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Property Law in Missouri--Joint Tenancies and Tenancies by Entireties--Direct Conveyances--Express Limitations

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PROPERTY LAW IN MISSOURI—JOINT TENANCIES AND TENANCIES BY ENTIRETIES—DIRECT CONVEYANCES—EXPRESS LIMITATIONS*

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I. DIRECT CONVEYANCE PRIOR TO AUGUST 29, 1953, AS EFFECTIVE TO CREATE JOINT TENANCY OR TENANCY BY THE ENTIRETY

Prior to the enactment of Section 442.025 of the Revised Statutes of Missouri, effective August 29, 1953, the so-called direct conveyancing act, the only safe practice in the creation of a joint tenancy or a tenancy by the entirety where a property owner desired to create the tenancy between himself and *ano*ther*s* was to convey through a straw party instead of directly. The basic problem was the dogma that a person could not convey to himself. If X conveyed to H[usband] in fee, and thereafter H conveyed to H and W[ife] in fee as tenants by the entirety, the orthodox view was that H and W were tenants in common, not tenants by the entirety, because H got his title from X at an earlier time, W got her title from H at a later time, and that there was no unity of title to satisfy that requirement of the four unities of rule.[1] Prior to 1954 Missouri had no decision which either held or stated by way of dictum that Missouri would reject the highly technical requirements of the common law and would permit a direct conveyance.

One of the original proposed title examination standards presented in 1946 for the consideration of the Title Examination Standards Committee (now a part of the Real Property Committee) of The Missouri Bar provided in rough draft: "Conveyance by record owner directly to himself or herself and spouse, containing recital that it is made for the purpose of creating a tenancy by the entirety, should be accepted."[2] Members of

*This article contains a discussion of selected 1960 and 1961 Missouri court decisions reported in volumes 335-349, South Western Reporter, Second Series.

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1. Eckhardt & Peterson, *Possessory Estates, Future Interests and Conveyances in Missouri*, § 39 n. 33, § 40, 23 V.A.M.S. 36-39 (1952).

2. Title Examination Standards Committee, *Final Report 1947-48*, 4 J. Mo. B. 255 col. 1, 256 col. 1 (1948).

the committee were generally in agreement that such a title was good in fact (that considering the high quality of the judges of the Missouri Supreme Court and the trend in real property decisions it was almost inconceivable that the court for purely technical reasons would fail to give effect to a grantor's clear expression of intention), but the majority of the committee were of the opinion that there was enough possibility of the issue being litigated that such a title was unmarketable and that a title examination standard as proposed would be neither safe nor appropriate.[3] Consequently the proposed standard was not adopted.

The committee then prepared and supported the legislation which became section 442.025, effective August 29, 1953, which did not purport to affect prior conveyances. This legislation eliminated most of the problems as to conveyances within its scope. Title Examination Standard No. 28 and the extensive comment thereto[4] cover the basic problems as to the scope and operation of the statute but with several important caveats.[5]

The effectiveness of a direct conveyance made prior to August 29, 1953, to create a joint tenancy or a tenancy by the entirety has finally been settled by *Kluck v. Metsger*[6] which is analyzed in detail *infra*. This case was foreshadowed in 1954 by *Creek v. Union Nat'l Bank*,[7] a case overlooked by the law reviews, probably because the summary of the issues preceding the headnotes to the report is confined to the issues of mental competency and undue influence and gives no hint as to the direct conveyancing issue.

The *Creek* case states that where two sisters, S1 and S2, were benefi-

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3. Title Examination Standards Committee, *Report 1953-54*, 10 J. Mo. B. 166 col. 1, 168 col. 2 (1954), where the tentative draft of Title Examination Standard No. 28 and comment thereto includes as Comment (h) a discussion of direct conveyances before Aug. 29, 1953. This part of the comment was dropped in the final draft, 23 V.A.M.S. (Supp.) ch. 442 app., as not essential, the standard itself covering only conveyances effective on and after Aug. 29, 1953.

4. 23 V.A.M.S. (Supp.) ch. 442 app.

5. *Ibid.* Comment (e) is concerned with a conveyance by one spouse who owns in severalty to the other spouse in severalty. Comment (f) is concerned with the use of a deed not only to effect partition but also by the same deed to create a joint tenancy or tenancy by the entirety.

In the first type of case, a conveyance by one spouse to the other in severalty, the safe practice is to convey through a straw.

In the second type of case, partition, the safe practice is to effect partition, and then by a separate deed create the joint tenancy or tenancy by the entirety.

6. 349 S.W.2d 919 (Mo. 1961).

7. 266 S.W.2d 737 (Mo. 1954).

ciaries as tenants in common of a trust of personal property, and thereafter S1 and S2 joined in a transfer to themselves, S1 and S2, "as tenants by the entirety [*sic*] with right of survivorship", they became joint tenants, even though the transfer did not go through a straw party.[8] It is doubtful whether this was a significant issue in the case, and it could be argued that there was unity of title or at least a reasonable facsimile thereof as well as the other three unities. In any event, a transfer of personal property by two tenants in common to themselves as joint tenants is not necessarily a controlling precedent in a case where a father conveys real estate to father and son in fee in joint tenancy. The really significant thing in the opinion by Bohling, C., in the *Creek* case is the expression of the court's attitude that clear intention should override purely formalistic rules based on arbitrary distinctions and niceties of the feudal common law, and that there is no good reason for going through a straw party.

Kluck v. Metsger,[9] without benefit of statute, holds that where the intention is clear a direct conveyance by H[usband] to H and W[ife] is effective to create a tenancy by the entirety. H owned Blackacre, and in 1943 he conveyed Blackacre by warranty deed, the significant provisions of which were as follows. The premises named H as party of the first part and W as party of the second part. The granting clause ran to "the party of the second part [W], a co-tenancy by the Entirety with said party of the first part [H]". Following the description was a special clause: "The said party of the first part reserving unto himself a co-tenancy by the entirety with said party of the second part in and to said premises; the intention of this deed being to vest fee simple title to said premises in [H] and [W], husband and wife, by the entirety with right of survivorship." The habendum ran to "the said party of the second part [W], as co-tenant by the entirety with right of survivorship." The opinion does not set out the warranty clause, but in view of the fact that the court quoted certain parts of the deed with special recitals, it is probable that the warranty clause had no special recital and ran simply to "the party of the second part and *her* heirs and assigns forever." H died intestate, survived by W and by H's children by a former marriage. Thereafter W quitclaimed to her son (apparently by a former marriage), who died intestate sur-

8. See *id.* at 749-50, and especially *id.* at 752, for a discussion of this problem.

9. *Supra* note 6.

vived by his widow and issue. The litigation to try and determine title was between the heirs at law of H, who contended that the 1943 deed gave W no interest whatsoever, and the successors in title to W, who claimed the entire fee.

It would seem that it could not be contended with any hope of success that the 1943 deed was without any effect whatsoever. The real problem would seem to be whether it was effective to create a tenancy by the entirety in the fee with W surviving to the whole, or whether on orthodox common law principles it gave W only an undivided one-half as tenant in common, leaving one-half in H as a tenant in common.

The court in an incisive opinion by Hyde, J., held that the 1943 deed effectively created a tenancy by the entirety, and that W survived to the whole, concluding:

> Therefore, we should hold that a deed creates the interest which the parties clearly intended it to create, without regard to purely formalistic practices, arbitrary distinctions and niceties derived from the feudal common law, in the absence of contrary public policy or prohibitory legislation. Sec. 442.025 RSMo 1959 (adopted 1953, Laws 1953, p. 615,) V.A.M.S., as well as our rule of construction in accordance with the grantor's intent, indicates a public policy in accord with this view and with our ruling in Creek v. Union National Bank, supra.[10]

For several reasons *Kluck v. Metsger* is a case of great authority, in addition to the eminence of the jurist who wrote the opinion. First, it is a square holding. Second, it is a hard case but nevertheless the court made good law; the holding excludes the natural objects of H's bounty, the blood issue of H who was the original source of the property, and gives the property to the widow and descendants of a stepchild of H. Third, Division No. 1 in the *Kluck* case expressly approves what Division No. 2 said in the *Creek* case; while neither opinion was by the court en banc, both divisions have clearly expressed themselves and are in accord.

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10. 349 S.W.2d at 921. Survivorship was effected as an ordinary incident of a tenancy by the entirety in fee. There is no indication whatsoever that survivorship was effected by construing the limitation as creating a contingent remainder in the whole in the survivor. On the Hunter v. Hunter type of construction and its limited area of operation, see Eckhardt, *Property Law in Missouri*, 24 Mo. L. Rev. 456-69 (1959) (Joint Tenancies and Tenancies by the Entirety—Words of Survivorship—Joint Tenancy or Tenancy by the Entirety in Fee, or "Joint" Life Estate with Contingent Remainder in Fee in Survivor); Eckhardt, *Property Law in Missouri*, 25 Mo. L. Rev. 390 (1960) (Hunter v. Hunter Revisited).

Fourth, the conveyance in issue was so ineptly drawn that it was not even a clean direct conveyance from H to H and W in fee as tenants by the entirety, but was a conveyance with a reservation with clear intention; if such a conveyance was effective to create a tenancy by the entirety, a fortiori a clean direct conveyance would be effective.

What is the significance of the *Kluck* case to title examiners with reference to conveyances prior to August 29, 1953? In my opinion a title examiner now can pass as marketable and without comment a title where the only question is as to the effectiveness of a direct conveyance to create a tenancy by the entirety and where a tenancy by the entirety is expressly indicated. I have not yet reached any firm conclusion as to whether a title examiner should pass a direct conveyance, H to H and W in fee, where the entireties estate depends on the presumption in Section 442.450 of the 1959 Revised Statutes of Missouri. In principle it would seem that a title examiner should pass any direct conveyance which he would pass if title had gone through a straw. The *Kluck* case was not really concerned with the sufficiency of a limitation to create a tenancy by the entirety, but with the technical problem whether one must convey through a straw. I believe this would be a proper subject for the Real Property Committee of The Missouri Bar to consider for a new title examination standard.

Although the *Kluck* case was concerned with the creation of a tenancy by the entirety, the principle of the case is fully and equally applicable to a direct conveyance purporting to create a joint tenancy; in addition there is the dictum in the *Creek* case which was concerned with the creation of a joint tenancy in personal property. I would pass a pre-1953 conveyance of the type, Father to Father and Son in fee in joint tenancy, without waiting for a definitive decision on the point.

II. Joint Tenancy—Sufficiency of Words to Create

A. *Source of Section 442.450, RSMo 1959*

The earliest legislation in Missouri concerning joint tenancies was in 1816 and prohibited joint tenancies, or at least prohibited their really important incident: "The doctrine of survivorship in cases of joint tenants shall never be allowed, in this territory."[11] In 1825 joint tenancies were per-

11. Act Jan. 19, 1816, 1 Mo. Terr. Laws § 2, at 436 (1804-1824).

mitted, but a transfer of real property to two or more persons created a tenancy in common unless expressly declared to pass "not in tenancy in common, but in joint tenancy."[12] In 1835 the present terminology of Section 442.450 of the Revised Statutes of Missouri was adopted, that a transfer of real property to two or more persons created a tenancy in common "unless expressly declared in such grant, or devise, to be in joint tenancy."[13]

B. *Sufficiency of Words to Create Joint Tenancy*

What words are sufficient to expressly declare a transfer to be "in joint tenancy" has given rise to a substantial amount of litigation in Missouri and elsewhere. The problem needs to be approached on two levels: first, in litigation what express declaration will be held to satisfy section 442.450; and second, what express declaration so clearly satisfies the statute that title is marketable.

Powers v. Buckowitz,[14] a decision by the Missouri Supreme Court en banc, is an extremely important holding as to what express declaration will be held in litigation to satisfy the statute, not only for its narrow holding on the limitation used in the case but also for its discussion of several variants. The able opinion was by Barrett, C.; Westhues, J., dissented without opinion.

Powers v. Buckowitz was concerned with a 1952 conveyance through a straw party whereby Mother conveyed to Straw in fee, and Straw quitclaimed to Mother and Daughter by the deed in question. The premises of the deed named Mother and Daughter "as tenants by entirety [*sic*] *and to* the survivor of them." The granting clause ran "unto the said parties of the second part, as tenants by entirety [*sic*] *and to* the survivor of them." The habendum ran to the parties of the second part "as tenants by the entirety [*sic*] *or* survivor of them *and to their heirs and assigns forever.*" Being a quitclaim deed there was no warranty clause and no opportunity for another variation of the recital. It is difficult to boil down the limitation to one hypothetical form because the scrivener (a layman) was not consistent, the first two recitals being identical and the third recital differing in the several respects indicated by italics supplied.

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12. § 3, at 216, RSMo 1825. There was an exception in this act in the case of transfers to executors or trustees, the exception being carried forward through successive amendments into the present § 442.450, RSMo 1959.

The exception in case of a transfer to a husband and wife with resultant tenancy by the entirety was first expressed in § 12, at 443, RSMo 1865.

13. § 6, at 119, RSMo 1835.

14. 347 S.W.2d 174 (Mo. 1961) (en banc).

Thereafter in 1952 Mother married the plaintiff, and in 1957 Mother died intestate survived by the plaintiff, her widower, and by her daughter, the other grantee in the 1952 deed. The widower's theory was that the 1952 deed created a tenancy in common, that Mother died owning an undivided one-half in fee, and that as widower he inherited from Mother one-half of one-half, or one-fourth of the whole. Daughter's theory was that the 1952 deed created a joint tenancy in fee with the incident of survivorship, and that she survived to the whole.

The problem was whether the language in the deed "expressly declared" the interest "to be in joint tenancy" to satisfy the requirement of section 442.450. The problem was made much more difficult by reason of the prior dictum by the court en banc in *State ex rel. Ashauer v. Hostetter*[15] that a devise to two daughters "as tenants by the entirety" created a tenancy in common in fee. In the *Ashauer* case the court said:

> But Sec. [442.450] makes it plain that a joint tenancy can be created in grantees or devisees, who are not executors, trustees or husband and wife, in one way only, and that is to expressly say so, by using the term "joint tenancy."[16]

The statement was dictum because the suit was by one tenant against the other for partition, and partition will be decreed as of course in the case of joint tenancies as well as tenancies in common.[17]

Notwithstanding the dictum in the *Ashauer* case, the court en banc in *Powers v. Buckowitz* held the deed in question created a joint tenancy in fee with its incident of survivorship:

> In summary, it was the manifest intention of the parties to create an estate in fee simple with right of survivorship in mother and daughter, and for the reasons indicated this particular instrument has "expressly declared" (V.A.M.S. § 442.450) the fact.[18]

To B and C in fee as tenants by the entirety. This essentially is the limitation in *Powers v. Buckowitz* but with the survivorship recital omitted. *Powers v. Buckowitz* states by way of dictum that such a limitation does not create a joint tenancy, saying: ". . . this phrase standing alone is in-

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15. 344 Mo. 665, 670, 127 S.W.2d 697, 699 (1939) (en banc).
16. *Id.* at 670, 127 S.W.2d at 699.
17. See Gunn, 5 Mo. L. REV. 114-18 (1940) (Property—Estates—Limitation Sufficient to Create Joint Tenancy) for an able analysis of the *Ashauer* case and its ramifications.
18. 347 S.W.2d at 176.

sufficient to create a joint tenancy with the right of survivorship. . . ."[19] The express recital of survivorship in the actual limitation in *Powers v. Buckowitz* was deemed significant as "an affirmative expression of intention" to create a joint tenancy.

To B and C in fee jointly. The court in *Powers v. Buckowitz* properly states by way of dictum that such a limitation would create only a tenancy in common, the word "jointly" being equivocal.[20] In popular usage all concurrent interests are held "jointly" and the word "jointly" is almost as indicative of a tenancy in common as it is of a joint tenancy.

C. *Proper Limitation of a Joint Tenancy*

How should a joint tenancy in fee be limited? It is believed that the basic form of the limitation should be: "to B and C in fee as joint tenants and not as tenants in common." A variant, "to B and C in fee *in joint tenancy* and not in tenancy in common," meets the literal requirement of section 442.450 that the interest be expressly declared to be "in joint tenancy," but is somewhat awkward, and the phrase "as joint tenants" in lieu of "in joint tenancy" is ordinarily used by lawyers and has been approved in at least two cases as a literal compliance with section 442.450.[21]

Since 1835 it has not been necessary to negative a tenancy in common by an express recital,[22] but the inclusion of the words "and not as tenants in common" shows clearly that the draftsman knows the difference between these two types of concurrent interests, and should be included as a routine matter.[23]

Any express recital of survivorship should be avoided, in view of *Hunter v. Hunter*.[24]

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19. *Ibid.*
20. *Ibid.*
21. McClendon v. Johnson, 337 S.W.2d 77, 81 (Mo. 1960); Powers v. Buckowitz, *supra* note 14, at 176.
22. *Supra* notes 12 and 13.
23. Where there is to be a joint tenancy between husband and wife, the draftsman should recite "and not as tenants in common and not as tenants by the entirety." See PETERSON & ECKHARDT, MISSOURI LEGAL FORMS § 723 (1960).
PETERSON & ECKHARDT, *op. cit.*, §§ 721-31, covers various limitations of concurrent interests. Section 701 shows how to modify a printed form by striking out and interlining so that the instrument will be completely consistent on its face.
24. 320 S.W.2d 529 (Mo. 1959), exhaustively discussed in Eckhardt, *Property Law in Missouri*, 24 MO. L. REV. 456-69 (1959).
That the construction in the *Hunter* case is being confined to its proper bounds, see McClendon v. Johnson, *supra* note 21, analyzed in Eckhardt, *Property Law in Missouri*, 25 MO. L. REV. 390-92 (1960); and see Powers v. Buckowitz, *supra* note 14.