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Creditors of a Joint Tenant: Is There a Lien after Death

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**CREDITORS OF A JOINT TENANT:
IS THERE A LIEN AFTER DEATH?**

*John W. Fisher, II**

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I. INTRODUCTION

The subject of cotenancies gives rise to some of the more interesting issues of property law. As discussed *infra*, cotenancies were first recognized in the

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thirteenth century in feudal England and are still of significant importance today.¹ Given the fact that cotenancies are created by a few words in a conveyance or devise or under the law of intestate succession, the legal relationship between cotenants is determined from the common law, court decisions and statutory provisions and not from the language of the creating instrument.² In spite of the significant amount of property owned by cotenants and the corresponding attention the subject area has received from our courts, there remain a number of unresolved questions. One of these questions has been brought to my attention over the past several years by several practicing attorneys.³

The question is perhaps best understood by a simple example. Assume that *A* and *B* own Blackacre as joint tenants with the right of survivorship; that *C* is a creditor of *A* (individually); that *A* dies survived by *B* and that *A*'s estate is without sufficient personal property to pay all of *A*'s debts, including the debt to *C*. Does *C* have any "rights" against Blackacre owned by *B* following *A*'s death pursuant to the right of survivorship? Since there is no case or statute in West Virginia specifically on point, an answer must be gleaned from the existing authority. In discussing this issue, it is assumed that the survivorship was not created at a time and for the purpose of defrauding creditors.

II. COMMON LAW

Because much of our modern property law has its roots in feudal England, an understanding of the "common law" is often helpful in the search for answers to today's questions. Inasmuch as the law of cotenancies began to take shape in Bracton's days,⁴ it is appropriate to begin this discussion with the early common law.

"Joint tenancies and tenancies in coparceny existed as early as the thirteenth

¹ For an extensive discussion of early cotenancy, see Anne L. Spitzer, *Joint Tenancy with Right of Survivorship: A Legacy from Thirteenth Century England*, 16 TEX. TECH L. REV. 629 (1985). An empirical study of cotenancy in Iowa was published in 1966. N. William Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 IOWA L. REV. 582 (1965-66).

² A. JAMES CASNER & W. BARTON LEACH, CASES AND TEXT ON PROPERTY 254 (3d ed. 1984).

³ The question was first raised with me by Attorney Henry W. Morrow, of Charles Town and since then by several other attorneys.

⁴ 2 AMERICAN LAW OF PROPERTY § 6.1 (A. James Casner ed., 1952). Henry Bracton, who died in 1268, was one of the early English legal scholars. 1 EARL JOWITT & CLIFFORD WALSH, JOWITT'S DICTIONARY OF ENGLISH LAW 246 (John Burke ed., 2d ed. 1977).

century. . . . Coparceners had undivided interests in the property which they . . . acquired as female heirs of the prior owner because [there were] no male heirs of equal degree⁵ who survived the owner's death.⁶ Upon the owner's death, the estate passed to the female heirs as undivided interest without survivorship.⁷ If there were male heirs, the land passed to the eldest son, to the exclusion of younger sons, under the principle of primogeniture, which had been brought to England and established by the Normans.⁸

In the thirteenth century, the only forms of co-ownership were joint tenancy and coparceny and every conveyance, as opposed to descent to female heirs, of a freehold estate (fee, fee tail or life estate) created a joint tenancy.⁹ "The grantees took as though they . . . constituted one person, a fictitious unity. . . . The historical explanation of this fiction [of a single unity] is not clear,"¹⁰ but it was probably related to the feudal relationship.¹¹ It was in the lord's best interest that each freehold "be a single feud continuing until the death of the survivor."¹² Professor Raleigh Colston Minor, addressing the reason for this common law preference, explains that "joint tenancy was much favored for the feudal reason that it prevented the *division* of the *useful* services, such as military or agricultural services, or rent, and the *multiplication* of the merely *honorary* services, such as *fealty*."¹³ Since the joint tenants were seised as a fictitious unity, there was of necessity "a community of interest which required that [the] individual interests [of

⁵ 2 AMERICAN LAW OF PROPERTY, *supra* note 4, § 6.1.

⁶ *Id.*

⁷ *Id.*

⁸ 1 *id.* § 2.1.

⁹ 2 *id.* § 6.1.

¹⁰ 2 AMERICAN LAW OF PROPERTY, *supra* note 4, § 6.1.

¹¹ *Id.*

¹² *Id.*

¹³ 2 FREDERICK D. L. G. RIBBLE, *MINOR ON REAL PROPERTY* § 838 (2d ed. 1928).

the joint tenants] be equal in all respects.”¹⁴

This community of identical interest evolved into the four unities which were recognized as essential to joint tenancy, i.e., time, title, interest, and possession.¹⁵ These four unities express the basic idea that joint tenants “hold as a unity with a community of interest between them, since if they take as one they must take at the same time, by the same deed or feoffment, and must have interests which are identical.”¹⁶

It should be noted that the right of survivorship in the joint tenancy “is not considered to be a type of future interest.”¹⁷ As noted above, at common law the joint tenancy was considered as a single entity “made up of the cotenants collectively,” and that entity continued “so long as any of the joint tenants survive[d]. . . . When the first joint tenant dies, his individual right to share possession and enjoyment ceases. . . . His heirs or devisees take nothing because the individual cotenant has no estate of inheritance to pass on to them. . . . The deceased tenant’s estate is extinguished [upon] his death [and] the estate continues in the survivor or survivors.”¹⁸ Of course, the last survivor “owns the whole estate . . .

¹⁴ 2 AMERICAN LAW OF PROPERTY, *supra* note 4, § 6.1.

¹⁵ *Id.*

¹⁶ *Id.* Commentators have explained that:

The essence of a joint tenancy was the existence of a single estate in the unit, not separate interests in the individual tenants. The requirement of the four unities necessarily arose as a result of the basic concept rather than as prerequisites to the creation of the estate. Unity of time meant that the interests of all tenants must vest at the same time. . . . Unity of title meant that all must acquire title by the same deed or will or by a joint adverse possession. Unity of interest meant that the joint tenants must have identical interests both as to the share of the common property and as to the period of duration of the interest of each. One could not take as a life tenant and the other in fee or in fee tail; one could not have a one-fourth interest and the other three-fourths. Unity of possession meant that all of the joint tenants had a common right to possess and enjoy the property. The unity of possession was not peculiar to joint tenancies. All co-owners, whether joint tenants, tenants in common, or coparceners, had a common right to share, possess, and enjoy the property.

Id. (citations omitted).

¹⁷ *Id.*

¹⁸ 2 AMERICAN LAW OF PROPERTY, *supra* note 4, § 6.1.

because he [or she] no longer shares the estate with his [or her] former cotenants.”¹⁹

“Early in the fourteenth century it was decided that whenever one of [these four unities was not present when the interest was created] or whenever one of the unities was severed after the joint [tenancy] was established, a tenancy in common would result,” in which each tenant owned “an undivided, inheritable share, free from . . . survivorship.”²⁰ The only unity necessary for a tenancy in common is the unity of possession.²¹

The distinction between the undivided, inheritable share of a tenancy in common and the single entity concept of joint tenancy was significant not only to the cotenants and their heirs, but also affected third parties such as creditors. “The moiety of a tenant in common, except for the undivided possession, is a separate legal title, and passes on the death of the tenant to his heirs, subject to dower or curtesy.”²² As a separate legal title, a tenant in common’s interest is subject to the cotenants’ “debts” the same as any other asset.²³ However, in order for a creditor of a joint tenant to “go after” the joint tenant’s interest in the land, the creditor must, in effect, sever the survivorship by destroying one of the four unities.²⁴ By destroying the four unities, the joint interest is “converted” into a tenancy in common.²⁵ Also, it was generally recognized that the recovery of a judgment, without the execution thereon, did not sever survivorship.²⁶ Lord Coke, in

¹⁹ *Id.* Powell expresses this same concept as follows:

Survivorship is an essential feature of a joint tenancy. This means that the joint tenant who survives the other cotenants takes the entire estate; the estates of deceased joint tenants have no interest. Theoretically the survivor’s interest attaches by means of the original conveyance, not by transfer from the decedent.

Characteristics of Joint Tenancy, 7 Powell on Real Prop. (MB) ¶ 617[3] (Nov. 1992) (citations omitted).

²⁰ 2 AMERICAN LAW OF PROPERTY, *supra* note 4, § 6.2.

²¹ *Id.*

²² *Id.* § 6.5.

²³ *Id.*

²⁴ *Id.* § 6.2.

²⁵ *Id.*

²⁶ 3 *id.* § 14.17.

discussing Littleton's work said:

So it is if one joint-tenant acknowledge a recognizance or a statute, or suffereth a judgment in an action of debt, &c. and dieth before execution had, it shall not be executed afterwards. But if execution be sued in the life of the conusor, it shall bind the survivor. And it is further implied, that both in the case of the charge, and of the recognizance, statute, and judgment, if he that chargeth, &c. survive, it is good for ever.²⁷

Professor William Draper Lewis in a footnote to Blackstone's *Commentaries on the Laws of England* explains the reason for this principle as follows:

In consequence of the right of survivorship among joint-tenants, all charges made by a joint-tenant on the estate determine by his death, and do not affect the survivor; for it is a maxim of law that *jus accrescendi præfertur oneribus* [The right of survivorship is preferred to incumbrances]. I Inst. 185, a. Litt. sec. 286. But if the grantor of the charge survives, of course, it is good. Co. Litt. 184, b. So, if one joint-tenant suffers a judgment in an action of debt to be entered up against him, and dies before execution had, it will not be executed afterwards; but if execution be sued in the life of the cognizor, it will bind the survivor. Lord Abegavenny's case, 6 Rep. 79. I Inst. 184, a.²⁸

"*A fortiori*, no part of the land can be reached by the non-judgment creditor of a deceased joint tenant. These holdings mean that there is usually a post-mortem exemption from the debts of the deceased joint tenant."²⁹

III. EARLY WEST VIRGINIA LAW

There is surprisingly little early case law in West Virginia discussing the

²⁷ 1 SIR EDWARD COKE, SYSTEMATIC ARRANGEMENT OF LORD COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND 582 (photo. reprint 1986) (1836) (citation omitted).

²⁸ 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 650 n.26 (William D. Lewis ed., Rees Welsh & Co. 1902) (1765) (alteration in original).

²⁹ 3 AMERICAN LAW OF PROPERTY, *supra* note 4, § 14.17 (citations omitted).

incidents of the ownership of real property as joint tenants. It is fair to assume that this scarcity of cases reflects the fact that the common law incident of cotenancy was accepted as the “law,” and challenges to the common law concepts were simply not pursued, at least not in the appellate court in our state.³⁰ The major exception to adherence to the concepts of the common law involves the “presumption” of the type of estate created when property was conveyed or devised to more than one person. At common law, a joint tenancy was created by a devise or conveyance *inter vivos* when the estate was granted or devised “to a plurality of persons, without adding any restrictive, exclusive, or explanatory words.”³¹ Therefore, at common law, it was presumed that a conveyance to two or more individuals created a joint tenancy.³² Minor explains the reason for this common law preference and the retreat from it as follows:

[J]oint tenancy was much favored for the feudal reason that it prevented the *division* of the *useful* services, such as military or agricultural services, or rent, and the *multiplication* of the merely *honorary* services, such as *fealty*. But for more than a century past the courts have laid hold of every available expression to construe estates given to a plurality of tenants as tenancies in common. And although this innovation began in equity, and in reference to wills, yet it has long prevailed in the courts of common law as well, and the doctrine extends to deeds as uniformly as to wills. Hence, such expressions as “equally to be divided,” “share and share alike,”

³⁰ See 2 JOHN B. MINOR, *INSTITUTES OF COMMON AND STATUTE LAW* 4-5 (2d ed. rev. & corrected 1877); 2 RIBBLE, *supra* note 13, § 844. Minor and Ribble, two early commentators on the law in Virginia and West Virginia, relied upon Blackstone’s *Commentaries on the Laws of England* and Lord Coke’s analysis of Littleton in discussing the law in the Virginias. See 2 MINOR, *supra*.

³¹ 2 RIBBLE, *supra* note 13, § 838. Blackstone stated the rule as follows:

The *creation* of an estate in joint-tenancy depends on the wording of the deed or devise by which the tenants claim title; for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A. and B. and their heirs, this makes them immediately joint-tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. As, therefore, the grantor has thus united their names, the law gives them a thorough union in all other respects.

2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 215 (John L. Wendell ed., Harper & Bros. 1872) (1765).

³² 2 AMERICAN LAW OF PROPERTY, *supra* note 4, § 6.1.

“respectively between and amongst them,” will, according to this modern construction, convert into a tenancy in common, what would once have been a joint tenancy.”³³

In Virginia, the “reversal” of the common law presumption that a conveyance to two or more persons created a joint tenancy culminated in statutory provisions. In 1849, Virginia adopted two statutes. The first provided:

When any joint tenant shall die, whether the estate be real or personal, or whether partition could have been compelled or not, his part shall descend to his heirs, or pass by devise, or go to his personal representative, subject to debts, curtesy, dower or distribution, as if he had been a tenant in common. And if hereafter an estate of inheritance be conveyed or devised to a husband and his wife, one moiety of such estate shall, on the death of either, descend to his or her heirs, subject to debts, curtesy or dower, as the case may be.³⁴

The second Virginia statute provided that:

The preceding section shall not apply to any estate which joint tenants have as executors or trustees, nor to an estate conveyed or devised to persons in their own right, when it manifestly appears from the tenor of the instrument that it was intended the part of one dying should then belong to the others. Neither shall it affect the mode of proceeding on any joint judgment or decree in favour of, or on any contract with, two or more, one of whom dies.³⁵

Minor explained the effect of these statutory provisions as follows:

The *jus accrescendi* [the right of survivorship] is entirely abolished, as between joint tenants in Virginia, save only in three cases, namely: (1) Joint trustees; (2) Joint executors; and (3)

³³ 2 RIBBLE, *supra* note 13, § 838 (citations omitted).

³⁴ VA. CODE § 33-18 (1849) (current version at VA. CODE ANN. § 55-20 (Michie 1950)).

³⁵ VA. CODE § 33-19 (1849) (current version at VA. CODE ANN. § 55-21 (Michie 1950)).

Where it appears from the tenor of the *instrument* that it was intended the part of one dying should then belong to the others.

The effect of this statute is by no means to abolish joint tenancies. On the contrary, they exist in Virginia, with all their legal attributes, except only that no survivorship takes place save in the three cases above mentioned.³⁶

When West Virginia became a state it included these Virginia statutes as a part of our first code.³⁷

The effect of these statutes was judicially recognized by the court in *DeLong v. Farmers Building & Loan Ass'n*³⁸ as reversing the common law presumption.³⁹ In *DeLong*, the court observed:

that as a result of legislation abrogating the common law doctrine of survivorship as an element of joint tenancy, the common law rule favoring joint tenancy has been superseded and it is now presumed that the tenancy in question is a tenancy in common instead of a joint tenancy unless a contrary intention to create a

³⁶ 2 RIBBLE, *supra* note 13, § 848 (alteration added) (citations omitted).

³⁷ W. VA. CODE §§ 71-18 to -19 (1870) (current version at W. VA. CODE §§ 36-1-19 to -20 (1985)). The original code stated that:

When any joint tenant shall die, whether the estate be real or personal, or whether partition could have been compelled or not, his part shall descend to his heirs, or pass by devise, or go to his personal representative, subject to debts, curtesy, dower, or distribution, as if he had been a tenant in common. And if hereafter an estate of inheritance be conveyed or devised to a husband and his wife, one moiety of such estate shall, on the death of either, descend to his or her heirs, subject to debts, curtesy, or dower, as the case may be.

W. VA. CODE § 71-18. The code also provided:

The preceding section shall not apply to any estate which joint tenants have as executors or trustees, nor to an estate conveyed or devised to persons in their own right, when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should then belong to the others. Neither shall it affect the mode of proceeding on any joint judgment or decree in favor of, or on any contract with, two or more, one of whom dies.

W. VA. CODE § 71-19.

³⁸ 137 S.E.2d 11 (W. Va. 1964).

³⁹ *Id.* at 17.

joint tenancy sufficiently appears.⁴⁰

While the code sections were cited in several early cases,⁴¹ it was not until 1921 that a “meaningful” discussion of these statutes appeared in a reported case. In *Neal v. Hamilton Co.*,⁴² the court was asked to construe a provision in the testator’s will which stated that “[i]n case of the death of either of my sons above named [without issue] I will and bequeath that the remaining son living shall have and hold in his own right the whole of the above named bounded two tracts of land.”⁴³ In order to construe the will, the court had to decide whether the sons took as joint tenants or as tenants in common.⁴⁴ After quoting the applicable statutes, the court concluded the testator had sufficiently expressed his intention to create survivorship; therefore, his sons took as joint tenants.⁴⁵

⁴⁰ *Id.* The *DeLong* case involved a deposit in a building and loan association. *Id.* Any question as to whether the general statement quoted above applied to the subject statutes is resolved later in the opinion when the court stated:

Under the provision of Section 19, Article 1, Chapter 36, Code 1931, which, except in certain instances specified in Section 20, abrogates the element of survivorship in a joint tenancy in real and personal property, a tenancy in such property is presumed to be a tenancy in common unless it appears from the contract or the applicable statute that a joint tenancy is intended.

Id.

⁴¹ *See* *Bank of Greenbrier v. Effingham*, 41 S.E. 143 (W. Va. 1902); *Lazier v. Lazier*, 14 S.E. 148 (W. Va. 1891).

⁴² 73 S.E. 971 (W. Va. 1912).

⁴³ *Id.* at 972 (alteration added).

⁴⁴ *Id.*

⁴⁵ *Id.* at 975. The court reasoned that:

Lastly, are the plain provisions of the will, and the estate or estates created thereby, materially controlled or affected, or prejudiced, by the provisions of sections 8, 18 and 19 of chapter 71, Code 1906? The pertinent provisions of these sections are: “8. Where any real estate is * * * devised * * * to any person without any words of limitation, such devise * * * shall be construed to pass the fee simple * * * unless a contrary intention shall appear by the will.” “18. When any joint tenant shall die * * * his part (of real estate) shall descend to his heirs or pass by devise, * * * subject to debts, curtesy, dower, * * * as if he had been a tenant in common.” “19. The preceding section shall not apply * * * to an estate conveyed or devised to persons in their own right, when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying

After concluding that the testator had sufficiently expressed his intention to create survivorship between his sons,⁴⁶ the court affirmed that the joint tenancy created pursuant to the statute had the same attributes as the joint tenancy that existed at common law.⁴⁷ The court stated:

True in this State as in Virginia the right of survivorship, at common law, is abolished by statute, but this is not so, if the deed, or as here, the will, expressly limits the estate granted or devised to the survivor. When so limited the grantees or devisees take joint estates only, subject to all the limitations attaching to such estates as at common law. 2 Minor's Inst. 410. Thus dower would not attach in favor of the widow of the one dying, for at

should then belong to the others."

Though the devise of the fourth paragraph of the will is to the two sons without words of limitation, it is insisted, that the provisions of said section 8 carried the fee simple to the sons, subject to the life estate, and though a joint tenancy at common law was thereby created, the estate of the deceased son, upon his death, by virtue of said section 18, passed to the plaintiff, his heir, "as if he had been a tenant in common." But section 8 says, unless a contrary intention shall appear by the will; and section 19 says, "the preceding section shall not apply * * * to an estate conveyed or devised to persons in their own right, when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should then belong to the others." Does not a contrary intention appear in the sixth paragraph of the will? And though survivorship at common law be abolished by said section 18, converting a joint tenancy into a tenancy in common, it is only by virtue of that section; and section 19 dissolves that effect, "when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should then belong to the others." How could a testator have more clearly manifested his intention that the "part of the one dying should then belong to the others," than by saying as he did in the sixth paragraph of his will, that "the remaining son living shall have and hold in his own right the whole of the above named bounded two tracts of land"? The words of the devise in the fourth paragraph must be placed in juxtaposition to these plain and positive words of the sixth paragraph. The provisions of the statute cannot be applied or otherwise enforced, except by due regard to both provisions of the will.

Is there anything then in the nature, character or quality of the estate which the two sons took on the death of the testator, to let in the plaintiff by inheritance, to succeed to the share which his father might have taken, and intercepting the operation of the sixth paragraph, in favor of the surviving son? We think not.

Id.

⁴⁶ *Neal*, 73 S.E. at 972.

⁴⁷ *Id.* at 975-76.

common law to give dower the husband must not be seized as a joint tenant, in consequence of survivorship. 2 Minor Inst. 121. And of course nothing would at his death go by inheritance to his heirs.⁴⁸

Another of the earlier cases of interest is *Carter v. Carter*.⁴⁹ In *Carter*, the plaintiff, the father of a deceased joint tenant, sought partition of the real estate as his son's sole heir.⁵⁰ The defendant was the plaintiff's daughter-in-law.⁵¹ The subject real estate had been owned (solely) by the plaintiff's son (defendant's husband), who conveyed it to a trustee (straw party) for the purpose of reconveying it to him and his wife as joint tenants with the right of survivorship.⁵² The plaintiff attacked the conveyance from the trustee to his son and daughter-in-law by arguing that the conveyance to the trustee did not authorize the trustees to reconvey the property to the grantors as joint tenants with the right of survivorship, i.e., the trustee could not impose any condition or limitation except those authorized in the deed to the trustee.⁵³ The court construed two deeds together (the deed from the son/husband to the trustee and the deed from the trustee to the husband (son) and wife and held the trustee had the authority to create survivorship.⁵⁴

The conveyance of real property to a straw party for the purpose of reconveying and creating the four unities necessary for a joint tenancy became

⁴⁸ *Id.*

⁴⁹ 104 S.E. 558 (W. Va. 1920).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Carter*, 104 S.E. at 558. The court explained:

here we have a deed from the beneficiaries of the trust, with a recital implying an intention to create a joint tenancy in the property, which at common law would have created in them the right of survivorship. In an effort to effectuate their purposes, and manifestly with reference to the provisions of section 19 of said chapter 71 (sec. 3757), we must say, in construing the two deeds together, that they procured Perry, their trustee, to grant the property to them in such a way as to give right of survivorship in them.

Id. at 558.

common practice in West Virginia.⁵⁵ Even after the adoption of chapter 36, article 1, section 20a of the West Virginia Code,⁵⁶ the conveyance of real property to a straw party for the purpose of reconveying the right of survivorship is still preferred by some attorneys.

IV. TENANCY BY ENTIRETY: A FOOTNOTE WITHIN THE TEXT

One of the interesting aspects of the adoption of the statutes reversing the common law presumption of joint tenancy when a conveyance was to two or more individuals, is the statute's effect on tenancy by entirety. Ribble has explained that:

The tenancy by entireties is governed by much the same principles that control *joint* tenancy. Indeed, in one aspect, it may be said to be a joint tenancy, *modified* by the common law principle that *the husband and wife are but one person*, for this tenancy can exist only where the persons to whom the property is given are *husband and wife at the time of the gift*, it not being created by a conveyance or devise to persons in joint tenancy who *afterwards marry*.⁵⁷

At common law, an estate in entirety differed from joint tenancy in that tenants in entirety had no individual interest that they could convey so as to break the unities and defeat survivorship.⁵⁸ At common law, the husband and wife were a unity, and the husband had complete custody, control, and right to use the property held by the

⁵⁵ *Id.*

⁵⁶ This provision eliminated need for straw party in creating joint tenancy with right of survivorship. See W. VA. CODE § 36-1-20a (1985). The statute states:

Any conveyance or transfer of property, or any interest therein, creating a joint tenancy with right of survivorship together with the person or persons conveying or transferring such property, executed by such person or persons to or in favor of another shall be valid to the same extent as a similar transfer or conveyance from a third party or by a straw party deed.

Id.

⁵⁷ 2 RIBBLE, *supra* note 13, § 853.

⁵⁸ 2 AMERICAN LAW OF PROPERTY, *supra* note 4, § 6.6.

unity during the joint lives of him and his wife.⁵⁹

The question of whether West Virginia recognized tenancy by entirety was before the Supreme Court of Appeals of West Virginia in *McNeeley v. South Penn Oil Co.*⁶⁰ For those interested in the evolution of real property law, the *McNeeley* case provides interesting reading. While the pivotal issue involved whether the cause of action was barred by the statute of limitations, in order to answer that question the court had to decide whether West Virginia still recognized the estate of tenancy by entirety.⁶¹ The case also discussed the husband's right to curtesy.⁶² After explaining that the decided weight of authority in our sister states had held that the married woman's act had not abolished estates by the entirety, that the West Virginia statute was based on the New York Act, and after noting that New York had held its act had not abolished estates by the entirety, the Supreme Court of Appeals of West Virginia held that tenancy by entirety had been abolished in West Virginia.⁶³ The court reasoned that chapter 71, section 8 of the West Virginia

⁵⁹ *Id.*

⁶⁰ 44 S.E. 508 (W. Va. 1903).

⁶¹ *Id.*

⁶² *Id.* Tenancy by curtesy was abolished in West Virginia in 1931. Act of Apr. 4, 1930, 1929-1930 W. Va. Acts Extraord. Sess. 9 (version codified at W. VA. CODE §§ 43-1-18) (effective Jan. 1, 1931) (repealed 1992). Also, in 1931 the husband was given the same statutory dower rights as the wife. Act of Apr. 4, 1930, 1929-1930 W. Va. Acts Extraord. Sess. 9 (version codified at W. VA. CODE §§ 43-1-1) (effective Jan. 1, 1931) (amended 1992). For a discussion of curtesy in West Virginia prior to its abolition, see Note, *Tenant By Curtesy — Acts 1921 — Construction*, 29 W. VA. L. Q. & B. 199 (photo. reprint 1963) (1922-1923).

⁶³ *McNeeley*, 44 S.E. at 512.

Code⁶⁴ combined with the married woman's act abolished tenancy by the entirety.⁶⁵

Just seven years after the decision in *McNeeley*, the Supreme Court of Appeals of West Virginia held that a conveyance “unto the said Tollison Stover and Martha Jane his wife to be held by them as a homestead for themselves, and after them to their heirs” created an estate by entirety for life only.⁶⁶ In the relevant portion of the opinion, the court explained:

Upon the death of Martha Jane Stover, her heirs immediately came into being, and the title to one moiety of the estate in remainder immediately became vested in them. Their enjoyment of the possession, however, was deferred until the death of Tollison Stover, because the life estate to him and his wife was an estate by entireties, and, being a life estate only, it was subject to the *ius accrescendi*. Section 18, c. 71, Code 1906, abolishing the common-law right of survivorship, does not apply to a life estate by entireties. It applies only to estates of inheritance.⁶⁷

⁶⁴ W. VA. CODE § 71-8 (1899) (current version at W. VA. CODE § 36-1-19 (1985)). The version of the code in effect in 1903 at the time of the *McNeeley* case stated:

Where any real estate is conveyed, devised, or granted to any person without any words of limitation, such devise, conveyance, or grant shall be construed to pass the fee simple or the whole estate or interest which the testator or grantor had power to dispose of in such real estate, unless a contrary intention shall appear by the will, conveyance, or grant.

Id.

⁶⁵ *McNeeley*, 44 S.E. at 512-13. Justice Brannon explained:

A reason exists, from this, in this state, for saying that estates by entirety have ceased since the married woman's act, that does not exist in other states. Survivorship has perished under the Code of 1849. The right of the husband to control and take the profits of and convey for his life the interest of the wife in entirety estates has been taken away by the separate estate act. What is left of an estate by entirety? Is its indivisibility or impartibility still left? I think not, as I think the statute of partition applies to it. From these considerations, I conclude that we cannot say that the statute of limitations does not apply because Higgins and wife had an estate by entirety, since I think that, by the joint operation of the act abolishing survivorship between husband and wife and the separate estate act, Higgins and wife held the land as joint tenants, not an estate by entirety. But Higgins had curtesy after his wife's death.

Id.

⁶⁶ *Irvin v. Stover*, 67 S.E. 1119, 1120 (W. Va. 1910).

⁶⁷ *Id.* at 1122.

While the court did not further explain its holding, it seems apparent that the court was interpreting the last sentence of section 18, which stated that “[a]nd if hereafter an *estate of inheritance* be conveyed or devised to a husband and his wife, one moiety of such estate shall, on the death of either, descend to his or her heirs, subject to debts, curtesy or dower, as the case may be.”⁶⁸ To the extent there may have been uncertainty as to the status of tenancy by entirety in West Virginia,⁶⁹ the question was answered in *Wartenburg v. Wartenburg*.⁷⁰ In *Wartenburg*, property had been conveyed to a husband and wife as “joint tenants.”⁷¹ The husband sought to partition the land conveyed to him and his wife as “joint tenants”; the circuit court denied partition, holding that because the parties took an estate by entireties, it was not subject to partition.⁷²

After briefly tracing the legislative history of the statutory provisions first adopted in Virginia in 1849 and incorporated into the laws of West Virginia in the code of 1868 as chapter 71, section 18 of the West Virginia Code, and noting that this section had been rewritten in the 1931 revision of our code,⁷³ the court stated “[t]he precise question involved in the instant case was discussed at length and, *we think*, decided, in *McNeeley v. South Penn Oil Co.*, 52 W.Va. 616, 44 S.E. 508, 62

⁶⁸ W. VA. CODE ch. 71, § 3037 (1906) (current version at W. VA. CODE § 36-1-19 (1985)) (corresponding to W. VA. CODE ch. 71, § 18 (1899)) (emphasis added).

⁶⁹ *Wartenburg v. Wartenburg*, 100 S.E.2d 562, 565 (W. Va. 1957).

⁷⁰ *Id.*

⁷¹ *Id.* at 563. The property had been conveyed to the husband and wife in two deeds: one deed provided it was to the parties (husband and wife) “for and during their natural lives as joint tenants with remainder in fee to the survivor.” *Id.* at 563. The second deed read “as joint tenants with the right of survivorship.” *Id.* As to the difference in the wording used in the two deeds the court stated that “[n]o contention is made, and we perceive no presently material difference or effect, as to the meaning of the language used in the respective deeds.” *Wartenburg*, 100 S.E.2d at 563.

⁷² *Id.*

⁷³ The court noted that “the Revisers of the 1931 Code appended a note to the section, saying: ‘This section is a shorter and more direct statement but having the same effect as § 18, c. 71, Code 1923.’” *Id.* at 564. The new version of this section read:

When any joint tenant or tenant by the entireties of an interest in real or personal property, whether such interest be a present interest, or by way of reversion or remainder or other future interest, shall die, his share shall descent or be disposed of as if he had been a tenant in common.

W. VA. CODE § 36-1-19 (1931) (setting forth statute in same language as is currently in effect).

L.R.A. 562.”⁷⁴ The court then explained:

In addition to the change in the language contained in Section 18 of Chapter 71 of the 1868 Code by the adoption of the 1931 Code, it may be helpful to point out that important and pertinent amendments and additions have been made to the statutory provisions relating to the rights of married women since the decision of *McNeeley v. South Penn Oil Co.*, supra. For example, Section 13 of Article 3 of Chapter 48 first became a part of our statutory law with the adoption of the 1931 Code. The section reads: “Any property to which a married woman is entitled, either at law or in equity, may not be subjected to any restraints upon alienation or other restrictions that may not lawfully be placed upon the property of persons not married.” Though we assume the holding in *McNeeley v. South Penn Oil Company*, supra, to be erroneous, how can we now say that the interest of a married woman in real estate is not susceptible of partition, in view of such changes in the married woman’s statutes, while the same interest, if owned by a woman “not married”, [sic] would be susceptible of partition?

In considering the effect of the several pertinent statutory provisions, we have not overlooked Code, 36-1-20, relating to the rights of survivorship. We think, however, that section cannot be given controlling effect as to the question involved. The rights of survivorship do not depend on the continued existence of common law estates by entireties. Such estates were created and existed at common law only by virtue of a fiction, a fiction not recognized in this State, that a husband and wife constitute a unity, and that, therefore, separate and distinct interests in property could not be created by a conveyance to them.

The effect of the statutes mentioned, especially Code, 36-1-19, we believe, completely abolishes common law estates by entireties. This being true, the deeds mentioned created joint tenancies in the grantees, vesting in each an undivided one half interest in the properties conveyed, subject to the survivorship rights of each other. Partition of the real estate conveyed by the

⁷⁴ *Wartenburg*, 100 S.E.2d at 564 (emphasis added).

deeds, therefore, is compellable.⁷⁵

V. THE MORE RECENT CASES IN WEST VIRGINIA: THE SECOND HALF OF THE TWENTIETH CENTURY

A number of the joint tenancy cases in the second half of this century have involved "joint accounts" in financial institutions. The first of these cases was *Lett v. Twentieth Street Bank*,⁷⁶ which was followed a decade later by *DeLong v. Farmers Building and Loan Ass'n*.⁷⁷ In the years since the *Lett* and *DeLong* cases, there have been a number of other joint account cases.⁷⁸

One of the more interesting of the joint tenancy cases in West Virginia is *State ex rel. Miller v. Sencindiver*.⁷⁹ The question in *State ex rel. Miller v. Sencindiver* was whether a wife who killed her husband should be permitted to claim the entire ownership of the real estate that had been conveyed to her and her husband as joint tenant with the right of survivorship.⁸⁰ While it is submitted the court erred in rejecting the constructive trust approach, which has been used in some sister jurisdictions to prevent the wrongdoer from profiting from his or her

⁷⁵ *Id.* at 565. A number of states still recognize tenancy by entirety. *Sawada v. Endo*, 561 P.2d 1291 (Haw. 1977); *Oval A. Phipps, Tenancy by Entireties*, 25 TEMP. L.Q. 24 (1951). In those states, the rights of a judgment creditor of only one of the tenants have been decided in different ways. For a very good discussion of the status of tenancy by the entirety, see *Sawada*, 561 P.2d at 1294-95. The *Sawada* decision provides both a summary and an update of *Oval A. Phipps, Tenancy by Entireties*, 25 TEMP. L.Q. 24 (1951-52). *Sawada*, 561 P.2d at 1294-95.

⁷⁶ 77 S.E.2d 813 (W. Va. 1953).

⁷⁷ 137 S.E.2d 11 (W. Va. 1964).

⁷⁸ See John W. Fisher, II, *Joint Tenancy in West Virginia: A Progressive Court Looks at Traditional Property Rights*, 91 W. VA. L. REV. 267, 277 (1989); Dana F. Eddy, *Issues of Ownership, Control, and Entitlement: Toward a More Pragmatic Analysis of the Law Governing Joint Deposit Accounts in West Virginia*, 97 W. VA. L. REV. 287 (1995). A discussion of the joint account decision is beyond the scope of this article, but these cases and the subject of "joint accounts" have been discussed in recent issues of the *West Virginia Law Review*. See *id.*; Fisher, *supra*.

⁷⁹ 275 S.E.2d 10 (W. Va. 1980).

⁸⁰ *Id.*

own wrongful act,⁸¹ several statements by the court in *Miller* are relevant to the present discussion. First the *Miller* court recognized that “[t]he Taylors’ [the slayer and the victims’] rights were established by their deed and did not involve descent or inheritance.”⁸²

After briefly discussing the holdings in other jurisdictions on the question of the slayer’s right to property owned jointly with the victim, the court then rejected the reasoning of the courts of our sister states and held the slayer was entitled to the entire joint estate in the land.⁸³ The court explained its reasoning as follows:

We decline to decide that a joint tenancy with survivorship created by prior conveyance is vested property that may be divested by the killing of one’s cotenant. We decline because by the Legislature’s modifications of the common law concerning joint tenancies, tenancies by the entireties, and cotenancies which allow creation by the parties of the incident of survivorship when intention to do so has been made clearly evident in a titling document, the Legislature has in effect preempted the matter.⁸⁴

If *State ex rel. Miller v. Sencindiver* is considered one of more enigmatic

⁸¹ For criticism of the *State ex rel. Miller v. Sencindiver* decision, see Fisher, *supra* note 78, at 294.

⁸² *State ex rel. Miller*, 275 S.E.2d at 13. Following citations from other jurisdictions for this proposition, the court quotes *United Trust Co.* as follows:

The right to succeed to property as a surviving joint tenant is another field and subject matter pre-empted by the legislature. . . . By these statutes the legislature has provided for the creation and termination of estates in joint tenancy and the requirements necessary for succeeding to such property by right of survivorship. The statutes were applied in *In re Estate of Foster*, 182 Kan. 315, 320 P.2d 855, and it was said that in none of them has the legislature seen fit to limit or restrict the right of a surviving joint tenant to succeed to the property because of criminal conduct on his part, and it was held:

“The distinctive characteristic of joint tenancy is survivorship, and a surviving joint tenant of real property does not take as a new acquisition under the laws of descent and distribution, but under the conveyance by which the joint tenancy was created, his estate merely being freed from participation of the other.”

Id. (quoting *United Trust Co. v. Pyke*, 427 P.2d 67, 76 (Kan. 1967)).

⁸³ *Id.* at 13-14.

⁸⁴ *Id.* at 14 (citing *DeLong v. Farmers Bldg. & Loan Ass’n*, 137 S.E.2d 11, 17 (W. Va. 1964)).

decisions on joint tenancy in West Virginia, then *Herring v. Carroll*⁸⁵ should be described as one of the more lucid. The *Herring* decision provides the pedological link between the common law doctrine and “modern,” i.e., post statutory, cotenancies.

In *Herring*, Mr. and Mrs. Herring were the owners of land conveyed to them as joint tenants with the right of survivorship.⁸⁶ Mrs. Herring conveyed “her right, title and interest” in the survivorship property to her son by a previous marriage.⁸⁷ Mr. Herring sought to nullify the deed from Mrs. Herring to her son.⁸⁸ Therefore, the issue placed squarely before the court was whether “one joint tenant can convey all of his right, title and interest in real property and, thereby, destroy the other joint tenant’s right of survivorship, thus, in effect creating a tenancy in common.”⁸⁹ The answer at common law was clearly that the conveyance by Mrs. Herring “severed” or ended the joint tenancy.⁹⁰ Because “[t]he doctrine of survivorship is the grand incident of joint estates, which more than any other distinguishes them from the other instances of estates held in common,”⁹¹ the court’s decision in *Herring* would answer the question of what effect the statutes⁹² reversing the common law presumption of joint tenancy had upon the common law concepts of cotenancy. The *Herring v. Carroll* opinion, written by Justice Miller,

⁸⁵ 300 S.E.2d 629 (W. Va. 1983).

⁸⁶ *Id.*

⁸⁷ *Id.* at 631.

⁸⁸ *Id.* at 630-31.

⁸⁹ *Id.* at 630.

⁹⁰ 2 AMERICAN LAW OF PROPERTY, *supra* note 4, § 6.2. Commentators have stated that:

Where there are only two joint tenants, the breaking of the unities ends the joint tenancy, the purchaser of the share conveyed and the remaining cotenant becoming tenants in common of equal shares. If there are more than two cotenants, the purchaser becomes tenant in common of the share conveyed, and the joint tenancy continues as to the remaining joint tenants, subject to survivorship as between themselves, but excluding the share conveyed which passes by will or inheritance on the death of the grantee of that share.

Id.

⁹¹ 2 RIBBLE, *supra* note 13, § 847.

⁹² W. VA. CODE §§ 36-1-19 to -20 (1985) (setting forth language effective in 1983).

is well-written and well-reasoned and, therefore, provides the reader with considerable insight into the nature of joint tenancy created pursuant to chapter 36, article 1, section 20 of the West Virginia Code.

One of the important aspects of the *Herring* case is that it “corrects” the misconception or misstatement in the *State ex rel. Miller* case, quoted *supra*, that suggests that “modern” joint tenancies created by the legislature have superseded the common law joint tenancies.⁹³

The court ended its discussion by declaring that “[f]or the foregoing reasons, we conclude that W. Va. Code, 36-1-19 and 20, do not abolish the common law requirement of the four unities in a joint tenancy.”⁹⁴

The *Herring* decision was followed by *Harris v. Crowder*⁹⁵ and *Vincent v. Gustke*.⁹⁶ In both the *Harris* and *Vincent* cases, the issue was what rights, if any, does a creditor of one spouse have relating to the marital home owned by the

⁹³ See *State ex rel. Miller v. Sencindiver*, 275 S.E.2d 10, 14 (W. Va. 1980) (citing *DeLong v. Farmers Bldg. & Loan Ass'n*, 137 S.E.2d 11, 17 (W. Va. 1964)). After quoting the last sentence from the above quote from *State ex rel. Miller*, the court in *Herring* explained the relevance of the common law’s four unities to the understanding of “modern” joint tenancy. *Herring*, 300 S.E.2d at 633-64. The *Herring* court elucidated as follows:

Moreover, our cases which discuss W. Va. Code, 36-1-19 and 20, have never suggested that these statutes have abolished the common law four unities that are essential to a joint tenancy. In *Neal v. Hamilton Company*, 70 W. Va. at 262, 73 S.E. at 975, this statement was made:

True in this State as in Virginia the right of survivorship, at common law, is abolished by statute, but this is not so, if the deed, or as here, the will, expressly limits the estate granted or devised to the survivor. When so limited the grantees or devisees take joint estates only, *subject to all the limitations attaching to such estates as at common law.* 2 *Minor’s Inst.* 410 (emphasis added).

Furthermore, had the Legislature intended to abolish the four common law unities for a joint tenancy when it enacted W. Va. Code, 36-1-19 and 20, there would have been no need for its enactment in 1974 of W. Va. Code, 48-3-7a. This statute authorizes a direct conveyance between husband and wife of an interest in property with a right of survivorship. At common law, such a direct conveyance could not create a joint tenancy because the four unities requirement was lacking. The grantor making the direct conveyance of an undivided interest did not hold his title from the deed to his grantee but under the original deed to the grantor.

Id. (citations omitted).

⁹⁴ *Id.* at 634.

⁹⁵ 322 S.E.2d 854 (W. Va. 1984).

⁹⁶ 336 S.E.2d 33 (W. Va. 1985).

husband and wife as joint tenants with the right of survivorship.⁹⁷ While these two decisions must be read together to understand the answer to that question, for present purposes the discussion in *Vincent v. Gustke* is the relevant opinion. The *Vincent* decision recognizes that a creditor of a joint tenant can obtain a judgment against a joint tenant; the judgment creates a lien against the joint tenant's property; the "judgment" lien creditor can "execute his lien against the debtor's share of the property;" and, "[s]ale on execution of a joint tenant's interest in joint property is sufficient to operate as a severance of a joint tenancy."⁹⁸ After the judgment creditor's sale, "the creditor [the purchaser at the judgment creditor sale] and the remaining joint tenant hold the property as tenants in common."⁹⁹

VI. CREDITORS OF DECEASED JOINT TENANTS

As the court established in the *Harris* and *Vincent* cases, West Virginia follows the common law in that the *mere* entry of a judgment does not sever the right of survivorship.¹⁰⁰ In order for severance of survivorship to occur, the judgment debtors interest in the joint tenancy estate must be sold pursuant to a judgment creditor suit.¹⁰¹ While severance is necessary to "destroy" the survivorship, the question remains, can a creditor of one of the joint tenants, who dies survived by his/her cotenants, assert any claim against the real estate held in a joint tenancy created pursuant to the West Virginia Code?¹⁰² The issue becomes particularly important where the deceased joint tenant does not "leave" sufficient personal property to pay his/her debts.¹⁰³ In considering this question, it is

⁹⁷ See John W. Fisher, II, *If Judgment Creditors Cannot Set Asunder a Debtor Spouse's Interest in the Marital Home, What Can They Do?*, 97 W. VA. L. REV. 339 (1995).

⁹⁸ *Vincent*, 336 S.E.2d at 35.

⁹⁹ *Id.* at 35. The holding in *Vincent* as summarized above is consistent with the authorities. See 2 AMERICAN LAW OF PROPERTY, *supra* note 4, § 6.2.

¹⁰⁰ See *Vincent*, 336 S.E.2d at 33; *Harris v. Crowder*, 322 S.E.2d 854 (W. Va. 1984).

¹⁰¹ See W. VA. CODE § 38-3-9 (1985); *Harris*, 322 S.E.2d at 861.

¹⁰² See W. VA. CODE §§ 36-1-20, 20a (1985).

¹⁰³ See generally 2 T. W. HARRISON, HARRISON ON WILLS AND ADMINISTRATION FOR VIRGINIA AND WEST VIRGINIA § 467 (George P. Smith, Jr. ed., 3d ed. 1986) (instructing that absent instructions in a will, either expressed or implied, personal property is used first to pay debts of the decedent). The

important to keep in mind that at common law the interest of the deceased joint tenant was *not* considered as “passing” to the surviving joint tenant at death.¹⁰⁴ The property interest in the joint tenancy was created at the time of the conveyance or devise and the death of a joint tenant simply meant the joint tenant no longer participated in the estate.¹⁰⁵ The concept has been explained as follows:

The right of survivorship is not considered to be a type of future interest. It is based on the concept that the estate is held by a fictitious entity made up of the cotenants collectively and that the entity continues so long as any of the joint tenants survive. When the first joint tenant dies, his individual right to share possession and enjoyment ceases. His heirs or devisees take nothing because the individual cotenant has no estate of inheritance to pass on to them. The deceased tenant’s estate is extinguished on his death; the estate continues in the survivor or survivors. The last survivor, of course, owns the whole estate in severalty because he no longer shares the estate with his former cotenants.

A joint tenancy arises only by purchase; that is, by deed or will or by adverse possession. If the property descends to heirs from an ancestor who died intestate, the heirs take as tenants in common.¹⁰⁶

The Supreme Court of Appeals of West Virginia has expressly followed the common law in this respect. In *State ex rel. Miller v. Sencindiver*,¹⁰⁷ the court stated that “[t]he Taylors’ [the joint tenants’] rights were established by their deed and did

Supreme Court of Appeals of West Virginia has stated that:

Numerous cases decided by this court hold that the personal estate is the primary fund for the payment of debts. It is an almost, if not quite, universal rule, both in England and America. 4 Kent, Comm. 420. Except where by will the personal estate is exempted from the payment of debts, and the real estate charged therewith, resort can never be had to the real estate of a decedent for the payment of his debts, unless the personal property is insufficient to pay them.

McConaughey v. Bennett’s Ex’rs, 40 S.E. 540, 543 (W. Va. 1901).

¹⁰⁴ 2 AMERICAN LAW OF PROPERTY, *supra* note 4, § 6.1.

¹⁰⁵ *Id.*

¹⁰⁶ 2 *id.* § 6.1; *see also* 2 RIBBLE, *supra* note 13, § 838 (footnotes omitted).

¹⁰⁷ 275 S.E.2d 10 (W. Va. 1980).

not involve descent or inheritance.”¹⁰⁸ Therefore, West Virginia follows the common law concept that there is no “interest” which “passes” from the first joint tenant who dies to his/her surviving joint tenant(s).¹⁰⁹ Since the first joint tenant to die has no inheritable interest in the real property,¹¹⁰ there would be no “asset” to survive his/her death which creditors could “attach.”

The court’s language and analysis in *Harris* establishes that the joint tenancy created in West Virginia pursuant to the statutory provision¹¹¹ is fundamentally the same as the joint tenancy estate which existed at common law.¹¹² This is important because it is a basic tenet of law in West Virginia that the common law is to be followed unless it has been changed by statute or is “repugnant.”¹¹³ Since the court in *Herring* expressly held that the four unities of the common law are still applicable in West Virginia and resolved the case on the basis

¹⁰⁸ *Id.* at 13. The court in *State ex rel. Miller* quotes with approval *United Trust Co v. Pyke* as follows:

The distinctive characteristic of joint tenancy is survivorship, and a surviving joint tenant of real property does not take as a new acquisition under the laws of descent and distribution, but under the conveyance by which the joint tenancy was created, his estate merely being freed from participation of the other.

Id. (quoting *United Trust Co. v. Pyke*, 427 P.2d 67, 76 (Kan. 1967)).

¹⁰⁹ *Id.*

¹¹⁰ See 2 RIBBLE, *supra* note 13, § 838.

¹¹¹ W. VA. CODE § 36-1-20 (1985).

¹¹² See *supra* note 93.

¹¹³ W. VA. CONST. art. VIII, § 13. The West Virginia Constitution provides:

Except as otherwise provided in this article, such parts of the common law, and of the laws of this State as are in force on the effective date of this article and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature.

Id. The West Virginia Code provides that:

The common law of England, so far as it is not repugnant to the principles of the constitution of this state, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the Legislature of this state.

W. VA. CODE § 2-1-1 (1994); see ROBERT M. BASTRESS, *THE WEST VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE* 222 (1995).

of common law concepts and analysis,¹¹⁴ it is fair to assume that there is nothing inherently repugnant in the common law concept of joint tenancy. Therefore, if the common law is not to be followed in this instance, it would be because it has been changed by statute. Since there is no statute in West Virginia which *specifically* addresses the question of a creditor's rights to pursue a deceased joint tenant's interest in land "passing" to his/her surviving joint tenant(s), the question is whether some related statute may be sufficient to change the common law. It is submitted that the two statutes which most probably raise the question are chapter 38, article 3, section 6 of the West Virginia Code¹¹⁵ and chapter 44, article 8, section 3 of the West Virginia Code.¹¹⁶

Under chapter 38, article 3, section 6 of the West Virginia Code, the precise

¹¹⁴ Herring v. Carroll, 300 S.E.2d 629, 634 (W. Va. 1983).

¹¹⁵ W. VA. CODE § 38-3-6 (1985) (lien of judgment on real estate). This section provides that:

Every judgment for money rendered in this State, other than by confession in vacation, shall be a lien on all the real estate of or to which the defendant in such judgment is or becomes possessed or entitled, at or after the date of such judgment, or if it was rendered in court, at or after the commencement of the term at which it was so rendered, if the cause was in such condition that a judgment might have been rendered on the first day of the term; but if from the nature of the case judgment could not have been rendered at the commencement of the term, such judgment shall be a lien only on or after the date on which such judgment or decree could have been rendered and not from the commencement of the term; but this section shall not prevent the lien of a judgment or decrees from relating back to the first day of the term merely because the case shall be set for trial or hearing on a later day of the term, if such case was matured and ready for hearing at the commencement of the term, not merely because an office judgment in a case matured and docketed at the commencement of the term does not become final until a later day of the term. A judgment by confession in vacation shall also be a lien upon such real estate, but only from the time of day at which such judgment is confessed. Such lien shall continue so long as such judgment remains valid and enforceable, and has not been released or otherwise discharged.

Id.

¹¹⁶ W. VA. CODE § 44-8-3 (1997) (real estate to be assets for payment of debts). This section provides that:

All real estate of any person who may hereafter die, as to which he may die intestate, or which, though he die testate, shall not by his will be charged with or devised subject to the payment of his debts, or which may remain after satisfying the debts with which it may be so charged, or subject to which it may be so devised, shall be assets for the payment of the decedent's debts and all lawful demands against his estate, in the order in which the personal estate of a decedent is directed to be applied.

Id.

status of the “creditor” is important. *Black’s Law Dictionary* defines a “general creditor” as “[a] creditor at large (*supra*), or one who has no lien or security for the payment of his debt or claim,” and a “creditor at large” as “[o]ne who has not established his debt by the recovery of a judgment or has not otherwise secured a lien on any of the debtor’s property.”¹¹⁷ *Black’s Law Dictionary* further defines a “lien creditor” as “[o]ne whose debt or claim is secured by a lien on particular property, as distinguished from a ‘general’ creditor, who has no such security. A creditor who has acquired a lien on the property involved, by attachment, levy or the like”¹¹⁸ The courts in West Virginia, recognizing the distinction between “general creditors” and “lien creditors,” have stated that “[t]he creditors protected by that statute [chapter 74, section 5 of the West Virginia Code]¹¹⁹ are lien creditors, having right to charge the property directly by execution, attachment, or otherwise, not holders of mere personal demands or claims.”¹²⁰ In other words, for a general creditor to become a lien creditor, the “debt” must be “reduced” to judgment and once a judgment has been entered, “[e]very judgment for money rendered in this State . . . shall be a lien on all the real estate of or to which the defendant in such judgment is or becomes possessed or entitled, at or after the date of such judgment.”¹²¹ As discussed *supra*, the docketing of a judgment is *not* sufficient to sever the survivorship feature of a joint tenancy.¹²² Therefore, under the common

¹¹⁷ BLACK’S LAW DICTIONARY 368 (6th ed. 1990).

¹¹⁸ *Id.* at 923.

¹¹⁹ Under West Virginia statutory law:

Every such contract, every deed conveying any such estate or term, and every deed of gift, or trust deed or mortgage, conveying real estate shall be void as to creditors and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the county wherein the property embraced in such contract, deed, trust deed or mortgage may be.

W. VA. CODE ch. 74, § 3103 (1906) (currently W. VA. CODE § 40-1-9 (1982)) (corresponding to W. VA. CODE ch. 74, § 5 (1899)).

¹²⁰ *Birch River Boom & Lumber Co. v. Glendon Boom & Lumber Co.*, 76 S.E. 972, 974 (W. Va. 1912); *see also* *Moore v. Tearney*, 57 S.E. 263 (W. Va. 1907).

¹²¹ W. VA. CODE § 38-3-6 (1985). Note that the docketing of an abstract of judgment pursuant to chapter 38, article 3, section 5 of the West Virginia Code is necessary for the lien to be valid against a purchaser of real estate for valuable consideration without notice. W. VA. CODE § 38-3-7 (1985).

¹²² *See supra* text accompanying notes 27-28, 98.

law, if the judgment is against the first joint tenant to die, the deceased joint tenant's interest in the land "ceased" upon his death so that the surviving joint tenant owns the real estate free of the lien acquired by the judgment creditor against the deceased joint tenant.¹²³ Obviously, if the lien is against the surviving joint tenant, then the surviving joint tenant has an inheritable interest to which the lien could attach.¹²⁴ Although the courts in West Virginia have not considered a "creditor" of a deceased joint tenant's right to the land owned as a joint tenant, our courts have recognized that, outside of the recording acts, judgment creditors cannot have greater rights than the judgment debtor.¹²⁵ In *Snyder v. Botkin*,¹²⁶ the court considered whether a judgment was a lien against land which was being sold under a parol contract, which had been sufficiently performed to enable the purchaser to compel the vendor to execute the parol contract in equity.¹²⁷ The court protected the purchaser under the oral contract by holding the land was not subject to a lien created by a judgment against the vendor.¹²⁸ The court's holding is expressed in the syllabus, which states that:

Where statute enactments do not interfere, a judgment creditor can acquire no better right to the estate of the debtor than the debtor himself has when the judgment is recovered. He takes it subject to every liability under which the debtor held it, and subject to all the equities which exist in favor of third parties; and a court of equity will limit the lien of the judgment to the actual

¹²³ See *supra* notes 27-28.

¹²⁴ 2 AMERICAN LAW OF PROPERTY, *supra* note 4, § 6.1. Commentators explain that:
When the first joint tenant dies, his individual right to share possession and enjoyment ceases. His heirs or devisees take nothing because the individual cotenant has no estate of inheritance to pass on to them. The deceased tenant's estate is extinguished on his death; the estate continues in the survivor or survivors. The last survivor, of course, owns the whole estate in severalty because he no longer shares the estate with his former cotenants.

Id.

¹²⁵ *Snyder v. Botkin*, 16 S.E. 591 (W. Va. 1892).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

interest which the debtor has in the estate.¹²⁹

To the extent that *Snyder* and its progeny provide guidance, they are consistent with the common law and negate an argument that chapter 38, article 3, section 6 of the West Virginia Code constitutes a statutory change of the common law on the issue discussed herein.

VII. WHAT REAL ESTATE OF DECEDENTS IS AN ASSET FOR PAYMENT OF DEBTS

As with chapter 38, article 3, section 6 of the West Virginia Code, without a case directly on point, one must look at the statute itself and the court decisions relating to the statute and try to glean some guidance as to how chapter 44, article 8, section 3 of the West Virginia Code may be applied to property which “passes” to a cotenant pursuant to joint tenancy. In understanding a statute, it is frequently helpful to understand the law prior to the enactment of the statute. Minor explains the background of this statute as follows:

By the feudal law land held by feudal tenure was not subject to the debts of the owner, lest the debtor tenant be substituted, without the lord’s consent, by one inimical to the lord’s interests, and the feudal rule requiring the lord’s consent to an alienation by the tenant be thus evaded and abrogated.

In process of time, however, the lands of a *deceased owner* became liable to his *debts of record* and to his debts of *specialty* (that is, *under seal*) expressly binding the heirs, provided the lands had *descended* upon the heir and had remained in his hands until suit was brought to enforce the debt.

By statute 13 Edw. I, c. 18, lands of a *living debtor* were allowed to be subjected upon a judgment against him under a “writ of *elegit*.” This statute enacted that “he who recovereth in debt or damages, may have either a *feri facias* of the chattels of the debtor, or a writ on which the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of the plow, and half of his land until the debt be levied upon a reasonable price or extent.” Formerly the land taken under this writ was not sold but merely retained by the creditor until the rents and profits were sufficient to pay the judgment. Now, in England, an order of sale

¹²⁹ *Id.* at 591, Syl. Pt. 3; *see also* *Westinghouse Lamp Co. v. Ingram*, 90 S.E. 837, Syl. Pt. 3 (W. Va. 1916).

may be had for the debtor's land and the proceeds distributed among all of his creditors.

....

While, as already mentioned, lands of a *deceased owner* could at common law be subjected only to *record* debts or debts of *specialty* expressly binding the heirs, and to none others, it is enacted in Virginia that "*all real estate* of any person who may hereafter die, as to which he may die *intestate*, or which, though he die *testate*, shall not by his will be *charged with* or devised *subject to the payment of his debts*, or which any *remain after satisfying such debts*, shall be *assets* for the payment of the decedent's debts and all lawful demands against his estate in the order in which personal estate is directed to be applied;" [sic] and that such assets may be administered by a court of equity.

In Virginia therefore, it will be seen, lands in *the hands of the devisees or heirs* are in general made liable *in equity* for *all the debts* of the deceased owner, but the heirs or devisees are not *personally* liable therefor further than to the extent of the value of the land to which they succeed. But they are responsible to that extent, even though they alienate the land in the meantime. In the latter event, however, the *purchaser* from the heir or devisee, if the conveyance be *bona fide* and before suit is brought by the decedent's creditors to administer the assets, or before a report of debts is filed by the personal representative of the decedent, is not responsible, either *in rem* or *in personam*, unless he has purchased *within one year* after the decedent's death. When such purchaser is liable to the decedent's creditors at all, he is liable to the extent of the value of the land so purchased, but no further.¹³⁰

Therefore, in view of the background of the statute and by giving its words their "plain meaning," there would not appear to be any "legislative intent" for the statute to change the definition of a decedent's "assets."¹³¹ There is also nothing in the statute or its background which indicates it was intended to "impliedly" alter traditional property rights.¹³² Support for this assumption is found in *Gilkison v.*

¹³⁰ 1 RIBBLE, *supra* note 13, § 161 (footnotes omitted).

¹³¹ *Id.*

¹³² *Id.*

*Gore*¹³³ which, for present purposes, is perhaps the most helpful decision relating to this statute. In *Gilkison*, a husband and wife purchased land “jointly.”¹³⁴

The grantor retained a “vendor’s lien” in the deed for the balance of the purchase price which was represented by a note signed by both husband and wife.¹³⁵ The husband and wife had also borrowed the “down payment” made to the grantor and had given a note secured by a deed of trust to secure the loan for the “down payment.”¹³⁶ The wife died “leaving” these lien debts as well as other joint and individual debts.¹³⁷ The specific question before the court relates to husband’s curtesy rights which the court held attached only to the equity of redemption (i.e., the land subject to the lien debts).¹³⁸

The court’s holding on the husband curtesy is reflected in the syllabus, which states that “[i]n this State the curtesy of the husband in his wife’s land is not subject to her general debts, but to the lien debts thereon only, existing thereon when his curtesy becomes consummate by her death.”¹³⁹ As to the unsecured debts, the lower court had “charged” the wife’s moiety with the payment of her share of these debts.¹⁴⁰ On appeal, the court said that “[b]ut as to the general and unsecured

¹³³ 91 S.E. 395 (W. Va. 1917).

¹³⁴ *Id.* at 395. While the court used the term “jointly” in the decision, the substance of the discussion indicates the property was owned as tenants in common. *Id.* For example, the court stated that:

What a wife dies seized of, where the facts are as assumed, and as in the case at bar, is an estate in the equity of redemption. This is the only estate she leaves, and it is the estate of inheritance which descends to her heirs, subject to the estate by the curtesy of the husband, given by the statute.

Id. Obviously, if it were a joint tenancy, the first joint tenant to die does not have an inheritable interest to descend to her heirs. Her husband, as the surviving joint tenant, would be the “sole” owner.

¹³⁵ *Id.*

¹³⁶ *Gilkison*, 91 S.E. at 395.

¹³⁷ *Id.*

¹³⁸ See *supra* note 65. A statutory form of curtesy existed in West Virginia until the general revision of the state code in 1931 when curtesy was abolished and the husband was given “dower” rights equal to the wife. For a discussion of curtesy in West Virginia prior to its abolition, see Note, *Tenant By Curtesy — Acts 1921 — Construction*, 29 W. VA. L.Q. & B. 199 (photo. reprint 1963) (1922-1923).

¹³⁹ *Gilkison*, 91 S.E. at 395, Syl. Pt. 3.

¹⁴⁰ *Id.* at 396.

debts we think the court below was in error.”¹⁴¹ Counsel argued the correctness of the lower court’s decision relying upon the married woman’s acts and “section 3, Chapter 86, making real estate of any person dying intestate, etc., assets for the payment of his debts”;¹⁴² the wording of our curtesy statute;¹⁴³ and a Nebraska case.¹⁴⁴ The court rejected counsel’s argument stating:

The Nebraska case involved the construction of a statute which gave to the husband an estate by the curtesy in his wife’s lands *subject to her debts*, and the cases cited in the opinion, and in the note supporting the principal case, involved the same or similar statutes. Our statute does not in specific terms subject the curtesy of the husband to the payment of her debts. True, a wife may by her contracts, under the statute, subject her property to the payment of her debts, and the same, and the rents, issues and profits thereof during her life time, may be sold by decree for the payment thereof; and by deeds or contracts, her husband joining therein, she may encumber her real estate, and render such liens at the time of her death superior to his curtesy. But we can find no warrant in any statute for subjecting his curtesy, consummate on her death, to her general debts. We think the effect of our statute, section 15, of said chapter 65, was to abolish tenancy by the curtesy initiate, but as to tenancy by the curtesy consummate, the husband takes such estate on the death of the wife free from all, except specific liens then existing thereon. It is only in those states like Nebraska, where the statute specifically renders the curtesy of the husband

¹⁴¹ *Id.*

¹⁴² *Id.* The pertinent section of the code provides:

All real estate of any person who may hereafter die, as to which he may die intestate, or which, though he die testate, shall not by his will be charged with or devised subject to the payment of his debts, or which may remain after satisfying the debts with which it may be so charged, or subject to which it may be so devised, shall be assets for the payment of the decedent’s debts and all lawful demands against his estate, in the order in which the personal estate of a decedent is directed to be applied.

W. VA. CODE ch. 86, § 4017 (1913) (currently W. VA. CODE § 44-8-3 (1997)) (corresponding to W. VA. CODE ch. 86, § 3 (1899)).

¹⁴³ *Gilkison*, 91 S.E. at 395.

¹⁴⁴ *Id.* at 396; *see Miller v. Hanna*, 131 N.W. 226 (Neb. 1911).

subject to the wife's debts, that the contrary rule has been established.¹⁴⁵

The significance of the *Gilkison* decision is that it recognized that chapter 44, article 8, section 3 of the West Virginia Code did not create rights in general creditors of a deceased cotenant's land greater than the deceased spouse's curtesy rights. Since the case involved an inheritable interest of the deceased spouse, it does not raise the same issue as joint tenancy, but the case does establish that the code section does not supersede a traditional property interest.

In addition, when chapter 44, article 8, section 3 of the West Virginia Code is construed along with sections 5¹⁴⁶ and 6,¹⁴⁷ as the *McConaughey* court says it should,¹⁴⁸ then the decedent's property made an asset for the payment of debts the property succeeded to by an "heir or devisee."¹⁴⁹ Chapter 44, article 8, section 6 of the West Virginia Code provides that "[a]n heir or devisee may be sued in equity by any creditor to whom a debt is due, for which the estate descended or devised is liable."¹⁵⁰ In *Roane County Bank v. Phillips*,¹⁵¹ the court stated that chapter 44,

¹⁴⁵ *Gilkison*, 91 S.E. at 396 (emphasis added).

¹⁴⁶ The pertinent section provides:

Any heir or devisee who shall sell and convey any real estate, which by this article is made assets, shall be liable to those entitled to be paid out of such assets, for the value thereof, with interest; in such case the estate conveyed shall not be liable, if at the time of the conveyance the purchaser shall have no notice of any fraudulent intent on the part of the grantor, and no suit shall have been commenced for the administration of such assets, nor any report have been filed, as aforesaid, of the debts and demands of those entitled.

W. VA. CODE ch. 86, § 5 (1899) (current version at W. VA. CODE § 44-8-5 (1997)).

¹⁴⁷ The pertinent section states:

An heir or devisee may be sued in equity by any creditor to whom a debt is due, for which the estate descended or devised is liable, or for which such heir or devisee is liable in respect to such estate; and he shall not be liable to an action at law for any matter for which there may be any redress by such suit in equity.

W. VA. CODE ch. 86, § 6 (1899) (current version at W. VA. CODE § 44-8-6 (1997)).

¹⁴⁸ 40 S.E. 540, 544 (W. Va. 1901).

¹⁴⁹ See W. VA. CODE §§ 44-8-5 to -6 (1997).

¹⁵⁰ W. VA. CODE § 44-8-6 (1997).

¹⁵¹ 22 S.E.2d 291 (W. Va. 1942).

article 8, section 3 of the West Virginia Code gives unsecured creditors a claim upon the land of which the decedent died *seised*.¹⁵²

The effect of chapter 44, article 8, section 3 of the West Virginia Code¹⁵³ on the common law was addressed by the court of claims in *McFaddin v. United States*.¹⁵⁴ In *McFaddin*, the Court of Claims was asked to decide whether, under the laws of West Virginia, real estate is subject to the payment of expenses of administration of a decedent's estate.¹⁵⁵

The court begins its analysis by noting that “[a]t common law, the real estate of the decedent is not subject to the payment of the expenses of the administration of his estate,”¹⁵⁶ and unless the common law has been changed by statute, then, under the constitution and statute of West Virginia, the common law prevails.¹⁵⁷ The government conceded that there was no statute precisely on point, but argued that chapter 44, article 8, section 3 of the West Virginia Code embodied such a change.¹⁵⁸ After quoting the statute, the court disposes of the government's argument by reasoning that:

The position of the defendant is that the phrase “all lawful demands against his estate” includes administration expenses, and therefore it must be said that real estate in West Virginia is subject to the payment of such expenses. We cannot accede to this proposition. Much of the West Virginia law is derived from

¹⁵² *Id.*; *see also* *Trail v. Trail*, 49 S.E. 431 (W. Va. 1904); *Hull v. Hull's Heirs*, 26 W. Va. 1 (1885).

¹⁵³ For the language of the pertinent statute in effect in 1935, *see supra* note 96. The language of the statute effective in 1935 is identical to the language in effect in 1913. *Compare* W. VA. CODE § 44-8-3 (1932) *with* W. VA. CODE ch. 86, § 4017 (1913) (currently codified at W. VA. CODE § 44-8-3 (1997)) (corresponds to W. VA. CODE ch. 86, § 3 (1899)).

¹⁵⁴ 10 F. Supp. 286 (Ct. Cl. 1935).

¹⁵⁵ *Id.* at 286. Under the tax law at that time real estate was considered part of the gross estate “[t]o the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.” *Id.* at 286 (quoting Revenue Act § 402(a), 42 Stat. 278 (1921)).

¹⁵⁶ *Id.*

¹⁵⁷ *See supra* note 113.

¹⁵⁸ *McFaddin*, 10 F. Supp. at 286.

Virginia, from which it was separated in 1863, many of the existing laws being adopted when it became a state. The section in question is identical with a section of the Virginia statute now appearing as section 5395, Code Va. 1930. An examination of the development of the Virginia statutes shows that the provision making real estate liable for "all lawful demands against his [decendent's] estate" first appeared therein in connection with certain revisions which were made in 1849. Code Va. 1849, c. 131, § 3. In making such addition, we find no reference to an enlargement of the common-law rule to make real estate liable for expenses which might be incurred by the decedent's personal representative in the administration of his estate, but rather the expressed purpose was to make such property liable for obligations incurred by the decedent in his lifetime for which the personal representative could be sued. Nor do we find any subsequent expressed intent of a different nature, either in connection with various related changes of the Virginia statute or in the adoption of the present statute in West Virginia. A change of so marked nature as contended for by defendant should not be spelled out of the general language used when another and different purpose was sought to be accomplished, unless the language used makes necessary such an interpretation. We find no decision by the Virginia or West Virginia courts directly in point, though various cases on closely analogous questions tend to support the view that the words "all lawful demands" do not refer to demands which the personal representative might make against the real estate for the payment of administration expenses.¹⁵⁹

VIII. IS THERE A GENERAL RULE?

As a general statement, absent a statute specifically addressing the issue, other states have followed the common law rule as set forth above. For example, Professor Paul G. Haskell explains that:

When a joint tenant dies, as we have said, his interest moves to the survivor without an instrument of transfer or estate administration. That interest which passes is not subject to the claims of the deceased joint tenant's creditors. During that joint

¹⁵⁹ *Id.* at 287.

tenant's life his interest could be reached by his creditors, but at his death his interest disappears, so there is nothing for the creditors to reach.¹⁶⁰

The general rule is stated in *American Jurisprudence* as follows:

An estate in joint tenancy is one held by two or more persons jointly, with equal rights to share in its enjoyment during their lives, and having as its distinguishing feature the right of survivorship, by virtue of which the entire estate, upon the death of a joint tenant, goes to the survivor, or, in the case of more than two joint tenants, to the survivors, and so on to the last survivor, free and exempt from all charges made by his deceased cotenant or cotenants.¹⁶¹

Similarly *Corpus Juris Secundum* states that “[s]o, subject to the statutory modification of the rule . . . on the death of a joint tenant the survivor or survivors take the whole estate, free from the claims of the heirs or creditors of the deceased cotenant.”¹⁶²

Because secondary sources are based upon the decisions in various jurisdictions, it will be helpful to examine some of those decisions. One of the earlier cases to discuss the issue was *Musa v. Segelke & Kohlhaus Co.*¹⁶³ In *Musa*, property was conveyed to a husband and wife, and the survivor of them in 1915.¹⁶⁴ In 1928, Segelke & Kohlhaus Co. obtained a judgment against the husband, and it was docketed on April 7, 1928.¹⁶⁵ Mr. Musa, the husband, died in 1932, and no

¹⁶⁰ PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 117 (2d ed. 1994). Professor Haskell also explains that creditors could reach the interest during the debtor joint tenant's life by stating that “the creditors of a joint tenant can levy upon his interest, the purchaser at the execution sale becoming a tenant in common with the other tenant.” *Id.*

¹⁶¹ 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 3 (1995) (footnotes omitted).

¹⁶² 48A C.J.S. *Joint Tenancy* § 3 (1981) (footnotes omitted).

¹⁶³ 272 N.W. 657 (Wis. 1937).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

execution of the judgment was issued until 1936.¹⁶⁶ Mrs. Musa brought suit to remove the judgment as a cloud on title “and to enjoin the seizure and sale of any interest in the land by virtue of the execution issued thereon.”¹⁶⁷ The court rejected the defendant’s argument that a statute making a judgment a lien against the land¹⁶⁸ and a separate statute which provided that one year after “the death of a judgment debtor execution may be issued against any property upon which the judgment is a lien and may be executed in the same manner and with the same effect as if he were still living”¹⁶⁹ gave the creditors a right to execute against the land now owned by the surviving tenant.¹⁷⁰ After noting that the mere entry of a judgment did not sever the survivorship and that the judgment creditor’s lien is against the precise interest or estate which the judgment debtor actually and effectively had in the land, the court concluded:

[T]here was no effective severance of the joint tenancy interests in question during Adam Musa’s lifetime; that, consequently, all of his right, title, and interest in the premises became extinguished and ceased upon his death; and that thereupon the entire right, title, and interest therein vested in the plaintiff by virtue of the deed conveying the premises to her and Adam Musa in joint tenancy.¹⁷¹

The *Musa* opinion gave rise to an annotation in *American Law Reports*.¹⁷² While the annotation has been updated by additional case citations, it has not been

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ West Virginia has a similar statutory provision. See W. VA. CODE § 38-3-6 (1985).

¹⁶⁹ *Musa*, 272 N.W. at 657-58.

¹⁷⁰ *Id.* at 658.

¹⁷¹ *Id.* at 659.

¹⁷² Annotation, *Rights and Remedies of Judgment Creditor or of Purchaser Under Execution, in Respect of Estate in Real Property Held in Joint Tenancy*, 111 A.L.R. 171 (1937).

superseded.¹⁷³

Another of the “early” cases on this issue is the California decision of *Ziegler v. Bonnell*.¹⁷⁴ While California is a community property state, it still has joint tenancy with the same attributes as the common law estate.¹⁷⁵

After quoting from *American Law Reports* annotation cited *supra*, the California court agreed with the reasoning of the *Musa* decision that since the judgment debtor’s interest in the land ended with his death, so did the lien.¹⁷⁶ The court said:

This rule is sound in theory and fair in its operation. When a creditor has a judgment lien against the interest of one joint tenant he can immediately execute and sell the interest of his judgment debtor, and thus sever the joint tenancy, or he can keep his lien alive and wait until the joint tenancy is terminated by the death of one of the joint tenants. If the judgment debtor survives, the judgment lien immediately attaches to the entire property. If the judgment debtor is the first to die, the lien is lost. If the creditor sits back to await this contingency, as respondent did in this case, he assumes the risk of losing his lien.¹⁷⁷

¹⁷³ The author, after noting that the question addressed in the annotation had not arisen very frequently, stated that:

According to the authorities cited in the annotation, it may be stated that in general, where land is held by joint tenants, one of whom is a judgment debtor, the mere docketing of the judgment does not effect a severance of the joint estate, and if the debtor dies before levy of execution, the judgment creditor loses his rights against the debtor’s interest, all of which passes to the surviving joint tenant; that, however, the estate of a joint tenant is subject to execution, and a levy thereof effects a severance of the joint estate, and after such a levy and sale, the purchaser and the surviving joint tenant hold the property as tenants in common.

Id. at 172.

¹⁷⁴ 126 P.2d 118 (Cal. Dist. Ct. App. 1942).

¹⁷⁵ *Id.* at 119. The California District Court of Appeals explained that “[t]he right of survivorship is the chief characteristic that distinguishes a joint tenancy from other interests in property. The surviving joint tenant does not secure that right from the deceased joint tenant, but from the devise or conveyance by which the joint tenancy was first created.” *Id.*

¹⁷⁶ *Id.* at 120-21.

¹⁷⁷ *Id.*

In 1953, the Court of Appeals of Maryland decided this question in *Eder v. Rothamel*.¹⁷⁸ In *Eder*, the court stated the issue simply: "Is a joint tenancy severed by the lien of a judgment against one of the joint tenants? If it is, the lien continues to embrace the interest of that joint tenant after his death. If it is not, that interest passes unencumbered to the surviving joint tenants."¹⁷⁹

The Maryland court followed the *Musa* and *Ziegler* decisions in holding that upon the death of the judgment debtor, the surviving joint tenant or tenants take free of the judgment lien.¹⁸⁰

In view of the general acceptance of the general rule, parties have advanced several arguments in an attempt to judicially alter the rule. For example, in *Schlichenmayer v. Luithe*¹⁸¹ the court rejected an argument of unjust enrichment.¹⁸² In *Schlichenmayer*, the plaintiff sought to hold the surviving wife liable for her deceased husband's debts.¹⁸³ The plaintiff advanced several arguments for holding

¹⁷⁸ 95 A.2d 860 (Md. 1953).

¹⁷⁹ *Id.* at 861.

¹⁸⁰ *Id.* at 862. As part of its decision, the *Eder* court states:

The point at which an involuntary conveyance reduces the interest of one of the joint tenants to the point of severance and destruction of the joint tenancy, varies with different jurisdictions. In some, this occurs when there is a levy on a judgment. Generally, this is where under a levy there is a seizure of real estate and the holding is that this seizure interferes with possession of the joint tenants so as to cause the destruction of the unity of possession and the consequent severance of a joint estate. In other jurisdictions where the levy does not deprive the tenant of the use of his property, it is held that there is no interference with any of the unities, and consequently, no severance of the joint tenancy. See *Van Antwerp v. Horan*, 390 Ill. 449, 61 N.E.2d 358, 161 A.L.R. 1133; and annotation in 161 A.L.R. 1139. There is complete agreement, however, in all jurisdictions that (a) the levy and completed sale in execution does sever the joint tenancy, and (b) the mere obtention or docketing of a judgment lien does not operate to sever the joint tenancy. We have been referred to no case in the United States or England, nor have we found any, which holds otherwise. In every reported case, it has been held that a judgment lien, without levy or execution on the judgment, does not sever a joint tenancy or prevent the interest of the judgment debtor from passing to or ripening in the surviving co-tenants, free of lien.

Id.

¹⁸¹ 221 N.W.2d 77 (N.D. 1974).

¹⁸² *Id.*

¹⁸³ *Id.*

the wife liable for her interest in the property the wife owned as the surviving joint tenant.¹⁸⁴ The only argument relevant for present purposes was unjust enrichment. In response to this assertion, the court explained:

We do not believe that the principle of unjust enrichment applies here. Mrs. Luithle was the joint tenant in real property acquired many years earlier by her husband and herself. Mrs. Luithle obtained her interest in the joint-tenancy real estate not from her husband's estate but by reason of the original joint-tenancy deed. Joint tenancy is not an estate of inheritance; a joint tenant who dies leaving a surviving tenant has no interest which he may devise. The creditors of the decedent might have levied upon the decedent's interest in the real estate during his lifetime, but upon his death the title passed to the cotenant free of all claims of creditors, and subject only to payment of estate taxes.

....

The doctrine of unjust enrichment applies only when a person has and retains money or benefits which in justice and equity belong to another. We find no basis for invoking the doctrine here, since the defendant's right to the property upon the death of her husband antedated by many years the acts of the husband which are claimed to have resulted in the unjust enrichment of the wife.

Mrs. Luithle was absolutely entitled to the joint-tenancy property upon the death of her husband, regardless of whether his estate was solvent or insolvent. There could scarcely be an "unjust" enrichment in her accepting what the law grants without any obligation to make restitution or payment.¹⁸⁵

One of the more recent discussions of the question is in *Rembe v. Stewart*.¹⁸⁶ The Iowa court begins its decision in *Rembe* by stating that "[t]his appeal invites us, on public policy grounds, to change a longstanding rule concerning property held in joint tenancy. We decline in the belief that any such change should be by

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 82-83 (citations omitted).

¹⁸⁶ 387 N.W.2d 313 (Iowa 1986).

statute.”¹⁸⁷ The longstanding rule the court was asked to change was “[t]he general rule that a surviving joint tenant takes real property free of the debts of the deceased joint tenant.”¹⁸⁸ The change the plaintiff urged the court to adopt was that “when probate assets are insufficient to pay claims made against an estate, property held by a surviving joint tenant should be made available to satisfy them.”¹⁸⁹ The court, attending that the plaintiff’s facts did not present a particularly strong case for change,¹⁹⁰ rejected the plaintiff’s arguments as follows:

Whatever the merits of the proposed change, we fear that, if it were to occur by judicial fiat, the cure might be worse than the disease. Joint tenancies are already fraught with dangerous and often expensive problems and to add to them might not be worth any advantages gained by the change. Experience has clearly taught that even the most careful estate plan is subject to shipwreck upon the treacherous reef of a stray joint tenancy deed. Joint tenancies have multiplied countless problems relating to death taxes in the estates of the unwary. It may be that the policies mentioned would justify the proposed change. But the additional litigation necessary to sort through claims such as this one, and in settling the real estate titles that might be compromised also have to be weighed in the balance.

We think the weighing of these and other conflicting considerations is more appropriate for the legislative than for the judicial process. We decline to change our rule.¹⁹¹

IX. CONCLUSION

As noted *supra*, the law in West Virginia has established that a judgment entered pursuant to chapter 38, article 3, section 6 of the West Virginia Code and

¹⁸⁷ *Id.* at 313.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 314.

¹⁹⁰ The plaintiff had served as conservator of the plaintiff for many years prior to her death and was executor of her estate. *Id.* The court noted there was no claim of fraud and that as the deceased joint tenant’s conservator, plaintiff was in no position to contend she contributed her services in ignorance of deceased joint tenant’s property interest. *Rembe*, 387 N.W.2d at 315.

¹⁹¹ *Id.* at 315.

docketed pursuant to chapter 38, article 3, section 5 of the West Virginia Code does not sever the survivorship between joint tenants,¹⁹² and it is the generally accepted rule that the lien against the property ceases when a judgment debtor dies survived by a joint tenant(s).¹⁹³ Given the fact that the court decisions in our state have essentially followed the common rules relevant to joint tenancy,¹⁹⁴ it is anticipated that the Supreme Court of Appeals of West Virginia will continue to adhere to those principles in holding that a lien against a joint tenant judgment debtor's land will cease upon the judgment debtor's death survived by a joint tenant. If this assumption is correct, the question then becomes whether the court would consider chapter 44, article 8, section 3 of the West Virginia Code¹⁹⁵ as sufficient to change the common law. As noted *supra*, such statutes were not specifically designed to address the issue of joint tenancy.¹⁹⁶ Therefore, if such a statute is to be applied to joint tenancy, it would have to be by inference. However, when the government argued in the *McFaddin* case that chapter 44, article 8, section 3 of the West Virginia Code could be construed broadly to make real estate subject to the expenses of the administration of a decedent's estate, the court rejected the argument, stating that "[a] change of so marked nature as contended for by defendant should not be spelled out of the general language used when another and different purpose was sought to be accomplished, unless the language used makes necessary such an interpretation."¹⁹⁷

It is, therefore, submitted that until the legislature specifically addresses this question, it should be assumed the common law principles still apply, that a creditor's rights against a joint tenant rise no higher than the joint tenant's rights and interest, and that when a joint tenant dies survived by a joint tenant, his/her rights in the estate cease to exist along with any claim a creditor has to such estate.

¹⁹² See *supra* note 98 and accompanying text.

¹⁹³ See *supra* part VIII.

¹⁹⁴ See *supra* note 93.

¹⁹⁵ See *supra* part VII; see *supra* note 116.

¹⁹⁶ See *supra* note 130.

¹⁹⁷ *McFadden v. United States*, 10 F. Supp. 286, 287 (Ct. Cl. 1935).

