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The Joint Tenancy Makes a Comeback in North Carolina

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THE JOINT TENANCY MAKES A COMEBACK IN NORTH CAROLINA

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The 1989-90 North Carolina General Assembly amended North Carolina General Statutes section 41-2 to allow the creation of a right of survivorship in joint tenancy, a right that had been abolished in the state more than two hundred years ago. After a brief examination of the history of joint tenancy in North Carolina, Professor John Orth addresses two questions that the new legislation has provoked. The first, regarding the degree of precision necessary in expressly providing for a right of survivorship, may be solved through professional prudence and sympathetic judicial construction. The second concerns the revival of the common-law requirement of the four unities necessary to the creation of a joint tenancy with right of survivorship. Professor Orth concludes by proposing remedial legislation to eliminate this second dilemma raised by the new statute.

In its 1989-90 legislative session the General Assembly of North Carolina restored the right of survivorship to the ancient concurrent estate of joint tenancy, a right that had been abolished by legislation more than two centuries ago. The new statute, effective January 1, 1991, permits the creation of a joint tenancy with right of survivorship "if the instrument creating the joint tenancy expressly provides for a right of survivorship."[1] Other provisions restate the

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1. Act of July 12, 1990, ch. 891, § 1, 1989 N.C. Sess. Laws —.

G.S. 41-2 reads as rewritten:

"§ 41-2. SURVIVORSHIP IN JOINT TENANCY ~~ABOLISHED~~ DEFINED; PROVISO AS TO PARTNERSHIP.

~~In~~ Except as otherwise provided herein, in all estates, real or personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common: Provided, that estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, are vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the joint business; but as soon as the same is effected, the survivor shall account with, and pay, and deliver to the heirs, executors and administrators respectively of such deceased partner all such part, share, and sums of money as he may be entitled to by virtue of the original agreement, if any, or according to his share or part in the joint concern, in the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners. Nothing in this section prevents the creation of a joint tenancy with right of survivorship in real or personal property if the instrument creating the joint tenancy expressly provides for a right of survivorship, and no other document shall be necessary to establish said right of survivorship. Upon conveyance to a third party by less than all of three or more joint tenants holding property in joint tenancy with right of survivorship, a tenancy in common is created among the third party and the remaining joint tenants, who remain joint tenants with right of survivorship as between themselves. Upon conveyance to a third party by one of two joint tenants

common law concerning the effect of a conveyance by one joint tenant. If there are three or more joint tenants, a conveyance by one severs the estate as to the conveyed interest, making the conveyee a tenant in common with the others, who remain joint tenants as between themselves.[2] If there are two joint tenants, a conveyance by one severs the estate altogether, leaving the concurrent owners as tenants in common. Left unanswered by the new statute is the question whether the common law requirement of "four unities"—time, title, interest, and possession—remains essential for the creation of the joint tenancy with right of survivorship in North Carolina.[3]

This Article will briefly survey the history of joint tenancy in North Carolina, noting the means by which something like a right of survivorship was recognized prior to the present statute. It will then examine the new statute and raise two questions about its application, one which may be answered by sympathetic judicial construction, the other which probably will require corrective legislation. In both cases the Article will describe the means by which careful practitioners can avoid creating uncertainties. Finally, the Article will propose further legislation that would eliminate the one substantial question raised by the new statute.

A. History of Joint Tenancy in North Carolina

By virtue of colonial legislation and practice North Carolina courts applied the common law as the rule of decision.[4] At common law any conveyance or devise to two unmarried persons created a joint tenancy, an estate conceptualized as one held by the joint tenants collectively rather than by each joint tenant individually.[5] The existence of the joint tenancy was marked by the presence of the time-hallowed "four unities" of time, title, interest, and possession: the joint tenants had to take their estate at the same time, trace it to the same source of title (deed or will), hold the same interest—no unequal shares were allowed—and share the same undivided possession. Without the four unities a joint tenancy could not be created, and the termination of any one of them severed the joint tenancy. Persons holding property concurrently but without the four uni-

holding property in joint tenancy with right of survivorship, a tenancy in common is created between the third party and the remaining joint tenant."

2. Although the statute refers to a conveyance "to a third party," the common law reached the same result even when the conveyee was one of the original joint tenants. 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 186 (1766); E. COKE, COMMENTARY UPON LITTLETON 193a (1628); 2 AMERICAN LAW OF PROPERTY § 6.2 (A. Casner ed. 1952). The only conveyance that would have failed to sever a joint tenancy at common law was one a joint tenant made as grantor to the same joint tenant as grantee. Because the statute does not address either situation, it can only be assumed that the common law results would still obtain.

3. The common law did not, strictly speaking, require the four unities for the creation of a joint tenancy; instead, the four unities defined the estate of joint tenancy. Without them, a joint tenancy could not come into being, or remain in existence: in other words, the four unities had to be present at the creation of the estate of joint tenancy, and the failure of any unity terminated or severed the estate.

4. Act of 1715, ch. 31, § VI, *reprinted in* 23 THE STATE RECORDS OF NORTH CAROLINA 38, 39 (W. Clark ed. 1904) [hereinafter STATE RECORDS] (present version at N.C. GEN. STAT. § 4-1 (1986)).

5. 2 W. BLACKSTONE, *supra* note 2, at 182.

ties held a tenancy in common, an estate in which each tenant held undivided shares.

The most important consequence of holding property in joint tenancy rather than in tenancy in common appeared at the death of one of the concurrent owners. In estates held in joint tenancy the interest of a deceased joint tenant enured to the benefit of the survivor, while in tenancies in common the share of the deceased tenant passed by devise or intestacy. This characteristic of the joint tenancy, which marked it off from the tenancy in common, was known as the "right of survivorship."

In 1784 the right of survivorship was abolished in North Carolina[6] as part of a wide-ranging reform of property law that included an end to primogeniture and entailed estates.[7] The sole expression of legislative intention with respect to the change in concurrent estates appears in the preamble to the relevant section of the statute: "in real and personal estate held in join-tenancy the benefit of survivorship is a manifest injustice to the families of such as may happen to die first."[8] The injustice referred to is presumably that of reasonable expectations defeated; widows,[9] heirs, or devisees of deceased owners discovering that they take no share in the concurrent estate because it was held, unbeknownst to them and perhaps even to the co-owners, in joint tenancy. Of course, no injustice could be discerned if all parties knew the exact nature of the tenancy and its legal consequences.

The legislative remedy was to abolish the "benefit of survivorship." With only a few insignificant changes in wording, the Act of 1784 has endured to the present, its current form appearing in North Carolina General Statutes section 41-2:

> In all estates, real or personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common.[10]

The Act of 1784 did not abolish joint tenancies, but by ending the right of survivorship in inheritable estates it made them practically indistinguishable from

6. Act of 1784, ch. 22, § VI, *reprinted in* 24 STATE RECORDS, *supra* note 4, at 574 (present version in N.C. GEN. STAT. § 41-2 (1984)).

7. Act of 1784, ch. 22, § II (primogeniture), *reprinted in* 24 STATE RECORDS, *supra* note 4, at 572-73; *id.* § V (entails), *reprinted in* 24 STATE RECORDS, *supra* note 4, at 574. On the latter, see Orth, *Does the Fee Tail Exist in North Carolina?*, 23 WAKE FOREST L. REV. 767 (1988).

8. Act of 1784, ch. 22, § VI, *reprinted in* 24 STATE RECORDS, *supra* note 4, at 574.

9. At common law widows were not heirs of their deceased husbands; they were instead entitled to dower, a life estate in one-third of all real property of which their husbands were seized during the marriage. The Act of 1784 included a number of provisions on dower and its assignment. Act of 1784, ch. 22, §§ VIII-X, *reprinted in* 24 STATE RECORDS, *supra* note 4, at 575-76. Dower was not assignable out of lands held by a husband in joint tenancy but was assignable out of lands held by him as a tenant in common.

10. N.C. GEN. STAT. § 41-2 (1984). Earlier codifications are CONSOLIDATED STATUTES OF NORTH CAROLINA, ch. 34, § 1735 (1919); REVISAL 1905 OF NORTH CAROLINA, ch. 33, § 1579 (1905); THE CODE OF NORTH CAROLINA, ch. 31, § 1326 (1883); REVISED CODE OF NORTH CAROLINA, ch. 43, § 2 (1854).

tenancies in common.[11] By a proviso in the original Act, also still in effect, the right of survivorship was retained for joint tenancies held by business partnerships.[12] Later legislation maintained the right of survivorship in joint tenancies held by joint trustees,[13] joint mortgagees or trustees with a power of sale,[14] and joint executors or administrators.[15] In addition, the manifest convenience of joint accounts at banking institutions led to legislation facilitating such arrangements.[16] Joint tenancies with right of survivorship in shares of stock or investment securities were permitted by statute, but only when the joint owners were husband and wife—and even then, subject to the rights of creditors of a deceased joint tenant; the latest statute extends that permission to "any parties," regardless of their marital relationship.[17]

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11. The continued existence of the joint tenancy in life estates might have made some difference in the application of the Rule in Wild's Case, although this technicality has not generally been recognized by the courts. *See* Link, *The Rule in Wild's Case in North Carolina*, 55 N.C.L. REV. 751, 793-95 (1977).

12. The proviso reads:

> Provided, that estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, are vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the joint business; but as soon as the same is effected, the survivor shall account with, and pay, and deliver to the heirs, executors and administrators respectively of such deceased partner all such part, share, and sums of money as he may be entitled to by virtue of the original agreement, if any, or according to his share or part in the joint concern, in the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners.

N.C. GEN. STAT. § 41-2 (1984).

13. *Id.* § 41-3. The statute provides:

> In all cases where only a naked trust not coupled with a beneficial interest has been created or exists, or shall be created, and the conveyance is to two or more trustees, the right to perform the trust and make estates under the same shall be exercised by any one of such trustees, in the event of the death of his cotrustee or cotrustees or the refusal or inability of the cotrustee or cotrustees to perform the trust; and in cases of trusts herein named the trustees shall hold as joint tenants, and in all respects as joint tenants held before the year 1784.

Id.

14. *Id.* § 45-8. The statute provides:

> In all mortgages and deeds of trust of real property wherein two or more persons, as trustees or otherwise, are given power to sell the property therein conveyed or embraced, and one or more of such persons dies, any one of the persons surviving having such power may make sale of such property in the manner directed in such deed, and execute such assurances of title as are proper and lawful under the power so given; and the act of such person, in pursuance of said power, shall be as valid and binding as if the same had been done by all the persons on whom the power was conferred.

Id.

15. *Id.* § 28A-13-5. The statute provides: "Any estate or interest in property which becomes vested in two or more personal representatives shall be held by them in joint tenancy with the incident of survivorship." *Id.*

16. North Carolinians are offered a choice in types of joint accounts. *Compare id.* § 41-2.1 (right of survivorship in bank deposits) *with id.* § 53-146.1 (1990) (joint accounts in banks) *and id.* § 54B-129 (1990) (joint accounts in savings and loan associations).

17. Act of July 12, 1990, ch. 891, § 2, 1989 N.C. Sess. Laws —.

G.S. 41-2.2 is rewritten to read:

"§ 41-2.2. JOINT OWNERSHIP OF CORPORATE STOCK AND INVESTMENT SECURITIES.

(a) In addition to other forms of ownership, shares of corporate stock or investment securities may be owned by ~~a husband and wife~~ any parties as joint tenants with rights of survivorship, and not as tenants in common, in the manner provided in this section.

As we have seen, the legislative remedy abolishing the right of survivorship was more extensive than the injustice it was meant to cure. Exceptions in commercial cases were needed from the beginning because the joint tenancy with right of survivorship was useful, even necessary, and no injustice was to be feared in such cases because the parties knew of, and desired, the relationship. Inevitably cases arose outside the explicit statutory exceptions in which parties consciously sought the benefit of survivorship for reasons of their own—perhaps to avoid probate.[18] Would the North Carolina courts refuse to give effect to clearly expressed intentions in such cases?

In fact, North Carolina courts occasionally have recognized something like rights of survivorship on grounds supposedly drawn from the law of contracts. The reasoning was starkly stated in one case from 1895:

> The Act of 1784, (*Code*, Sec. 1326) abolishes survivorship, where the joint tenancy would otherwise have been created by the law, but does not operate to prohibit persons from entering into written contracts as to land, or verbal agreements as to personalty, such as to make the future rights of the parties depend upon the fact of survivorship.[19]

The application of this theory is illustrated by the 1964 decision in *Vettori v. Fay*.[20] In that case a conveyance had been made to two persons "as joint tenants" and to "the heirs and assigns of the survivor."[21] After the death of one

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(b) (1) A joint tenancy in shares of corporate stock or investment securities as provided by this section shall exist when such shares or securities indicate that they are owned with the right of survivorship, or otherwise clearly indicate an intention that upon the death of either ~~spouse,~~ party, the interest of the decedent shall pass to the surviving ~~spouse.~~ party.

(2) Such a joint tenancy may also exist when a broker or custodian holds the shares or securities for the joint tenants and by book entry or otherwise indicates (i) that the shares or securities are owned with the right of survivorship, or (ii) otherwise clearly indicates that upon the death of either ~~spouse~~ party, the interest of the decedent shall pass to the surviving ~~spouse~~ party. Money in the hands of such broker or custodian derived from the sale of, or held for the purpose of, such shares or securities shall be treated in the same manner as such shares or securities.

(c) Upon the death of a joint tenant his interest shall pass to the surviving joint tenant. The interest of the deceased joint tenant, even though it has passed to the surviving joint tenant, remains liable for the debts of the decedent in the same manner as the personal property included in his estate, and recovery thereof shall be made from the surviving joint tenant when the decedent's estate is insufficient to satisfy such debts.

(d) Nothing herein contained shall be construed to repeal or modify any of the provisions of G.S. 105-2, 105-11, and 105-24, relating to the administration of the inheritance tax laws, or any other provisions of the law relating to inheritance taxes."

18. Property lawyers should not ignore what might be called nonmaterial or psychological reasons for two unmarried persons seeking to place property in their joint names. Holding a residence, for instance, as joint tenants with right of survivorship might represent for the parties a commitment to a lifelong relationship and provide a sense of security. Of course, a joint tenancy affords far less protection to such parties than a tenancy by the entirety, which is available only to married couples.

19. Taylor v. Smith, 116 N.C. 531, 535, 21 S.E. 202, 204 (1895).

20. 262 N.C. 481, 137 S.E.2d 810 (1964).

21. *Id.* at 482, 137 S.E.2d at 810-11. The granting clause ran "unto the parties of the second part their assigns as joint tenants and unto their [sic] heirs and assigns of their survivor forever," while the habendum clause was "unto the said parties of the second part their assigns, and the heirs and assigns of the survivor to the only use and behoof of them and their said heirs and assigns forever." *Id.*

Although the court read this grant as creating a contractual right of survivorship, it might have

cotenant, the other brought an action against the heirs of the deceased seeking a judgment that defendants had no interest in the property. The North Carolina Supreme Court upheld the conclusions of the trial court "that the deed was a written contract and that its provisions were binding upon and between the grantees."[22] The decision may be defended as effectuating the apparent intention of the cotenants as to what should happen upon the death of the first to die, but it must be conceded that the losing parties fell squarely within the class of those singled out for protection in 1784: "the families of such as may happen to die first."[23]

Basing the decision in *Vettori* on contract raises several disturbing questions. The "contract" that supposedly conferred the right of survivorship was contained in a conveyance by a grantor to the grantees. Normally grantors have no interest in the form of title taken by grantees and merely follow their instructions in this regard; there is no indication that the grantor in *Vettori* did otherwise. The intention that matters, then, is that of the grantees, yet there is no evidence of any consideration passing between them; there are certainly no words of promise in the grant. Left unanswered is whether, while both cotenants were alive, either one could have conveyed an undivided interest. In a true joint tenancy each has the power to sever the tenancy by conveyance. It is difficult to imagine that anyone would view such a conveyance in the circumstances of *Vettori* as a breach of contract. Yet if it is not viewed as such, then the right of survivorship created by the deed must be taken to be a product of conveyance, or the implied terms of the contract must be greatly elaborated.[24]

Not only does the contract theory leave unanswered certain disturbing questions, but it also has not been applied consistently by the courts. In the 1949 decision of *Pope v. Burgess*,[25] a contract clearly intended to create a right of

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construed it to create a joint life estate followed by alternative contingent remainders in fee simple. Note that the words of inheritance ("and heirs") apply only to the survivor.

22. *Id.* at 483, 137 S.E.2d at 811.

23. Act of 1784, ch. 22, § VI, *reprinted in* 24 STATE RECORDS *supra*, note 4, at 574.

24. Had the court in *Vettori* read the grant to create a joint life estate followed by alternative contingent remainders in fee simple, either cotenant could have conveyed the share of the life estate (creating an estate *pur autre vie*) and—by virtue of North Carolina General Statutes § 39-6.3, making such interests alienable—the alternative contingent remainder in fee simple.

25. 230 N.C. 323, 53 S.E.2d 159 (1949), refusing to enforce the following contract:

North Carolina

Nash County

This Contract, made this December 28, 1934, by and between William R. Pope and Carter R. Pope, Witnesseth:

That whereas, the parties hereto are the owners as tenants in common of two hundred forty (240) acres of land, more or less, including the store house and building, the tenant houses and all outhouses, and improvements of every kind and sort, located in Nash County, North Carolina, described or referred to in the last Will and Testament of Thomas S. Pope, deceased, and also in the deed executed by Thomas S. Pope and Allean Pope to T.T. Thorne, Trustee, recorded in Book 347, at page 259, in the office of the Register of Deeds of Nash County, and in addition thereto, are the owners as tenants in common of two (2) acres of land situate in or near the Town of Battleboro, and being the same land conveyed by J. R. Whitehead and wife, Mayme Whitehead, to William R. Pope and Carter R. Pope; and whereas, the parties hereto have agreed to and with each other that it is the desire and purpose that on the death of either one of said parties, that is William R. Pope and Carter R. Pope, that the survivor, or one living, shall become the absolute owner in fee

survivorship and recorded in the registry of deeds was denied effect because it did not operate as a present conveyance! Notwithstanding the difficulties with the contract theory, North Carolina lawyers today are using contracts purporting to create rights of survivorship, typically attached to deeds and recorded with them.[26] Worries about their enforceability may have been one of the considerations that led legislators to pass the new statute.[27]

B. The New Statute on Joint Tenancy

The new statute on joint tenancy comes in the form of an addition to the current codification of the Act of 1784; that is, the general rule adopted two centuries ago remains in force, but a further and very broad exception to it is created. The estate of joint tenancy in North Carolina is still without the right of survivorship, unless "the instrument creating the joint tenancy expressly provides for a right of survivorship."[28] The effect is very much like a reversal of the

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simple of all and every part of the interest of the party hereto deceased in the foregoing described lands, and it is further agreed that the executor, or administrator of the party hereto so deceased, as aforesaid, shall make, execute and deliver unto the survivor a deed in fee simple for such estate, right, title and interest as the person so deceased may have or own at the time of his death in and to the foregoing described or referred to lands, so that the survivor shall become the absolute owner in fee simple of the estate and interest of the deceased party in as full and ample a manner as if the conveyance should have been made of said lands to the said survivor. It is the purpose and intent of this conveyance that the parties hereto, who are tenants in common of said lands, desire and intend that on the death of one of the parties hereto that all the estate, right, title, and interest that he has in and to the aforesaid lands shall become vested in the survivor as the owner in fee simple thereof, just as if said survivor, whether it be William R. Pope or Carter R. Pope, had been the owner of said lands in fee simple absolute in the first place.

The consideration for this contract is Ten Dollars ($10.00) paid by each of the contracting parties hereto to the other contracting party, and for other good and valuable considerations passing from and to the parties to this contract.

This instrument is executed in duplicate originals on this 28th day of December 1934, original copies hereof delivered to William R. Pope and to Carter R. Pope.

Id. at 323-26, 53 S.E.2d at 159-61.

26. In a typical example, the grantees in a deed are described as "joint tenants with right of survivorship as agreed on per Exhibit A attached hereto and incorporated herein by reference." The exhibit is described as a "joint tenancy agreement":

> FOR AND IN CONSIDERATION of the agreements contained herein and the sum of ONE AND NO/100 ($1.00) DOLLAR, receipt and sufficiency of said consideration being acknowledged by the parties, the undersigned agree that they are acquiring the real property described in the North Carolina General Warranty Deed to which this Agreement is appended as equal joint tenants, with total and complete rights of survivorship with the effect that upon the death of either of the parties hereto, the entire interest and estate in the subject property is granted to and shall automatically vest in the survivor. In the event of the death of either of the parties hereto, the survivor will assume the responsibility for the payment of the outstanding indebtedness upon any promissory note from the parties secured by a deed of trust encumbering the property described in the deed to which this Agreement is appended and the survivor will save the estate of the deceased party harmless from any cause whatsoever arising out of said note and deed of trust.

Despite the contractual form, note the almost inevitable use of words of grant.

27. This concern may explain the otherwise unnecessary clause in the new statute: "[A]nd no other document shall be necessary to establish said right of survivorship." Act of July 12, 1990, ch. 891, § 1, 1989 N.C. Sess. Laws — (amending N.C. GEN. STAT. § 41-2 (1984)). The Act also includes a saving clause: "Nothing in this act shall be construed to affect the validity of instruments that provide for a right of survivorship executed prior to the effective date of this act." *Id.* § 3.

28. *Id.* (amending N.C. GEN. STAT. § 41-2 (1984)).

common-law presumption in favor of the joint tenancy, the method of reform adopted in many other states.[29] In other words, grants or devises to two unmarried persons in North Carolina continue to create estates lacking the right of survivorship, unless this is "expressly" provided for.

One obvious question raised by the new statute concerns the degree of precision required in expressly providing for a right of survivorship. A carefully drafted instrument will closely follow the words of the statute, describing the grantees as holding "as joint tenants with right of survivorship," or even "as joint tenants with right of survivorship and not as tenants in common." Such wording would undoubtedly accomplish its purpose. But not all drafting is equally careful: the right of a survivor may be referred to without expressly using the phrase "right of survivorship." In *Vettori*, for example, where a right of survivorship was found to have been created by contract, those specific words were not used. The grantees were described only as holding "as joint tenants" and reference was made as well to "the heirs and assigns of the survivor." Reliance must be placed on courts interpreting the statute to recognize that what must be expressed is the intention to create the right of survivorship, not some set verbal formula.[30]

A more serious question raised by the new statute concerns the means of creating the newly authorized joint tenancy with right of survivorship. As we have seen, the four unities of time, title, interest, and possession were required at common law in creating the estate. Where a grant by a third person ran in favor of grantees as joint tenants, no problem was encountered with the unities: the grantees took at the same time and by the same title; they held the same interest and shared the same possession. It sometimes happened, however, that the grantor was not a third party, but rather an owner who wished, as it were, to share the ownership with another. Where the grantor was also named as one of the grantees, the four essential unities failed and with them the intent to create the joint tenancy, no matter how plainly expressed. In other words, if *A* conveyed to *A* and *B* "as joint tenants with right of survivorship," the resulting estate at common law was a tenancy in common—without, of course, the right of survivorship. This result was explained as following necessarily from the absence of at least two of the four unities: time and title. The grantees in the hypothetical case did not take their interests at the same time or by the same

29. *See, e.g.*, ILL. REV. STAT. ch. 76, § 1 (Supp. 1990):

> No estate in joint tenancy in any lands, tenements or hereditaments, or in any parts thereof or interest therein, shall be held or claimed under any grant, legacy or conveyance whatsoever heretofore or hereafter made, unless the premises therein mentioned shall expressly be thereby declared to pass not in tenancy in common but in joint tenancy.

30. Compare the amendment to § 41-2 with § 41-2.2(b)(1) (as amended by the new statute):

> A joint tenancy in shares of corporate stock or investment securities as provided by this section shall exist when such shares or securities indicate that they are owned with the right of survivorship, or otherwise clearly indicate an intention that upon the death of either spouse *party* the interest of the decedent shall pass to the surviving spouse *party*.

Act of July 12, 1990, ch. 891, § 2, 1989 N.C. Sess. Laws —. The argument that the failure to include a general reference to intention in the amendment to § 41-2 implies a legislative intention in favor of a more restrictive reading should be rejected.

title: *A*'s interest stemmed from the original transfer to him, while B's stemmed from the grant in question.

In North Carolina since 1784 the four unities have not been an issue with respect to the joint tenancy because that estate was functionally identical with the tenancy in common. The unities were required, however, to create tenancies by the entirety held by married persons.[31] Again, no problem arose from grants by a third party to a married couple "as tenants by the entirety."[32] But a grant by *A* to *A* and *A*'s spouse *B* "as tenants by the entirety" resulted in a tenancy in common at common law because of the absence of some of the necessary unities. In North Carolina this result was changed by statute in 1957.[33] Because the new statute on joint tenancies does not expressly provide a solution to this age-old problem, there can be no certainty about how a court would resolve it. Possibly the common-law requirement of the four unities would be relaxed,[34] but it seems more likely that the court would continue to require them, as it did with respect to the tenancy by the entirety until the adoption of the corrective statute. To avoid any risk of defeated expectations, a careful lawyer would be well advised to use the tried-and-true means of providing the necessary four unities: conveying through a "strawman"—the usual means for creating a tenancy by the entirety in this state prior to 1957.[35] In the hypothetical case of *A* seeking to

31. Tenancies by the entirety were defined by the four unities plus a "fifth unity": the unity of person created by marriage. This is another way of saying, of course, that tenancies by the entirety were available only to married couples.

32. There is a statutory presumption in North Carolina that a conveyance to persons who are married to one another results in a tenancy by the entirety. The statute reads:

> A conveyance of real property, or any interest therein, to a husband and wife vests title in them as tenants by the entirety when the conveyance is to:
>
> (1) A named man "and wife," or
>
> (2) A named woman "and husband," or
>
> (3) Two named persons, whether or not identified in the conveyance as husband and wife, if at the time of conveyance they are legally married;
>
> unless a contrary intention is expressed in the conveyance.

N.C. GEN. STAT. § 39-13.6(b) (1984).

33. Act of May 8, 1957, ch. 598, § 1, 1957 N.C. Sess. Laws 545 (codified at N.C. GEN. STAT. § 39-13.3(b) (1984)): "A conveyance of real property, or any interest therein, by a husband or a wife to such husband and wife vests the same in the husband and wife as tenants by the entirety unless a contrary intention is expressed in the conveyance." The effect of the statute is to suspend the need for the missing unities not only at the creation of the estate but throughout its existence.

34. In 1956, the year before the statute dispensing with the need for the four unities to create a tenancy by the entirety in a conveyance by one spouse to both spouses, the North Carolina Supreme Court had upheld such a conveyance on the theory that a married couple is "an entity separate from the individuals." Woolard v. Smith, 244 N.C. 489, 494, 94 S.E.2d 466, 469 (1956). It could be argued that the joint tenants, too, constitute such an "entity," despite the absence of the marital bond. The ingenuity of this argument should not conceal the fact that it would change the common law.

A more promising argument in North Carolina might be that the joint tenancy with right of survivorship is a new concurrent estate, not to be confused with the common-law joint tenancy, which as we have seen was not abolished in 1784 but only shorn of its common-law incident, the right of survivorship. As a new tenancy, the "joint tenancy with right of survivorship" might not be subject to all the common-law technicalities.

35. See Smith v. Smith, 249 N.C. 669, 678, 107 S.E.2d 530, 536 (1959), in which the court stated, referring to conveying through a "strawman": "[T]his is the device customarily used in creating such an estate in land owned by one spouse, when it is desired that it be held by the entireties."

transfer property to *A* and *B* "as joint tenants with right of survivorship," a preliminary conveyance to a nominee, possibly *A*'s lawyer, with immediate reconveyance to *A* and *B* "as joint tenants with right of survivorship" would avoid all questions concerning the four unities. The price of certainty is the cost of the extra conveyance.

To avoid the need for conveyance through a "strawman" to create the joint tenancy with right of survivorship in such cases, the North Carolina General Assembly might wish to consider adopting the following statute, modeled on the 1957 statute that eliminated that otiose individual in the creation of tenancies by the entirety:

> A conveyance of real property, or any interest therein, by a person, as grantor, to such person and one or more other persons, as grantees, as joint tenants with right of survivorship vests the same in the grantees according to the intention expressed in the conveyance.[36]

C. Conclusion

For the first time in more than two centuries North Carolinians are able to create a joint tenancy with right of survivorship. The risk of injustice to those whose expectations are defeated by failure to benefit at the death of a joint tenant is minimized by the statutory requirement that the intention to create the estate be clearly expressed. The statutory authorization of the estate permits the effectuation of intent without the need for dubious theories of contract. The power of any joint tenant to sever the estate by conveyance is spelled out in the statute. Although questions of interpretation of intent may arise in some cases and despite the fact that one obvious problem concerning the creation of the estate is not resolved, foresightful practitioners have reliable means to forestall such difficulties.

36. Again, it is hoped that the intention to create a joint tenancy with right of survivorship would be given effect even if the exact words were not used.