February 1959

**Joint Estates in Real Property in West Virginia**

Robert L. Merricks

Follow this and additional works at: [https://researchrepository.wvu.edu/wvlr](https://researchrepository.wvu.edu/wvlr)

Part of the Property Law and Real Estate Commons

**Recommended Citation**


This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
JOINT ESTATES IN REAL PROPERTY IN WEST VIRGINIA

ROBERT L. MERRICKS

The extensive increase in home ownership, fostered by recent liberal money lending policies, including low down payments on loans guaranteed by the Federal Housing Administration immediately prior to World War II, and continued after the war by similar policies promoted by both the FHA and the Veterans Administration, has resulted in the reappearance of joint estates, created by deed, particularly between husband and wife. Prior to the depression years of the 1930's, title to the great majority of owner-occupied real estate was vested in either the husband or the wife, seldom in both. Where the title was vested in both, without more, the general opinion of the bar and bench was that they held as tenants in common. With the recent rise in home ownership, has come more joint ownership of the home property by spouses. Perhaps the economic liberation of women, occasioned by more wives receiving money wages, has been an important factor. At any rate, lawyers practicing in the field of real property now estimate that about 90% of the deeds written in the more populous counties of this state, conveying real property for use as a home, are made to both husband and wife, and about 90% of such deeds contain some sort of language, creating or attempting to create some kind of survivorship between such husband and wife. The purpose of the use of survivorship language seems to be, primarily, to keep the real estate from passing to infant children in the event of the intestate death of one of the parents. Such use of survivorship language is a poor substitute for a will, but most practitioners realize that the percentage of married persons, in the average middle range of economic circumstances, who have executed wills, remains low. Hence the use of joint estates with survivorship has grown.

* Member of the Kanawha County bar.

1 The West Virginia Supreme Court and bar seemingly ignored the case of McNeely v. South Penn Oil Co., 52 W. Va. 616, 44 S.E. 508 (1902), wherein it was held that a conveyance to husband and wife created a joint tenancy, not a tenancy in common. See Edwards v. Edwards, 117 W. Va. 505, 185 S.E. 904 (1936), and Coffman v. Coffman, 108 W. Va. 285, 150 S.E. 744 (1929), wherein the deeds evidently were to husband and wife, without more. In each case, no mention was made of the McNeely case or its holdings. Since the joint tenancy in the McNeely case is without survivorship, the effect is practically the same as a tenancy in common between husband and wife. W. Va. Code ch. 36, art. 1, § 19 (Michie 1955). See also syllabus 1, Wartenburg v. Wartenburg, 100 S.E.2d 582 (W. Va. 1957).
WEST VIRGINIA LAW REVIEW

The tremendous surge in the use of such estates in West Virginia has resulted in a great deal of confusion among attorneys, in drafting deeds, as to just what type of estate to create, and, after its creation, as to what incidents can be attributed to the estate so created. The recent case of Wartenburg v. Wartenburg\(^2\) is an example.

This was a case of a husband seeking partition of two jointly-owned parcels of land. Two separate tenancies are dealt with. One deed, dated August 28, 1948, created a joint life estate. The other deed dated June 19, 1948, created a joint tenancy. The circuit court fell into the usual confusion and held that both deeds created estates by the entireties; "the parties 'being husband and wife, took an estate by the entireties in the property conveyed.'" Partition was denied. The supreme court stated, "no contention is made and we perceive no presently material difference or effect, as to the meaning of the language used in the respective deeds." The court held that both were joint tenancies, and partition was allowed. Neither tenancy was a tenancy by the entireties, but the court, in syllabus 1, stated that common law estates by the entirety have been abolished. We have no quarrel with the holding of the Wartenburg case; partition is permitted by statute in a joint tenancy, and the case of Bush v. Ralphsnyder\(^3\) holds that a life tenant may compel partition in a joint life estate.

This article is concerned only with real property. Different rules have been applied in many cases dealing with survivorship in jointly-owned personal property.

There are four general types of real property joint estates, having incidences of survivorship:

Type 1. A joint life estate; e.g., to A and B (or A, B and C, etc.,) for life with remainder to the survivor.

Type 2. Tenancy in common, with survivorship; e.g., to A and B (or A, B, C, etc.,) as tenants in common, with survivorship.

Type 3. Joint tenancy; e.g., to A and B (or A, B, C, etc.,) as joint tenants with survivorship, and not as tenants in common.

Type 4. Tenancy by the entireties; e.g., to H and W as tenants by the entireties, with survivorship.

For convenience, these types will be referred to by type numbers.

\(^2\) 100 S.E.2d 562 (W. Va. 1957).
\(^3\) 100 S.E.2d 484, 130 S.E. 897 (1928).
JOINT ESTATES

Although we are here dealing primarily with joint estates between husband and wife, the tenancies in types 1, 2 and 3 may be between A and B, not husband and wife, or between A, B, C, etc., ad infinitum. In types 1 and 2, the interest of A in the real property does not have to be the same as B, e.g., A may own \( \frac{3}{4} \) and B \( \frac{1}{4} \) or A may own \( \frac{1}{4} \), B \( \frac{1}{4} \) and C \( \frac{1}{4} \). In type 3, the interests have to be the same, no matter how many tenants. Only in type 4 is the tenancy limited to a husband and a wife, and no more.

The common law incidents of these estates will be considered in order to understand them as they exist today in West Virginia, limited and altered by statute and by decisions of our supreme court.

In all four types, it is the generally accepted rule that the survivor takes the whole of the real property,\(^4\) and it is also generally accepted that any cotenant may convey his interest to any other cotenant. Such a conveyance to a cotenant terminates his own interest in the real property, including his right to take as a survivor in type 2, 3 and 4 tenancies.\(^5\)

\(^4\) An exception is the case of murder of one tenant by another, holding that the survivor could not profit by his illegal act. Bradley v. Fox, 7 Ill. 2d 108, 129 N.E.2d 699 (1955).

\(^5\) 1 MINOR, REAL PROPERTY § 908 (1908), citing 2 MINOR, INSTITUTES 471 (1875), reads:

"It is one of the incidents of a joint tenancy, as we have seen that while the tenants hold per mie et per tout, yet each may convey to a cotenant or to a stranger a distinct share.

"In this respect, the tenancy by the entireties differs radically from an ordinary joint tenancy. While the husband at common law, under his ordinary marital right of disposing of and managing his wife's lands during the coverture, might during the coverture control and dispose of his wife's share of the land held by entireties, yet with this exception, in consequence of their legal oneness, neither can dispose absolutely even of his or her own part of the property without the other's assent, but the whole remains at common law to the survivor."

We can hardly conceive of a case where the receiving spouse would refuse his consent, actual or implied, by acceptance of the conveyance. 2 MINOR, INSTITUTES 471, 472 (1875), contains only the following pertinent language: "It would seem that even now, in case of a tenancy by entireties, the parties cannot separately alienate their respective shares."

The word "aliens" as used here, would indicate a conveyance to a stranger, not to a spouse cotenant. 26 AM. JUR. HUSBAND AND WIFE § 257 (1940):

"The view has been taken that one spouse can convey or transfer to the other spouse the former's interest in an estate held by them by the entireties so as to relinquish his or her rights in such estate and vest it as a separate estate in the grantee or transferee, and this has been held to be true even in jurisdictions where neither spouse can convey or transfer any interest in such an estate without the consent of the other, the theory being that such consent is to be implied from the grantee or transferee spouse's acceptance of the conveyance or transfer."

A careful analysis of each type of estate, not generally done by the courts or lawyers, shows that each has separate incidents, particularly during the lifetime of the tenants.

Type 1, a joint life estate, was formerly in general use, in some parts of this state, but a question was raised as to where the title would vest, in the event both life tenants were killed simultaneously in a common accident or disaster; in view of the possibility that the title might revert, in such event, back to the grantor, the use of this type was generally abandoned.6

Type 2, a tenancy in common, with survivorship, is not in general use in this jurisdiction. In the opinion of this writer, this type of survivorship is created by the language, "to A and B, and to the survivor of them," which language has been sometimes used in deeds in this jurisdiction.7

The large majority of deeds containing survivorship clauses, use language to create type 3, a joint tenancy. This is often confused with type 4, an estate by the entireties; some courts misdescribe the type 4 tenancy as a joint tenancy by the entireties. Actually, at common law, the two estates were very different, with dissimilar incidents and characteristics, both while the tenants were living and after their death.

The main incidents of a joint tenancy, one of the estates in the Wartenburg case, are that the estate has the four common law unities, of time, title, interest and possession. Breach of any one of

6 The Uniform Simultaneous Death Act, adopted in 1953, W. Va. Code ch. 42, art. 5, § 1 (Michie 1955), eliminates the possibility of revert in the type 1, joint life estate tenancy.

7 Some authorities hold that one tenant in a type 2 tenancy in common with survivorship cannot convey his undivided interest away and thereby defeat the survivorship. See Burns v. Nolette, 83 N.H. 489, 496, 144 Atl. 848, 352, 67 A.L.R. 1051 (1929), wherein it is stated:

"But there is obviously a very great distinction between the limitation of survivorship that is involved in a gift of joint tenancy, and the limitation of the word 'survivor' which is annexed to a tenancy in common. The survivorship involved in an estate in joint tenancy is that which is capable of being defeated at the pleasure of the joint tenant, so that if, by alienation or otherwise, the joint tenancy is converted into a tenancy in common, the survivorship ceases; but when a gift to the 'survivor' is annexed to a tenancy in common and not to a joint tenancy, then the limitation takes effect by virtue of the gift, and not by virtue of something involved in a limitation of joint tenancy. Taaffe v. Connem, 10 H. L. Cas. 64, 78. Such a provision creates life estates, with cross remainders."

We submit that such construction violates the intent of the parties to create a tenancy in common, with an added feature of survivorship. "The right of survivorship may be annexed to a tenancy in common if the parties so intend." 4 Thompson, Real Property § 1786 (perm. ed. 1940). See also § 1790.
these unitities results in the destruction of the joint tenancy. It may exist between two or more tenants, not necessarily husband and wife. A conveyance to two or more persons, not husband and wife, at common law, created a joint tenancy. It may be destroyed by any tenant attorning (conveying) to a stranger, which destroys the unity of title, thereby breaching the tenancy as to the particular tenant who does the attorning. A, B and C hold as joint tenants. A attorns to a stranger. B and C continue as joint tenants, as between themselves, including the right of survivorship, but the stranger holds as tenant in common, without survivorship, with B and C. It likewise may be destroyed by collateral attack on the interest of one tenant, by a creditor, by levy, attachment and sale. Dower does not exist in this type 3 joint tenancy.

Type 4, tenancy by the entireties, has the same four unitites, plus a fifth unity, of persons; it only exists where the tenants are husband and wife.

"By common law land conveyed simply to a husband and wife did not, as in the case of a conveyance to two persons, not husband and wife, creates [sic] a joint tenancy, but an estate by entirety. It is a sole, not a joint tenancy. Each holds the entirety. They are one in law, and their estate one and indivisible.

"If the husband alien, if he suffer a recovery, if he be attainted, none of these will effect [sic] the wife, if she survive him.

"Nor is this by the jus accrescendi. There is no such thing between them. That takes place where, by the death of one joint tenant, the survivor receives an accession, something which he had not before, the right of the deceased. But the husband and wife have the whole, from the moment of conveyance to them, and the death of either cannot give the survivor more.' This statement of the nature of this ancient estate in land, dating far back in time, in Thornton v. Thornton, 3 Rand. 179, is supported by all the authorities.

---

8 2 Minor, Institutes 463.
9 See note 5 supra.
10 4 Thompson, Real Property § 1780.
11 Id. §§ 1776-1780. For a general description of type 3, joint tenancy, see 41 C.J.S. Husband and Wife § 83 (1944).
12 4 Thompson, Real Property § 1778; Turner v. Turner, 185 Va. 505, 39 S.E.2d 299 (1949).
13 4 Thompson, Real Property § 1804. This fifth unity is described in 26 Am. Jur. Husband and Wife § 71 (1940), as the husband and wife unity of ownership.
14 This same quotation appears in 4 Thompson, Real Property 332.
"No partition, voluntary or involuntary, can be made between husband and wife of such an estate. 11 Am. & Eng. Ency. Law 49; 2 Minor 471.\textsuperscript{15} One dying, the survivor gets the whole. In such land the husband had, at least, an estate for his life, and if he outlived his wife, he simply retained the whole. His conveyance of the whole would operate to confer on his grantee an estate during his life, and if he survived, it would pass the fee to the whole."\textsuperscript{16}

The common law basis for the estate by the entireties was the legal fiction that husband and wife were one person; at common law, there could be no moieties between them. Neither party holds a separate interest, the definition of the estate being \textit{per tout et non per my}. Being one person, they could not be joint tenants or tenants in common, as these tenancies require more than one tenant.\textsuperscript{17}

As noted in the above citation from the \textit{McNeeley} case, this type 4 tenancy is not subject to collateral attack and it cannot be destroyed by either party conveying to a stranger, but it can be destroyed by a divorce between the parties; after divorce, \textit{H} and \textit{W} hold as tenants in common.\textsuperscript{18} The source of the consideration for purchase of the property, is immaterial.\textsuperscript{19}

Some cases hold that a tenancy by the entireties and a joint tenancy are exactly alike except that the former has the additional unity of marriage relation. In our opinion, these cases represent fuzzy legal thinking. One particular characteristic shows that there is a considerable difference between the two estates; a joint tenancy

\textsuperscript{15} See note 5 \textit{supra}; the authorities cited do not support the proposition that the husband and wife cannot voluntarily partition the estate.

\textsuperscript{16} McNeeley v. South Penn Oil Co., 52 W. Va. 616, 620-621, 44 S.E. 508, 509 (1902). For more definition of the type 4 tenancy, see 41 C.J.S. \textit{Husband and Wife} § 34 (1944).

\textsuperscript{17} 41 C.J.S. \textit{Husband and Wife} § 31 (1944).

\textsuperscript{18} 27 C.J.S. \textit{Divorce} § 180 (1941). Bernatavicius v. Bernatavicius, 259 Mass. 469, 156 N.E. 685, 52 A.L.R. 886 (1927). "The weight of authority is that a decree of divorce severs an estate by the entireties, and makes the divorced spouses tenants in common." At 890. The divorce destroys the unity of persons in the type 4 estate. Once destroyed, the question arises as to whether the estate is reduced to a joint tenancy or a tenancy in common. "Joint tenancy and its doctrine of survivorship are not in harmony with the genius of our institutions, nor are they much favored at law." Consequently, the result, in a common law type 4 tenancy is that a divorce reduces the estate to a tenancy in common.

\textit{Quaere}, where the estate is created by expressed intent, using language "to \textit{H} and \textit{W}, as tenants by the entireties, \textit{with survivorship}," will the courts carry out the intent and continue the survivorship, even though the tenants are divorced? Divorce does not affect a joint tenancy, or its survivorship. 27 C.J.S. \textit{Divorce} § 180 (1941). See also Annot. 59 A.L.R. 718 (1929). See discussion in 25 Am. Jur. \textit{Husband and Wife} § 117 (1940), noting a split of authorities on the point. See also 4 \textit{Thompson, Real Property} § 1814.

\textsuperscript{19} 41 C.J.S. \textit{Husband and Wife} § 31 (1944).
may be destroyed by a collateral attack. Another characteristic is that one tenant by the entireties cannot compel partition, while partition between joint tenants is generally recognized not only by statute in West Virginia\textsuperscript{20} but in most other states.\textsuperscript{21} As noted herein, there are numerous other differences.

Both estates, type 3 joint tenancy and type 4 tenancy by the entireties, existed at common law in Virginia, prior to the formation of our state in 1863.

Survivorship in joint tenancies was abolished as early as July 1, 1787, but this act was held to have no application to tenants by the entireties. Survivorship between tenants by the entireties continued in Virginia as at common law until July 1, 1850, when it was partially abolished.

"'And if hereafter an estate of inheritance be conveyed or devised to a husband and his wife, one moiety of such estate shall on the death of either, descend to his or her heirs subject to debts, curtesy or dower, as the case may be.'\textsuperscript{22}

The present West Virginia statute, successor to the above quoted section of the Virginia Code of 1849, reads as follows:

"When any joint tenant or tenant by the entireties of an interest in real or personal property, whether such interest be a present interest, or by way of reversion or remainder or other future interest, shall die, his share shall descend or be disposed of as if he had been a tenant in common."\textsuperscript{23}

Note that neither the Virginia Code of 1849, nor the present West Virginia Code actually abolishes the type 4 tenancy; both merely remove the survivorship feature at death. During coverture, the estate continued with all of its incidents, until emaciated by the married women's acts in this state. Virginia, by enactment in its Code of 1887, abolished the estate \textit{ab initio}, by providing that immediately upon creation, it is reduced to a tenancy in common. The said Virginia statute reads in part as follows:

"And if hereafter any estate, real or personal, be conveyed or devised to a husband and his wife, they shall take and hold the same by moieties, in like manner as if a distinct moiety had been given to each by a separate conveyance."\textsuperscript{24}

\textsuperscript{20} W. Va. Code ch. 37, art. 4, § 1 (Michie 1955).
\textsuperscript{21} See 41 C.J.S. 457 (1944) for more differences between type 3 and type 4 tenancies.
\textsuperscript{23} W. Va. Code ch. 36, art. 1, § 19 (Michie 1955).
Judge Brannon, in the *McNeeley* case, sounded the death knell to the common law estate in this jurisdiction; syllabus 2 of the *McNeeley* case reads:

“Survivorship in estates by entirety was abolished 1st July, 1859, by §18, Chapter 116, Virginia Code 1849, continued in the West Virginia Code of 1868, Chapter 71, § 18.”

Syllabus 5 of the *McNeeley* case reads:

“The conveyance of land to husband and wife since 1st April, 1869, does not create an estate by entirety, but a joint tenancy, and the wife’s interest is separate estate. The joint effect of section 18, chapter 71, abolishing survivorship in estates by entirety, and of chapter 66, relating to separate estate of married women, of Code of 1868, is to abolish estates by entirety. The husband is not entitled to sole possession during coverture, but has curtesy in his wife’s half after her death.”

Although, in our opinion, this syllabus is not supported by authorities, “the syllabus is the law.”

This *McNeeley* case has been widely cited for the proposition that it abolishes type 4 tenancies in our state. Most jurisdictions take the opposite view, that estates by the entirety are not abolished by married women’s statutes.

“The only effect which a married women’s statute, providing that the property of a married woman shall be her sole and separate property free from the control of her husband, has upon tenants by the entireties, is to deny the husband, during marriage, the right, which he formerly had at common law, to the exclusive possession and control of the property.”

Can a type 4 tenancy by the entireties, or any of the other types, be created in this state by intent expressed in a deed? We think so.

Under the common law, a conveyance to husband and wife, whether described in the deed as tenants in common or as joint tenants, vested an estate in them as tenants by the entireties. Some courts still hold to this rule, and pay no attention to the expressed intent of the grantor, creating types 1, 2 or 3 tenancies. This is an archaic view to take in these modern times of married women’s independence and of separate estate acts, existing in practically all

---

27 E.g., the circuit court in the *Wartenburg* case.
of the forty-eight states. The substantial number of cases holding that a tenancy by the entireties is created by a deed to husband and wife, no matter what type of estate is expressly intended to be created, are flagrant violations of the rules of construction and of intent of the parties.

Our court has not held to the theory that any deed to husband and wife creates a type 4 tenancy. The West Virginia court has followed the doctrine of the McNeeley case, without citing it, in at least two later cases concerning deeds to husband and wife, without expression of intent as to what estate was to be created. These are Coffman v. Coffman\(^{30}\) and Edwards v. Edwards.\(^{31}\) Although neither case sets forth the exact language of the deed conveying the property in question to the husband and wife, evidently the deeds were merely to husband and wife, without more. As above noted at common law, such a conveyance ordinarily created a tenancy by the entireties, in the absence of contrary intent expressed.\(^{32}\) The Coffman case involved partition between husband and wife. Without referring to the McNeeley case, the West Virginia court did not think that a conveyance to husband and wife created a tenancy by the entireties; partition was allowed. “And it is held that partition cannot be made between tenants by the entirety.”\(^{33}\) The West Virginia Code does not permit partition between tenants by the entireties but only between joint tenants, coparcenors and tenants in common.\(^{34}\) The Edwards case allowed an accounting between husband and wife; no mention was made of an estate by the entireties, or of the McNeeley case.

Another case illustrating that our court did not favor tenancies by the entireties, is that of Carter v. Carter.\(^{35}\) In that case, the deed was to Angus R. Carter, Jr., and Elah Carter, his wife, as joint owners, the deed containing the further provision:

“It is expressly understood that if the said Angus R. Carter, Jr., should die before his wife, Elah Carter, dies, that then the entire estate in and to the said property shall be and become the sole property of the said Elah Carter; that if the said Elah Carter should die before her husband, Angus R. Carter, Jr.,

\(^{31}\) 117 W. Va. 505, 185 S.E. 904 (1930). See note 1 supra.
\(^{32}\) 41 C.J.S. Husband and Wife § 31 (1944).
\(^{33}\) 14 Mich J. Jur. 140 (1951); 68 C.J.S. Partition § 28 (1950); 26 Am. Jur. Husband and Wife § 68 (1940). Partition was also the problem in the Wartenburg case.
\(^{34}\) W. Va. Code ch. 37, art. 4, § 1 (Michie 1955).
\(^{35}\) 87 W. Va. 254, 104 S.E. 552 (1920).
should die then the entire estate in fee simple in and to the said property, should be and become the sole property of the said Angus R. Carter, Jr."

Without citing the McNeeley case the court held that the said language created a joint tenancy with right of survivorship. In most other jurisdictions, the said language clearly would have created a tenancy by the entireties.

These cases indicate that our court's thinking, without reference to the McNeeley case, was away from the strict rule that any conveyance to husband and wife, created a type 4 tenancy, long before the present surge in survivorship usage started. The court was thus following the rule of the intent of the parties, not to create a type 4 tenancy, unless expressly intended. However, nothing in any of these cases opposes the express intentional creation of the type 4 estate by the entireties.

The intent of the parties is controlling as to what estate is created.\textsuperscript{36} In the case of Davidson v. Eubanks,\textsuperscript{37} a Missouri case in a jurisdiction where the common law tenancy by the entireties still exists, language in the caption or premises of deed, following the names of the grantees, stating "as tenants in common," was held to be sufficient indication of intent to create what it said, a tenancy in common. Note that the language "as tenants in common," was not in the granting clause, and it was not in a habendum clause, but was only in the caption of the deed.

To the same effect, see syllabus 2, in the West Virginia case of Irvin v. Stover:

"In construing deeds, as well as wills, the purpose is to ascertain the intention of the parties and when the intention is thus ascertained it will be effectuated, unless it contravenes some principle of law."\textsuperscript{38}

Young v. Cockman, a Maryland case, states the matter of intent, as follows:

"A conveyance to a husband and wife will ordinarily create a tenancy by entirety but an intention clearly expressed in the instrument that they shall take as joint tenants or as tenants in common will be effective."\textsuperscript{39}

\textsuperscript{36} Amiot, 161 A.L.R. 457 (1946).
\textsuperscript{37} 354 Mo. 301, 189 S.W.2d 295, 161 A.L.R. 450 (1945).
\textsuperscript{38} 67 W. Va. 356, 67 S.E. 1119 (1910).
\textsuperscript{39} 182 Md. 246, 34 A.2d 428 (1943), 149 A.L.R. 1006 (1944). Emphasis added.
Professor Minor notes the same thing, in writing about the common law fiction of husband and wife "constituting but one person at law. When land is conveyed to them, after marriage, not expressly to hold as tenants in common, they are said to be seized by entireties." An expressed intention would create a tenancy in common.

"While a conveyance or devise to a husband and wife will ordinarily create a tenancy by the entireties, the authorities are generally to the effect that an intention, clearly expressed in the instrument, that they will take as tenants in common or joint tenants, will be effective."

Allen v. Parkey, often cited to the effect that type 4 tenancies are abolished, holds that the intent of the parties controls. Construing a Virginia statute containing the very same wording as the West Virginia Code, the Virginia court held that the parties created a type 4 tenancy by the entireties, by specific language, and partition was denied. The West Virginia Code carries this intent into effect. This code section, which needs to be read with the preceding section, is as follows:

"When Survivorship Preserved. The preceding section shall not apply to any estate which joint tenants have as executors or trustees, nor to an estate conveyed or devised to persons in their own right, 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. Neither shall it affect the mode of the proceeding on any joint judgment or decree in favor of, or on any contract with, two or more, one of whom dies."

This section preserves the rights of the parties to create, intentionally, any type of survivorship they desire.

---

40 2 MINOR, INSTITUTES 466 (1875).
41 1 TIFFANY, REAL PROPERTY 646 (2d ed. 1920).
42 154 Va. 739, 149 S.E. 615 (1929).
43 Burroughs v. Gorman, 163 Va. 58, 184 S.E. 174 (1936), where the grant was to H and W "to be owned and held by them as joint tenants, with the common law right of survivorship." The Virginia court, construing Va. Code § 5160 (1919), which is identical with W. VA. CODE ch. 38, art. 1, § 20 (Michie 1955), held that the intent controlled and that the grantees held under a type 3 joint tenancy.
44 W. VA. CODE ch. 38, art. 1, § 20 (Michie 1955).
45 26 AM. JUR. HUSBAND AND WIFE § 87 (1950): "According to the trends of modern authority . . ., husband and wife may, in jurisdictions which recognize their right to take and hold property as tenants by the entireties, become joint tenants or tenants in common in property conveyed or given to them during marriage, provided, according to some courts, the instruments of title by appropriate words clearly indicates an intention to make them joint tenants or tenants in common, and not tenants by the entireties."
The law is aptly stated in the Virginia case of Vasilou v. Vasilou.46 The deed was made to husband and wife "as tenants by the entireties, with right of survivorship as at common law." Wife and husband joined in a deed conveying to wife. A creditor of husband brought suit to set aside the deed to wife as a fraudulent conveyance and to require partition. The court held that the deed created what it intended, a common law tenancy by the entireties, under the Virginia Code, which is identical with the West Virginia statute, and that a creditor of husband, alone, could not attack it. Therefore, the deed to wife was not in fraud of husband's creditors, and partition was denied. The Virginia court, in a well-written opinion goes into the history of the statutes abolishing the common law type 4 tenancy, and the line of Virginia cases interpreting the statutes.

Although the West Virginia court has not yet ruled on a case involving an expressly created tenancy by the entireties we cannot see how the court, in a properly presented case, could refuse to follow the weight of authority, including the Vasilou case, and give to this code section its clear meaning, thus sustaining an estate by the entireties where one was intended. Our court should follow the same rules of intent as to types 1, 2 and 3 tenancies, although in the Wartenburg case it failed to note that the first deed contained only a type 1 tenancy.

No particular technical language is required to create a survivorship between the tenants. The use of the word "jointly", or a grant to two or more persons "and the survivor", has been held sufficient.47 The language expressing intent does not need to be in the granting clause; "and to the survivor of her" in a habendum has been held sufficient.48 The language in the Carter case did not use the word "survivor," but it was held to create a joint tenancy with survivorship.

A will is construed in Neal v. Hamilton Co., reading as follows:

"Fourth. After the death of my wife Adaline, I will and bequeath unto my two sons James L. Neal and John Neal the Farm I now live on to be equally divided between the two above named sons. The above request includes both tracts of land I now own..."

47 4 THOMPSON, REAL PROPERTY § 1790.
"Sixth. In case of the death of either of my sons above named, I will and bequeath that the remaining son living shall have and hold in his own right the whole of the above named bounded two tracts of land."\(^{49}\)

The court held that the two sons took "a joint remainder in fee simple, subject to the right of survivorship."

"The donor or testator must make plain his purpose, but when that purpose has been made plain and it is manifest that he intended survivorship should follow, the court will give effect to this intention, and no particular words are necessary."\(^{50}\)

"The right of survivorship exists wherever it is manifest that a grantor or testator so desired and makes plain his purpose. Indeed the statute in express terms so declares."\(^{51}\)

Although survivorship is the most important feature of these joint estates, the incidences during the lives of the tenants are also important. It is necessary for an attorney to create a particular estate, and to know the advantages and disadvantages of such estate.

We suggest the use of the following language to create each of the four types:

Type 1: Grant to A and B (or A, B, C, etc.), for and during their natural lives, with remainder to the survivor of them.

Type 2: Grant to A and B (or A, B, C, etc.), as tenants in common with survivorship.

Type 3: Grant to A and B (or A, B, C, etc.), as joint tenants with survivorship.

Type 4: Grant to H and W, as tenants by the entireties, with survivorship.

The practitioner is confronted with the problem of which type to use. As noted above, type 3 is in general use. Many attorneys favor type 4. Some objection has been raised that type 4 is an implied fraud upon the husband’s creditors because they cannot attach his interest in it, credit often being extended to the husband on the strength of his material possession of a home. In our opinion this argument has no merit. Any creditor, with a slight amount of effort can check the conveyance in the nearby county clerk’s office and determine that a debtor’s home is held in a type 4 tenancy. Many

\(^{49}\) 70 W. Va. 251, 73 S.E. 971 (1912).
business men and others, realizing the continuing possibility of personal loss, place the title to their home in the name of their wife only. This places the home out of reach of the husband's general creditors just as effectively as a type 4 tenancy. The use of type 4 can keep the family home free from the results of improvident acts by either husband or wife, acting separately.

Another objection to the creation of a type 4 estate by specific intentional conveyance, is that all of the common law limitations on the wife would attach to the estate.

"Subject to survivorship, the husband 'is entitled during coverture to the full control and usufruct of the land to the exclusion of the wife, and has, according to the weight of authorities the power to sell, mortgage, or lease for the same period, and his life interest is subject to the claims of creditors.' 15 Am. & Eng. Ency. Law 849."52

In a few states it has been held that women's separate estate acts abolish the type 4 tenancy, because they are designed to do away with the legal rule that as to property, man and wife are one.

"But it will be found that the very decided weight of authority from other states is to the effect that the married woman's act do not abolish estates by entirety. Our own act comes from New York, and there the holding has been that it was not the effect of the section, and plainly was not its purpose, to change the force and operation of a conveyance to a wife. It does not enlarge the estate which a wife would otherwise take in land conveyed to her, and whatever the effect of a conveyance to a husband and wife was, prior to that statute, so it remains. If the operation of such conveyance was to pass the entire estate to each of the grantees, so that each became seized of the entirety, there is nothing in the force or effect of the language used to change the operation of such a deed as to make the grantees tenants in common. The section gives the wife no greater right to receive conveyances than she had at common law, but its sole purpose was to secure to her during coverture, what she did not have at common law, the use, benefit and control of her own real estate, and the right to convey and devise it as if unmarried."53

Since the women's separate estate acts54 as above noted, remove the husband's sole control in a type 4 tenancy, the common law limitations on a wife's property in the type 4 estate no longer exist.

---

52 McNeely v. South Penn Oil Co., 52 W. Va. 616, 626, 44 S.E. 508, 511 (1902).
53 Id. at 627, 44 S.E. at 512.
54 W. Va. Code ch. 48, art. 3, §§ 1-24 (Michie 1955), is the modern version of the women's separate estate acts in West Virginia.
JOINT ESTATES

Incidents of a tenancy by the entireties that remain today, when the estate is created by express language, thus would seem to be few. Survivorship upon death is the most important remaining incident. Indivisibility and impartibility have not been lost although Judge Brannon in the McNeely case, after noting that survivorship has perished under the Code of 1850, and that the rights of husband to control and take profits of and convey for his life, the interest of the wife, have been taken away by the separate estate act, states,

"What is left of an estate by entirety? Is its indivisibility or impartibility still left? I think not, as I think the statute of partition applies to it."

However, the good judge cited no authority for his thoughts and we have found none. The statute of partition includes only "tenants in common, joint tenants and coparceners of real property." Consequently, we can only conclude that an estate by the entireties is still impartible and indivisible, except by the act of one tenant conveying to the other.

Another factor in determining what type of tenancy to use is the necessity for administration of the estate of a deceased tenant, particularly where the only property owned at the date of death is real estate held in a type 3 or type 4 tenancy. Some attorneys in this jurisdiction are of the opinion that the decedent's debts do not attach to property passing to the survivor under a type 3 joint tenancy; others are of the opinion that decedent's creditor's rights are not barred, and hence administration of decedent's estate, held in type 3, joint tenancy, is necessary. We have found no decisions in this jurisdiction. Since the deceased tenant's debts do not attach to his interest passing to the survivor of a type 4 tenancy by the entireties, it is generally accepted that no administration of the decedent's estate is necessary. In type 4, the decedent had no separate estate; his creditors had no rights prior to his death to attach his interest in the tenancy, and his death gave them nothing new.

Tax matters, not here considered, also have a bearing on the type of tenancy to use in a particular factual situation. One type may fit the case of a husband and wife with few assets, and another type may be the best for a millionaire couple, where the...
benefits of the estate tax marital exemption may be desired. As above noted, the use of wills for both husband and wife, will, from a practical standpoint, eliminate the problems of survivorship in a specific case. But in the absence of wills, the practitioner should create a specific type of estate, suited to the facts at hand.

[An article on the tax aspects of joint ownership, by Charles B. Stacy, Esq., of the Kanawha County bar, will appear in the April issue of the Law Review. Ed.]