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Say What You Mean!

How Arkansas Courts Are Contradicting the Default Rule of Tenancy in Common

Joel Hutcheson*

I. Deviating from statutory law

In 2015, the Arkansas Court of Appeals ruled that a warranty deed with the grantees listed as “Herbert Love and Gloria Love” vested the property in a tenancy by the entirety.¹ There was no language in the deed designating the grantees as a married couple, such as “husband and wife” or “tenants by the entirety.”² In fact, the only way someone reading the deed would know that the grantees were married was that the grantees were also the grantors, where it listed them as husband and wife.³ The court made its decision by looking to precedent case law which states that the words “husband and wife” or “tenants by the entirety” are not necessary to the creation of a tenancy by the entirety.⁴

I must initially emphasize that the court’s decision, as mentioned above, was based on a long line of decisions that held “where property is conveyed to two parties who are *in fact* husband and wife,” a tenancy by entirety is to be presumed.⁵ The

* The author is a student at the University of Arkansas School of Law. He would like to thank Greg Bennett and Debra Downs for teaching him everything he knows about title examination, and for encouraging him to apply to law school. He would also like to thank Stephen Clowney, Professor of Law at the University of Arkansas, for making property law his favorite area of practice. Hands down. He would also like to thank Carl Circo, Professor of Law at the University of Arkansas, Madeleine Goss, Jose Ruiz, and the rest of Law Notes staff for their insightfulness, diligence, and patience in helping this article reach its final draft. Finally, the author thanks his family for their unfailing and continued support.

¹ O’Neal v. Love, 2015 Ark. App. 689, at 2, 476 S.W.3d 846, 851.

² *Id.* at 5, 476 S.W.3d at 851.

³ *Id.* at 2, 476 S.W.3d at 848.

⁴ *Id.* at 6, 476 S.W.3d at 851 (citing Curtis v. Patrick, 237 Ark. 124, 126, 371 S.W.2d 622, 623 (Ark. 1963)).

⁵ Curtis, 237 Ark. at 126, 371 S.W.2d at 623 [emphasis added].

problem with this holding is that it goes against a very old and widely held property rule that recognizes the default form of ownership to be a tenancy in common.⁶ Arkansas statutory law specifically states that “[e]very interest in real estate granted or devised to two (2) or more persons . . . shall be in tenancy in common unless expressly declared”⁷

II. Analyzing intent

It is important for the grantees to expressly declare what kind of ownership they want to take because the outcomes for each can be very different.⁸ Unlike tenancy in common, joint tenancy and tenancy by the entirety create in the co-owners a right of survivorship.⁹ This feature allows the entire estate to be vested in the surviving tenant upon the death of the other tenant.¹⁰ In contrast, tenancy in common provides that the interests held by the co-tenants will, upon their deaths, pass to their respective heirs.¹¹

Arkansas, like many other states, adopted the statutory presumption to construe an estate to be a tenancy in common.¹² This does not mean that other forms of ownership are prohibited or less favored; rather, it merely provides for a construction against other forms of ownership if intention to create them is not clear.¹³ When interpreting whether the grantor’s intention was to create a survivorship estate, the court looks at the four corners of the document.¹⁴ However, evidence of the grantor’s intention cannot prevail over the statute because to allow such would render the statute meaningless.¹⁵

⁶ Tripp v. Miller, 82 Ark. App. 236, 243-44, 105 S.W.3d 804, 809-10 (2003).

⁷ ARK. CODE ANN. § 18-12-603 (West 2018).

⁸ Garrett Ham, *Buying Real Estate with Someone Else* (Apr. 24, 2013), <https://www.garrettham.com/buying-real-estate-with-someone-else/> [hereinafter *Buying Real Estate with Someone Else*] [<https://perma.cc/6NNT-8AXZ>].

⁹ *Joint Ownership of Real Property*, THE MARYLAND PEOPLE’S LAW LIBRARY, <https://www.peoples-law.org/joint-ownership-real-property> (last visited Feb. 28, 2019) [<https://perma.cc/SZ53-AW7J>].

¹⁰ Ferrell v. Holland, 205 Ark. 523, 529-30, 169 S.W.2d 643, 647 (1943).

¹¹ *Buying Real Estate with Someone Else*, *supra* note 9.

¹² Ferrell, 205 Ark. at 529, 169 S.W.2d at 646.

¹³ *Id.*, 169 S.W.2d at 646.

¹⁴ Wood v. Wood, 264 Ark. 304, 306, 571 S.W.2d 84, 85 (1978).

¹⁵ James v. Taylor, 62 Ark. App. 130, 136, 969 S.W.2d 672, 675 (1998).

A. Creating survivorship estates

Although both joint tenancy and tenancy by the entirety are survivorship estates, there are differences when creating them.¹⁶ Like joint tenancy, a tenancy by the entirety can only be created if the four essential common law unities of time, title, interest, and possession coexist.¹⁷ Unlike joint tenancy, the creation of a tenancy by the entirety requires what some jurisdictions refer to as a fifth unity, which is marriage.¹⁸ Intent to create either survivorship estate must include specific language in the deed identifying which kind of estate is being formed.¹⁹ Arkansas courts have held that the actual words “joint tenancy” are not required when creating a joint tenancy;²⁰ however, the courts have rejected the words “jointly” and “jointly and severally” to be sufficient.²¹ When creating a tenancy by the entirety, it is common to see grantees simply designated as “husband and wife.”²² Nevertheless, Arkansas courts have ruled that merely describing the grantees as “husband and wife” is insufficient to establish an intent to create a survivorship interest.²³ This holding was made to address instances where the grantees are an unmarried couple attempting to take title to property as if they were married.²⁴

In 1978, the Supreme Court of Arkansas held that a conveyance to “Boyd E. Wood and Murtha A. Wood, husband and wife, as tenants by entirety” created a joint tenancy.²⁵ Although Boyd and Murtha were never legally married, the court noted that the deed “did not stop with describing the purchasers as husband and wife but went further and stated that they were to hold ‘as tenants by entirety.’”²⁶ Because of this extra descriptive language found within the four corners of the document, the court

¹⁶ *Buying Real Estate with Someone Else*, *supra* note 9.

¹⁷ *Nicholson v. Shipp*, 253 Ark. 464, 466, 486 S.W.2d 691, 693 (1972).

¹⁸ 2 H. TIFFANY, *THE LAW OF REAL PROPERTY* § 430 (3d ed. 1939).

¹⁹ *See Nicholson*, 253 Ark. at 465-66, 486 S.W.2d at 692-93.

²⁰ *James*, 62 Ark. App. at 133, 969 S.W.2d at 674.

²¹ *Id.* at 134-35, 969 S.W.2d at 674-75.

²² *See Lowe v. Morrison*, 289 Ark. 459, 459-60, 711 S.W.2d 833, 833-34 (1986).

²³ *Brissett v. Sykes*, 313 Ark. 515, 519, 855 S.W.2d 330, 333 (1993).

²⁴ *Id.*, 855 S.W.2d at 333.

²⁵ *Wood*, 264 Ark. at 305, 571 S.W.2d at 85.

²⁶ *Id.* at 306, 571 S.W.2d at 85-86.

held that it was clear that Boyd and Murtha intended to create a survivorship estate.²⁷ The Arkansas Court of Appeals later looked to this case when determining a conveyance to “Wesley Shaw and Dixie Shaw, his wife” did not create a survivorship estate.²⁸ The court recognized, where the grantees are an unmarried couple attempting to take title as husband and wife, there must be more in the language of the deed than merely describing the grantees as “husband and wife” in order to suggest an intent to create a survivorship interest.²⁹

B. Applying the “expressly declare” rule

In my opinion, the holdings of Boyd and Murtha Wood and Wesley and Dixie Shaw can go beyond the issue of unmarried couples and may be applied to grantees that are married. Just because tenancy by the entirety requires marriage does not mean that every married couple’s intention is to hold property by the entirety. If it is the married couple’s intention to create a survivorship estate, they must expressly declare it; otherwise, their intent will be defeated by the statutory presumption of tenancy in common.

Returning to the case of Herbert and Gloria Love, the facts stated that prior to 1995, Herbert owned the property individually.³⁰ In 1995, Herbert and Gloria, specifically designated as husband and wife in their capacity as grantors, executed a warranty deed to themselves with no specific designation in their capacity as grantees.³¹ The appellate court held that “[o]nce property is placed in the names of both a husband and his wife, *without specifying the manner in which they take*, a presumption arises that they own the property as tenants by the entirety.”³² In this case, the Loves differ from the Woods and the Shaws in that (1) they were actually married, and

²⁷ *Id.*, 571 S.W.2d at 85-86.

²⁸ *Smith v. Stewart*, 84 Ark. App. 766, 768, 596 S.W.2d 346, 348 (1980).

²⁹ *Id.*, 596 S.W.2d at 348.

³⁰ *O’Neal*, 2015 Ark. App. 689, at 2, 476 S.W.3d at 848.

³¹ *Id.*, 476 S.W.3d at 848.

³² *Id.* at 6, 476 S.W.3d at 850 (citing *Evans v. Seeco, Inc.*, 2011 Ark. App. 739, at 5, 2011 WL 5974368 [emphasis added]).

(2) they acted as both the grantors and the grantees in their deed.³³ Again, the courts have held that the intent of the parties is found within the four corners of the document, and within the four corners of the Loves' warranty deed we find that, at most, Herbert and Gloria take title to the property as "husband and wife," which can only be based on their designation in their capacity as grantors.³⁴ Nevertheless, Arkansas law states that "husband and wife" is not sufficient language to create a survivorship estate.³⁵ As confirmed earlier, survivorship estates are not favored less, but the statute requires that the intention to create them be clear, and ultimately, the designation of the Loves in their capacity as grantees is not clear enough to create one.³⁶

The lack of designation in their capacity as grantees can cause anyone examining the deed to ask certain questions: if Herbert and Gloria specifically designated themselves as husband and wife in their capacity as grantors, then why did they not do the same in their capacity as grantees? Was it simply a mistake? Did they assume that whoever would read the warranty deed would presume that Herbert and Gloria were creating a tenancy by the entirety? Let us imagine a situation in which the grantors and the grantees are completely different people, like in the cases of Boyd and Murtha Wood and Wesley and Dixie Shaw.³⁷ If a warranty deed states that John Doe conveys his interest in certain property to Herbert Love and Gloria Love, are we entitled to presume that Herbert and Gloria intend to hold the property as tenants by the entirety? Furthermore, may we even presume that Herbert and Gloria are husband and wife? In my opinion, divining the intent of the parties within the four corners of an ambiguous deed is not so simple. Furthermore, Arkansas recognizes that the practice of divining the intent of the parties is subject to the qualifications that such practice must not conflict with settled

³³ *O'Neal*, 2015 Ark. App. 689, at 2, 476 S.W.3d at 848.

³⁴ *Id.*, 476 S.W.3d at 848.

³⁵ *Wood*, 264 Ark. at 306, 571 S.W.2d at 85-86.

³⁶ *Ferrell*, 205 Ark. at 529, 169 S.W.2d at 646.

³⁷ *Wood*, 264 Ark. at 305, 571 S.W.2d at 85; *Smith*, 84 Ark. App. at 766-67, 596 S.W.2d at 347.

principles of law and rules of property.³⁸ Therefore, Arkansas law stands and should continue to stand by only one presumption.³⁹

C. Nesting forms of ownership

There have been some cases in which Arkansas courts have found one form of ownership nesting within another form.⁴⁰ For example, in 1981, the Supreme Court of Arkansas was presented with a case in which a deed conveyed real property to “R. N. Shinn and Mary Shinn, his wife; Billy W. Shinn (single); Wayne M. Newton and Sarah Newton, his wife, & Shinn Investments Ltd. (Shinn Investments Ltd. being a limited partnership including G. J. Shinn and Mary Sue Shinn, general partners) GRANTEES . . . as tenants in common,”⁴¹ One interpretation was that the deed created six separate interests in the property, giving a 1/6 undivided interest to each person/entity named.⁴² But the court instead held that the deed created only four separate interests based on three reasons.⁴³ First, the court pointed out that both married couples were grouped together by the words “and” and “his wife,” essentially making them one person.⁴⁴ Second, the court noted the punctuation, specifically the commas and semicolons, stating that they clearly separated the parties into four groups.⁴⁵ Finally, the court stated that “to hold that the words ‘as tenants in common’ control would mean” that the court would have to “ignore the words ‘and wife’ and the punctuation, and, in doing so, totally ignore any of the grantor’s intent that these factors relate.”⁴⁶

In justifying its answer, the majority opinion cited a case from 1977, which held that “under Arkansas law where property is conveyed to or purchased by a husband and wife in their joint names *with nothing else appearing*, the property is deemed to be

³⁸ *James*, 62 Ark. App. at 136, 969 S.W.2d at 675.

³⁹ *Id.*, 969 S.W.2d at 675.

⁴⁰ *Shinn v. Shinn*, 274 Ark. 237, 238, 623 S.W.2d 526, 527 (1981).

⁴¹ *Id.*, 623 S.W.2d at 527.

⁴² *Id.*, 623 S.W.2d at 527.

⁴³ *Id.* at 239, 623 S.W.2d at 527.

⁴⁴ *Id.*, 623 S.W.2d at 527.

⁴⁵ *Shinn*, 274 Ark. at 239, 623 S.W.2d at 527.

⁴⁶ *Id.*, 623 S.W.2d at 527.

held as an estate by the entirety with the right of survivorship.”⁴⁷ In his dissent, Justice Hays used the same quote to make an interesting argument.⁴⁸ By emphasizing the words “nothing else appearing,” he argued that, because the deed included the language “as tenants in common,” a tenancy by the entirety, or any other form of ownership for that matter, could not be implied.⁴⁹ In other words, language such as “his wife” should not carry as much weight as the express declaration of a specific form of ownership, an argument that would eventually be recognized by the court eight years later.⁵⁰

It should not be surprising that I disagree with the quote used in the Shinn case because it goes against the statutory presumption of tenancy in common,⁵¹ however, I agree with the courts that it is possible for one form of ownership to be nested within another.⁵² This can be done by following the “expressly declare” rule of the statutory presumption.⁵³ For example, if John and Jane Smith wish to hold property with Jack and Jill Doe as tenants in common while retaining rights of survivorship between the spouses, I would structure the language as: John Smith and Jane Smith, as tenants by the entirety, and Jack Doe and Jill Doe, as tenants by the entirety, together as tenants in common. This form may appear wordy, but it is not ambiguous.

III. Arguing policy

The courts would argue that tenancy by the entirety is on a higher pedestal than other forms of ownership, and therefore, should receive more protection.⁵⁴ In 1916, the Supreme Court of Arkansas held that the statutory presumption was not to apply to tenancy by the entirety.⁵⁵ The court stated that the statute, “was intended to remedy what was regarded as an evil growing out of

⁴⁷ *Id.* at 240-41, 623 S.W.2d at 528.

⁴⁸ *Id.*, 623 S.W.2d at 528.

⁴⁹ *Id.*, 623 S.W.2d at 528.

⁵⁰ *Shinn*, 274 Ark. at 240, 623 S.W.2d at 528.

⁵¹ *Id.* at 240-41, 623 S.W.2d 526 at 528.

⁵² *Id.* at 238-39, 623 S.W.2d at 527.

⁵³ ARK. CODE ANN. § 18-12-603 (West 2018).

⁵⁴ *Davies v. Johnson*, 124 Ark. 390, 392, 187 S.W. 323, 324 (1916).

⁵⁵ *Id.*, 187 S.W. at 324.

an estate of joint tenancy, whereby a survivor, though a stranger, on the death of his cotenant, would take the whole by survivorship,⁵⁶ but it was not intended to apply to the case of a husband and wife, “who are regarded by the law, Divine and human, as one person, and hold the estate as an entirety and not as joint tenants.”⁵⁷

Another paramount difference between joint tenancy and tenancy by the entirety is found in their alienability.⁵⁸ In joint tenancy, if one tenant conveys his or her interest, he or she severs the right of survivorship from that interest.⁵⁹ In tenancy by the entirety, a spouse may convey his or her interest, but it is subject to the right of survivorship existing in the other spouse.⁶⁰ It is my belief that the court’s policy for exempting tenancy by the entirety from the statutory presumption stems from this differentiation.

As the court stated, Arkansas adopted the statutory presumption in order to prevent the presumption of two strangers holding property in joint tenancy.⁶¹ In other words, it is bad policy to presume that two or more people of no relation would intend to create rights of survivorship on each of their interests without expressly declaring it, thereby inhibiting their respective heirs at law from inheriting their interests.⁶² This argument is understandable, and I can see a possibility of it remedying itself. If one of the joint tenants deeds to another stranger, then the right of survivorship tying that interest to the others is severed, preventing the stranger from obtaining the whole estate by survivorship.

On the other hand, in the case of tenancy by the entirety, it is not the court’s worry that two individuals will be presumed to be a married couple.⁶³ Rather, the court is concerned that a married couple will be mistakenly presumed to be two strangers, which will cause them to lose the benefits of a tenancy by the

⁵⁶ *Id.*, 187 S.W. at 324. (quoting *Robinson v. Eagle*, 29 Ark. 202, 206 (1874)).

⁵⁷ *Davies*, 124 Ark. at 392, 187 S.W. at 324.

⁵⁸ See *Cockrill v. Armstrong*, 31 Ark. 580, 585 (1876); *Ford v. Felts*, 3 Ark. App. 235, 237, 624 S.W.2d 449, 451 (1981).

⁵⁹ *Cockrill*, 31 Ark. at 585.

⁶⁰ *Ford*, 3 Ark. App. at 237, 624 S.W.2d at 451.

⁶¹ *Davies*, 124 Ark. at 392, 187 S.W. at 324.

⁶² *Id.*, 187 S.W. at 324.

⁶³ *Ford*, 3 Ark. App. at 237, 624 S.W.2d at 451.

entirety.⁶⁴ One such benefit would occur in a situation where a spouse decides to sell his or her interest in the property to a stranger.⁶⁵ In that case, the stranger and the other spouse would each own an undivided one-half interest in the property, but both would be subject to an inseverable right of survivorship.⁶⁶ Again, it is a valid argument to protect such benefits.

Nevertheless, I find that the court's policy argument is still defeated, and this relates back to analyzing intent. If the court is concerned about married couples being mistakenly labeled as anything but, would not the best way to avoid such a mistake be to expressly declare the survivorship estate or, at least, the marriage? The purpose for instruments of conveyance, such as deeds, is arguably to not only put subsequent purchasers on notice, but also the public.⁶⁷ When a deed is recorded in the county records, anyone can have access to it.⁶⁸ If a lawyer, a title insurance agent, a real estate broker, a neighboring landowner, or a prospective buyer is reading a deed where the grantees are not specifically designated as "joint tenants," "husband and wife," or "tenants by the entirety," then what conclusion should any of them draw? Is the answer dependent on whether the reader happens to know the grantees are married based on knowledge outside the four corners of the document?

To my surprise, title examiners are instructed to presume a tenancy by entirety, "[u]nless a different estate is specifically indicated," where the grantees are married, "regardless of whether such fact is stated."⁶⁹ Further, "[p]roof of the marital status may be shown outside the instrument of conveyance."⁷⁰ This completely contradicts the court's instructions to only use evidence of intent found within the four corners of the document, and it undeniably conflicts with the statutory presumption. Without a doubt, Arkansas courts have been negating the statutory presumption by allowing outside evidence of the party's

⁶⁴ *Id.*, 624 S.W.2d at 451.

⁶⁵ *Id.*, 624 S.W.2d at 451.

⁶⁶ *Id.*, 624 S.W.2d at 451.

⁶⁷ See JOYCE PALOMAR, PATTON AND PALOMAR ON LAND TITLES § 17 (3d ed. 2018).

⁶⁸ *See id.*

⁶⁹ Ark. Bar Ass'n, Standards for Examination of Real Estate Titles in Arkansas, 7.2(1) (2013).

⁷⁰ *Id.*

intention to prevail. To remedy this deviation from the law, I propose that the courts overturn all cases that go against the statutory presumption. As drastic as this may sound, it will preserve and provide clarity to the law. Exempting even one form of ownership from the settled principles of law and rules of property sacrifices certainty and uniformity for confusion and ambiguity.

IV. Conclusion

Arkansas law recognizes a default rule in property ownership: interest in real estate conveyed to two or more people is held in tenancy in common, unless expressly declared.⁷¹ This rule was passed by state legislation to *prevent* law suits, not merely to be applied in them. By allowing any exceptions to this rule, the courts open a door for more ambiguous documents and legal complaints to be filed. Therefore, I propose that the courts overturn all decisions that contradict the statutory presumption.

⁷¹ ARK. CODE ANN. § 18-12-603 (West 2018).