Montana Law Review

Volume 19
Issue 1 *Fall 1957*

Article 10

July 1957

Real Property—Co-Tenancies—Creation of Joint Tenancies (Hennigh v. Hennigh, Mont. 1957)

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of a liquor seller after relying upon one of the authorized identification cards in a sale to a minor.

It is submitted that the protection of adolescents against psychic and physical impairment from the use of alchohol, being a settled policy of the state, is more important than the inconvenience that might come to the liquor purveyors in taking the trouble to ascertain the maturity of their customers. The burden is not intolerable, and the legislature has the undoubted power to impose it. If it seems too heavy, relaxation should come from the legislature and not from the courts.

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REAL PROPERTY—CO-TENANCIES—CREATION OF JOINT TENANCIES—In 1944 Marion E. Hennigh and her husband, Charles D. Hennigh, purchased certain real property by warranty deed with money from a joint bank account. The deed described the grantees as "Charles D. Hennigh and Marion E. Hennigh as Joint Tenants of Townsend, Montana." In the granting, habendum and warranty clauses was typed the word "their," so that the clause read "their heirs and assigns." Mr. Hennigh died intestate in 1948 and his wife claimed the above property by right of survivorship. It was therefore omitted from an inventory and appraisal of the decedent's estate. The petitioners, children of the deceased husband by a former marriage, made an application in the probate court to include said property in the decedent's estate. This application being denied, the petitioners brought an action in the district court which was also dismissed. On appeal to the Supreme Court of Montana, *held,* affirmed. By the use of the words "joint tenants" in the warranty deed a joint tenancy with the right of survivorship was created. *Hennigh v. Hennigh,* 309 P.2d 1022 (Mont. 1957).

Joint tenancy is the form of co-ownership in which each co-owner is possessed of the whole of the estate, subject to the other's interest. In contrast is the other form of co-ownership, tenancy in common, where tenants hold distinct, although undivided, interests. The chief difference between the two is that the former carries with it the right of survivorship while the latter does not.

The very early common law concerning joint tenancies seems to be uncertain.[1] But at quite an early period judges tended to favor the joint tenancy, so that a conveyance to two or more people without a contrary intent shown was regarded as creating a joint tenancy rather than a tenancy in common.[2] This favoritism developed because it tended to lesson feudal burdens since only one service was due from all joint tenants.[3] With the abolition of tenures this reason no longer existed, and the courts began to look with disfavor on the joint tenancy because it worked a hardship on the heirs and made no provision for posterity.[4] Thus courts began to take

[1]See 2 TIFFANY, REAL PROPERTY § 421 n. 23 (3d. ed. 1939).

[2]See Sturkis v. Sturkis, 316 Ill. 114, 146 N.E. 530, 531 (1925) (dictum); Svenson v. Hanson, 289 Ill. 242, 124 N.E. 645, 647 (1919) (dictum); Wolfe v. Wolfe, 207 Miss. 480, 42 So. 2d 438, 438 (1949) (dictum).

[3]See Shipley v. Shipley, 324 Ill. 560, 155 N.E. 334, 335 (1927) (dictum).

[4]See 2 TIFFANY, REAL PROPERTY § 421 at 202 (3d ed. 1939).

a view, opposite to the common law, that if the intent to create a joint tenancy was not clear a tenancy in common was created.[5] As a result of the same hostility, joint tenancies were abolished by statute in some states.[6] Other states obtained the same result by abolishing the right of survivorship.[7]

In 1865 Montana passed such an act abolishing the right of survivorship, therefore in effect abolishing the joint tenancy.[8] This act was repealed in 1885 when Montana adopted a code section basically the same as section 67-307, Revised Codes of Montana, 1947.[9] This section provides that property can be held in joint tenancy and, together with sections 67-308 and 67-313, forms the foundation for joint tenancies in Montana. Section 67-308 provides:

> A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants.

Section 67-313 provides:

> Every interest created in favor of several persons in their own right, including husband and wife, is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in section 67-308.

The law of most states is similar to that of Montana, providing in effect that a tenancy in common will be created unless the intent to create a joint tenancy is clearly shown.[10] Like much of the law, the rule is clear, but the difficulty comes in applying it.

That which all courts try to ascertain is the intent of the parties. As will be illustrated by the divergent results the courts differ as to what words are necessary to express this intent. The majority of the courts agree that the exact words "joint tenants" need not be used.[11] They also agree that oral evidence can not be used to show the intent of the grantor was to create a joint tenancy. This intent must be gleaned from the instrument itself.[12]

Many courts hold that a grant or devise to *A* and *B* "jointly" will not create a joint tenancy;[13] a fortiori if the granting, habendum and warranty clauses read, "to their heirs and assigns," because such words negate the

[5]State v. Reindl, 94 Colo. 222, 20 P.2d 639 (1934); Gagnon v. Pronovost, 96 N.H. 154, 71 A.2d 747 (1950); REVISED CODES OF MONTANA, 1947, § 67-313.

[6]*E.g.*, Alexander v. Alexander, 154 Ore. 317, 58 P.2d 1265 (1936); ORE. REV. STAT. § 205 (1939).

[7]*E.g.*, TENN. CODE ANN. § 107 (Williams 1956).

[8]Instant case at 1023.

[9]Instant case at 1024.

[10]See Zambunos v. Zambunos, 324 Mass. 186, 85 N.E. 325 (1949), and cases cited note 2 *supra*.

[11]Armstrong v. Hallwig, 70 S.D. 406, 18 N.W.2d 284 (1945), and cases cited therein.

[12]Slosberg v. Horn, 102 Cal. App. 2d 635, 228 P.2d 99 (1951). But see the dissent in Hologhan v. Melville, 41 Wash. 2d 80, 249 P.2d 777 (1952), to the effect that if evidence is sufficient a joint tenancy could be created orally.

[13]Mustain v. Gardner, 203 Ill. 284, 67 N.E. 779 (1902); Doran v. Beale, 108 Miss. 305, 63 So. 647 (1913); see also Taylor v. Taylor, 62 Iowa 501, 17 N.W.2d 745 (1945); Weber v. Nedin, 210 Wis. 43, 246 N.W. 307 (1933).

incident of survivorship necessary for a joint tenancy.[14] But at least one court has held that the word "jointly" has no place in describing a tenancy in common, and in order not to alter the instrument by rejecting the word, a joint tenancy must be created.[15] The insertion of the word "jointly" after an instrument has been completed has been held to show an intent to create a joint tenancy.[16] It should be noted that in the last two cases referred to the words "heirs and assigns" did not appear in the instrument.

In determining whether the word "jointly" in an instrument is sufficient to create a joint tenancy some courts look to the identity of the draftsman of the instrument. If he was an attorney it may indicate that the word was used technically, therefore creating a joint tenancy; drafting by a layman may indicate usage in a non-technical sense, therefore creating a tenancy in common.[17]

Generally, if the granting clause reads "to their heirs and assigns" such language will prevail over a mere recital in an instrument expressing a desire to create a joint tenancy.[18] But if the unquestionable intent is to create a joint tenancy, as where the deed reads "to *A* and *B* as joint tenants and not as tenants in common," and the granting clause reads "to their heirs and assigns," this latter mentioned language may be deemed a scrivener's mistake.[19]

Colorado has a statute which requires that documents creating joint tenancies expressly declare land "to pass not in tenancy in common, but in joint tenancy." In default of such declaration it "shall be deemed to be a tenancy in common."[20] Illinois, with a similar statute, has held that the words "and not as tenants in common" need not be used.[21]

There seem to be, then, three distinguishable views:

1. One view requires the use of the exact words, "to *A* and *B* as joint tenants and not as tenants in common." This explicit language usually overrides the use of the words "heirs and assigns" in the granting, habendum and warranty clauses, but it should be noted that this may not be so where the words "to *A* and *B* as joint tenants and not as tenants in common" are mere recitals in the instrument.

2. Some courts require only the use of the words "joint tenants" without using the words "and not as tenants in common." This writer was unable to discover any decisions wherein the words "joint tenants" and "heirs

[14]Fries v. Fracklaver, 198 Wis. 587, 224 N.W. 717 (1929); Taylor v. Taylor, *supra* note 13.

[15]Case v. Owen, 139 Ind. 48, 38 N.E. 395 (1894); see also Mudhenk v. Biere, 81 Ind. App. 85, 135 N.E. 493 (1922).

[16]Murray v. Kator, 221 Mich. 101, 190 N.W. 667 (1922).

[17]See Householter v. Householter, 160 Kan. 614, 164 P.2d 101 (1945); Overheiser v. Lackey, 207 N.Y. 229, 100 N.E. 738 (1913). But see Albright v. Winey, 226 Iowa 222, 284 N.W. 86 (1939), to the effect that if an attorney drafts an instrument he should use more precise language.

[18]Wright v. Smith, 247 Ala. 665, 60 So. 2d 688 (1952).

[19]Draughon v. Wright, 200 Okla. 198, 191 P.2d 121 (1949).

[20]See State v. Reindl, 94 Colo. 222, 29 P.2d 639 (1934).

[21]Engelbrecht v. Engelbrecht, 323 Ill. 208, 153 N.E. 827 (1926).

and assigns'' appeared in the same instrument as they do in the instant case.

3. Mere use of the word ''jointly'' may not be sufficient, especially where the words ''heirs and assigns'' appear in the granting clause.[22]

With these three views in mind, we can say that the instant case appears to fit under the second, requiring only the use of the words ''joint tenants.'' It appears that the court has disregarded a fact of prime significance in determining the parties' intent, namely, the use of the words ''heirs and assigns'' in the granting, habendum and warranty clauses. It has been seen that the use of these words makes no difference where the intent to create a joint tenancy is explicitly shown. It has also been seen that where the word ''jointly'' is used alone, the use of the words ''heirs and assigns'' in the granting clause will negate the right of survivorship incident to a joint tenancy, therefore creating a tenancy in common. The words ''joint tenants'' are more precise than the use of the word ''jointly,'' but not so precise as the words ''to *A* and *B* as joint tenants and not as tenants in common.'' It would seem, therefore, that the use of the words ''heirs and assigns'' should have merited the attention of the Montana Supreme Court, but the court does not mention the use of these words, even to say that it disregards them.

The instant case appears to be the first in Montana to interpret the statutory requirement for creation of a joint tenancy. The court seems to say that notwithstanding the use of ''heirs and assigns'' in the granting, habendum and warranty clauses a joint tenancy will be created by using the words ''joint tenants'' in the instrument.[23] The fact, however, that perhaps no consideration was given to the phrase ''heirs and assigns'' leaves the question still in considerable doubt, which doubt is deepened by the position of other courts that use of the phrase is crucial.

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[22]Perhaps a word of caution should be injected here. The views set forth above are merely generalized and there may be special facts and circumstances in the particular case which would lead to a different result even though the suggested wording was used.

[23]It is interesting to note that the West Publishing Co. in digesting the instant case interpreted the case in exactly this manner. One of the headnotes reads as follows: "Where defendant and her husband purchased certain realty and received a warranty deed wherein they were described as joint tenants, a joint tenancy was created and upon death of husband property passed to defendant as surviving tenant, notwithstanding fact that granting clause, habendum and warranty clauses read 'to their heirs and assigns'."