Nebraska Law Review

Volume 34 | Issue 1 Article 6

1954

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WORDS NECESSARY FOR CREATION OF A JOINT TENANCY

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The use of joint tenancies has increased in Nebraska within the past decade to the point where it has been estimated that more than half of the conveyances recorded are of that type.[1] In view of the widespread use of this joint form of ownership many questions will arise in the future concerning the language necessary to create a joint tenancy. Section 76-205 of the Revised Statutes of Nebraska provides:

> In the construction of every instrument creating or conveying ... any real estate or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law.

If property is granted to "*A* and *B* jointly", the question arises whether this is sufficient indication of the grantor's intent to create a joint tenancy in *A* and *B*, or is it necessary for the draftsman to make that intent more definite by providing that the grant is to "*A* and *B* as joint tenants with right of survivorship and not as tenants in common," or some similar language.

In light of the above statutory language, the sole question is whether a conveyance to "*A* and *B* jointly" was intended to create a joint tenancy. In determining this point, the use of the word "jointly" is controlling. It is elementary that significance must be given to every word.[2] Fortunately the legal effect of the word "jointly" has been passed upon by courts and discussed by writers of authority. Jones,[3] a leading author in real property, says:

> Under a statute which provides that a conveyance to two or more persons shall be construed to create a tenancy in common unless it shall manifestly appear from the tenor of the instrument that it was intended to create an estate in joint tenancy, a conveyance to the grantees "jointly" sufficiently indicates an intention to create a joint estate in them, without adding the words negativing an estate in common. "As tenants in common are two or more

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1 See Moodie, Some Dangers of Joint Tenancy, 29 Neb. L. Rev. 235 (1950).

2 In Re Darr's Etate, 114 Neb. 116, 206 N.W. 2 (1926); Albin v. Parmek, 70 Neb. 740, 98 N.W. 29 (1906); Rupert v. Penner, 35 Neb. 587, 53 N.W. 598 (1892).

3 2 Jones, The Law of Real Property in Conveyancing § 1786 (1939); see also, 2 Thompson, Real Property § 1724 (1939).

> persons who hold possession of any subject of property by several and distinct titles, the word 'jointly' can find no place in describing an estate to be held by them."
> There is no substantial difference between deeding or devising land to two persons and the survivor of them, and deeding or devising land to two persons to be held in joint tenancy.

In deciding *In Case v. Owen*[4] the Indiana Supreme Court was required to construe a conveyance to "L.R. and J.R., jointly." The court was confronted with a statute which provided that all conveyances made to two or more persons created a tenancy in common unless an intent to create a joint tenancy appeared. The court argued that tenants in common are two or more persons who hold possession of property by several and distinct titles. Since the word "jointly" indicates one title held by two persons, to construe the grant as creating a tenancy in common would require the court "to strike out and wholly reject the word 'jointly'."[5] Construing a similar conveyance and statute, the same result was reached in a Michigan case.[6] The issue of whether the negative

[4] 139 Ind. 22, 38 N.E. 395 (1895).

[5] Id. at 24.

[6] Murray v. Kator, 221 Mich. 198, 190 N.W. 667 (1922). The deed provided that C.S. and M.S. held the property as "heirs jointly." The court held that a joint tenancy was created. The statute provided that all grants to two or more persons created estates in common, unless expressly declared to be joint tenancy. In light of this statute, the court said:

> Defendant insists that an estate in common was created by the conveyance. Our statute (3 Comp. Laws 1915, Sec. 11562) provides:
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> > All grants and devises of lands, made to two or more persons, * * * shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.
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> The effect of this statute is to reverse the common-law rule relating to the termination of such estates. Does the word "jointly" inserted in the premises of this deed, declare an estate in joint tenancy? While the law does not favor joint tenancies, it nevertheless permits their creation. In re: Blodgett's Estate, 197 Mich. 455, 461, 163 N.W. 907. It is apparent from the face of the deed that the word "jointly" was inserted after the paragraph had been written. Had it not been inserted, it is clear that an estate in common would have been created. An intent on the part of the grantors to create an estate other than in common may be inferred. In Smith v. Smith, 71 Mich. 633, 638, 40 N.W. 21, 23, it was said:
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> > The object to be arrived at by courts in construing deeds or other contracts is to ascertain clearly the intention of the parties.

words "and not as tenants in common" were necessary in the conveyance "to *A* and *B*, jointly" was squarely presented to the New Jersey court.[7] The court came to the conclusion that such negative language was not necessary to constitute a joint tenancy.

> The language which follows, quoted from French v. Carhart, 1 N.W. 102, is expressive of the rule that the circumstances surrounding the preparation and execution of the deed will be considered in arriving at such intent. The word "jointly" was inserted for some purpose. None other can be gleaned from the word used when read with the remainder of the deed that an intent on the part of the grantors to create an estate in joint tenancy.

[7] Coudert v. Earl, 45 N.J. Eq. 654, 18 Atl. 220 (1889). The court stated.

> The question is, whether, in order to create an estate in joint tenancy under that act, it is necessary to use the negative as well as the affirmative words in it, or indeed, any particular form of language.
>
> I do not think the question is open to the least debate or doubt. The statute, as I interpret it, does not undertake to prescribe any particular mode or language in which the parties shall express their intention. It says the intention to create the estate in question must be expressly *set forth* in the grant; that is, it must not be left to inference or implication. And here it is to be observed, that the two estates mentioned are entirely inconsistent with each other; they cannot exist and be held at the same time by the same parties in the same property. If an estate is held by several persons as joint tenants, it is not and cannot be held by them at the same time as tenants in common. It follows, that to say of an estate that it is held by several persons as joint tenants, is to say, in effect, that it is not round or black. And so when a gift to more than one person says that the estate shall be held by them as joint tenants, it is, in effect, *expressly*, and not by inference or implication merely set forth that it is the intention of the parties that the estate shall be held in joint tenancy and not in tenancy in common. In such case the result is the effect of direct and express assertion, and not of inference or implication merely. The object of the statute was to prevent joint tenancies being created by mere inference from the context or by doubtful language, and it confined the parties to direct and explicit expression. In my judgment that result is attained when it is declared to be the intention of the parties that the estate shall be held by them as joint tenants. The use of the words "and not as tenants in common" adds nothing to the sense of the others, and is mere tautology and surplusage.

A Michigan case, *Hoyt v. Winstanley*,[8] illustrates an apparent exception to the universal rule. In Michigan a conveyance to husband and wife creates a common law estate by the entirety. Where such an estate exists, adding the phrase "as joint tenants" or the word "jointly" in the grant is held to add nothing to the meaning and the estate remains a tenancy by the entirety. This result is reached because a tenancy by the entirety is held to be a form of joint tenancy, merely an enlargement thereof, and including its characteristics. In its opinion the court states:

> In this state, where the common-law rule is unchanged by statute, a conveyance to husband and wife conveys an estate in entirety, but may create one in joint tenancy or in common, if explicitly so stated in the deed. The question then in the case under consideration is the construction to be placed on the language of the deed to "Jasper Winstanley and wife as joint tenants." To "Jasper Winstanley and wife" conveys an estate by the entirety. The explanatory words, "as joint tenants," would of themselves be sufficient to indicate that an estate in joint tenancy was intended to be conveyed were it not for the fact that an estate by the entirety is a species of joint tenancy and is commonly included in that class. We have held that a grant to a husband and wife jointly conveyed an estate in entirety. The same word "jointly" used in a conveyance to grantees, not husband and wife, conveys an estate in joint tenancy. So too the words "joint tenants," when coupled with "husband and wife" do not bear the ordinary meaning; for an estate by the entirety is a joint tenancy. It is an estate in joint tenancy plus the unity of the marital relation.

Of course the apparent exception in the *Hoyt* case has no application in Nebraska since *Kerner v. McDonald*[9] held that "the common-law rule of estate by entirety does not obtain in this jurisdiction." It would seem that where tenancy by the entirety has been abolished there is a strong policy for holding the conveyance a joint tenancy instead of a tenancy in common. Such a result has been reached in Wisconsin.[10]

It seems that the law is clear. A conveyance to husband and wife, jointly, or as, joint tenants, illustrates an intention to create a joint tenancy. Text writers and courts so hold whenever the question has been considered, notwithstanding statutes that require the intent of the grantor to be definitely expressed. Nebraska had no such statute. Nebraska merely has a statute requiring the "true intent" to control. When the question arises, the Nebraska court will probably follow the weight of authority and hold that such a conveyance creates a joint tenancy.

8 Hoyt v. Winstanley, 221 Mich. 515, 191 N.W. 213 (1923).
9 60 Neb. 663, 84 N.W. 92 (1900).
10 Haas v. Williams, 218 Wis. 429, 261 N.W. 216 (1935).