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Concurrent Estates in Land: Joint Tenancy between Two Married Couples, or a Married Couple and Another Person—Joint Tenancy or Tenancy by the Entirety within the Married Couple

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mount issue in most fourth amendment litigation.¹⁰⁴ The arrest warrant plus probable cause rule as applied to the *Payton* situation is consistent with the expectation of privacy test. When that test is applied to the "entry of the third party's residence to arrest" question, however, it mandates a search warrant requirement and the Court, in *Steagald*, should reach that result.

STEVEN W. HUBBARD

CONCURRENT ESTATES IN LAND: JOINT TENANCY BETWEEN TWO MARRIED COUPLES, OR A MARRIED COUPLE AND ANOTHER PERSON— JOINT TENANCY OR TENANCY BY THE ENTIRETY WITHIN THE MARRIED COUPLE

*Nelson v. Hotchkiss*¹

Grantor conveyed a farm by a 1969 deed to "[H1] and [W1], husband and wife; and [H2] and [W2], husband and wife, all as joint tenants with right of survivorship in all four, and not as tenants in common."² In January 1975, H1 and W1 dissolved their marriage. The couple agreed that their undivided one-half interest in the farm would "remain the joint property of [H1 and W1] for a period of two (2) years."³ In December 1976, H1 conveyed his interest to H2 and W2 with W1's consent. H2 died two months later.

W1 sued for a partition in August 1977. The trial court held that the original conveyance created a technical joint tenancy among the four.⁴

104. "In these cases, which involve application of the exclusionary rule, the issue is whether certain evidence is admissible at trial." 445 U.S. at 591-92.

1. 601 S.W.2d 14 (Mo. En Banc 1980).
2. *Id.* at 16.
3. *Id.*
4. *Id.* at 17.

The concept of a joint tenancy is that there is but one estate owned jointly by several persons. A joint tenancy is created only where there are the four unities of title, interest, time and possession. For unity of title, the estate must be created by one instrument, deed or will. For unity of

H1's conveyance to H2 and W2, the trial court ruled, severed the joint tenancy as to that undivided one-quarter. The fact that H2 and W2 held this one-quarter interest as tenants by the entirety was not disputed. The remaining three-quarters was found by the trial court to be held in equal shares by W1, W2, and H2 as joint tenants. Following H2's death, W1 and W2, the only remaining joint tenants, each survived to an undivided one-half of the jointly held three-quarters, or three-eighths each. W2, as the surviving spouse in an estate by the entirety, gained complete ownership of the one-quarter conveyed by H1 to H2 and W2. Consequently, the trial court awarded W1 three-eighths of the partition sale proceeds and awarded W2 three-eighths plus one-quarter, or a total of five-eighths of the proceeds.

On appeal to the Missouri Court of Appeals for the Southern District, W2 asserted ownership as the surviving spouse in an estate by the entirety of both the undivided one-half originally conveyed to W2 and H2 and the undivided one-quarter later conveyed by H1. W2 therefore claimed entitlement to three-quarters of the partition sale proceeds.⁵ The court of appeals, in an opinion written by Judge Prewitt, agreed with W2 and reversed. The language in the deed, the court of appeals concluded, was insufficient to negate the creation of a tenancy by the entirety between each husband and wife.⁶ The language in the deed was sufficient, however, to create a joint tenancy between the two estates by the entirety.⁷

interest, the interests must be of the same quantum or duration: a conveyance to B for life and to C and his heirs creates a tenancy in common for B's life, not a joint tenancy. For unity of time, the interests must vest at the same time: a conveyance to B for life, remainder to the heirs of C and the heirs of D, creates a tenancy in common in the remainder as between the respective heirs, because their interests will vest at different times, at the death of C as to his heirs, and at the death of D as to his heirs.

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

5. *Nelson v. Hotchkiss*, No. 10996, slip op. at 2 (Mo. App., S.D. Nov. 14, 1979). See *Davidson v. Eubanks*, 354 Mo. 301, 189 S.W.2d 295 (1945):

[U]nder the statute [§ 442.450 RSMO (1978)] a grant to two or more persons (other than executors and trustees and husband and wife) creates a tenancy in common unless expressly declared to be a joint tenancy; and in our case, we have seen, a grant to husband and wife creates an estate by the entirety, unless the instrument clearly expresses that a tenancy in common (or a joint tenancy) is intended. Otherwise stated, . . . a husband and wife, to whom an estate is granted as joint grantees, are prima facie tenants by the entireties.

Id. at 310, 189 S.W.2d at 299-300. In *Nelson*, the supreme court referred to the rule that a husband and wife take as tenants by the entirety as a rebuttable presumption. 601 S.W.2d at 18.

6. No. 10996, slip op. at 4.

7. *Id.* at 5. The presumption of a tenancy in common in a conveyance to two or more people is derived from RSMO § 442.450 (1978). See note 5 *supra*.

The Missouri Supreme Court agreed with the court of appeals but decided the case, after transfer, as though on original appeal.⁸ In an opinion written by Judge Welliver, the supreme court noted that the divorce between H1 and W1 ended the unity of person⁹ necessary to support a tenancy by the entirety and thereby ended the tenancy by the entirety in their undivided one-half interest. Since they were no longer both seised of an undivided one-half of the farm,¹⁰ but instead each seised of an undivided one-quarter, the unity of interest¹¹ necessary to support a joint tenancy was destroyed and the joint tenancy between the two estates by the entirety was ended. After the dissolution, H1 and W1 each held their interests as tenants in common with H2-W2's estate by the entirety in an undivided one-half. The nature of the tenancy between H1 and W1 after the dissolution but prior to H1's conveyance was left unclear, but it was not necessary for resolving the questions presented to decide whether, as between themselves, they held as joint tenants or as tenants in common.¹²

The record contained no evidence as to either the path of devolution intended by the 1969 conveyance or the circumstances leading up to that transaction.¹³ The supreme court pointed out that the language of the deed was not inconsistent with the formation of two estates by the entirety and a joint tenancy between the estates.¹⁴ In fact, the court concluded that this construction effected the probable intent of the parties.¹⁵

8. 601 S.W.2d at 16.

9. The unity of person is derived from the fiction that husband and wife are one person and is often stated as a requirement of a tenancy by the entirety. *See, e.g., In re Estate of King*, 572 S.W.2d 200, 211 (Mo. App., K.C. 1978). *See generally* 41 C.J.S. *Husband and Wife* § 33 (1944).

10. Each estate by the entirety consisted of an undivided one-half of the farm and, as in all such estates, each tenant by the entirety was seised of the whole estate and not of an undivided one-half of the estate. *See generally* 41 C.J.S. *Husband and Wife* § 34 (1944).

11. *See* note 4 *supra*.

12. In cases decided under Missouri's old divorce law, absolute divorce converted a tenancy by the entirety into a tenancy in common unless agreed or adjudged otherwise. *See, e.g., McIntyre v. McIntyre*, 377 S.W.2d 421, 426 (Mo. 1964); *Allan v. Allan*, 364 S.W.2d 578, 582 (Mo. 1963); *Pfeiffer v. Pfeiffer*, 355 S.W.2d 934, 939 (Mo. 1962).

The new dissolution law states that the trial judge "shall divide the marital property." RSMO § 452.330 (1978). *Corder v. Corder*, 546 S.W.2d 798 (Mo. App., K.C. 1977) interpreted this section as *requiring* the trial judge to divide the marital property. *Id.* at 804. An earlier case, *Davis v. Davis*, 544 S.W.2d 259 (Mo. App., K.C. 1976), found that the legislative intent of RSMO § 452.330 was to foreclose the tenancy in common option except where the "economics involved" required such a solution. *Id.* at 264. For a definition of marital property, see note 41 *infra*.

13. 601 S.W.2d at 20.

14. *Id.* at 19.

15. *Id.* at 20.

Nelson is the first Missouri case to decide whether a conveyance of real property to "husband and wife" creates a tenancy by the entirety or a joint tenancy.¹⁶ Previous cases had decided that a conveyance to "husband and wife as tenants in common" created a tenancy in common instead of a tenancy by the entirety;¹⁷ that a conveyance to "husband and wife jointly" created a tenancy by the entirety;¹⁸ and that a tenancy by the entirety, instead of a joint tenancy, had been created in a bank account opened by a husband and wife.¹⁹

The instant case reaffirmed the proposition that, absent language which "clearly expresses"²⁰ a contrary intent in a conveyance to "husband, wife, and a third party," the husband and wife take a one-half interest as tenants by the entirety and the third party takes a one-half interest.²¹ The question apparently had not arisen in any reported Missouri Supreme Court case during this century, but had been faced in a recent Missouri court of appeals case.²²

In addition, the *Nelson* court found that the presumption that two tenancies by the entirety are created by a deed to two married couples can be overcome by a clearly expressed intent to create a joint tenancy among the four grantees.²³ As authority for this observation the court cited, but did not discuss, *Fekkes v. Hughes*, a Massachusetts case.²⁴ In *Fekkes*, a

16. For a discussion concerning the technical differences between a joint tenancy and a tenancy by the entirety, see 41 C.J.S. *Husband and Wife* § 33 (1944).

17. *Davidson v. Eubanks*, 354 Mo. 301, 312, 189 S.W.2d 295, 300 (1945).

18. *Milligan v. Bing*, 341 Mo. 648, 657, 108 S.W.2d 108, 112 (1937) (it was not argued that a joint tenancy had been created).

19. *Cullum v. Rice*, 236 Mo. App. 1113, 1118, 162 S.W.2d 342, 344 (K.C. 1942).

20. 601 S.W.2d at 19.

21. *Id.* at 18.

22. A Missouri court of appeals case decided two months before *Nelson*, *Jenni v. Gamel*, 602 S.W.2d 696 (Mo. App., E.D. 1980), ruled that a conveyance to "husband, wife, son-1, and son-2 as joint tenants or to the survivor of them" transferred a one-third interest to each son and a one-third interest to husband-wife. *Id.* at 700-01. *Hall v. Stephens*, 65 Mo. 670, 677 (1877) appears to be the most recent Missouri Supreme Court case on the subject. The *Jenni* court relied on *Hall* to support its apportionment.

23. 601 S.W.2d at 19.

24. 354 Mass. 303, 237 N.E.2d 19 (1968). The dissent in *Nelson* at the court of appeals argued that *Fekkes* was authority for the proposition that the conveyance in *Nelson* created a joint tenancy among the four as individuals and that the use of the words "with right of survivorship *in all four*" expressed an intent "that the joint tenancy should exist without qualification among all of the grantees." No. 10996, slip op. at 2 (Maus, J., dissenting).

The *Jenni* analysis of *Fekkes* tracks Judge Maus' analysis because the creation of a technical joint tenancy among "husband, wife, and third parties" hinges on the use of the word "all." In *Jenni*, the failure to use "all" before "as joint tenants"

conveyance to “[H1] and [W1], husband and wife, and [H2] and [W2], husband and wife, all as joint tenants”²⁵ was found to create a technical joint tenancy among the four. The *Fekkes* court added that the use of the word “all” overcame any ambiguity as to the parties’ intent.²⁶ In the instant case, however, the same language as the *Fekkes* conveyance plus the words “with right of survivorship in all four and not as tenants in common” was found not to create a technical joint tenancy among the four. It is unclear whether *Fekkes* was cited to show only that the presumption of two tenancies by the entirety can be overcome or to serve as an example of how Missouri courts would rule given the same facts. In other words, the *Nelson* court might not find that the presumption is overcome by the language used in the *Fekkes* deed.

Nelson provides Missouri attorneys with valuable guidelines for the preparation of a deed. An attorney should always draft the deed not simply to be defensible at trial but to preclude any possibility of litigation.²⁷ If the attorney intends to create a tenancy other than one by the entirety in a conveyance to a husband and wife, that intent must be “clearly expressed.”²⁸ The present case demonstrates that a conveyance to “husband and wife as joint tenants and not as tenants in common” would not be a “clear expression” of an intent to create a joint tenancy. A tenancy by the entirety is, as a practical matter, a special form of a joint tenancy.²⁹ The court stated that the words “and not as tenants by the entirety” will

seems to have prevented the creation of a technical joint tenancy among the four grantees. 602 S.W.2d at 700-01.

Nelson demonstrates, however, that the use of “all as joint tenants” in a conveyance to “husband, wife and a third party,” without a recital that the husband and wife are not to hold as tenants by the entirety, will not create a technical joint tenancy among the grantees as individuals. In other words, *Jenni*’s reliance on *Fekkes* to prevent the creation of a joint tenancy among all four grantees was misplaced.

25. 354 Mass. at 304, 237 N.E.2d at 20. At the time of this case, Massachusetts presumed the creation of a tenancy by the entirety in a conveyance to a husband and wife. *Id.*

26. *Id.* The *Fekkes* court emphasized the word “all,” probably to distinguish *Fekkes* from an earlier case, *Fulton v. Katsowney*, 342 Mass. 503, 174 N.E.2d 366 (1961). In *Fulton*, a conveyance to a third party and a husband and wife “as joint tenants and not as tenants in common” created a tenancy by the entirety in the husband and wife in an undivided one-half. *Id.* at 504, 174 N.E.2d at 367. The *Fulton* court found an ambiguity as to whether the joint tenancy applied only as between the husband and wife or as among all three parties. It held that the husband and wife were tenants by the entirety and that only a tenancy in common was created between the estate by the entirety and the third party. *Id.* at 505, 174 N.E.2d at 368.

27. Peterson & Eckhardt, *Legal Forms*, 6 MISSOURI PRACTICE SERIES § 691 (1960).

28. See note 5 *supra*.

29. See note 16 *supra*.

overcome the presumption of the creation of a tenancy by the entirety in a conveyance to a husband and wife.³⁰ A specific negative recital should be included, therefore, if a tenancy by the entirety is not intended.

The controversy might never have occurred in *Nelson* had the deed clearly expressed the parties' intent. W1 argued that a joint tenancy was created among the four grantees. When given the circumstances of the instant case, authorities suggest that such an intent can be implemented by the following language: "to [H1] and [W1], his wife, and [H2] and [W2], his wife, in undivided one-fourths, as joint tenants in fee simple absolute and not as tenants in common, and not as tenants by the entirety between the said [H1] and [W1] and not as tenants by the entirety between the said [H2] and [W2]."³¹

W2 argued, and the supreme court agreed, that a tenancy by the entirety between each husband and wife and a joint tenancy between the couples were created by the conveyance. Authorities suggest that this intent can be more clearly implemented by the following: "to [H1] and [W1], his wife, as tenants by the entirety, an undivided one-half, and to [H2] and [W2], his wife, as tenants by the entirety, an undivided one-half, the two couples to hold as joint tenants and not as tenants in common."³²

The original intent of the parties in *Nelson*, however, may have been to allow the ultimate survivor to take the fee simple absolute and to minimize any possibility that a partition, mortgage, or conveyance out would prevent this. A series of life estates followed by a remainder in fee could have effected this intent. Each grantee would have had a life estate and a contingent remainder in fee in the whole. The ultimate survivor would then have taken by way of remainder in fee rather than by way of the incident of survivorship.³³ This intent could have been implemented by stating: "to [H1, W1, H2, W2] as tenants in common for their joint lives, and then to the three survivors of them as tenants in common for their joint lives, and then to the two survivors of them as tenants in common for their joint lives, and then to the survivor of them in fee simple absolute."³⁴ The contingent remainders created probably are not destructible in Missouri.³⁵

30. 601 S.W.2d at 20.

31. Peterson & Eckhardt, *supra* note 27, § 724.5 (Berman Supp. 1979). This form contains the language suggested by the court to manifest a "clear expression" of an intent not to create a tenancy by the entirety between each husband and wife. 601 S.W.2d at 20.

32. Peterson & Eckhardt, *supra* note 27, § 725.

33. No difference in final result would seem to occur, but creating such estates would seem to minimize the likelihood that the intent of the parties for the ultimate survivor to take the entire fee could be defeated. A partition, mortgage, or conveyance out would destroy the right of survivorship incident to a joint tenancy in fee since the unities of title and time would be destroyed. *See* note 4 *supra*.

34. Peterson & Eckhardt, *supra* note 27, § 754.

35. "At common law a contingent remainder was destructible." Eckhardt &

The supreme court did not discuss *Hunter v. Hunter*³⁶ in which a less than explicit devise of land using the words "joint tenants" and "with right of survivorship" was construed to create a life estate for the shorter life with a contingent remainder in fee in the survivor.³⁷ The omission of the words "in fee" or similar words to limit the tenancy prevented the devise from creating a technical joint tenancy capable of severance by a conveyance of a jointly held interest.³⁸ If this construction had been adopted by the *Nelson* court, partition probably would not have been possible unless all parties holding a present or future interest had consented. Under this view, all grantees would have been tenants in common in a series of life estates. It would then have been important to determine whether H1 transferred only a life estate or all right, title, and interest in his undivided one-quarter. If H1 transferred only a life estate, W1 might then have been entitled to only one-third, W2 would have taken a remainder in one-third of H2's share instead of surviving to H2's entire interest, and H1 would have been compensated for the contingent remainder he did not convey.

The decision in *Nelson* leaves unclear the effect of the new Missouri marriage-dissolution law³⁹ on a technical joint tenancy between husband and wife. Prior to the new law, all property held in a tenancy by the entirety was, upon absolute divorce, converted into a tenancy in common where the parties did not otherwise dispose of the property by separation agreement.⁴⁰ Under the new law, the trial judge is required to dispose of all marital property.⁴¹ The trial court in *Nelson*, which ruled each grantee an

Peterson, *supra* note 4, § 49, at 47. Its destructibility in Missouri has never been expressly ruled on but authorities suggest it is not destructible. See, e.g., Eckhardt, *The Destructibility of Contingent Remainders in Missouri*, 6 MO. L. REV. 268, 295-96 (1941); Eckhardt, *Property Law in Missouri*, 25 MO. L. REV. 390, 393-94 (1960). Since this form of estate involves a contingent remainder, the practitioner should be aware of the possibility of its destructibility and should provide a gap in seisin so that the fee interest will be an indestructible executory interest rather than a contingent remainder. This alternative to the contingent remainder is discussed in Eckhardt, *supra*, 6 MO. L. REV. at 272.

36. 320 S.W.2d 529 (Mo. 1959). *Hunter* is discussed in Eckhardt, *Property Law in Missouri*, 24 MO. L. REV. 456, 456-58 (1959); Eckhardt, *supra* note 35, 25 MO. L. REV. at 390-92.

37. 320 S.W.2d at 535.

38. This proposition can be inferred from a later case, *McClendon v. Johnson*, 337 S.W.2d 77 (Mo. 1960), which involved a transfer similar to that in *Hunter* but added the words "and to their heirs and assigns." *Id.* at 79. The *McClendon* court held a joint tenancy in fee was created. *Id.* at 81. Each joint tenant, therefore, could convey the fee as to his interest.

39. RSMO §§ 452.300-.420 (1978).

40. See note 12 *supra*.

41. *Id.* RSMO § 452.330.3 (1978) defines marital property:

All property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation is presumed to be marital prop-

individual joint tenant, found that the joint tenancy remained intact until the conveyance by H1 to H2 and W2.⁴² In other words, a dissolution would have no effect, in the trial court's view, on property held in technical joint tenancy by a husband and wife unless agreed or ordered otherwise.⁴³ This view, however, could lead to litigation between heirs of a decedent and decedent's ex-spouse over whether a joint tenancy continued after the dissolution.⁴⁴ The attorney should determine whether the client wishes an ex-spouse to take the interest on the client's death and should resolve the problem expressly at the time of dissolution to prevent further litigation.

The supreme court never reached the question whether a dissolution would end presumptively a joint tenancy between husband and wife since it found no technical joint tenancy between each husband and wife.⁴⁵ Since the facts did not require such a finding, the court did not discuss the possibility that the property agreement created a joint tenancy between H1 and W1.

The *Nelson* court also did not discuss each spouse's ability to bring an action for a partition as to the joint tenancy between the couples. Had W1 still been married at the time of the partition suit and had she and H1 still held their interest as tenants by the entirety, could she have maintained an action to sever the joint tenancy between the couples over H1's objection to the severance of their interest from the joint tenancy? The question has not arisen in Missouri. A New Jersey case cited in the opinion answered in the affirmative.⁴⁶

Nelson has clarified and reaffirmed the law surrounding conveyances to a husband and wife. The case presents a textbook example of the importance of a clear statement of the tenancies and interests intended to be created by a deed. Form books, when properly utilized, can aid the practitioner greatly in the preparation of a clear, concise deed. While careful

erty regardless of whether title is held individually or by the spouses in some form of coownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property.

See generally Krauskopf, *Marital Property at Marriage Dissolution*, 43 MO. L. REV. 157 (1978).

42. 601 S.W.2d at 17.

43. In at least one state, this conveyance would have created a joint tenancy capable of continuing unchanged after divorce. *See* *Witzel v. Witzel*, 386 P.2d 103, 108 (Wyo. 1963) (transfer was to husband and wife as joint tenants and not as tenants in common).

44. *See, e.g.*, *Mann v. Bradley*, 188 Colo. 392, 535 P.2d 213 (1975) (husband and wife held house as joint tenants; nothing said about the continuation of the right of survivorship on divorce, litigation required to prevent husband from taking house from his minor children on the death of his ex-wife).

45. 601 S.W.2d at 17.

46. *Platt v. Platt*, 93 N.J. Eq. 395, 116 A. 326 (1922).