as grantees, and the conveyance has the same effect as to whether it creates a joint tenancy, or tenancy by the entireties, or tenancy in common, or tenancy in partnership, as if it were a conveyance from a stranger who owned the property to the persons named as grantees in the conveyance.

(2) Any two or more persons owning property which they have power to convey, may effectively convey such property by a conveyance naming one, or more than one, or all such persons, as grantees, and the conveyance has the same effect as to whether it creates a separate ownership, or a joint tenancy, or a tenancy by the entireties, or tenancy in common, or tenancy in partnership, as if it were a conveyance from a stranger who owned the property, to the persons named as grantees in the conveyance.

(3) Any "person" mentioned in this Section may be a married person, and any "persons" so mentioned may be persons married to each other.

The Uniform Property Act has been adopted by one state to date.

**Creation of Joint Tenancies in West Virginia**

West Virginia has three primary forms of joint ownership:

73 **9B Uniform Laws Annotated** 303.
77 **Uniform Property Act, Commissioners' Prefatory Note, 9B Uniform Laws Annotated** 630.
78 **Id. at** 637.
80 Nebraska (NEB. REV. STAT. § 76-118 (1970)).
81 Tenancy by the entirety has been abolished in West Virginia. Wartenburg
tenancy in coparcenary,62 tenancy in common,63 and joint tenancy.

Common Law Presumption Reversed

West Virginia is one of many states which has statutorily abandoned the common law presumption favoring joint tenancies and embraced instead the presumption that a tenancy in common is created unless the intent to create survivorship is specifically stated in the conveyancing instrument.64

There are three statutes in West Virginia relating to joint tenancies in real property.65 The first provides that when any joint tenant of an interest in property dies, his interest shall descend or be disposed of as if he had been a tenant in common.66 The second statute provides that the first statute shall not apply to any estate which joint tenants have as executors or trustees, nor to any estate "when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should then belong to the others." 67 The third statute permits a direct conveyance


62 An estate in parcnary is created where lands of inheritance descend from a decedent to two or more persons as joint heirs. Under W. Va. Code § 42-1-1 (1966), when the owner of any real estate of inheritance dies intestate, it passes to his heirs and they become coparceners of the estate.

63 All conveyances of joint ownership in West Virginia are presumed to be tenancies in common, unless survivorship is specifically provided for. W. Va. Code §§ 36-1-19, -20 (1966). See discussion infra.

64 Id.; 48 C.J.S. Joint Tenancy § 2.

There are no West Virginia cases involving deeds which specify the exact words which must be used in a deed to create survivorship. See generally Rastle v. Gamsjager, 151 W. Va. 499, 153 S.E.2d 403 (1967); DeLong v. Farmers Bldg. & Loan Ass'n, 148 W. Va. 625, 137 S.E.2d 11 (1964).

65 Joint tenancies in personal property are governed by different statutes in this state and are not considered in this article except by analogy.


67 Id. at § 20. Although no particular words are necessary to create a joint tenancy, the use of the words "[a] joint estate or one to donees, share and share alike, etc., is not enough." The right of survivorship must be clearly spelled out in the instrument creating the joint tenancy. Wallace v. Wallace, 168 Va. 216, 229, 190 S.E. 293, 298 (1937), construing W. Va. Code § 5160 (1919) (current version at W. Va. Code §§ 55-21 (1974 Replacement Vol.), identical to W. Va. Code § 36-1-20 (1966).

"[A]nd to the survivor of them” in a habendum clause is sufficient to create a joint tenancy in West Virginia. Realty Securities & Discount Co. v. National Rubber &
from husband or wife to himself or herself and the other as a valid joint tenancy with right of survivorship without an intervening deed to a straw party.\textsuperscript{68}

Present Day Joint Estates

Against the foregoing background, the question of whether the four unities are still necessary to create a valid joint tenancy in West Virginia today can now be dealt with properly.

Consider the following hypothetical situations: a landowner [A] is the sole owner of a piece of property and wishes to establish a joint ownership with right of survivorship with her spouse [B] in the land. Can A effectuate her intent by making a direct conveyance to herself and B as joint tenants, in other words, A \rightarrow A & B, without an intervening straw party deed? The answer is clearly yes; a conveyance to oneself and one’s spouse is expressly permitted by section seven-a, article three, chapter forty-eight [§ 48-3-7a] of the West Virginia Code, enacted in 1974.

The same result, however, is not likely in a second situation. A landowner [O], a widower, desires to create a joint tenancy in a piece of property with his daughter [D]. Would a deed naming him as grantor and him and his daughter as grantees, in other words, O \rightarrow O & D, or a deed conveying a one-half undivided interest in the property to his daughter, in other words, \( \frac{1}{2} \text{ undiv. int.} \rightarrow D \), with O’s intent clearly expressed that he and D are to hold as joint tenants and that the entire property shall belong solely to the survivor of the two accomplish the grantor’s intent? Under the present law in West Virginia the answer appears to be no in either case.\textsuperscript{69}

There are at least four grounds which support the conclusion that there must be a unity of time, title, interest, and possession to create a valid joint tenancy in West Virginia: (a) such a result would follow past judicial decisions in which it has been held that joint tenancies are subject to all the limitations attaching to such estates at common law; (b) case law establishes that effect will be given to the intent of the parties only when it is not contrary to

\textsuperscript{68} \textit{See} Brown, \textit{supra} note 16, at 209-10, 227.
any rule of law; (c) an analogy may be drawn from cases involving joint tenancies in personal property which indicate that the common law requirements are still valid in the absence of statutory provisions to the contrary; and (d) permitting the creation of a joint tenancy in such a situation without the presence of the four unities appears contrary to legislative intent, or at least legislative interpretation of the current requirements in West Virginia.

a.) Common law limitations

After discussing the statutory provisions affecting the creation of joint ownership estates in West Virginia, particularly the aspect of survivorship, the court in Neal v. Hamilton, 90 concludes:

True in this State as in Virginia the right of survivorship, at common law, is abolished by statute, but this is not so, if the deed, or as here, the will, expressly limits the estate granted or devised to the survivor. When so limited the grantees or devisees take joint estates only, subject to all the limitations attaching to such estates at common law. 91

Obviously, a primary limitation on the creation of a joint tenancy at common law was that the four unities be present. Indeed, as previously discussed, 92 if one of the unities was lacking at the creation of the interest or severed after the joint estate was established, a tenancy in common, which required only the unity of possession, would result, with each tenant owning an undivided inheritable share, free from the incident of survivorship. 93

b.) Expressed intent of the parties

There is extensive case law in West Virginia establishing what effect is to be given to the expressed intent of the parties to an instrument. 94 In Swope v. Pageton Pocahontas Coal Co., 95 the court said that “[e]ffect must always be given to the plain intent of the

90 70 W. Va. 250, 73 S.E. 971 (1912).
91 Id. at 262, 73 S.E. at 975 (emphasis added).
92 See supra note 10, and accompanying text.
93 Casner, supra note 6, § 6.2.
parties, if such intention can be ascertained from considering the whole instrument and *is not contrary to law*" (emphasis added). Deference to the parties' intent is a rule of construction and is subordinate to established rules of law, such as the common law requirements, adopted in West Virginia, for the creation of estates in joint tenancy.86

c.) *Joint tenancies in personal property*

An analogy to the creation of joint tenancies in personal property further demonstrates the unlikelihood that joint tenancies may be created by a conveyance from a landowner to himself and another in West Virginia without an intervening straw party deed. Under the banking laws of this state, a joint tenancy is created when a deposit is made in a banking institution in the name of the depositor and another or others in the form to be paid to any of them during their lifetimes or to the survivor or survivors of them.87 In *Lett v. Twentieth St. Bank*,88 the West Virginia Supreme Court of Appeals, under a previous statute with similar provisions,89 upheld a joint tenancy created in much the same manner. The facts in *Lett* showed that Boyd Wilson deposited sums at two different times into a savings account denominated "Boyd or Delania Wilson" at defendant bank. Three years later, Wilson added his sister, Prudence Lett, as a depositor and had her fill out a signature card. After Boyd and his wife, Delania, died, Lett instituted a proceeding against the bank to recover the money in the savings account as the sole survivor and therefore sole owner of the deposit. The court relied on section twenty-three, article eight, chapter thirty-one [§ 31-8-23] of the West Virginia Code90 to uphold Lett's claim that she was entitled to all of the money as the survivor. Under this statute, the court held a joint tenancy had been created even though it was probable that all of the money deposited in the savings account had belonged to Boyd Wilson before the account was created and that Lett's interest in the account accrued three

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86 This was the approach of the Nebraska court in *Stuehm v. Mikulski*, 139 Neb. 374, 297 N.W. 595 (1941); see *supra* note 61 and accompanying text.


90 This provision is similar and has been replaced by *W. Va. Code* § 31A-4-33 (Cum. Supp. 1975).
years after the Wilsons'.

In *DeLong v. Farmers Bldg. & Loan Ass'n*, 101 a similar account was established in a savings and loan association. In *DeLong*, however, the court held that no joint tenancy had been created, because section nineteen, article one, chapter thirty-six [§ 36-1-19] of the West Virginia Code had generally abolished survivorship in joint tenancies in real and personal property, and the provisions of section twenty-three, article eight, chapter thirty-one [§ 31-8-23],102 restoring survivorship, were limited to banking institutions. These cases clearly support the inference that the common law requirements to create a joint tenancy are still applicable in West Virginia in the absence of a specific contrary statute.

d.) Legislative action

Recent legislative activity also supports the conclusion that the four unities are still required to create a joint tenancy in West Virginia. On March 5, 1974, the West Virginia Legislature enacted section seven-a, article three, chapter forty-eight [§ 48-3-7a] of the West Virginia Code, which permits the creation of valid joint tenancies by direct conveyances between husband and wife to the same extent as was previously accomplished by transfer from a third party to the husband and wife or by a straw party deed. Obviously such a provision would not be needed, and, indeed, would serve no purpose, if it were possible to create joint tenancies in West Virginia by a direct conveyance from a landowner to himself and another without regard to the four unities.

This same conclusion was reached by the Wisconsin court in *Hass v. Hass*.103 In *Hass*, a widow attempted to create a joint tenancy in lands she owned by making a conveyance to herself and her son. At the time the conveyance was made and *Hass* was decided, Wisconsin had two statutes relating to joint tenancies in real property. The first,104 similar to section nineteen, article one, chapter thirty-six [§ 36-1-19] of the West Virginia Code, established a presumption in favor of tenancies in common. Subsection (3) of the second statute,105 similar to section twenty, article one, chapter

102 See supra note 105.
103 248 Wis. 212, 21 N.W.2d 398 (1946).
104 Wis. STAT. ANN. § 230.44 (West).
105 Id. at § 230.45.
thirty-six [§ 36-1-20] of the West Virginia Code, provided that a joint tenancy could be created if the conveying language expressed such an intent. Subsection (2) of the same statute,106 similar to section seven-a, article three, chapter forty-eight [§ 48-3-7a] of the West Virginia Code, allowed a joint tenancy to be created by a conveyance between husband and wife of land he or she owned if the intent to create a joint estate between the grantor and grantee was expressed.

The court held that the conveyance created only a tenancy in common. The court stated that "if the language of subsection (3) was broad enough to include a deed from an owner to himself and another as joint tenants, subsection (2) would be meaningless."107 The court noted that when the intent of the parties is expressly disclosed, it should be given effect, unless it contravenes some established rule of law, which, the court held, it clearly did in this situation.108

CONCLUSION

It is probable that the common law requirement of the four unities must still be satisfied in West Virginia to create a joint tenancy. Because the result of a direct conveyance between a landowner and another as joint tenants is not illegal per se, but must be accomplished indirectly, and because this rule tends to thwart the intent of the parties, action by the West Virginia Legislature to remedy the situation would seem appropriate.

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106 Id.
107 248 Wis. at 216, 21 N.W.2d at 400.
108 Because of the particular language used in the granting clause in Hass, "unto the said parties of the second part, a life estate as joint tenants during their joint lives and an absolute fee forever in the remainder to the survivor of them," however, the court did hold that survivorship was established. It held that the conveyance created a tenancy in common for the joint lives of the parties, with the survivor to take the remainder. However, in a subsequent case, Moe v. Krupke, 255 Wis. 33, 37 N.W.2d 865 (1949), in which the granting clause in a 1942 deed was simply between a brother, party of the first part, and him and his sister as joint tenants, parties of the second part, the Wisconsin court held that a tenancy in common, with no remainders of any kind, was created. The court reached this result even though the Wisconsin legislature amended subsection (3) of § 230.45 of the Wisconsin Code in 1947 to allow the creation of joint tenancies by a direct conveyance from a grantor to himself and another. The court held that the amendment "creates a new estate unknown to the common law. The language of the amendment is a contradiction in terms as those terms were defined at common law" and would only be applied to deeds executed after its effective date.