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Estates by the Entirety: Creation Between Husband and Wife

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VI. Conclusion

This law places a heavy burden on the owner without regard to the extent of the improvement he is making. It is inequitable in making the owner an insurer of the honesty and solvency of the contractor, even though he has no control over personnel, conditions of employment, or purchase of materials. The failure of any other state to enact this law reveals a general disapproval of its policy. Much of the objection to the law might be obviated if its operation were restricted to the larger transactions and another lien law passed adjusting more equitably the rights of parties involved in less extensive improvements.

George O. Pringle

ESTATES BY THE ENTIRETY: CREATION BETWEEN HUSBAND AND WIFE

In May of 1928, Alfred Johnson, holding fee simple title to non-homestead property in severalty, desired to create an estate by the entirety. Thereupon, as grantor, he conveyed by warranty deed to himself and wife as co-grantees. Subsequently he devised the same property to his son. Alfred Johnson died in 1935. Upon administration of the wife's estate four years later, the administrator petitioned for a declaratory decree construing the effect of the deed. The circuit court held the deed effectual to create an estate by the entirety. An appeal to the supreme court terminated in an affirmance of the judgment of the court below, the result of an evenly divided court.[1] The decision in this case is illustrative of a controversy which has resounded in the courts of many states since the advent of married women's property acts and the removal of the inhibition against direct conveyances between the spouses.[2]

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[1]Johnson v. Landefeld, 138 Fla. 511, 189 So. 666 (1939).

[2]See cases cited *infra* notes 17, 18, 20, 21, 23.

An enactment of the 1947 Legislature has partially resolved the doubt created by the decision in *Johnson v. Landefeld*.[3] An amendment to Florida Statutes 1941, Sec. 689.11 (Supp. 1947),[4] provides that an estate by the entirety may be created by deed from one spouse to the other in which the purpose to create such an estate is recited.[5] An examination of the amendment raises the problem of how to accomplish a deed of conveyance that will secure the intended result. More specifically, the problem is twofold: (1) who is to be named grantee; and (2) what interest is to be conveyed? The problem may be illustrated by a hypothetical set of facts: *A* holds fee simple title to Blackacre in severalty. He desires to create an estate by the entirety pursuant to the amendment. He has the following alternatives: (1) to convey the fee simple to his wife, or (2) to convey an undivided interest to his wife, or perhaps (3) to convey the fee simple to himself and his wife. The first two alternatives more nearly satisfy the letter of the amendment, while the third alternative would seem equally within the spirit of the amendment though not its letter. Unfortunately, the legislature did not contemplate this procedural problem. The only requirement stipulated is that the deed should contain a recitation of purpose to create an estate by the entirety. In view of this, it is possible, or probable, that any deed conveying an interest from one spouse to the other and containing this requisite statement of purpose will be sustained. In the absence of statute, there is considerable difference in the legal effect of the alternative conveyances suggested. An examination of the cases will indicate this, although they are not all in accord.

By the common law an estate by the entirety arises whenever an interest in land is conveyed or devised to a man and his wife.[6] It is not

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[3]Johnson v. Landefeld, 138 Fla. 511, 189 So. 666 (1939).

[4]". . . An estate by the entirety may be created by the spouse holding fee simple title conveying to the other by a deed in which the purpose to create such estate is stated."

[5]The phrases "tenancy by the entirety," "estate by the entirety," and variations of these are used interchangeably. It would seem that "estate by the entirety" is a contracted form of expressing "an estate held by tenants by the entirety" or "an estate held by the entirety." "By the entirety" refers to the mode of ownership and has no reference to *quantum* of estate.

[6]Doe d. Freestone v. Parratt, 5 T. R. 652, 101 Eng. Rep. 363 (1794); 2 BL. COMM. *182; Co. LITT. *187. At least in the absence of an expressed intention to the contrary. CHALLIS, REAL PROPERTY *305 (1887); 2 TIFFANY, REAL PROPERTY §431 (3d ed. 1939); *accord*, Knapp v. Fredricksen, 148 Fla. 311, 4 So.2d 251 (1941); Menendez v.

necessary that the conveyance recite that they are man and wife, nor is it necessary that the conveyance express that they should take as tenants by the entirety.[7] It has been said that a conveyance that would make two other persons joint tenants would, if the same conveyance were made to man and wife, make them tenants by the entirety.[8] The husband and wife, in contemplation of law, are one person,[9] and title by such a conveyance devolves upon the spouses as a single entity. Thus, in addition to the requisite unities of time, title, interest, and possession necessary to a joint tenancy, a tenancy by the entirety has a fifth unity, that of person.[10] Since the title devolves on them as one, both are seised of the *entire* estate and not by moieties;[11] hence the consequence that neither the husband nor the wife can dispose of any part without the assent of the other.[12] Since at common law the husband could not convey directly to the wife, whenever the husband held title to real property in severalty and desired to create an estate by the entirety, he could do so only by conveying to a third person, or trustee, who would thereupon reconvey to both spouses. The elimination of this circuitous method was the motive for attempting to accomplish this purpose by direct conveyance.

The cases that have adjudicated attempts by the husband and wife to create an estate by the entirety by direct conveyance fall into two categories: (1) those in which the husband, or wife, having title in severalty, has conveyed an undivided half interest to the other spouse, and (2) those in which the husband, or wife, having title in severalty, has conveyed the fee to both spouses as co-grantees.[13]

Rodriguez, 106 Fla. 214, 143 So. 223 (1932).

[7]See note 6 *supra; accord,* Matthews v. McCain, 125 Fla. 840, 170 So. 323 (1936).

[8]CHALLIS, REAL PROPERTY *303 (1887).

[9]2 BL. COMM. *182; *accord,* Hunt v. Covington, 145 Fla. 706, 200 So. 76 (1941).

[10]2 TIFFANY, REAL PROPERTY §430 (3d ed. 1939); *accord,* Andrews v. Andrews, 155 Fla. 654, 21 So.2d 205 (1945). The unities of time and title require that the title of the husband and wife arise by the same conveyance and vest at the same time.

[11]4 THOMPSON ON REAL PROPERTY §1804 (perm. ed. 1940); *accord,* Bailey v. Smith, 89 Fla. 303, 103 So. 833 (1925). Hence the description, "tenants by (of) the entirety." It is this fact that each tenant is seised of the whole estate which makes survivorship inapplicable to the tenancy.

[12]Doe d. Freestone v. Parratt, 5 T. R. 652, 101 Eng. Rep. 363 (1794); Back v. Andrew, 2 Vern. 121, 23 Eng. Rep. 687 (1690); 2 BL. COMM. *182; Co. LITT. *187b; *accord,* Richart v. Roper, 156 Fla. 822, 25 So.2d 80 (1946).

[13]The deeds in both categories contained expressions of intent to create an estate by the entirety. Some of the cases adjudicating deeds in either category involve the

In *Pegg v. Pegg*,[14] the court considered the validity of a deed in category (1). HELD, the deed did not satisfy the unities of time and title requisite to an estate by the entirety. Similarly, the Supreme Court of Pennsylvania in the case In re *Walker's Estate*,[15] reached the same conclusion.[16]

Hicks v. Sprankle[17] involved a deed in the second category. HELD, the wife could not convey to herself,[18] and the husband as sole capable grantee took the fee.[19] On the other hand, the Supreme Court of New

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creation of joint tenancies rather than tenancies by the entirety. Generally, these cases have arisen in states where tenancy by the entirety does not obtain. Since most of the questions involving the creation of either of these tenancies by conveyance between the spouses are similar, these cases have been included.

[14]165 Mich. 228, 130 N. W. 617 (1911).

[15]340 Pa. 13, 16 A.2d 28 (1940).

[16]*Contra*: *In re* Farrand, 126 Misc. 590, 214 N. Y. Supp. 793 (1926); *In re* Horler's Estate, 180 App. Div. 608, 168 N. Y. Supp. 221 (1917) (to create a joint tenancy), overruling Dressler v. Mulhern, 77 Misc. 476, 136 N. Y. Supp. 1049 (1912). The New York courts make no attempt to reconcile the obvious insufficiencies of such deeds in respect to the unities of time and title.

[17]149 Tenn. 310, 257 S. W. 1044 (1924) (the husband joined in the deed as grantor).

[18]*Accord,* Michigan State Bank v. Kern, 189 Mich. 467, 155 N. W. 502 (1915) (deed in fraud of creditors, held a tenancy in common created); Wright v. Knapp, 183 Mich. 656, 150 N. W. 315 (1915) (held that the whole fee passed to the other spouse); Stuehm v. Mikulski, 139 Neb. 374, 297 N. W. 595 (1941); Cameron v. Steves, 4 Allen 141 (N. Brun. Sup. Ct. 1858) (held that the other two capable grantees took the fee as joint tenants). There are two reasons given for this rule. At early common law, livery of seisin was necessary to the transfer, or necessary to the vesting, of a freehold estate in another. The inability of making livery of seisin to oneself has been suggested as a reason for the rule that a grantor cannot convey to himself. *See* Cameron v. Steves, *supra.* However, upon inspection this does not appear broad enough to cover the general nature of the prohibition. Livery of seisin was not necessary in the creation or transfer of an estate less than freehold. Further, if it were merely the inability of making livery of seisin to oneself, a conveyance by *A* "to *B* for life, remainder to *A* and the heirs male of his body" would appear to surmount this obstacle, since livery of seisin need only be made to *B*. Yet this was prohibited. Pibus v. Mitford, 1 Vent. 372 (1674). The paramount reason was that a person could not take as purchaser from himself, thereby acquiring a new title and breaking the line of descent of the property. 1 LEAKE, DIGEST OF THE LAW OF PROPERTY IN LAND 51 (1874). By the Inheritance Act, 3 and 4 Wm. IV, c. 106, §3 (1833), this rule was abrogated to permit a grantor to convey to himself to alter the line of descent of his property. This act was later repealed.

[19]If for any reason one of several joint grantees is incapable of taking, the other

Jersey in *Cadgene v. Cadgene*,[20] involving similar facts, sustained the validity of a deed to create an estate by the entirety. In reaching this decision the Court relied on the reasoning of In re *Klatzl's Estate*,[21] to the effect that a conveyance from one spouse to both spouses does not conflict with the rule that a grantor cannot convey to himself.[22] Later New York decisions appear to proceed on the reasoning that the grantor spouse does not take as grantee, but the effect of the deed is to reserve an interest to him equal to that conveyed to the wife.[23] The affirming opinion in *Johnson v. Landefeld*[24] follows this view.[25]

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shall take the whole. Dowset v. Sweet, 1 Amb. Rep. 175, 27 Eng. Rep. 117 (1753); Humphrey v. Tayleur, 1 Amb. Rep. 136, 27 Eng. Rep. 89 (1752); Bagwell v. Dry, 1 P. Wms. 700, 24 Eng. Rep. 577 (1721). The reason for the rule seems to be that each joint tenant has a benefit by the gifts to the others because of the possibility that the others' shares may accrue to him by survivorship. Thus, to give him only his share, when one of the other joint devisees or grantees is incapable of taking, would deprive him of a contingent benefit conferred by the devise or conveyance. This reasoning was of greater force before the statutes of 31 Hen. VIII, c. 1, and 32 Hen. VIII, c. 32, which conferred on joint tenants the power to compel partition. While a tenancy by the entirety differs from a joint tenancy, yet the reason for the rule would seem applicable, for each such tenant becomes seised of the entire estate by the conveyance or devise, and it is merely the other tenant's share of the usufruct which is the contingent benefit. To give the sole capable tenant less than the entire estate would be to deprive that tenant of part of the estate intended to be vested in him (or her) by the conveyance.

[20]17 N. J. Misc. 332, 8 A.2d 858 (1939).

[21]216 N. Y. 83, 110 N. E. 181 (1915).

[22]The court adopted the reasoning of Justice Collins in that case: "The ownership it [the deed] devolved was in both grantees as one person . . . . The husband did not convey to himself, but to a legal unity which was the consolidation of himself and another." For an interesting analogy to this reasoning, *see* Pope v. Brandon, 2 Stew. 401 (Ala. 1830).

[23]Coon v. Campbell, 138 Misc. 567, 240 N. Y. Supp. 772 (1930); Boehringer v. Schmid, 133 Misc. 236, 232 N. Y. Supp. 360 (1928), *aff'd*, 228 App. Div. 881, 239 N. Y. Supp. 922, *aff'd per curiam*, 254 N. Y. 355, 173 N. E. (1930); *In re* Vogelsang's Estate, 122 Misc. 599, 203 N. Y. Supp. 364 (1924). The New York courts cite *In re* Klatzl's Estate, 216 N. Y. 83, 110 N. E. 181 (1915), as establishing this proposition, but, in fact, it was merely suggested as a basis in the concurring opinion of Chief Justice Bartlett. Unfortunately, he cited no authority for his statements nor attempted to explain the rationale of his observations.

[24]138 Fla. 511, 189 So. 666 (1939).

[25]By common-law rule there are three requisites to a valid reservation: (1) the thing reserved must be something new, something not *in esse* before the grant; it is created by the grant; (2) the thing reserved must issue out of the thing granted.

The reasonable conclusion to be drawn from the cases is that, in the absence of statute, deeds of the first category do not satisfy the incidents of an estate by the entirety. The reasoning of the cases applies equally whether the fee, or merely an undivided interest, is conveyed.[26] As to deeds in the second category the cases are in definite conflict.[27]

As the letter of the recent amendment contemplates a deed of the

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as rent issues out of the land; (3) the reservation must be in favor of the grantor. Co. LITT. *47a; 6 THOMPSON ON REAL PROPERTY §3458 (Perm. Ed. 1940); 4 TIFFANY, REAL PROPERTY §1972 (3d ed. 1939); *see* Jacksonville v. Shaffer, 107 Fla. 367, 371, 144 So. 888, 890 (1932). The second of these requisites has been abrogated in many states to allow the reservations of an easement. 4 TIFFANY, REAL PROPERTY §973 (3d ed. 1939). More recently a number of states have explained the retention of a life estate in the grantor, when conveying the fee, on the basis of reservation. 4 TIFFANY, REAL PROPERTY §972 (3d ed. 1939); *see* Wise v. Wise, 134 Fla. 553, 564, 184 So. 91, 95 (1938). It is difficult to see how reservation of an interest in the grantor can satisfy the concept of an estate by the entirety. The title to any interest which the grantor reserves, *i.e.*, does not convey to the other spouse, is in him by virtue of the conveyance by which he acquired title, and therefore predates the title of his spouse. Thus the unities of time and title are lacking. Further, even assuming the grantor can reserve some new interest, or be said to acquire a new title to the interest reserved, what interests can he on the one hand convey to his spouse and on the other reserve to himself which satisfy the concept that each is seised of the whole by the conveyance? The only such interest is the whole, and this cannot be conveyed and reserved as well.

[26]There have been no cases involving deeds conveying the whole fee from one spouse to the other. However, the probable effect of such a deed would be to vest the whole fee in the grantee spouse. The recital of an intent to vest an estate by the entirety in both spouses would be repugnant to the granting clause conveying the property to a single grantee.

[27]If any criticism of the cases as a whole is to be made, it is the peremptory manner in which some of the courts have applied the rule that a grantor cannot convey to himself. There is ample ground upon which to question its applicability to the creation of an estate by the entirety. The concept of the estate is that the title to the whole is held by both spouses, but this is more accurately stated thus: Title to the whole is held by the unity or entity which is composed of both spouses. This is exemplified by the fact that neither spouse can dispose of any part of the estate without the assent of the other. Both spouses, the unity, must join in the alienation. This unity is neither the husband nor the wife but a separate entity, albeit a legal fiction. If the fiction of conveying to the unity of husband and wife exists when the title devolves from a third person, why may not the fiction exist when the title is sought to be devolved upon them by either individual spouse? Perhaps the courts feel a natural antipathy toward extending a fiction or making it applicable in another situation. Yet, it is doing no more than giving either spouse the

first category, it is reasonable to conclude that it impliedly intends an abrogation of the common-law incidents of the estate which cannot be satisfied by such a conveyance. The estate by the entirety must arise by force of statute, and it would seem of little consequence what form the deed takes, providing the intent of the grantor is clearly expressed. A safe procedure, and one which circumvents an embarrassing choice, would be to convey the property to the other spouse, in language substantially as follows: "to grant, bargain, sell, and transfer such interest in Blackacre as will under the statute create an estate by the entirety."

The amendment raises two other questions: (1) may a spouse having a life estate or term of years in property create an estate by the entirety in that interest under the amendment;[28] and (2) may a spouse having fee simple title to property create an estate by the entirety in a lesser estate than the fee? As to (1), the wording of the amendment appears to restrict its operation to situations wherein one of the spouses holds title in fee simple.[29] It may be questioned that the legislature intended such a restriction, particularly in the absence of any apparent reason for so doing. The maxim *"expressio unius est exclusio alterius"* is of doubtful applicability in this situation. Where the spouse does hold fee-simple title there is nothing in the amendment to suggest that he may not so create an estate by the entirety in a lesser estate than the fee. Generally a person may not have a particular estate in land with reversion in fee in himself, since the law of merger operates to extinguish the lesser particular estate.[30] However, because of the *sui generis* character of an estate by the entirety, there is sound reason for asserting that this rule does not apply. Both tenants by the entirety are seised

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right to confer on themselves what any third person may. If at common law the spouses were one, the legislatures have effectively made them two, and the courts, in deciding that tenancy by the entirety exists, have surely established that they are three: the husband, the wife, and the unity. It would seem only in keeping with the spirit of these decisions and recent legislation to provide that either spouse may convey to this unity in the same manner as a third person.

[28]A tenancy by the entirety may exist in any quantum of estate: in fee, in tail, for life, or for years. It matters not whether the estate be in possession, reversion, or remainder. 4 THOMPSON ON REAL PROPERTY §331 (perm. ed. 1940). It may also exist in an equitable estate. Matthews v. McCain, 125 Fla. 840, 170 So. 323 (1936).

[29]FLA. STAT. 1941, §689.11 (Supp. 1947). ". . . the spouse holding fee simple title conveying to the other. . . ."

[30]See the discussions of merger in BL. COMM. *177, CO. LITT. *187b, 4 KENT COMM. 99 (14th ed. 1896).

of the whole.[31] There are no moieties as in joint tenancy; the tenants merely share the usufruct of the estate during their joint lives.[32] Upon the death of one of them the only effect on the estate is that it is freed from that tenant's participation and the whole of the estate *continues* in the survivor by virtue of the original conveyance.[33] Neither tenant has an alienable interest in the estate in his or her own right.[34] Thus the whole particular estate cannot merge, since its owner is neither the husband nor the wife but the separate legal entity comprised of both spouses; nor can anything less than the whole particular estate merge, for neither tenant has such an interest. This situation is within the rule expressed by Chancellor Kent.[35]

It is unfortunate that the legislature did not adopt an enactment similar to the Uniform Interparty Agreement Act[36] now in force in several states.[37] The present amendment is certainly commendable in that it is in keeping with the spirit of modern legislation in giving husband and wife more freedom in dealing with their property in respect to transfers between themselves. It gives them the right to confer on themselves an estate which any third person may so confer upon them. It also eliminates a bothersome circuituity of conveyancing. The creation of an estate by the entirety by conveyance from one spouse to the other offers a logical anomaly, however. By this method the estate arises without some of the incidents which distinguish it: the unities of time and title. At the same time, this estate created by deed from a third person has all the recognized incidents. Equally anomalous is the fact that whatever the interest conveyed to the "other spouse," whether the fee or an undivided half interest, both spouses are to become seised of the whole, for this is the fundamental concept of the estate.

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[31]Bailey v. Smith, 89 Fla. 303, 103 So. 833 (1925).

[32]4 THOMPSON ON REAL PROPERTY §1803 (perm. ed. 1940).

[33]*Ibid.*

[34]See note 12 *supra.*

[35]"The power of alienation must extend to the one estate as well as to the other, in order to allow the merger . . . ." 4 KENT COMM. 102 (14th ed. 1896).

[36]9 U. L. A. 425. This act was redesignated a Model Act in 1943.

[37]Maryland, Nevada, Pennsylvania, and Utah. Two other states, Massachusetts and Rhode Island, have similar enactments. The act in substance permits a person to convey to himself and another jointly. Two states have held the act broad enough to allow an estate by the entirety to be created pursuant to its terms. *In re* Vandergrift, 105 Pa. 293, 161 Atl. 898 (1932); Lawton v. Lawton, 48 R. I. 134, 136 Atl. 241 (1927). *Contra*: Ames v. Chandler, 265 Mass. 428, 164 N. E. 616 (1929) (held that

The most logical way to secure the benefit which the amendment seeks to confer is to permit the spouse holding title in severalty to convey to both spouses as co-grantees. The only impediment advanced against the creation of an estate by the entirety in this way is the rule, logically irrelevant in a conveyance by one spouse to a separate and distinct legal entity, that a grantor cannot convey to himself.[38] Once the rule is clearly analyzed and accordingly distinguished, a conveyance from one spouse to both spouses satisfies all the requisites of the estate.[39] While such a conveyance is within the spirit of the amendment, it is regrettably not within its letter.

GEORGE H. DE CARION

APPELLATE REVIEW OF HABEAS CORPUS IN FLORIDA

Until April 1, 1942, when the present Florida Supreme Court Rules of Practice became effective, appellate review of proceedings at law in a lower court was invoked by writ of error, except in those instances in which certiorari or prohibition would be appropriate or for which there was other express provision of law.[1] Appeal was not allowed in any law procedure.[2]

Rule 2 of the Supreme Court of Florida abolishes relief by writ of error and provides that all relief formerly obtained by that writ shall henceforth be sought by appeal, as in equity. Return days of appeals have likewise been abolished, and the filing of a notice of appeal with the clerk of the lower court now gives the Supreme Court jurisdiction of the subject-matter and the parties.[3]

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the wife was not "another person" within the statute).

[38]See note 27 *supra.*

[39]Cadgene v. Cadgene, 17 N. J. Misc. 332, 8 A.2d 858 (1939); *In re* Klatzl's Estate, 216 N. Y. 83, 110 N. E. 181 (1915); *In re* Vandergrift, 105 Pa. 293, 161 Atl. 898 (1932); Lawton v. Lawton, 48 R. I. 134, 136 Atl. 241 (1927).

[1]FLA. STAT. 1941, §59.01; Pleasant Valley Farms v. Carl, 90 Fla. 420, 105 So. 427 (1925).

[2]Trabue v. Williams, 46 Fla. 228, 35 So. 872 (1903); Montgomery v. Thomas, 40 Fla. 450, 25 So. 62 (1899).