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North Carolina's Reincarnated Joint Tenancy: Oh Intent, Where Art Thou

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NORTH CAROLINA'S REINCARNATED JOINT TENANCY: OH INTENT, WHERE ART THOU?*

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A mother, her daughter, and her son-in-law received title to a North Carolina home as joint tenants with right of survivorship. Little did the mother know that she was almost instantly destroying the newborn joint tenancy when, in order to finance the purchase price, she alone executed a mortgage note and deed of trust at the closing. When she died several years later with that mortgage loan in default, a legal dispute arose centered on whether "severance" of the joint tenancy had occurred. Following traditional joint tenancy law theory, the Court of Appeals decided somewhat reluctantly that the joint tenancy was indeed severed at the very closing during which it was successfully created; for by executing the deed of trust, the mother had conveyed "title" according to North Carolina's title theory of mortgage law. Under a common law "four unities" analysis, her execution of the deed of trust unilaterally destroyed the unity of title required for a joint tenancy and automatically converted it into a tenancy in common. Contrary to what was most likely intended as part of an informal family estate and eldercare plan, her fifty percent undivided interest in the home remained in her estate at her death and did not pass by survivorship to her daughter and son-in-law.[1]

This article addresses key real property and public policy issues triggered by the 1990 legislative reincarnation of the joint tenancy with right of survivorship in North Carolina with a special emphasis on creation and severance issues. It also focuses on piecemeal statutory amendments and revisions to North Carolina joint tenancy law since 1990. The authors' analysis leads to the

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1. Countrywide Home Loans, Inc. v. Reed, 220 N.C. App. 504, 504–07, 725 S.E.2d 667, 668–69 (2012).

following conclusions: First, because joint tenancy creation is now intent-based, not unities-based, joint tenancy termination should likewise be intent-based, not unities-destruction-based. Second, unilateral "stealth" severances of joint tenancies are contrary to public policy, unless accompanied by effective prior notice to the other joint tenant or tenants. Third, North Carolina General Statute section 41-2 requires substantial and comprehensive revision to further clarify the contemporary law of joint tenancy in North Carolina. Fourth, substantial improvement in the law's transparency is required in the legislative process if all interested parties, including consumers, are to have a meaningful opportunity to provide input when important real property laws are added, revised, or deleted from the General Statutes.

INTRODUCTION

Until the 2012 *Countrywide* decision,[2] North Carolina experienced 228 years with no appellate court decision addressing traditional joint tenancy law, including the lightning rod issue of severance. Professor John Orth's article, *The Joint Tenancy Makes a Comeback in North Carolina*,[3] chronicles in precise detail the history of the joint tenancy in North Carolina, including its legislative abolishment in 1784[4] and return via a revision of North Carolina General Statute ("G.S.") 41-2 effective in 1991.[5] While the appellate courts decided a handful of cases prior to 1990 recognizing and interpreting contracts for survivorship between cotenants,[6] the two-plus century period from 1784 to 1990 is free of traditional joint tenancy law issues.[7] Another twenty-two years passed after the

2. *Id.*

3. John V. Orth, *The Joint Tenancy Makes a Comeback in North Carolina*, 69 N.C. L. REV. 491 (1991).

4. *Id.* at 493.

5. *Id.* at 491–92.

6. *Id.* at 495–97. Professor Orth discusses three of these interim-period contract cases, Vettori v. Fay, 262 N.C. 481, 137 S.E.2d 810 (1964), Pope v. Burgess, 230 N.C. 323, 53 S.E.2d 159 (1949), and Taylor v. Smith, 116 N.C. 531, 21 S.E. 202 (1895). Orth's critique of *Vettori v. Fay* provides sound reasons why practicing attorneys today should avoid the contract theory option. *See* Orth, *supra* note 3, at 496. See *infra* note 65, for Professor Orth's discussion of the shortcomings of contract-for-survivorship theory.

7. Technically the "joint tenancy" continued to exist, but in a form that eliminated the survivorship feature. Therefore, with the exception of the "trade and commerce" provisions in the original statute, the joint tenancy became indistinguishable from a tenancy in common. *See* SAMUEL F. MORDECAI, MORDECAI'S LAW LECTURES 602 (1916) ("[A]s far back as 1784, we practically abolished joint tenancy as a beneficial estate in fee simple . . . .").

"reincarnation" of the joint tenancy before the North Carolina Court of Appeals addressed any issue based on traditional joint tenancy law. *Countrywide* and the unfortunate legislative response to that case notwithstanding,[8] the North Carolina history—more aptly "non-history"—of traditional joint tenancy law presents a unique, challenging, and wonderful jurisprudential opportunity for both an exploration of contemporary joint tenancy theory and a clarification of creation and severance issues. Two centuries of North Carolina law devoid of precedent provide a "clean slate" for a fresh consideration of issues and public policy in a millennium far different from the medieval roots of the tenancy's origin.

In this article, we first summarize the North Carolina General Assembly's 1991 amendment to the joint tenancy statute, G.S. 41-2, and the piecemeal amendments to that statute that followed. We then analyze predictable creation and severance issues. Next, we revisit *Countrywide* and what we consider a flawed legislative response to that decision. Throughout, we advocate an intent-based analysis of creation and severance issues, an approach that revisits an ongoing, yet decades-old debate.[9] Finally, we compare and contrast the approach of other jurisdictions to joint tenancy creation and severance. As part of our discussion of joint tenancy legislation, we highly recommend the North Carolina General Assembly develop a

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8. *See* discussion *infra* Part III.

9. *See, e.g.*, R.H. Helmholz, *Realism and Formalism in the Severance of Joint Tenancies*, 77 NEB. L. REV. 1, 1–2 n.1 (1998) (citing and summarizing scholarship from the 1950s as follows: "*See* Paul Basye, *Joint Tenancy: A Reappraisal*, 30 CAL. ST. B.J. 504, 507 (1955) (describing the four unities of joint tenancy as 'an outstanding example of persisting medieval formalism'); Londo H. Brown, *Some Aspects of Joint Ownership of Real Property in West Virginia*, 63 W. VA. L. REV. 207, 227 (1961) (stating that the four unities requirement is 'outmoded and has no place in modern law'); John Mann, *Joint Tenancies Today*, 1956 ILL. L. F. 48, 75 (describing the joint tenancy as 'a technical common law estate, full of pitfalls for the unwary and uninformed'); Elmer M. Million et al., *Real and Personal Property*, 36 N.Y.U. L. REV. 357, 381 (1961) (noting with approval the development of an intent-based test according to discussions 'during the past seven years'); Frank Reichelderfer, *Severance of Joint Interests*, 1959 ILL. L. F. 932, 934–35 (showing need for the use of a straw-man to sever); Robert W. Swenson & Ronan E. Degnan, *Severance of Joint Tenancies*, 38 MINN. L. REV. 466, 503 (1954) (arguing that the unities may have had a purpose historically 'but are useless concepts today'); Leland Stuart Beck, Note, 41 CORNELL L.Q. 154, 159 (1955) ('The intention of the parties should be controlling, and the function of the court is to seek out that intention.'); Note, *Effect of Contract to Sell*, 42 IOWA L. REV. 646, 648–49 (1957) (criticizing recent decision as contrary to the better rule that would 'hold intention to be the primary test for severance,' as was true for creation); Edward H. Hoenicke, Comment, *Elimination of the Straw Man in the Creation of Joint Estates in Michigan*, 54 MICH. L. REV. 118, 120 (1955); George W. Marti, Note, 55 MICH. L. REV. 1194, 1195 (1957); Harold J. Romig, Jr. & John M. Shelton, Comment, *Severance of a Joint Tenancy in California*, 8 HASTINGS L.J. 290, 298 (1957)").

more deliberative and transparent vetting process prior to the addition or revision of any statute having the effect of making substantial alterations to the law of real property.

I. THE STATUTES

A. The 1991 Reincarnation of the North Carolina Joint Tenancy

A brief summary of the key statute and subsequent amendments and revisions to statutes dealing with joint tenancy law in North Carolina is essential to an understanding of current real property and public policy issues. Section (a) of G.S. 41-2, the key statute we will focus on throughout this article, reads as follows as revised and amended in 1991 and 2009:

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

> *two joint tenants holding property in joint tenancy with right of survivorship, a tenancy in common is created between the third party and the remaining joint tenant. A conveyance of any interest in real property by a party to one or more other parties, whether or not jointly with the grantor-party, as joint tenants with right of survivorship, creates in the parties that interest, if the instrument of conveyance expressly provides for a joint tenancy with right of survivorship.*[10]

The General Assembly adopted a regrettable drafting approach when it reincarnated the joint tenancy with right of survivorship form of concurrent ownership. Rather than revising the law with a straightforward new statute drafted from scratch, legislators opted for an incomplete, confusing patchwork quilt of verbiage, combining a colonial weaver's fragment of woolen cloth with a piece of modern spandex. The original language of 1784 was left in place with the 1991 "reincarnation" language tacked to the end.[11] Professor Orth notes that:

> The new statute on joint tenancy comes in the form of an addition to the current codification of the Act of 1784; that is, the general rule adopted two centuries ago remains in force, but a further and very broad exception to it is created. The estate of joint tenancy is still without the right of survivorship, unless "the instrument creating the joint tenancy expressly provides for a right of survivorship."[12]

In blunt, non-legal terms, however, the methodology employed in the 1991 revision might more aptly be termed "duct-tape" drafting. Picture a layperson, a first-year law student, or even an attorney with limited exposure to real property law, reading this statute for the first time. The title to G.S. 41-2 was revised in the reincarnation process to read, in part: "Survivorship In Joint Tenancy defined; proviso as to Partnership."[13] The first sentence of the 1991 statute continues to

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10. N.C. GEN. STAT. § 41-2(a) (2013) (emphasis added). The 2009 legislation converted the former statute as amended in 1990 to subsection (a) and added a new subsection (b) to the statute. *See* Act of July 10, 2009, ch. 268, § 1, 2009 N.C. Sess. Laws 427, 428 (codified at N.C. GEN. STAT. § 41-2(a)).

11. *See* Orth, *supra* note 3, at 497.

12. *Id.* at 497 (citations omitted) (quoting Act of July 12, 1990, ch. 891, § 1, 1989 N.C. Sess. Laws 224, 225 (codified as amended at N.C. GEN. STAT. § 41-2 (2013)). For a transcription of the 1991 revision of G.S. 41-2, see N.C. GEN. STAT. § 41-2(a) and *supra* note 10 and accompanying text. Through subsequent amendments, the title to G.S. 41-2 now reads: "Survivorship in joint tenancy defined; proviso as to partnership; unequal ownership interests." N.C. GEN. STAT. § 41-2(a).

13. Act of July 12, 1990, ch. 891, § 1, 1989 N.C. Sess. Laws 224, 224 (codified as amended at N.C. GEN. STAT. § 41-2 (2013)).

declare that a joint tenancy in North Carolina does not have a survivorship feature[14] but inserts the language "[e]xcept as otherwise provided herein" at the beginning of that sentence.[15] This is followed by business entity exceptions. The first sentence of the language tacked on to the end of the original statute in the above-quoted statute then declares, "[n]othing in this section prevents the creation of a joint tenancy in real or personal property if the instrument creating the joint tenancy expressly provides for survivorship."[16]

Yes, attorney and law student alike will ultimately make sense out of the statute, and an astute layperson might also successfully decipher it. However, most readers will do so only after journeying through ancient language of little utility to perhaps ninety-five percent of those seeking guidance on the law of joint tenancy. From the vantage point of evaluating the quality of the statute, we find little solace in the fact that a careful reader will eventually arrive at the relevant sentences tacked to the end by the 1991 revision.[17]

In what at best can be considered a lukewarm defense of the revision technique engaged in by the General Assembly during the 1990-91 session, the North Carolina approach to recognizing joint tenancies mimics that of other jurisdictions.[18] In one popular law school hornbook, for example, the authors summarize this trend as follows: "In many states there are statutes that do not purport to abolish joint tenancies, but which provide in substance that a transfer to two or more persons in their own right shall create a tenancy in common unless the transferor indicates that the transferees shall take as joint tenants."[19]

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14. *Id.*

15. *Id.*

16. *Id.*; *see also supra* italicized text accompanying note 10.

17. A precise and comprehensive legislative history of the 1991 amendment to G.S. 41-2 is either non-existent or tremendously difficult to obtain. Locating the applicable committee minutes involves sifting through thousands of documents located on microfiche at the North Carolina Legislative Office Building. A June 6, 1989, memorandum from Rep. Giles Perry, a co-sponsor of H.B. 1067 with Rep. S. Thompson, to the Senate Judiciary Committee explains that the amendment's purpose is to "specify that no document other than the one creating the joint tenancy is needed to establish a right of survivorship, when it expressly provides for such." Memorandum from Rep. Giles Perry (June 6, 1989) (on file with author).

18. *See* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 5.3 (3d ed. 2000) (citing various state statutes, including: "Ark. Stat. § 50-411; Md. Code Real Property, § 2-117; 60 Okla. Stat. Ann. § 74; Official Code Ga. Ann. § 85-1002; Mass. Gen. L. Ann. Ch. 184 § 7 (1977); Kan. Stat. Ann. § 58-501; Ohio Rev. Code §§ 5202.20, 5302.17; Va. Code 1950, §§ 55-20, 55-21").

19. *Id.* § 5.3, at 185.

By this point, the reader is probably thinking: "Tell me what you really think about the 1991 revision to G.S. 41-2." But the familiar sales pitch in late-night commercials—"but wait, there's more"—is our best response, for even the title utilized in the 1991 revision is an incomplete and, in part, a misleading patch job. The language preceding the proviso as to partnership property was changed from "Survivorship In Joint Tenancy Abolished" to "Survivorship In Joint Tenancy Defined."[20] This title simply does not accurately disclose a significant reform of the North Carolina law of concurrent ownership.

B. Elimination of Three of the Four Common Law Unities

A series of helpful post-1991 amendments to G.S. 41-2 transformed the traditional joint tenancy into conformity with contemporary law and practice of many jurisdictions. As the legislative dust settles, three of the four traditional joint tenancy unities are no longer required for creation, leaving only unity of possession remaining as an attribute of the joint tenancy. The continuing requirement of unity of possession is an insignificant one. This is the case because, under traditional joint tenancy law, actual possession by each joint tenant is not required,[21] and joint tenants have always enjoyed the flexibility to modify rights of possession and use without jeopardizing the unity of possession requirement.[22]

The unities of time and title, common law requirements that the joint tenancy be created at the same time and by the same instrument,[23] were eliminated effective July 10, 2009,[24] leaving straw-men and straw-women unemployed throughout the state.[25] The

20. Act of July 12, 1990, ch. 891, § 1, 1989 N.C. Sess. Laws 224, 224 (codified as amended at N.C. GEN. STAT. § 41-2 (2013)).

21. *See* SHELDON F. KURTZ, MOYNIHAN'S INTRODUCTION TO THE LAW OF REAL PROPERTY 274 n.2 (4th ed. 2005) (citing 2 WILLIAM BLACKSTONE, COMMENTARIES *180).

22. *See, e.g.*, Hammond v. McArthur, 183 P.2d 1, 3 (Cal. 1947) (noting that joint tenants are able to modify the right of equal possession and use, but these modifications are not inconsistent with unity of possession). Some jurisdictions have eliminated all four unities. *See, e.g.*, MINN. STAT. ANN. § 500.19(3) (West 2014) ("The common law requirement for unity of time, title, interest, and possession for the creation of a joint tenancy is abolished.").

23. STOEBUCK & WHITMAN, *supra* note 18, § 5.3, at 183.

24. *See* Act of July 10, 2009, ch. 268, § 1, 2009 N.C. Sess. Laws 427, 428 (codified as amended at N.C. GEN. STAT. § 41-2(a) (2013)). The elimination of the need for a "strawperson" fulfilled Professor Orth's final suggestion in his article. *See* Orth, *supra* note 3, at 500.

25. G.S. 41-2, however, does not expressly deal with whether severance of a joint tenancy can take place by execution of a deed by a grantor-joint tenant to herself as a

amendment included a curative provision saving conveyances prior to its enactment that had not followed the proper straw-conveyance procedure.[26] Unity of interest was also jettisoned in 2009;[27] G.S. 41-2(b) now reads, in part:

> (b) The interests of the grantees holding property in joint tenancy with right of survivorship shall be deemed to be equal unless otherwise specified in the conveyance. Any joint tenancy interest held by a husband and wife, unless otherwise specified, shall be deemed to be held as a single tenancy by the entirety, which shall be treated as a single party when determining interests in the joint tenancy with right of survivorship. If joint tenancy interests among three or more joint tenants holding property in joint tenancy with right of survivorship are held in unequal shares, upon the death of one joint tenant, the share of the deceased joint tenant shall be divided among the surviving joint tenants according to their respective pro rata interest and not equally, unless the creating instrument provides otherwise.[28]

As with the prior amendment eliminating the unities of time and title, the elimination of unity of interest included a necessary curative provision.[29] Inquiries to Professor Hetrick prior to the amendment of

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tenant in common. See *infra* text accompanying notes 106–13, dealing with whether unilateral severance by one joint tenant is effective by a direct conveyance to herself.

26. The last sentence of G.S. 41-2(a) was amended in 1991 to read: "A conveyance of any interest in real property by a party to himself and one or more other parties, as joint tenants with right of survivorship, creates in the parties that interest, if the instrument of conveyance expressly provides for a joint tenancy with right of survivorship." Act of July 9, 1991, ch. 606, § 1, 1991 N.C. Sess. Laws 1338, 1338 (codified as amended at N.C. GEN. STAT. § 41-2 (2013)). Gender-neutral changes were made to the last sentence of subsection (a) in 2009, and that sentence now reads: "A conveyance of any interest in real property by a party to one or more other parties, whether or not jointly with the grantor-party, as joint tenants with right of survivorship, creates in the parties that interest, if the instrument of conveyance expressly provides for survivorship." Act of July 10, 2009, ch. 268, § 1, 2009 N.C. Sess. Laws 427, 428 (codified as amended at N.C. GEN. STAT. § 41-2 (2013)).

27. Act of July 10, 2009, ch. 268, § 1, 2009 N.C. Sess. Laws 427 (titled "An Act To Clarify That Interests In A Joint Tenancy With A Right Of Survivorship May Be Held In Unequal Shares"). In reality, this legislation reflects a major substantive change to the law of joint tenancy, not a mere clarification.

28. *Id.* The title to G.S. 41-2 now reads: "Survivorship in joint tenancy defined; proviso as to partnership; unequal ownership interests." N.C. GEN. STAT. § 41-2 (2013).

29. The last paragraph of G.S. 41-2(b) now reads:

> This subsection shall apply to any conveyance of an interest in property created at any time that explicitly sought to create unequal ownership interests in a joint tenancy with right of survivorship. Distributions made prior to the enactment of this subsection that were made in equal amounts from a joint tenancy with right of survivorship that sought to create unequal ownership shares shall remain valid and shall not be subject to modification on the basis of this section.

G.S. 41-2 to eliminate the unity of interest requirement reveal that attorneys were considering the creation of joint tenancies with unequal interests to serve the practical needs of their clients.[30] A classic principle of statutory construction dictates that the express earlier elimination of two unities—time and title—left the remaining common law unities of interest and possession in place.[31] As with the earlier amendment eliminating time and title, the amendment's retroactive "cure" was deemed necessary due to the perceived needs of clients and the erroneous assumption among some members of the bar that a joint tenancy could be legally created in North Carolina with unequal interests. In any event, the takeaway is a very positive one: the amendment eliminating unity of interest provides client-centered flexibility to the law of joint tenancy.[32]

In 2012, additional amendments became necessary to correct an oversight in the revision of G.S. 41-2 that ignored the ripple effect of recognizing unequal ownership interests in joint tenancies on the Simultaneous Death Act.[33] Last but not least, the General Assembly

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N.C. GEN. STAT. § 41-2(b).

30. During 2007 and 2008, Professor Hetrick received numerous phone calls from attorneys describing fact situations in which deeds creating joint tenancies with unequal interests were being considered.

31. By omitting only the unities of time and title, the General Assembly left the remaining unities of interest and possession in place, invoking the doctrine of *expessio unius est exclusio alterius*. *See, e.g.*, Evans v. Diaz, 333 N.C. 774, 779–80, 430 S.E.2d 244, 247 (1993) ("Under the doctrine of *expressio unius est exclusion alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list.").

32. *See, e.g.*, Routhier v. Twp. of Clark, No. 450599, 2014 WL 2781729, at *1–2 (Mich. Tax Trib. May 6, 2014) (discussing a property tax dispute in which the grantor had conveyed by quitclaim deed a one percent interest to his son and a ninety-nine percent interest to himself, "all parties as joint tenant with full rights of survivorship"). Other jurisdictions cling to the "unity of interest" requirement. *See, e.g.*, Walsh v. Reynolds, 335 P.3d 984, 995 (Wash. Ct. App. 2014) (finding that same-sex domestic partners owned property as tenants in common rather than as joint tenants where unity of interest was lacking).

33. *See* Act of Oct. 1, 2012, ch. 69, § 1, 2012 N.C. Sess. Laws 230 (codified at N.C. GEN. STAT. § 28A-24-3 (2013)). The necessary revision eliminated the prior rule under the Simultaneous Death Act that property passed in the event of a simultaneous death "[to] each of the co-owners in the proportion that one bears to the whole number of co-owners,"Act of June 27, 2007, ch. 132, § 1, 2007 N.C. Sess. Laws 222–223 (codified at N.C. GEN. STAT. § 28A-24-3 (2013)), and replaced it with the following:

> Except as otherwise provided in this Article:
>
> (1) If there are two or more co-owners with right of survivorship and it is not established by clear and convincing evidence that at least one of them survived the other or others by at least 120 hours, then, unless the governing instrument provides otherwise, each co-owner's pro rata interest in the property passes as if that co-owner had survived all other co-owners by at least 120 hours.

effectively reversed the court of appeals decision in *Countrywide* "and more" effective July 1, 2013, by adding subsection (a1) to G.S. 41-2.[34]

Throughout this article, we presume that a North Carolina joint tenancy is now an intent-based form of concurrent ownership. Both Professor Orth[35] and other leading real property experts[36] opine that the emphasis in statutory interpretation should be on language sufficient to indicate an intent to create a joint tenancy. While three of the four traditional common law unities are no longer necessary, some or all will likely continue to be present in many conveyances. The continued existence of unities, however, should not preclude an intent-based framework of analysis on both creation and severance issues.[37] In short, the archaic common law focus on unities is inconsistent with contemporary joint tenancy jurisprudence. Historically, unities-based theories of creation and severance tended to be intent defeating, too often a trap for laypersons and attorneys alike. Indeed, we propose that even the continuing use of the word "severance" is inaccurate; instead, the term "termination" more precisely conveys the idea that one joint tenant either expressly or impliedly intends to end the joint tenancy with its survivorship feature and convert it into a tenancy in common. We will, however, continue to use the term "severance" because so many appellate courts uniformly do so.

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(2) If there are two or more co-owners with right of survivorship and it is established by clear and convincing evidence that at least one of them survived the other or others by at least 120 hours, then, unless the governing instrument provides otherwise, the pro rata interest or interests of the deceased owner or owners who are not established by clear and convincing evidence to have survived by at least 120 hours passes to (i) the remaining owner if only one or (ii) if more than one, then to those remaining owners according to the pro rata interest of each.

Act of Oct. 1, 2012, ch. 69, § 1, 2012 N.C. Sess. Laws 230 (codified at N.C. GEN. STAT. § 28A-24-3 (2013)).

34. *See* Act of June 26, 2013, ch. 204, § 1.11, 2013 N.C. Sess. Laws 577 (codified as amended at N.C. GEN. STAT. § 41-2(a1) (2013)) (discussed *infra* Section III.A).

35. *See* Orth, *supra* note 3, at 498 ("[R]eliance must be placed on courts interpreting the statute to recognize that what must be express is the intention to create the right of survivorship, not some set verbal formula.").

36. *See* STOEBUCK & WHITMAN, *supra* note 18, § 5.3, at 185 ("Even where the statutory language is rather restrictive, it is generally unnecessary to use the exact words contained in the statute in order to indicate the intent to create a joint tenancy.").

37. Compare Helmholz, *supra* note 9, at 1–2 n.1, with prior articles summarized therein. The tension between formalism and intent in joint tenancy law deserves reexamination in light of the relatively recent elimination of three of the four unities in North Carolina and many other jurisdictions.

One relic of colonial American property law particularly deserving of the jurisprudential dumpster is the categorization of joint tenancy as an "odious" form of concurrent ownership.[38] While the tenancy in common remains the safe, default category of concurrent ownership—absent a clear intent to the contrary—the joint tenancy is far from "odious,"[39] and instead, enjoys considerable contemporary utilitarian value as a flexible method of creating a survivorship feature.[40] While the original common law rule favoring joint tenancies ended with feudalism, and the colonial distaste for joint tenancies was understandably based on their medieval role in preserving aristocratic forms of land ownership,[41] no compelling modern rationale exists for an appellate court to bend over backwards to avoid finding a joint tenancy. All that should be necessary today is clear intent to create a joint tenancy regardless of the particular verbiage employed.

C. *Shortcomings of the Revised North Carolina Joint Tenancy Statutes*

Two overarching issues—creation and severance—dominate joint tenancy controversies in other jurisdictions. Because joint tenancies will continue to be created by a few words in a conveyance or devise,[42] the outcome of most foreseeable issues will be determined

38. *See, e.g.*, Blodogett v. Union & New Haven Trust Co., 149 A. 790, 793 (Conn. 1930) ("Our own court from an early day has looked with disfavor upon the common law joint tenancy with its 'odious and unjust doctrine of survivorship.' But that has not prevented our recognition of the right in this jurisdiction to create estates of this nature by will, or deed, or other instrument, when the intention to so create is clear and definite."); Davidson v. Heydon, 2 Yeates 459, 460 (Pa. 1799); Galbraith v. Galbraith, 3 Serg. & Rawle 392, 393 (Pa. 1817) (explaining that the tenancy in common is favored because "a joint-tenancy is odious; and the principles of the feudal system from which it originated are foreign to the feelings and civil institutions of Pennsylvania"); Fawver v. Fawver, 47 Va. (6 Gratt.) 236 (Va. 1849).

39. The Oxford Dictionary defines "odious" as "extremely unpleasant; repulsive." Odius, OXFORD DICTIONARY, http://www.oxforddictionaries.com/us/definition/american_english/odious (last visited Aug. 17, 2015).

40. *See* JOHN G. SPRANKLING, PROPERTY LAW § 10.02 [B][4], at 134 (3d ed. 2007) (noting that the joint tenancy has been extensively used in recent years as a tool to avoid the cost and delay of probate proceedings).

41. Statutes ending the common law presumption of a joint tenancy enacted soon after the American Revolution were based on identification of the joint tenancy as a remnant of feudalism. *See* 2 H. TIFFANY, THE LAW OF REAL PROPERTY § 424, at 206 n.47 (B. Jones ed., 3d ed. 1939).

42. *See, e.g.*, John W. Fisher, II, *Creditors of a Joint Tenant: Is There a Lien After Death?*, 99 W. VA. L. REV. 637, 638 (1997) (noting that because co-tenancies are created by a few words in a conveyance or devise, "the legal relationship between cotenants is determined from the common law court decisions and statutory provisions and not the language of the creating instrument").

by appellate court decisions without statutory guidance. Concerning creation and severance issues, the 1991 and subsequent amendments to G.S. 41-2 are helpful but incomplete. In the following subsections of this article, we transition from a general analysis of G.S. 41-2 to an examination and critique of predictable joint tenancy creation and severance issues.

1. Predictable Creation Issues

G.S. 41-2 addresses creation of a joint tenancy as follows: "Nothing in this section prevents the creation of a joint tenancy with right of survivorship in real or personal property if the instrument creating the joint tenancy expressly provides for a right of survivorship, and no other document shall be necessary to establish said right of survivorship."[43]

Examples of predictable creation language:

Example 1. *O conveys "to A & B as joint tenants with right of survivorship."* Clearly, this precise language creates a joint tenancy under the above-quoted statutory language. Experienced real estate attorneys will cling to this simple formula for success.

Example 2. *O conveys "to A & B as joint tenants and not as tenants in common."* Historically, lawyers in other jurisdictions might adopt this language to create a joint tenancy. Professor Orth opines that this language will pass muster,[44] and we concur. By eliminating the tenancy in common, the only form of concurrent ownership without a survivorship feature, the language indirectly, but expressly, provides for survivorship.[45] While no North Carolina appellate court

43. N.C. GEN. STAT. § 41-2(a) (2013).

44. Orth, *supra* note 3, at 498 ("A carefully drafted instrument will closely follow the words of the statute, describing the grantees as holding 'as joint tenants with right of survivorship,' or even 'as joint tenants with right of survivorship and not as tenants in common.' Such wording would undoubtedly accomplish its purpose. But not all drafting is equally careful: the right of a survivor may be referred to without expressly using the phrase 'right of survivorship.' In *Vettori*, for example, where a right of survivorship was found to have been created by contract, those specific words were not used. The grantees were described as only holding 'as joint tenants' and reference was made as well to 'the heirs and assigns of the survivor.' Reliance must be placed on courts interpreting the statute to recognize that what must be expressed is the intention to create the right of survivorship, not some set verbal formula.").

45. See *infra* Example 8 where the possibility of a "tenancy in common with right of survivorship" is discussed. The traditional tenancy in common, however, has no right of survivorship.

has interpreted this language, other jurisdictions appropriately reach the joint tenancy result.[46]

Example 3. *O conveys "to A & B as joint tenants."* Without a doubt, this language, standing alone, will unfortunately occur, particularly when laypersons surf the web for guidance on do-it-yourself drafting of important legal documents. Absent other language in the conveyance, the current joint tenancy creation requirements of G.S. 41-2 are not precisely satisfied. At a minimum, this incomplete language will likely result in a dispute and possible litigation on the creation issue.[47]

Example 4. *O conveys "to A & B jointly with right of survivorship."* Used in isolation, the word "jointly" has always been suspect because the joint tenancy form of concurrent ownership is traditionally not favored.[48] In this example, however, the word "jointly" is not used in isolation, and the addition of the words "with right of survivorship" should be sufficient to create a joint tenancy in North Carolina. The language might validly be selected because it appears in other North Carolina statutes.[49] G.S. 30-3.2(3f)(c) equates the term "jointly with right of survivorship" with "joint tenants with right of survivorship," appearing to use the former term as a generic version of the latter. The sub-subsection reads as follows:

> Property held as tenants by the entirety or jointly with right of survivorship as follows:

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46. *See, e.g.*, 4 GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1775, at 10 (Replacement Vol. 1979) [hereinafter COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY] (citing two Illinois Supreme Court decisions, Dolley v. Powers, 89 N.E.2d 412 (Ill. 1949) and Klouda v. Pechousek, 110 N.E.2d 258 (Ill. 1953)).

47. The possibility of reformation, of course, exists, although any language that results in what can be costly litigation is per se inadequate. However, beware of those inevitable deed interpretation disputes where additional, arguably contradictory language is added. *See, e.g.*, Spresser v. Langmade, 427 P.2d 478, 480 (Kan. 1967) (describing grantees in the introductory clause of a deed as "joint tenants with the right of survivorship and not as tenants in common," but the granting and habendum clauses included the language "unto said parties of the second part, their heirs, successors and assigns, forever"). The Kansas Supreme Court reversed the trial court's conclusion that a tenancy in common was created and found that the "clearest type of language" was used to show an intent to create a joint tenancy with right of survivorship. *Id.*

48. *See* COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY, *supra* note 46, § 1775, at 11–12.

49. *See, e.g.*, N.C. GEN. STAT. § 30-3.2(3f)(b) (2013). The "definitions" section of Article 1A, "Elective Share," reads, in part, as follows: "Property over which the decedent, immediately before death, held a presently exercisable general power of appointment, except for (i) property held *jointly with right of survivorship* which is includable in total assets only to the extent provided in sub-subdivision c. of this subdivision . . . ." *Id.* (emphasis added).

> 1. One-half of any property held by the decedent and the surviving spouse as tenants by the entirety or as joint tenants with right of survivorship is included, without regard to who contributed the property.
>
> 2. Property held by the decedent and one or more other persons other than the surviving spouse as joint tenants with right of survivorship is included to the following extent:
>
> I. All property attributable to the decedent's contribution.
>
> II. The decedent's pro rata share of property not attributable to the decedent's contribution, except to the extent of property attributable to contributions by a surviving joint tenant.
>
> The decedent is presumed to have contributed the jointly owned property unless contribution by another is proven by clear and convincing evidence.[50]

It is clear that the "property held" language in the introduction of the sub-subsection is referring to real property, and the language "jointly with right of survivorship" is used interchangeably with the language "joint tenants with right of survivorship."

A potential dispute could involve a conveyance to a third person by one party intending to sever the purported joint tenancy, with the other party asserting that joint life estates with a contingent remainder to the survivor were created, not a true joint tenancy with right of survivorship.

Example 5. *O conveys "to A & B for their joint lives with right of survivorship."*[51] Does this language create a joint tenancy with right of survivorship, or a materially different combination of present estates for life with contingent remainder in fee simple absolute to the survivor? The label we place on this conveyance matters under both the law of partition and severance. While a joint life estate can be partitioned,[52] the contingent remainders are indestructible and not subject to partition absent an agreement by both A & B.[53] Although a deed of trust executed by only A or B will convey both the grantor's

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50. *Id.*

51. If the intention of the grantor is to create joint life estates with contingent remainder to the survivor, use of the term "contingent remainder" will reinforce the fact that a joint tenancy with right of survivorship is not intended. Perhaps this is overkill, but to remove all doubt, a statement in the conveyance as follows will suffice: "It is not the grantor's intent in this conveyance to create a joint tenancy."

52. Ray v. Poole, 187 N.C. 749, 752, 123 S.E. 5, 6–7 (1924).

53. *Id.* at 752, 123 S.E. at 6; *see also* COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY, *supra* note 46, § 1775, at 13 (noting that life estates with cross remainders "cannot be defeated by deed or will of one of the life co-tenants").

joint life estate and contingent remainder, it will not survive the death of a predeceasing mortgagor. G.S. 41-2(a1), the legislative response to *Countrywide*, is clearly inapplicable.[54]

Example 6. *O conveys "to A & B with right of survivorship."* This inadequate language is neither fish nor fowl. It expressly provides for survivorship without using the important words "as joint tenants," and alludes to a possible future interest without using the words "remainder" or "contingent remainder." Without more, the words appear to point to a joint tenancy with right of survivorship, the closest form of concurrent ownership that fulfills the grantor's probable intent.[55] This is the case because a fee simple is presumed and the words "life estate" or "joint lives" are absent. In addition, it would be inappropriate for a court to overemphasize the modern preference for a tenancy in common in a fact situation where the grantor clearly intended a survivorship feature.

Example 7. *O conveys "to A & B jointly."* One leading treatise reaffirms the traditional preference for the tenancy in common default rule[56] while one contemporary hornbook author opines that this language "may be insufficient" to create a joint tenancy.[57] As with many of these creation examples, the words featured often occur with other language. The word "jointly," for example, is sometimes combined with "jointly and severally," compounding the confusion.[58]

Example 8. *O conveys "to A & B as tenants in common with right of survivorship."* Oh, the web we spin! This language may

54. G.S. 41-2(a1), the legislative response to *Countrywide*, is strictly limited to the "joint tenancy" form of real property ownership. Specifically, it deals with the issue of whether a deed of trust executed by a joint tenant "severs" the joint tenancy. A conveyance "to A & B for their joint lives with right of survivorship" is not a joint tenancy; rather, it is a combination of present and future interests in real property. Therefore, any issue of "severance" of a joint tenancy is completely inapplicable.

55. G.S. 30-3.2(3f)(c), discussed with Example 4, *supra*, also lends credence to this interpretation. *See also* COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY, *supra* note 46, § 1775, at 11 n.15 ("Conveyance to A and B and their heirs with right of survivorship did not militate against a joint tenancy since heirs were words of limitation.") (citing Spresser v. Langmade, 427 P.2d 478, 480 (Kan. 1967) (holding a conveyance "to A & B and their heirs with right of survivorship did not militate against a joint tenancy since heirs were words of limitation").

56. *See* COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY, *supra* note 46, § 1775, at 13 (citing *In re* Ungara's Estate, 51 N.Y.S.2d 386, 388 (N.Y. Sup. Ct. 1944), *superseded by statute*, N.Y. EST. POWERS & TRUSTS LAW § 6-2.2 (McKinney 1998) ("jointly" does not overcome the statutory presumption of a tenancy in common)).

57. *See* SPRANKLING, *supra* note 40, § 10.02[2], at 133.

58. *See id.* (citing James v. Taylor, 969 S.W.2d 672, 675 (Ark. Ct. App. 1998) (finding a tenancy in common)).

effectively create a right of survivorship, but what title do we place on this conveyance? After all, the hallmark of a common law tenancy in common is the lack of a right of survivorship.[59] Stoebuck and Whitman summarize the law, in part, as follows:

> Although survivorship is not an incident of tenancies in common, many cases assert that the right of survivorship may be annexed to a tenancy in common if the instrument creating the tenancy in common so provides. This means, apparently, that an instrument containing an express provision for survivorship will be held to create a tenancy in common for the lives of the cotenants, with a contingent remainder (usually in fee simple) in favor of the surviving cotenant.[60]

Thompson on Property, the venerable treatise on real property law, explains that "[i]n a tenancy in common with right of survivorship, the survivor takes by virtue of the contract created by the express language of the instrument . . . ."[61] The author adds that survivorship "arises by virtue of the agreement of the parties and not as an incident of the property law."[62]

The Thompson treatise goes on to explain that use of this form of conveyance is attributed to "a counter current endeavoring to revive the survivorship result" in jurisdictions that prohibited the tenancy by the entireties and joint tenancy.[63] The explanation fits those intervening North Carolina appellate court decisions recognizing and enforcing contracts for survivorship between cotenants,[64] although Professor Orth understandably sees contract theory as both raising

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59. *Id.* § 10.02[1], at 131. ("Tenants in common do not have a right of survivorship, unlike joint tenants or tenants by the entirety.").

60. STOEBUCK & WHITMAN, *supra* note 18, § 5.2, at 180 (citing Pope v. Burgess, 230 N.C. 323, 325, 53 S.E.2d 159, 160 (1949) and COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY, *supra* note 46, § 1793, at 140 n.36, § 1796, at 149 (including section 1796 of COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY, which is titled "Tenancy in common with right of survivorship")).

61. COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY, *supra* note 46, § 1796, at 149.

62. *Id.*

63. *Id.* § 1796, at 148; *see also id.* § 1775, at 13 n.24 (citing Halleck v. Halleck, 337 P.2d 330 (Or. 1959) (recognizing the use of a joint tenancy in Oregon at a time when a joint tenancy could not be created and holding that "a tenancy in common with right of survivorship can be created through the medium of increment life estates with cross indestructible remainders")).

64. *See* Orth, *supra* note 3, at 495–97 (discussing the three North Carolina contract cases *Taylor v. Smith*, *Vettori v. Fay*, and *Pope v. Burgess*).

"several disturbing questions" and being inconsistently applied by the courts.[65]

Current use of the language "to A & B as tenants in common with right of survivorship," however, can predictably produce confusion now that North Carolina recognizes the joint tenancy with right of survivorship. Does this language now create nothing but a joint tenancy in tenancy-in-common clothing? Or, does it result in a contract for survivorship that eliminates the possibility of unilateral severance by one cotenant? Had this language been utilized in *Countrywide*, what result?[66]

Example 9. O conveys to unmarried grantees "as tenants by the entirety." Does this transfer create a joint tenancy or a tenancy by the entirety? In a recent Indiana appellate court decision, for example, a father conveyed real property to his two sons "as tenants by the entireties."[67] When one son predeceased the other, his estate commenced a declaratory judgment action seeking a ruling that the sons held title as tenants in common. The Indiana Court of Appeals held that the grantor's use of the term "tenants by the entirety" evidenced a sufficient intent to convey a right of survivorship.[68] While a conveyance to two brothers as tenants by the entirety will hopefully be a rare fact situation, conveyances to purportedly married couples who, in fact, are not legally married are predictable.[69]

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65. *Id.* at 496–97 (noting that worries about the enforceability of contracts for survivorship may have been one of the reasons for passage of the statute recognizing traditional joint tenancies).

66. These are matters reserved for our discussion of "severance." *See infra* Section IV.B. As a bit of dramatic foreshadowing, however, we ask: Is G.S. 41-2(a1), dealing with a deed of trust executed by one "joint tenant," applicable at all to a "tenancy in common with right of survivorship?"

67. Powell v. Powell, 14 N.E.3d 46, 47 (Ind. Ct. App. 2014). The deed was drafted by the grantor's legal counsel. *Id.* at 50.

68. *Id.* The relevant statute presumes a tenancy in common unless "the intent to create an estate in joint tenancy manifestly appears from the tenor of the instrument." *Id.* at 48 (quoting IND. CODE ANN. § 32-17-2-1(c) (West 2014)).

69. In its opinion, the Court of Appeals of Indiana cites the following cases from other jurisdictions as having addressed similar situations where a conveyance to unmarried couples as "tenants by the entirety" results in a joint tenancy with right of survivorship: Coleman v. Jackson, 286 F.2d 98, 99–102 (D.C. Cir. 1960) (conveyance to putative husband and wife as "tenants by the entirety" creates a joint tenancy); Wood v. Wood, 571 S.W.2d 84, 85–86 (Ark. 1978) (conveyance to a putative husband and wife as "tenants by the entirety" where the husband was already married to another results in a joint tenancy with right of survivorship); Sams v. McDonald, 160 S.E.2d 594, 595 (Ga. Ct. App. 1968) (membership in a savings and loan association granted as tenants by the entireties results in joint tenancy with right of survivorship); Powell v. Powell, 14 N.E.3d 46, 50–51 (Ind. Ct. App. 2014); Morris v. McCarty, 32 N.E. 938, 938–39 (Mass. 1893) (conveyance to putative husband and wife as "tenants by the entirety, and not as tenants in common" results in a

Example 10. Conveyances to married same-sex couples. Consider the following examples of conveyances to a same-sex married couple. *O conveys:*

a) *"to A & B."*

b) *"to A & B as tenants by the entirety."*

c) *"to A & B, a married couple."*

Prior to the recognition of the right of same-sex couples to legally marry in the June 15, 2015, landmark United States Supreme Court decision of *Obergefell v. Hodges*[70] and the *Bostic v. Schaefer*[71] decision of the United States Court of Appeals for the Fourth Circuit, Example 10 a) clearly results in a tenancy in common; Example 10 b) raises the same issues discussed in Example 9, above, and; Example 10 c) results in a tenancy in common. By both case law[72] and statute,[73] a conveyance or devise of real property in North Carolina "to a husband and wife" creates a tenancy by the entirety absent clear intent to the contrary. Following the recognition of same-sex marriages in North Carolina, the result should be the creation of a tenancy by the entirety under the same circumstances; if same-sex married partners do not enjoy property rights equal to opposite-sex married partners, serious constitutional issues are triggered.[74]

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joint tenancy with right of survivorship); Mitchell v. Frederick, 170 A. 733, 734–37 (Md. 1934) (conveyance to putative husband and wife in an invalid second marriage "by the entirety" results in a joint tenancy with right of survivorship); and McManus v. Summers, 430 A.2d 80, 81–84, 87 (Md. 1981) (conveyance to a couple as "tenants by the entirety" created a joint tenancy with right of survivorship assuming that the husband's divorce from his first wife was not valid).

70. 135 S. Ct. 2584, 2604 (2015) (stating that the right to marry is a fundamental one and that same-sex couples may not be deprived of that right and liberty under the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

71. 760 F.3d 352, 376 (4th Cir. 2014) (finding the right of same-sex couples to marry as a fundamental human right protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

72. *See, e.g.*, Freeze v. Congleton, 276 N.C. 178, 181, 171 S.E.2d 424, 426 (1970) ("A title conveying real estate to a husband and his wife, nothing else appearing, creates an estate by the entireties.").

73. *See* N.C. GEN. STAT. § 39-13.6(b) (2013) ("A conveyance of real property, or any interest therein, to a husband and wife vests title in them as tenants by the entirety when the conveyance is to: (1) A named man 'and wife,' or (2) A named woman 'and husband,' or (3) Two named persons, whether or not identified in the conveyance as husband and wife, if at the time of the conveyance they are legally married; unless a contrary intention is expressed in the conveyance.").

74. *Obergefell*, 135 S. Ct. at 2602 ("Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right."). *See, e.g.*, State v. Schmidt, 323 P.3d 647, 669 (Alaska 2014) (holding that a property tax exemption program

Therefore, the recognition of same-sex marriages requires an extensive review and revision of all General Statutes dealing with tenancies by the entirety. As of this writing, they are not gender-neutral. Prompt revisions to these statutes are crucial to accord same-sex couples all traditional benefits of the tenancy by the entirety.[75]

We conclude, with all due deference to the drafters of the 1991 statutory language, that the effort to bring the traditional joint tenancy out of moth balls after two centuries was both cursory and incomplete. Of course, skilled real estate practitioners know how to create a joint tenancy; laypersons relying on web-based information and less-skilled lawyers—if other jurisdictions are any indication—fall short on regular occasions. We will recommend that, in light of contemporary public policies we will detail later in this article, a more complete, precise, and clear statute be enacted to replace G.S. 41-2.

2. Predictable Severance Issues

As most law school graduates will recall from their first-year property law course, "severance" is a frequent and troublesome issue in joint tenancy law. Curiously, one of the pieces of guidance provided by the 1991 version of G.S. 41-2—what is known in academic circles as "severance *pro tanto*"—provides guidance on an area where the law in all jurisdictions is clear.[76] In relevant part, the statute provides:

> Upon conveyance to a third party by less than all of three or more joint tenants holding property in joint tenancy with right of survivorship, a tenancy in common is created among the third party and the remaining joint tenants, who remain joint tenants with right of survivorship as between themselves. Upon conveyance to a third party by one of two joint tenants holding property in joint tenancy with right of survivorship, a tenancy in common is created between the third party and the remaining joint tenant.[77]

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violates the Equal Protection Clause where it facially discriminates between same-sex and opposite-sex married couples).

75. By the date of publication of this article, our hope is that key statutes will be revised as we suggest. A full discussion of this issue and the need of urgent statutory reform is beyond the scope of this article.

76. *See* Marci v. Swiers, 905 N.Y.S.2d 871, 878 (N.Y. Sup. Ct. 2010) (holding joint tenant's conveyance of his one-third interest to his brother vested the brother with a one-third interest as tenant in common with the remaining two joint tenants who continued to hold the two-third undivided interest as joint tenants).

77. N.C. GEN. STAT. § 41-2 (2013).

Despite the likelihood of future legal disputes over severance, the 1991 version of the statute and later iterations unfortunately sidestep potential severance scenarios. As a practical matter, additional revisions to G.S. 41-2 therefore remain necessary to guide attorneys and laypersons alike on foreseeable future severance issues. At the same time, some predictable severance issues present close questions of intent and are therefore better anticipated by effective, preventive legal planning and drafting. Below, we discuss our views on the appropriateness of a legislative or preventive legal approach to likely severance controversies. We also consider whether an intent-based or traditional unities-based approach to severance (termination of the survivorship feature of a joint tenancy) best serves public policy and practical considerations of preventive law. Most basic law school hornbooks and appellate cases summarize predictable severance issues as follows:

a) *Whether a lease by one joint tenant severs.* This issue has been aptly described as "like a comet in our law: though its existence in theory has been frequently recognized, its observed passages are few."[78] Stoebuck and Whitman observe:

> [O]ne joint tenant may, of course, lease his own undivided interest. Whether such a lease will effect a severance has, however, been a subject of controversy since the time of Littleton and Coke.... In the United States there is little authority on the point, and two fairly recent cases reached opposite results as to the effect of a lease given by one joint tenant. In the case holding that such a lease does not sever the joint tenancy, the death of the lessor during the lease term necessarily terminated the lease and gave the surviving joint tenant the immediate right to possession.[79]

78. Tenhet v. Boswell, 554 P.2d 330, 334–35 (Cal. 1976) (en banc).

79. STOEBUCK & WHITMAN, *supra* note 18, at 190. The two case notes by Stoebuck and Whitman were *Tenhet v. Boswell* and *Alexander v. Boyer*. In *Tenhet*, the court found "neither temporary nor permanent severance; when [the] lessor died, [the] lease terminated and lessee's interest also terminated." *Id.*; *see also Tenhet*, 554 P.2d at 332. The court in *Alexander* found "joint tenancy [was] severed." STOEBUCK & WHITMAN, *supra* note 18, at 190; *see also* Alexander v. Boyer, 253 A.2d 359, 366 (Md. 1969); JOSEPH WILLIAM SINGER, PROPERTY 352–53 (3d ed. 2010) (citing 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 51.04[1][b], at 51-20 (Michael Allan Wolf ed., 2000) (summarizing *Tenhet*, including the arguments both in favor of severing the joint tenancy and also for keeping the joint tenancy, while stating the approach in *Tenhet* appears to be the modern trend in most jurisdictions when faced with the question)); SPRANKLING, *supra* note 40, § 10.04[A][2], at 144–45 (concurring that the issue has rarely been addressed by any courts in the United States, but arguing that jurisdictions seem roughly equally split

While an intent-based approach to severance is more in line with contemporary thinking than a unities-based approach, it is still of little help in analyzing this issue. The answer is best left to preventive law in lease drafting under these circumstances: First, will this transfer by one joint tenant be a prudent one? Second, assuming the joint tenant nonetheless desires to lease only his or her interest, does that joint tenant intend to terminate the survivorship feature of the joint tenancy by executing the lease? If the answer to the second question is affirmative, then a provision in the lease precisely setting forth the intent of the grantor should be sufficient.[80] While a lease by one joint tenant may or may not sever a joint tenancy, a purported lease of the entire fee simple estate by one—without joinder or ratification by the others—is completely ineffective to give the lessee exclusive right of possession and transfers only the lessor's undivided interest. Another possibility, of course, is the execution of a lease by all joint tenants. Our next example addresses that scenario.

b) *Whether a lease given by all joint tenants severs.* Based on clear landlord and tenant law, the survivorship interests of all joint tenants remain subject to the lease upon the death of one joint tenant; i.e., a valid lease for a definite period of time, traditionally called a "tenancy for years," survives the death of a lessor. The existence of two or more concurrent owners who have executed a lease does not alter that result.

Calling this scenario a "severance *pro tanto*" may be an accurate description. However, bypassing the severance issue entirely and instead applying both common sense and traditional landlord and tenant law provides a better framework for analysis. If all joint tenants execute a lease, it might be prudent once again for their attorney to address the potential severance issue and insert a provision in the lease either severing or not severing the joint tenancy (subject to the lease term in either event). An intent-based approach to addressing the joint tenancy implications of this lease should honor a clear statement of intent on this issue in the lease.

c) *Whether a conveyance by one joint tenant of his or her interest for the life of the transferee severs.* Reported decisions are scarce, but

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between following the *Tenhet* approach and an approach that views the granting of a lease interest as effectually destroying the unity of interest).

80. For the attorney who is unsure concerning this approach, the old-fashioned "straw" conveyance to a third party and back again prior to the lease will clearly sever.

one approach relying on the traditional unities-based theory of severance concludes that a severance *pro tanto* has occurred.[81]

While the growing trend in other jurisdictions is application of an intent-based analysis to traditional severance issues,[82] that approach, absent more facts or specific language in the conveyance, produces a result as unclear as that of a severance-based analysis.

d) *Whether a contract to convey by one joint tenant severs during the executory period prior to the closing.* A consummated real estate sales transaction, of course, severs a joint tenancy. But what happens when only one joint tenant contracts to convey his or her interest and then dies prior to the closing date? If a severance has occurred, then the purchase price should be distributed pro rata according to each tenant in common's interest; if not, then the surviving joint tenant or tenants enjoy all of the purchase price, and the heirs or devisees of the deceased vendor joint tenant receive nothing.

The traditional approach to this issue is steeped in both a destruction-of-unities analysis combined with the still viable common law doctrine of equitable conversion. Upon the execution of a specifically enforceable contract to convey his or her interest, the joint tenant is transferring equitable title to the vendee and retaining only bare legal title representing the right to receive the contract price. Therefore, the conveyance of equitable title has been traditionally considered a "severance" for joint tenancy law purposes.[83] As with the discussion of leases *supra*, an intent-based

81. STOEBUCK & WHITMAN, *supra* note 18, at 190 (citing Hammond v. McArthur, 183 P.2d 1, 2–3 (Cal. 1947); Swartzbaugh v. Sampson, 54 P.2d 73, 75–76 (Cal. Dist. Ct. App. 1936)) ("[I]f any of the joint tenants dies during the continuance of the life estate conveyed, there is no immediate right of survivorship; but upon termination of the life estate the joint tenancy revives or, if only one of the joint tenants is then living, he acquires sole ownership in severalty.").

82. *See infra* Section IV.B.

83. *See* STOEBUCK & WHITMAN, *supra* note 18, at 190–91 ("An executory contract to convey one joint tenant's interest—assuming the contract is specifically enforceable—*severs the vendor's undivided interest from the joint tenancy in equity*, so that the vendor's successors in interest will be entitled to the purchase money if the vendor dies before the contract is performed. [However,] the courts are divided as to whether there is a severance . . . when all the joint tenants join as vendors in the executory contract."). *Id.* (emphasis added) (citing *In re* Baker's Estate, 78 N.W.2d 863, 866 (Iowa 1956) (holding that a severance is effected, so that the vendors are entitled to the purchase money as tenants in common)); *see also* Weise v. Kizer, 435 So.2d 381, 382 (Fla. Dist. Ct. App. 1984) (finding no severance "unless there is an indication from the contract, or from the circumstances, that the parties intended to sever the joint tenancy"); Alexander v. Boyer, 253 A.2d 359, 365 (Md. 1969) (finding that an unexercised option to buy does not effect a severance). This division clouds the question of whether each cotenant would be entitled to a pro rata portion of the purchase money.

approach to addressing the joint tenancy implications of the unilateral execution of a contract to convey by one joint tenant should defer to a provision on point in the contract. While current standard Form 2-T does not cover this issue, an attorney-drafted contract to convey dealing with this issue might prevent future disputes.[84]

e) *Whether a contract to convey by all joint tenants severs during the executory period prior to the closing.* Once again, this issue matters where one joint tenant dies prior to the real estate closing. The purchase price should be distributed pro rata according to each cotenant's interest if a severance has occurred upon execution of the contract; if no severance occurs until the closing date, then the surviving joint tenant or tenants enjoy all of the purchase price, and the heirs or devisees of the deceased vendor joint tenant receive nothing. Courts are divided concerning whether severance occurs under these circumstances.[85] The authors favor an intent-based analysis here as in most other "severance" scenarios. While intent may be unclear and subject to dispute, basing severance theory on the doctrine of equitable conversion removes the analysis to a clearer but arbitrary framework of analysis.

f) *Whether the granting of an option to purchase by one joint tenant severs.* This issue is triggered when a joint tenant grants another the option to purchase the joint tenant's interest in real property, the joint tenant dies during the option period, and the option is then timely exercised by the optionee after the death of the optionor.[86] Severance occurs under these circumstances only if a court

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See also Weise v. Kizer, 435 So.2d 381, 382 (Fla. Dist. Ct. App. 1984) (finding no severance "unless there is an indication from the contract, or from the circumstances, that the parties intended to sever the joint tenancy"); Alexander v. Boyer, 253 A.2d 359, 365 (Md. 1969) (finding that an unexercised option to buy does not effect a severance)).

84. The authors are not suggesting that Form 2-T, Offer to Purchase and Contract (Revised 1/2015; jointly approved by the North Carolina Bar Association and the North Carolina Association of Realtors®) be amended to cover what can be considered a rare fact situation. The form is already twelve pages long (not counting addenda) and should not be expected to cover every conceivable contingency. Assuming that the grantor/joint tenant intends severance, the attorney who is unsure of what a North Carolina appellate court will conclude on this issue might resort to the old-fashioned "straw" conveyance to a third party and back again prior to execution of the contract to convey by the joint tenant.

85. *See supra* note 83 and accompanying text.

86. *See* Lawes v. Bennett, 29 Eng. Rep. 1111, 1112–14 (1785) (applying a relation-back theory combined with the doctrine of equitable conversion); Eddington v. Turner, 38 A.2d 738, 741–42 (Del. Ch. 1944) ("The theory of the relation back of the equitable conversion as held in *Lawes v. Bennett*, does not appeal to us as either embodying the intent of the testator or embodying any sound principle of law or equity."). *See generally* L.S. Tellier, Annotation, *Equitable Conversion Doctrine as Applicable to Option to Purchase Land, in the Event of Death of Optionor or Optionee Before Its Exercise*, 172

engages in two fictions: the doctrine of equitable conversion combined with the doctrine of "relation back." The unfortunate reasoning is that, once an option to purchase is exercised, the exercise relates back to the date of the option and triggers equitable conversion as of that date. Under an intent-based analysis, we are back to the unclear issue of whether the optionor joint tenant intended to sever as of the granting of the option to purchase.[87]

g) *Whether a pending divorce action severs.*[88] By a traditional unities-based severance analysis, the commencement of an action for divorce and even a final decree or judgment of divorce does not sever any of the four unities.[89] Therefore, contrary to the likely intent of most couples seeking and obtaining a divorce, the counterintuitive result is that the joint tenancy is not terminated. Under an intent-based approach, both the institution of an action for divorce and a final judgment of divorce strongly indicate an implied intent by each spouse to terminate the survivorship feature. Jurisdictions today are divided, with a majority favoring an intent-based approach.[90] The

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A.L.R. 438 (1948) (considering the applicability of equitable conversion to options to purchase land by analyzing the approaches taken by numerous jurisdictions).

87. Since it is likely that the optionor/joint tenant does intend to sever, the option agreement itself should include a provision on point or the optionor/joint tenant's attorney should effect a severance prior to execution of the option. *See Alexander*, 253 A.2d at 365.

88. Divorces by joint tenant spouses will continue to be a rare occurrence in North Carolina. Divorces involving tenants by the entirety, on the other hand, number in the thousands each year. The tenancy by the entirety is the preferred and predominant form of concurrent ownership by married couples in North Carolina. However:

> The tenancy by the entirety differs from the joint tenancy because, in a substantial majority of states that recognize it, (1) the individual undivided interests cannot be transferred without the consent of both spouses; (2) the individual interests cannot be reached by creditors of one spouse; and (3) partition is unavailable as a remedy for owners who cannot agree about what to do with the property; instead, the owners can sever their relationship only by divorce.

SINGER, *supra* note 79, at 356. A divorcing couple may nonetheless desire to continue to own real property as joint tenants. *See, e.g.*, Whittaker v. Preston, 336 P.3d 921, 921 (Kan. Ct. App. 2014) (unpublished table decision) (divorcing couple agreed to continue to hold property as joint tenants following their divorce).

89. *See, e.g.*, Young v. McIntyre, 672 S.E.2d 196, 203 (W. Va. 2008) (reciting the common law four unities, holding that a joint tenancy is not severed by a divorce decree alone, but finding that a divorce settlement agreement was "sufficient to cause destruction of the four unities by implication" based upon an implied intent theory).

90. While the filing of a divorce proceeding may not be the act that actually severs the joint tenancy, it will in all likelihood and probability be the impetus that causes the parties to sever their joint tenancy. *See* SPRANKLING, *supra* note 40, § 10.04[A][3], at 145. "Most courts appear to follow a presumption that a divorcing spouse does not intend to preserve any right of survivorship in the other spouse, and thus tend to interpret ambiguous

issue should not, however, be left to chance or implication. Either a unilateral severance or a court order expressly dealing with this question is the prudent way to deal with this issue.

h) *Whether a pending action for partition severs.* The uniform rule in all jurisdictions,[91] including North Carolina, is that a tenant in common or joint tenant is entitled as a matter of right to petition for and obtain a partition.[92] Neither G.S. 41-2 nor Chapter 46 of the North Carolina General Statutes address the severance issue. The formal filing by one or more joint tenants of a petition to partition presents a quintessential example of the need for an intent-based approach to severance. As with pending divorce actions, it is unlikely that a joint tenant who has petitioned for partition intends the survivorship feature to continue until the partition is final. An intent-based approach, therefore, logically requires termination of the joint tenancy upon filing the petition for partition.[93] As a matter of

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agreements as terminating the joint tenancy." *Id.* (citing Mann v. Bradley, 535 P.2d 213, 214 (Colo. 1975) (agreement impliedly severed joint tenancy)). *But see* Porter v. Porter, 472 So. 2d 630, 634 (Ala. 1985) (divorce decree did not sever joint tenancy); *see also* STOEBUCK & WHITMAN, *supra* note 18, at 192 ("A divorce decree between spouses who are joint tenants does not sever the joint tenancy if the decree does not dispose of the jointly held property."); *id.* at 191 n.22; Porter v. Porter, 472 So. 2d 630, 630 (Ala. 1985) (no severance even though one spouse awarded sole possession); Estate of Layton, 52 Cal. Rptr. 2d 251, 251 (1996). But whether a joint tenancy between spouses persists after a divorce decree is entered ordering the former spouses to join in sale of the property depends either upon the intent of the parties as evidenced in the divorce proceedings or upon the subjective or manifested intent of the trial judge. *In re* Marriage of Lutzke by Lutzke v. Lutzke, 361 N.W.2d 640, 650 (Wis. 1985).

In North Carolina, the issue is perhaps purely academic, since real property devised or conveyed to a husband and wife with nothing else appearing results in a tenancy by the entirety. JAMES A. WEBSTER, PATRICK K. HETRICK, & JAMES B. MCLAUGHLIN, JR., WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA, § 7.04[1][b], at 7–8 (6th ed. 2014). A tenancy by the entirety cannot be unilaterally severed and ends only upon the death of one spouse, a final divorce, or mutual agreement. On the other hand, "normal" joint tenants (those who are not married to one another) would not have any cause, standing, or reason to seek divorce from their cotenants rendering the issue moot. However, at this time, this issue has not reached a court in North Carolina, meaning the analysis is far from certain.

91. "Absent a contrary agreement, each cotenant has a right to obtain partition—without proving any cause or reason—regardless of any inconvenience, burden or damage to other cotenants." SPRANKLING, *supra* note 40, § 10.04[B], at 145.

92. WEBSTER, HETRICK, & MCLAUGHLIN, JR., *supra* note 90, § 7.14[1], at 7-23 (citing N.C. GEN. STAT. § 46-22 (2013); Seawell v. Seawell, 233 N.C. 735, 738, 65 S.E.2d 369, 371 (1951); Hyman v. Edwards, 217 N.C. 342, 344, 7 S.E.2d 700, 702 (1940); Talley v. Murchison, 212 N.C. 205, 206, 193 S.E.2d 148, 148 (1937); Foster v. Williams, 182 N.C. 632, 635, 109 S.E. 834, 836 (1921); Bomer v. Campbell, 70 N.C. App. 137, 139, 318 S.E.2d 841, 842 (1984); Harris v. Harris, 51 N.C. App. 103, 107–08, 275 S.E.2d 273, 276–77 (1981)).

93. One might challenge this statement by creating a scenario where a non-petitioning joint tenant predeceases the petitioner. In fairness, severance at the commencement of the

preventive law, the severance issue should be addressed either at the commencement of the partition process by court order or by a simple unilateral severance procedure once one joint tenant opts to partition.[94]

Unities-based severance theory resolves this issue in a counterintuitive manner by finding no severance until the partition process is complete.[95] While most appellate courts continue to adhere to that theory, some acknowledge discomfort in the process and identify limited exceptions.[96]

i) *Whether the filing of a judgment against one joint tenant severs.* While a sale on execution of a judgment against one joint tenant severs, authorities are divided on the issue of whether a levy of execution or attachment preliminary to a sale severs.[97] The common

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partition action benefits all parties. Intent must be measured as of a point in time and should not be cancelled by a fortuitous change in facts as the partition action progresses.

94. Another possibility, of course, is a preventive legal approach through the addition of a provision in Chapter 46 of the General Statutes or a comprehensive revision of G.S. 41-2.

95. *See, e.g.*, Goetz v. Slobey, 908 N.Y.S.2d 237, 238–39 (N.Y. App. Div. 2010) (holding joint tenant's commencement of partition action and moving out of the house did not destroy unity of interest or possession and precluded severance prior to the joint tenant's death); Orlando v. Deprima, 870 N.Y.S.2d 871, 872 (N.Y. App. Div. 2008) (noting that "the apparently universal rule in this country is that a pending suit for partition of a joint tenancy does not survive the death of one of the tenants").

96. *See, e.g.*, O'Brien v. O'Brien, 391 N.Y.S.2d 502, 503 (N.Y. App. Div. 1976) (adopting exception where parties to a partition proceeding stipulated to all pertinent facts and all that remained to be done was a computation of the interests and liabilities of the joint tenants).

97. *See* STOEBUCK & WHITMAN, *supra* note 18, at 191 ("Severance of one joint tenant's undivided interest from the joint tenancy may result from an involuntary transfer of that interest, e.g., by virtue of a sale of the interest by the joint tenant's trustee in bankruptcy or by virtue of a sale on execution of a judgment against the joint tenant. But there is a division of authority as to whether a mere levy of execution, or an attachment, without sale, effects a severance. A court-ordered mortgage foreclosure sale of one joint tenant's interest will, of course, sever a joint tenancy even in a 'lien theory' state. A divorce decree between spouses who are joint tenants does not sever the joint tenancy if the decree does not dispose of the jointly held property."). North Carolina authorizes a seldom used procedure authorizing a judgment creditor of a judgment debtor who owns an undivided interest in fee in land to institute a special proceeding for partition. N.C. GEN. STAT. § 46-5 (2013). The statute is silent on whether that action by the judgment creditor severs a joint tenancy, and the answer in this instance should be in the negative. The statute provides, in part:

> Upon the actual partition of the land the judgment creditor may sue out execution on his judgment, as allowed by law, and have the homestead of the judgment debtor allotted to him and sell the excess.... The remedy provided for in this section shall not deprive the judgment creditor of any other remedy in law or in equity which he may have for the enforcement of his judgment lien.

law rule, based upon unities-severance theory, is that the mere entry of judgment does not sever.[98] An intent-based rule of termination of the joint tenancy should produce the same result. A revision of G.S. 41-2 to cover this contingency would prevent future misunderstandings and litigation.[99]

j) *Whether the filing of a bankruptcy petition severs.* This issue arises when a debtor joint tenant or non-debtor dies during the bankruptcy process.[100] One commentator recently observed that, while few courts have ruled on this issue, a split of authority exists.[101] Courts finding a severance of the joint tenancy once a bankruptcy petition is filed rely on the legislative history of the Bankruptcy Act, assume that the debtor's interest in property includes "title" to property, and rely on the elimination of unity of title.[102] On the other hand, several bankruptcy cases do not find severance, perhaps in part based on the probable intent of the joint tenants.[103]

k) *Whether a mortgage or deed of trust executed by one joint tenant severs.* The *Countrywide* case and a full discussion and critique of this issue are discussed in other parts of this article.[104] In a nutshell, the issue is now answered by the addition of subsection (a1) to G.S. 41-2.[105]

l) *Whether unilateral severance by one joint tenant occurs by a direct conveyance from that joint tenant to herself.* In a recent

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Id.

98. *See* Fisher, *supra* note 42, at 658–64 (discussing the common law rule as the law of West Virginia, and noting that, "if the common law is not to be followed in this instance, it would be because it has been changed by statute").

99. The authors, however, are pessimistic about the outcome of a statutory clarification in light of the method of clarifying the *Countrywide* case with the addition of subsection (a1) to G.S. 41-2. Judgment creditors will lobby for a severance result. While we are not opposed to that legislative result if a full and transparent discussion of the competing public policies and property interests takes place, we fear another surreptitious amendment.

100. Jonathan D. Luke, Note, *Joint Tenancies in Bankruptcy: Preserving Post-Petition Survivorship Rights for Debtors and Non-Debtors Alike*, 47 IND. L. REV. 585, 596 (2014).

101. *Id.* at 599–600.

102. *Id.* at 596–98 (citing *In re* Yun Chin Kim, 288 B.R. 431, 434 (Bankr. D. Md. 2002); *In re* Tyson, 48 B.R. 412, 413–14 (Bankr. C.D. Ill. 1985); *In re* Panholzer, 36 B.R. 647, 651 (Bankr. D. Md. 1984); *In re* Lambert, 34 B.R. 41, 42–43 (Bankr. D. Colo. 1983).

103. *Id.* at 599–602 (citing *In re* Anthony, 82 B.R. 386, 388 (Bankr. W.D. Pa. 1987); *In re* Spain, 55 B.R. 849, 854 (Bankr. S.D. Ala. 1985)).

104. *See infra* Part II.

105. No matter what the jurisdiction, clearly a completed foreclosure sale severs. *See, e.g.*, *In re* Williams, 476 B.R. 329, 333 (Bankr. N.D. Ala. 2012) (holding severance of a joint tenancy occurs by a completed foreclosure of one joint tenant's interest).

appellate court decision in Kansas,[106] two cousins owned real property as joint tenants with right of survivorship.[107] Nine years later, one cousin, with the intent of severing, signed a quitclaim deed conveying his interest in the joint tenancy to himself, gave the deed to his attorney for recordation, and then died six days later.[108] The Kansas Court of Appeals held that the cousin's unilateral act of executing a quitclaim deed and giving it to his attorney for recordation effectively severed the joint tenancy.[109] The court explained this result, in part, as follows: "Just as a grantor can create a joint tenancy by unilaterally transferring ownership to himself or herself, so should a grantor be able to sever a joint tenancy through self-conveyance."[110]

Will North Carolina follow the Kansas approach? The following more complete example should be instructive: A and B own North Carolina land as joint tenants with right of survivorship. A then executes a deed naming the grantor as "A, a joint tenant with right of survivorship" and naming the grantee as "A, a tenant in common." The deed language adds: "the purpose of this deed is to unilaterally sever the joint tenancy between A and B and convert ownership to a tenancy in common."

North Carolina has no appellate court decision directly on point to this example. In an 1853 decision, the Supreme Court held that an infant *en ventre sa mere* and born within 280 days of execution of the deed was capable of taking as grantee in a deed.[111] The court opinion recites the following maxims: "Property must at all times have an owner. One person cannot part with the ownership unless there be another person to take it from him. There must be a 'grantor and a grantee, and a thing granted.'"[112] Because the foundation for the common law rule was the ancient ceremony of feoffment by livery of seisin, there is no contemporary public policy rationale for applying

106. Reicherter v. McCauley, 283 P.3d 219 (Kan. Ct. App. 2012).
107. *Id.* at 220.
108. *Id.*
109. *Id.* at 223.
110. *Id.* at 222.
111. Dupree v. Dupree, 45 N.C. 164, 164–65 (1853); *see also* N.C. GEN. STAT. § 41-5 (2013) ("An infant unborn, but in esse, shall be deemed a person capable of taking by deed or other writing any estate whatever in the same manner as if he were born."); Mackie v. Mackie, 230 N.C. 152, 155, 52 S.E.2d 352, 354 (1949).
112. *Dupree*, 45 N.C. at 167; *see also* 2 WILLIAM BLACKSTONE, COMMENTARIES *296 ("So as in every grant there must be a grantor, a grantee, and a thing granted....").

the rule to the unilateral severance of a joint tenancy by a deed from the joint tenant grantor to himself as a tenant in common.[113]

In a sense A's conveyance is by A as the owner of one distinct category of concurrent ownership to A as owner of another distinct category. With legal advice, A could have easily severed by use of a straw-person and subsequently receiving a conveyance back. Since a joint tenancy can now be created by a conveyance from A to A and B, there is little or no reason to require A to go through the straw transaction to sever.[114] Contemporary hornbooks and treatises list the requirements of a valid deed as including an identification of grantor and grantee.[115] That requirement should not preclude the severance deed in the above example. Above all, a court should honor A's clear intent.[116]

m) *Whether severance by implication, including a written statement or agreement of severance without a conveyance, is recognized.* Applying an intent-based test for whether severance occurs by implication through the agreements and conduct of joint tenants—particularly if understandings are based on informal communications and oral agreements—will undoubtedly qualify these scenarios as litigation magnets. The traditional unities-based approach to severance, on the other hand, provides a challenging but not insurmountable test.[117] In addition, some jurisdictions take an intent-based approach, recognizing the concept of intent to sever by implication, including severance through the conduct of the joint tenants.[118]

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113. *Dupree*, 45 N.C. at 168 ("Suppose a case of land, which at common law could only pass by feoffment. To whom, or to what could livery of seisen [sic] have been made? Who would have performed the services?").

114. *See supra* Section I.B for the discussion of the "Elimination of Three of the Four Common Law Unities."

115. STOEBUCK & WHITMAN, *supra* note 18, § 11.1, at 807–08; SPRANKLING, *supra* note 40, § 23.04[A][1], at 379.

116. What the authors consider the distastefulness of stealth unilateral severances is discussed *infra* Section IV.B.

117. *See, e.g.*, Edwin Smith, L.L.C. v. Synergy Operating, L.L.C., 285 P.3d 656, 667–68 (N.M. 2012) (recognizing intent-based severance by implication via an agreement between all joint tenants inconsistent with the four unities or right with the right of survivorship).

118. *See, e.g.*, Estate of Woods v. McBeth, No. B240946, 2013 WL 5772025, at *3–4 (Cal. Ct. App. Oct. 25, 2013) (stating that the unexecuted settlement agreement demonstrated intent to sever pursuant to California Civil Code section 683.2, but the court's decision nonetheless discusses traditional "four unities").

D. *Appellate Court Silence on Creation and Severance Issues*

With the exception of the *Countrywide* "deed of trust/severance holding," there is no other North Carolina appellate court decision since the 1991 reincarnation of the joint tenancy on any other traditional creation and severance issues, despite these issues being commonplace in other jurisdictions. Why? In an overwhelming majority of other states, the traditional tenancy by the entirety is not recognized,[119] and the most utilitarian replacement has been the joint tenancy or community property. North Carolina, on the other hand, recognizes, presumes, and thereby encourages the tenancy by the entirety form of ownership for married couples.[120] Recent trends in North Carolina, however, indicate an increasing use of the joint tenancy form of ownership, particularly among non-married couples.

A second explanation for the dearth of existing North Carolina appellate court decisions on traditional joint tenancy issues since 1991 is that the transaction costs of appealing matters of civil law combined with the time delay in ultimate resolution can consume years. In other words, the paucity of controversies may be confirmation only of the reality that the game of resolving traditional joint tenancy issues in court most often is not worth the candle.[121] Thus, hundreds, and perhaps thousands, of North Carolina creation and severance issues may arise each year, but they neither grace trial court nor court of appeals chambers.

E. *The Need for Clarification*

Additional statutory guidance on both joint tenancy creation and severance issues is appropriate because mistakes in attempting to create a joint tenancy, or achieving or attempting to achieve a severance, are commonplace, particularly where a layperson engages

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119. *See* STOEBUCK & WHITMAN, *supra* note 18, § 5.5, at 193 (noting that "tenancies by the entirety have now been abolished in all but twenty jurisdictions").

120. N.C. GEN. STAT. § 39-13.6 (2013). See *supra* note 73 for the text of this subsection. This statute presuming a tenancy by the entirety might also include a provision that a failed attempt to create a tenancy by the entirety should result in the creation of a joint tenancy, the closest default form of concurrent ownership. *See, e.g.*, MASS. GEN. LAWS ch. 184, § 7 (2011) ("A conveyance or devise of land to two persons as tenants by the entirety, who are not married to each other, shall create an estate in joint tenancy and not a tenancy in common."). Unfortunately, the tenancy by the entirety is periodically under attack by creditors seeking a way to reach entirety assets for the debt of one spouse.

121. Most appellate court decisions are appeals, in part at least, of a summary judgment motion and can often result in a remand and, therefore, a continuing transaction cost.

in self-help drafting.[122] If cases from other jurisdictions are any indication, even experienced attorneys sometimes overlook a potential severance issue that often results in no harm but that sometimes comes back to haunt the parties. If, for example, an attorney does not recognize that, in her jurisdiction, the commencement of a divorce proceeding does not in and of itself sever the joint tenancy, no harm occurs if both joint tenants survive until a final decree or judgment that addresses the matter. Likewise, a petition for partition by one joint tenant does not sever a joint tenancy in many jurisdictions, and no problem arises where all joint tenants survive to the final partition sale or division in kind. But preventive law requires skilled attorneys to consider "worst case scenarios." While a rare occurrence, one joint tenant might predecease the other during the pendency of a divorce action or partition proceeding. The standard assumption in a divorce is, we assume, that neither unhappy spouse intends for the other to take by survivorship after the action has commenced. Likewise, the often-disgruntled joint tenant who wishes to end the joint tenancy by petitioning for partition probably presumes logically but erroneously in some jurisdictions that the survivorship feature ends with the petition.[123]

F. A Joint Tenancy that Cannot Be "Broken"

Unilateral severance, particularly stealth unilateral severance without notice to the other joint tenant or joint tenants, is the Achilles' heel of contemporary American joint tenancy law. In a recent case, for example, a mother conveyed property to her daughter and her niece in 2001 "as joint tenants with right of survivorship and not as tenants in common."[124] The deed also included the following language: "IT IS THE INTENTION of all the parties of this deed that title shall vest in the grantees as joint tenants, so that on the death of one of them the survivor will take the whole estate herein conveyed."[125]

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122. *See, e.g.*, Crossland v. Crossland, No. CV126028025, 2013 WL 1849272, at *1–3 (Conn. Super. Ct. Apr. 11, 2013).

123. Preventive law in a jurisdiction following a unities-based approach to severance in these instances dictates either (i) a prompt motion for a court order eliminating the survivorship feature, or; (ii) a unilateral conveyance of one joint tenant's interest to the venerable straw-man who will dutifully re-convey back, an archaic—and we argue silly—but effective legal cure.

124. Kail v. Knudeson, 328 P.3d 1235, 1236 (Okla. Civ. App. 2014).

125. *Id.*

The mother died shortly after the deed was executed and recorded, and the niece did not become aware of the deed until four years later.[126] Subsequently the niece unilaterally severed the joint tenancy by executing a deed of the property to a third party who promptly deeded the property back.[127] All deeds were duly recorded, and subsequent conveyances were made of the niece's fifty percent interest.[128] The daughter, upset about the unilateral severance, commenced an action in 2010 to reform or cancel her mother's 2001 deed.[129] She asserted that her mother's true intent was to create a joint tenancy that one joint tenant "could not break."[130] While a normal reading of the 2001 deed might justify a layperson's opinion that the joint tenancy "could never be broken," the court properly rejected the daughter's argument.[131] The niece's actions clearly severed the joint tenancy in all jurisdictions on either an "intent" or "severance of a unity" theory.[132]

II. *COUNTRYWIDE*[133]

Hindered by a lack of statutory guidance, including the numerous shortcomings and general incompleteness of G.S. 41-2, the court of appeals in *Countrywide* addressed a predictable severance scenario. Importantly, the legal dispute before the court presented an opportunity to focus on the quintessential policy question of whether severance theory should be unities-based or intent-based. As the following discussion of *Countrywide* reveals, the court opted for a traditional unities-based analysis while providing examples of statutes

126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 1236–37.
131. *Id.* at 1238. (quoting Estes v. ConocoPhillips Co., 184 P.3d 518, 526 (Okla. 2008) (noting that "ignorance of the law is no excuse and every person is presumed to know the law").
132. *See, e.g.*, Albro v. Allen, 454 N.W. 2d 85, 87–88 (Mich. 1990) (recognizing two different types of joint tenancies, one "standard," one "indestructible"). An indestructible joint tenancy is not severable by unilateral action because that would deprive the other of her right of survivorship. *Id.*
133. 220 N.C. App. 504, 725 S.E.2d 667 (2012). The troubled history of Countrywide Home Loans, Inc. is well known in real estate circles. *See, e.g.*, Jim Puzzanghera & Walter Hamilton, *BofA to Pay $16.65-billion over Soured Home Loans in Mortgage Meltdown*, L.A. TIMES (August 21, 2014), http://www.latimes.com/business/la-fi-bank-america-settlement-20140822-story.html. For more insight into the subprime mortgage market meltdown of 2008, including Countrywide's loan practices, see BETHANY MCLEAN & JOE NOCERA, ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS 138–45 (2010).

from two other jurisdictions for consideration by members of the General Assembly.

A. *The Facts*

The following description by the court of appeals provides more detailed facts than the abstract[134] introducing this article:

> The record tends to show the following: On 25 March 2001, Margaret D. Smith ("Mrs. Smith") and Mrs. Smith's daughter and son-in-law, Judy and Troy Reed ("Defendants"), executed an offer to purchase and contract to buy a home in Mooresville, North Carolina. Countrywide Home Loans, Inc., ("Plaintiff") agreed to finance the purchase of the home and provided a loan to Mrs. Smith in the amount of $117,900.00. The general warranty deed named the grantees as "Margaret D. Smith and Troy D. Reed and wife, Judy C. Reed Joint Tenants with rights of survivorship[.]" The deed of trust to secure Plaintiff's loan and promissory note was prepared in Mrs. Smith's name only and was executed by Mrs. Reed, as attorney in fact for Mrs. Smith, on 1 May 2001. Neither Mr. Reed nor Mrs. Reed signed the deed of trust or promissory note in his or her individual capacity.[135]

Following the closing, all three lived together in the home with the daughter and son-in-law caring for the elderly mother "such that Mrs. Smith was not required to go to a nursing home."[136] Less than five months after the closing, the mortgage loan went into default and foreclosure proceedings were commenced.[137] Mrs. Smith died several years later in 2004 while the mortgage loan remained in default and prior to any foreclosure sale.[138] Several months later, ongoing negotiations took place between Mr. and Mrs. Reed and resulted in a loan modification agreement "purportedly" amending and supplementing the original deed of trust.[139] In 2006, the Reeds sought a further loan modification, which was denied.[140]

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134. *See supra* pp. 101–02.
135. *Countrywide*, 220 N.C. App. at 505, 725 S.E.2d at 668.
136. *Id.* at 505, 725 S.E.2d at 669.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 506, 725 S.E.2d at 669.

B. *The Trial Court*

In 2009, Countrywide filed a complaint against the Reeds seeking reformation of the deed of trust to make them obligors under the mortgage loan.[141] The Reeds filed an answer and counterclaims alleging negligent misrepresentation and a violation of North Carolina mortgage law.[142] In 2011, Countrywide filed a summary judgment motion seeking judgment as a matter of law on both its claim as plaintiff and the defendant Reeds' counterclaims.[143] The Reeds promptly filed a motion for summary judgment raising the statute of limitations as a bar to reformation and denied any liability for the mortgage loan.[144]

The trial court granted summary judgment in Countrywide's favor.[145] When the dust settled on the trial court's analysis, Mrs. Smith's one-half interest was found to be vested in the Reeds by survivorship, but remained subject to the Countrywide deed of trust.[146] The Reeds' one-half undivided interest owned as tenants by the entirety was held not to be encumbered.[147]

C. *The Court of Appeals*

The court of appeals, faced with the first traditional joint tenancy/severance issue in North Carolina history, noted that the question presented was a "novel one."[148] In truth, most joint tenancy issues that the appellate courts of this state will face in coming years will also be cases of first impression and, therefore, "novel" ones. After recognizing that the deed to Mrs. Smith and the defendants created a joint tenancy with right of survivorship, the court recited the fact that Mrs. Smith became the sole obligor under the deed of trust filed one minute after delivery of the general warranty deed.[149] Next, the court summarized the issue by holding "the deed of trust severed the joint tenancy,"[150] thus limiting the encumbrance to the portion

141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 507, 725 S.E.2d at 669.
147. *Id.* at 507, 725 S.E.2d at 669–70. The trial court's judgment does not use the terms "joint tenancy" or "severance." Paragraph 5 of the order reads: "Troy D. Reed and wife Judy Reed own the real property in fee simple absolute; subject to Plaintiff's deed of trust encumbering a one-half undivided interest in said property." *Id.* at 507, 725 S.E.2d at 670.
148. *Id.* at 509, 725 S.E.2d at 671.
149. *Id.*
150. *Id.*

owned by Mrs. Smith. In the alternative, if "the deed of trust did not sever the joint tenancy," the encumbrance would attach to the entire property.[151]

The statement of the second issue bears careful scrutiny because it begs an important question of joint tenancy law. For if a deed of trust executed by only one joint tenant does not sever the joint tenancy, the crucial issue then becomes whether the deed of trust encumbrance ceases to exist when the mortgagor joint tenant dies. Professor Singer notes that "the courts are split," but further observes that "most states provide that, even though the mortgage does not sever the joint tenancy, it survives the death of the joint tenant who granted the mortgage and continues to burden that fractional interest that is now owned by the surviving joint tenant."[152] We find the apparent majority rule to be a counterintuitive approach favoring savvy mortgagees with constructive knowledge of the status of title to the mortgaged property over the survivorship property rights of the non-signing joint tenant.

The court of appeals recognized the split in other jurisdictions on the issue in the following note located at the end of the decision.

> Other States have codified statutes addressing the particular question raised in this appeal, and our General Assembly may also consider and address this issue, should it be so inclined. South Carolina, S.C. Code Ann. § 27-7-40(a)(iii) (2011) prohibits any encumbrance of a joint tenancy unless all joint tenants join in the encumbrance. *See* S.C. Code Ann. § 27-7-40(a)(iii) (providing, "[t]he fee interest in real estate held in joint tenancy may not be encumbered by a joint tenant acting alone without the joinder of the other joint tenant or tenants in the encumbrance"). In Wisconsin, Wis. Stat. § 700.24 (2011) provides that on the death of a mortgaging joint tenant the survivor takes subject to the mortgage. *See* Wis. Stat. § 700.24 (stating that a real estate mortgage, a security interest, or a lien "on or against the interest of a joint tenant does not defeat the right of survivorship in the event of the death of such joint tenant, but the surviving joint tenant or tenants take the interest such deceased joint tenant could have transferred prior

151. *Id.*

152. SINGER, *supra* note 79, at 352 (citing Harms v. Sprague, 456 N.E.2d 976, 979 (Ill. App. Ct. 1983) for the first proposition and citing Brant v. Hargrove, 632 P.2d 978, 981–82 (Ariz. Ct. App. 1981) and WIS. STAT. § 700.24 (2001) for the second).

to death subject to such mortgage, security interest or statutory lien").[153]

The helpful reference by the court of appeals to the statutes of two other jurisdictions evidences perhaps an unspoken uneasiness by the court concerning its resolution of the severance issue. True, the court's result is logically correct based on a traditional common law "severance of unities approach," but it sacrifices the obvious intent of the parties to create a joint tenancy. As we discuss below, the General Assembly's legislative response has numerous shortcomings.

III. A FLAWED LEGISLATIVE RESPONSE TO *COUNTRYWIDE*

As summarized immediately above, the court of appeals concluded in *Countrywide* with a helpful footnote that pointed out the distinctly different approaches of two other states while deferring to the legislature "should it be so inclined."[154] In this Part of the article, we report that the General Assembly opted to adopt the mortgagee-friendly Wisconsin approach over the South Carolina approach favoring non-signing joint tenants. Further, we opine that the legislative response is flawed for a number of practical, public policy, and theoretical reasons.

A. Countrywide *"Reversed" and More*

Pressured, assumedly by mortgage lenders and other creditors, the General Assembly promptly responded to *Countrywide* by adding new subsection (a1) to G.S. 41-2 as follows:

> (a1) Upon conveyance to the trustee of a deed of trust by any or all of the joint tenants holding property in joint tenancy with right of survivorship to secure a loan, the joint tenancy with right of survivorship shall be deemed not to be severed, and upon satisfaction of the deed of trust, legal title to the property subject to the joint tenancy shall revert to the grantors as joint tenants with right of survivorship in the respective shares as owned by the respective grantors at the time of the execution of the deed of trust, unless a contrary intent is expressed in the deed of trust or other instrument recorded subsequent to the deed of trust.[155]

153. *Countrywide*, 220 N.C. App. at 510–11 n.2, 725 S.E.2d at 672 n.2. See *infra* Section III.A for a discussion of what we consider the flawed legislative response to *Countrywide*.

154. *Id.*

155. Act of June 26, 2013, ch. 322, § 41-2, 2013 N.C. Sess. Laws 575, 577 (codified at N.C. GEN. STAT. § 41-2(a1) (2013)).

However, as is unfortunately too often the case with important statutory changes to North Carolina real property law, the new subsection passed through the General Assembly flying quietly under the radar without meaningful opportunity for vetting by concerned consumer groups and the practicing bar in general. The new joint tenancy law subsection was buried in the midst of a fourteen-page session law with a title making no reference to the key change in mortgage law.[156] Indeed, the session law focuses on an extensive revision and clarification of notary public law, with ten sections dedicated to that area preceding the addition of the new joint tenancy law subsection of G.S. 41-2(a1),[157] with twenty-six additional sections on notary public issues immediately following.[158] Finally, the session law adds a series of statutory amendments addressing satisfaction of security interest procedures, sections that have nothing to do with the new joint tenancy subsection, G.S. 41-2(a1).[159] For these reasons it is doubtful that the new joint tenancy language received much notice in advance of enactment.

B. Critique of the Amendment

As seen above in the language of the new subsection G.S. 41-2(a1), the statute allows a mortgagee to obtain a deed of trust executed by only one joint tenant, who then predeceases the other or others, that encumbers the surviving non-mortgagor/joint tenant's (or joint tenants') title to the property. While there is no case directly on point, the clear result of this statutory approach is to render the title of the survivor or survivors unmarketable until the mortgage debt of the deceased joint tenant is satisfied.[160]

The one-sided language favoring the mortgagee materially alters the traditional law of joint tenancy. Under the statute, the joint tenancy is not deemed severed, and legal title to the property does

156. Act of June 26, 2013, ch. 322, 2013 N.C. Sess. Laws 575 (The session law is titled: "AN ACT MAKING CORRECTIONS AND OTHER AMENDMENTS TO THE NOTARY PUBLIC ACT, MAKING OTHER CONFORMING CHANGES, AND PROVIDING FOR AN ALTERNATIVE PROCEDURE FOR SATISFACTION OF SECURITY INSTRUMENTS.").

157. *Id.* §§ 1.1 to .10. The revision to G.S. 41-2(a1) is located at section 1.11.

158. *Id.* §§ 1.12 to .38.

159. *Id.* §§ 2.1 to .8.

160. *See, e.g.*, Burkhead v. Farlow, 266 N.C. 595, 598, 146 S.E.2d 802, 805 (1966) (quoting Pack v. Newman, 232 N.C. 397, 400, 61 S.E.2d 90, 92 (1950)) (defining "marketable title" as title "free from reasonable doubt in law or fact as to its validity"); Kniep v. Templeton, 185 N.C. App. 622, 633, 649 S.E.2d 425, 432 (2007) (defining "marketable title" as title that is free from major defect).

not "revert" to the grantors, until the deed of trust is satisfied.[161] The language salvages the ineptitude of a commercial mortgagee—always represented by attorneys—who nonetheless ignorantly granted a mortgage loan to one joint tenant without obtaining the signature of the other(s). Meanwhile, the losers under subsection (a1) will often be a consumer/mortgagor not represented by an attorney and a non-signing joint tenant who had nothing to do with the promissory note and loan documents. In *Countrywide*, for example, joint tenants Judy and Troy Reed, the daughter and son-in-law of Mrs. Smith (the only joint tenant to sign the note and deed of trust at the closing) never applied for the mortgage loan, were not named in the note or deed of trust, and were not asked by the mortgagee to sign the note as borrowers.[162]

The new subsection concludes with a provision holding the joint tenancy in abeyance on a mortgage executed by the predeceasing joint tenant/mortgagor valid until the mortgage debt is satisfied. This is the case "unless a contrary intent is expressed in the deed of trust or other instrument recorded subsequent to the deed of trust."[163] The language, while appearing to be even-handed, does not ring true from the typical consumer/mortgagor's vantage point. In almost all residential mortgage loan transactions, mortgagees dictate the contents of a deed of trust and will take care not to include language suggesting a "contrary intent." Consequently, the language is of no value to consumers, a waste of legislative ink.

A major shortcoming of subsection (a1) is that the statutory language runs contrary to a cardinal principle of joint tenancy law: A surviving joint tenant does not take title to the property by a survivorship transfer at the death of the predeceasing joint tenant. Rather, the surviving joint tenant takes the entire estate by virtue of the joint tenancy estate created by the original conveyance.[164] As one hornbook author colorfully observes:

> The right of survivorship stems from the common law's schizophrenic vision of a joint tenancy, expressed in archaic French as "per my et per tout." Joint tenants were seen as both (a) a unit that owned the entire estate and (b) individuals who each owned an undivided fractional share (or *moiety*) in the

161. N.C. GEN. STAT. § 41-2(a1) (2013).

162. Brief of Defendant-Appellants at 5, Countrywide Home Loans, Inc. v. Reed, 220 N.C. App. 504, 725 S.E.2d 667 (2012) (No. COA11-769).

163. N.C. GEN. STAT. § 41-2(a1).

164. David E. Missirian, *Separate But Equal? Same Sex Couples in New England*, 35 REAL EST. L.J. 558, 559 (2007).

> estate. Since joint tenant D already owned the entire estate, C's death was not seen as creating any new rights in D. Rather, the death merely withdrew C's interest from the estate, leaving D as the only remaining owner.[165]

Put another way, the right of survivorship is not a future interest like a reversion or remainder. Accordingly, a surviving joint tenant does not receive anything from a decedent joint tenant.[166]

In spite of a national split of authority on whether a mortgage lien continues after the death of the joint tenant/mortgagor, the General Assembly's approach to this issue runs counter to a foundational principle of real property law: A grantee can acquire no greater title than the grantor has,[167] for "a stream can flow no higher than its source."[168] Ultimately, the subsection language awards a mortgagee of the joint tenant/mortgagor a bonus at the expense of diminishing the real property interest of the non-mortgaging joint tenant.

Accepting *arguendo* that subsection (a1) serves a valid public purpose by preserving a deed of trust as security after the death of a mortgagor/joint tenant, it nonetheless obscures that purpose with language that perplexes when applied to basic joint tenancy fact situations. For example, assume that, on November 5, 2013, A and B take title to North Carolina land as joint tenants with right of survivorship; on March 26, 2014, B unilaterally executes a deed of trust of B's interest in the land to a mortgagee to secure repayment of B's loan, and; B then dies on February 17, 2015, leaving few assets and owing a substantial amount of money on the mortgage loan.

Applying the literal language of (a1) to this example, "the joint tenancy with right of survivorship shall be deemed not to be severed."[169] A joint tenancy, therefore, continues to exist between A & B in our example after B's unilateral execution of a deed of trust in

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165. SPRANKLING, *supra* note 40, §10.02[B][1], at 132. Sprankling defines "per my et per tout" as meaning "by the share and by the whole." *Id.* § 10.02[B][1], at 132 n.7; *see also* Fisher, *supra* note 42, at 640 (citing 2 AMERICAN LAW OF PROPERTY § 6.1 (A. James Casner ed., 1952) (noting, *inter alia*, that the right of survivorship in the joint tenancy is not a type of future interest, and that the deceased joint tenant's estate is extinguished upon his or her death)).

166. *See* STOEBUCK & WHITMAN, *supra* note 18, § 5.3, at 183 n.6 (citing 2 HERBERT THORNDIKE TIFFANY, REAL PROPERTY § 419 (3d ed. 1939)).

167. Ashworth v. Bullock, 304 P.3d 74, 78 (Utah Ct. App. 2013) (holding that a joint tenant may not transfer more than his or her own interest in joint tenancy property).

168. Quotation attributed to Dr. Robert E. Lee. Dr. Lee was a Professor of Law and dean emeritus at Wake Forest University Law School. Professor Lee died in 1977.

169. N.C. GEN. STAT. § 41-2(a1) (2013).

2014; but B then died, and A is the now the sole owner of the land. The (a1) language continues to befuddle when it continues:

> [A]nd upon satisfaction of the deed of trust, legal title to the property subject to the joint tenancy shall revert to the grantors as joint tenants with right of survivorship in the respective shares as owned by the respective grantors at the time of the execution of the deed of trust.[170]

Once again, the statutory language is puzzling when applied to a simple scenario. Assuming that the statute requires payment of the mortgage loan by A to clear the real property of the mortgage encumbrance—the joint tenant who did not execute the mortgage note and deed of trust—and assuming A pays the outstanding mortgage loan balance to satisfy the deed of trust, it makes no sense at all in this example to apply the statutory language. A is now the sole owner of the property. In no way can title to the joint tenancy revert as directed by the statute. Presumably, the intent of the drafter of subsection (a1) would have been better served by stating that a mortgage lien continues to encumber joint tenancy property after the death of a mortgagor/joint tenant to the extent of that mortgagor's interest when she executed the deed of trust; i.e., the surviving joint tenant or tenants take subject to the mortgage to that extent.

The *Countrywide* fact situation is nothing but a slight variation on the above example. While three people—mother, daughter, and son-in-law—took title as joint tenants with right of survivorship, North Carolina law treats the married couple as "one," owning a fifty percent undivided interest as tenants by the entirety as between each other.[171] Thus, when the mother died, only one legal person, the husband-wife entity, remained.[172] As of her death, the joint tenancy ceased to exist in spite of the statutory language deeming it not severed by the mother's execution of the deed of trust.[173]

Finally, it is counterintuitive as a matter of public policy that mortgagees, without fail represented by attorneys and loan officers, merit statutory protection from their folly in a *Countrywide* mortgage-loan situation where, casting all common sense to the wind, a mortgagee accepts the signature of only one of three joint tenants on a deed of trust. Prior to and after the enactment of new subsection

170. *Id.*

171. Countrywide Home Loans, Inc. v. Reed, 220 N.C. App. 504, 510, 725 S.E.2d 667, 671 (2012).

172. *Id.* at 509–10, 725 S.E.2d at 671 (citing N.C. GEN. STAT. § 41-2(b)).

173. *Id.* at 510, 725 S.E.2d at 671–72.

(a1), prudent mortgagees need only obtain the signatures of all joint tenants to adequately secure repayment of the mortgage loan. Instead, in light of the new subsection, mortgagees will potentially enjoy a windfall at the expense of the joint tenant who has not signed the deed of trust, and might not even have knowledge of its execution by the other joint tenant. Ultimately, the new language encourages mortgage loans secured by the signature of only one joint tenant.[174]

IV. CREATION AND SEVERANCE ISSUES IN OTHER JURISDICTIONS: HISTORICAL PREJUDICE TO EMERGING EMBRACE

As we have demonstrated, the joint tenancy estate has coursed a tumultuous, winding road in American jurisprudence over the past two centuries.[175] Joint tenancies were once readily accepted and recognized as a preferred form of concurrent property ownership within early American common law.[176] That preferred status did not last long, however. The sweeping political reform ushered in by the American Revolution included casting aside English common law notions of primogeniture, whereby the eldest son inherited the family estate, and the *jus accrescendi*, or right of survivorship, concomitant

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174. Harkening back to our discussion of "predictable creation issues," *supra* Section I.C.1, would prospective concurrent owners of real property be better off taking title in one of the following ways?

> 1) "to A & B jointly with right of survivorship and not as joint tenants;"
> 2) "to A & B for their joint lives with right of survivorship and not as joint tenants;"
> 3) "to A & B as joint life tenants, contingent remainder to the survivor, and not as joint tenants," or;
> 4) "to A & B as tenants in common with right of survivorship and not as joint tenants."

Admittedly, each alternative comes with its own theoretical and practical inventory of strengths and weaknesses, although each would not fall under the purview of subsection (1b).

175. *See generally* John V. Orth, *Joint Tenancy Law: Plus ça Change . . .*, 5 GREEN BAG 2D 173 (2002) (chronicling the history of joint tenancy law and suggesting continued stability of and societal demand for the joint tenancy estate).

176. 4 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION § 31.06(a) (David A. Thomas ed., 2004) [hereinafter THOMPSON ON REAL PROPERTY]; *see, e.g.*, Alexander v. Boyer, 253 A.2d 359, 363 (Md. 1969) (citing Hannan v. Towers, 3 H. & J. 147, 148–49 (Md. 1810) ("At common law it was presumed that a conveyance to two or more persons created a joint tenancy."); Wilson v. Johnson, 46 P. 833, 834 (Kan. Ct. App. 1896) ("Estates in entirety and joint tenancies are recognized by our supreme court as existing in Kansas, and, until the passage of chapter 203 of the Session Laws of 1891, the right of survivorship under the common law was in full force and effect.").

to joint tenancies.[177] Beginning in the latter half of the 18th century, acceptance of joint tenancies as a natural form of concurrent ownership quickly turned to repudiation as states and territories began rejecting joint tenancies as intrinsically un-American.[178] The rapidity of the movement against joint tenancies was expressed in anything but parsed words. Courts and legislatures alike denounced joint tenancies with bitter contempt describing these estates as "odious and unjust,"[179] "odious in equity,"[180] and "adverse to the understandings, habits, and feelings of the people."[181] The tenor of the day is best reflected within the preamble to a 1784 North Carolina omnibus statute abolishing joint tenancy that proclaims: "In real and personal estate held in joint-tenancy the benefit of the survivor is *manifest injustice* to the families of such as may happen to die first."[182]

For the better part of the past two centuries, legislatures, courts, and practitioners have largely continued to hold firm to the notion that joint tenancies should be viewed with hostility, are nothing more than a mere gamble, and create harsh and unforeseen results.[183] Yet, neither this continued hostility nor abolition of the common law form of joint tenancies has ended use of the estate. Despite historic opposition, the joint tenancy estate remarkably has endured and remains an ever-popular form of concurrent ownership.[184] Joint tenancies are common in the financial industry for the ownership of

177. Orth, *supra* note 175, at 177.

178. *See, e.g.*, Burnett v. Pratt, 39 Mass. (22 Pick.) 556, 557 (1839) ("Even the common law now favors tenancies in common... and the policy of our legislation is decidedly adverse to joint tenancies. The doctrine of survivorship is not in accordance with the genius of our institutions."); Sergeant v. Steinberger, 2 Ohio 305, 306 (1826) ("The laws passed, both during the territorial government and since, authorize joint tenants, tenants in common, and coparceners, and, in some cases, the executors, administrators, or guardians of such persons, to demand and have partition. It is, from this, evident that the legislature have treated a joint tenancy as a tenancy in common."); Lynch v. Frost, 727 P.2d 698, 699 (Wash. Ct. App. 1986); Choman v. Epperley 592 P.2d 714, 719 (Wyo. 1979) ("[T]he policy of the American law is opposed to the creation of a joint tenancy with the entire property going to the survivor, at least unless the parties clearly demonstrate that is the intent....")).

179. Whittlesey v. Fuller, 11 Conn. 337, 340 (1836).

180. Davidson's Lessee v. Heydon, 2 Yeates 459, 461 (Pa. 1799).

181. Sergeant v. Steinberger, 2 Ohio 305, 306 (1826).

182. Act of 1784, ch. 22, *reprinted in* 24 THE STATE RECORDS OF NORTH CAROLINA 574 (Walter Clark ed., 1905) (emphasis added).

183. Alexander v. Boyer, 253 A.2d 359, 366 (Md. 1969) (citing A. R. Kimbrough, Comment, *Cotenancy: Effect of Conveyances, Leases, and Encumbrances of One Contenant in Excess of His Interest: Joint Tenancy: Effect of Lease as to Severance: Remedies of Cotenants as Against Each Other*, 25 CALIF. L. REV. 203, 208 (1937)); Cleaver v. Long, 126 N.E.2d 479, 481 (Ohio 1955) ("Many members of the legal profession in Ohio are of the opinion that joint tenancy is a thing to be frowned upon in this State....").

184. Orth, *supra* note 175, at 180.

joint accounts,[185] utilized by domestic partners to share property,[186] offer value in avoiding probate delays and expenses,[187] and provide useful tools for elder and estate planning,[188] among other uses. Notwithstanding its popularity, historic skepticism has continued unnecessarily to pervade legislative and judicial treatment of the joint tenancy estate, slowing its progress as a contemporary tool for asset management.

We now turn to a brief overview of some of the issues that continue to plague the joint tenancy estate while illustrating some of the preferable statutory approaches to creation and destruction. As part of this endeavor, we will illustrate several progressive statutes that may serve as models for North Carolina and other states in taking a more enlightened view of joint tenancies in recognition of their continued use and popularity. We begin with a brief discussion of common law jurisprudence and the original context in which joint tenancies were created before examining how colonial presumptions disfavoring the estate continue to infect modern interpretational issues. Next we explore an array of word choice considerations affecting creation issues given the significant weight courts afford to the precise language utilized in creating the joint tenancy estate. Thereafter we delve into the abyss that is terminating joint tenancies, the conflicting interests at stake, and the multitude of approaches courts and legislatures have applied to destroying joint tenancy interests. We conclude with a brief proposal for revising North Carolina's joint tenancy statute and the best formula for any statute addressing the modern joint tenancy estate.

A. Creating Joint Tenancies: Unities to Express Intent

At common law, creating joint tenancies was entirely formalistic in nature. A joint tenancy was deemed created by deed or devise upon the conversion of the four unities of time, title, interest, and possession.[189] Simply, all tenants having "one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession"

185. *See, e.g.*, Holmes v. Beatty, 290 S.W.3d 852, 857 (Tex. 2009).

186. *See, e.g.*, Walsh v. Reynolds, 335 P.3d 984, 995–96 (Wash. Ct. App. 2014).

187. *See, e.g.*, WASH. REV. CODE § 64.28.010 (2013) ("Whereas joint tenancy with right of survivorship permits property to pass to the survivor without the cost or delay of probate proceedings, there shall be a form of co-ownership of property, real and personal, known as joint tenancy.").

188. *See, e.g.*, Hendrickson v. Minneapolis Fed. Sav. & Loan Ass'n, 161 N.W.2d 688, 691–92 (Minn. 1968).

189. 7 POWELL, *supra* note 79, § 51.01[2], at 51-3 to -4.

were considered joint tenants with the *jus accrescendi* right of survivorship.[190] Absent words of contrary expression, a conveyance as basic as "to A and B and their heirs" immediately created a joint tenancy.[191] American courts sometimes referred to this form of creation as "technical joint tenancy."[192] The absence of any one or more of the four unities resulted in a failure of the joint tenancy estate, irrespective of the intent of the parties.[193]

Although since denounced as manifestly unjust, the common law four-unities approach to creating joint tenancies was not without benefit. The specificity of each separate unity offered concrete terms on which parties and courts could rely to determine the creation of the joint tenancy estate.[194] Those guideposts for creating joint tenancies were largely lost when technical joint tenancy fell into disfavor. The mere existence of the four unities by deed or devise will not create a joint tenancy in any American state today.[195]

The majority of modern state statutes addressing joint tenancies permit joint tenancies to be created by express declaration while jettisoning the concept of technical joint tenancy in favor of tenancies in common.[196] A prime example is Maryland's statute, which cuts off common law joint tenancy while preserving the right of parties to create the estate by simply stating:

> No deed, will, or other written instrument which affects land or personal property, creates an estate in joint tenancy, unless the deed, will, or other written instrument expressly provides that the property granted is to be held in joint tenancy.[197]

Maryland's statute offers the clearest expression of legislative abrogation of technical joint tenancies and embrace of joint tenancies created by express terms. In fact, it is representative of the majority of states that, in one form or another, echo the sentiment that joint tenancies may only be created by an express declaration.[198] Its simplicity has enabled Maryland courts to easily conclude that the legislature has embraced the rights of individuals to establish joint

190. 2 WILLIAM BLACKSTONE, COMMENTARIES *180–81.

191. *Id.* at *180.

192. *See, e.g., In re* Hutchison's Estate, 166 N.E. 687, 690 (Ohio 1929).

193. THOMPSON ON REAL PROPERTY, *supra* note 176, § 31.06(b), at 15.

194. *In re* Estate of Johnson, 739 N.W.2d 493, 498 n.6 (Iowa 2007) (discussing the clarity provided by the four unities that, in theory, offered a bright-line test for the determination of joint tenancies).

195. 7 POWELL, *supra* note 79, § 51.02[1], at 51-5.

196. *See* THOMPSON ON REAL PROPERTY, *supra* note 176, § 31.06(d), at 23.

197. MD. CODE ANN., REAL PROP. § 2-117 (LexisNexis 2012).

198. 7 POWELL, *supra* note 79, § 51.02[1], at 51-5.

tenancies by express declaration.[199] And its specificity offers flexible options for parties seeking to create joint tenancies by clarifying that they may do so by deed, will, or any other written instrument.[200] In doing so, the statute obviates the need for separate provisions addressing different types of property, whether real or personal, or different types of individual situations in which joint tenancies may be utilized.

1. Presumptions and Construction of Joint Tenancies

Statutes enabling the creation of joint tenancies by express declaration offer a foot in the door to those seeking to utilize the estate. However, merely enabling a device without addressing the presumptions or construction that should be applied when ambiguity arises leaves open the question of how best to approach interpretational issues when considering stilted or haphazard language utilized by drafters.

Early courts often applied strict interpretation to any language used to create joint tenancies. In *Butler v. Butler*,[201] the court surveyed the then-existing judicial sentiment of the late 1800s concluding "it is established by an overwhelming and unanimous mass of authorities, that such estates are not to be favored, and that courts are 'to exercise their *ingenuity* against them.' "[202] Since that time, courts have slowly evolved in considering the construction to apply in the event of ambiguity in an instrument purporting to create a joint tenancy.[203] Modern judicial analysis generally begins by recognizing that most legislative policies require resolving any drafting ambiguity in favor of

199. *E.g.*, Gardner v. Gardner, 335 A.2d 157, 160 (Md. Ct. Spec. App. 1975).

200. MD. CODE. ANN., REAL PROP. § 2-117.

201. 13 D.C. (2 Mackey) 96 (1882).

202. *Id.* at 100 (citing Chew v. Chew, 1 Md. 163, 171 (1851) ("On the contrary this court is imperatively required by a long course of judicial decisions in this State and elsewhere, sustained by every dictate of reason, justice and humanity, to view with disfavor, estates in joint tenancy, and to give the widest and most liberal construction to testamentary instruments, in order to defeat them wherever we can.")); Bambaugh v. Bambaugh, 11 Serg. & Rawle 191, 192 (Pa. 1824) ("The inconvenience of joint-tenancy, has induced the courts to seize on every expression which indicates an intention to give a separate interest to each."); Evans v. Brittain, 3 Serg. & Rawle 135, 137–38 (Pa. 1817) ("For many years past the judicial current has set strong against joint-tenancy, and justly...."); Galbraith v. Galbraith, 3 Serg. & Rawle 392, 392 (Pa. 1817) ("Joint tenancy is, at this day, so far from being favoured that the Courts think themselves justified in exercising their ingenuity against it."); Martin v. Smith, 5 Binn. 16, 17–18 (Pa. 1812) ("[N]othing can be more unnatural than an estate in joint-tenancy. It is with good reason therefore that courts of justice have long been disposed to lay hold of slight expressions, in order to make a tenancy in common.").

203. *See, e.g.*, James v. Taylor, 969 S.W.2d 672, 673–74 (Ark. Ct. App. 1998).

establishing a tenancy in common rather than a joint tenancy.[204] In fact, most states have adopted legislative positions in favor of construing estates as tenancies in common rather than joint tenancies where ambiguity exists.[205] However, where the express intent of the grantor is clear, then the right to survivorship will be upheld.[206] As the Supreme Court of Ohio noted, "[i]f, on the other hand, a donor or grantor, by the operative words of the gift or grant, clearly expresses an intention to give the right of survivorship, such words will not be disregarded."[207]

For example, Arkansas' statute enabling joint tenancies is titled "tenants in common" and provides that:

> Every interest in real estate granted or devised to two (2) or more persons, other than executors and trustees as such, shall be in tenancy in common unless expressly declared in the grant or devise to be a joint tenancy.[208]

Arkansas' statute favoring tenancies in common typifies most joint tenancy statutes by continuing to reflect the early twentieth century shift away from a constructional preference in favor of joint tenancies to a constructional preference for tenancies in common.[209] Notably, however, more recent decisions and enactments have witnessed a movement toward construing joint tenancies more favorably. Ohio's revised joint tenancy statute provides that "[a]ny deed or will containing language that shows a clear intent to create a survivorship tenancy *shall be liberally construed to do so.*"[210] Iowa offers the most recent legislative example of a state taking a progressive stance on favorably construing the joint tenancy estate where revisions to its longstanding joint tenancy statute became effective this year. The statute states, in part:

> A conveyance of real property to two or more grantees in a conveyance instrument in any of the following circumstances

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204. *See, e.g.*, Kipp v. Chips Estate, 732 A.2d 127, 130 (Vt. 1999) (citing Cross v. Cross, 85 N.E.2d 325, 327 (Mass. 1949); Palmer v. Flint, 161 A.2d 837, 842 (Me. 1960); Gagnon v. Pronovost, 71 A.2d 747, 750–51 (N.H. 1949) *aff'd on reh'g*, 71 A.2d 747, 749 (N.H. 1950) ("Although the statute does allow a deed to create a joint tenancy by explicit language, the legislative policy requires that we resolve ambiguity in favor of a tenancy in common rather than a joint tenancy.")).

205. THOMPSON ON REAL PROPERTY, *supra* note 176, § 31.06(d), at 23.

206. 7 POWELL, *supra* note 79, § 51.02[1], at 51-7.

207. *In re* Hutchison's Estate, 166 N.E. 687, 691 (Ohio 1929).

208. ARK. CODE ANN. § 18-12-603 (2011).

209. *See, e.g.*, Erickson v. Erickson, 115 P.2d 172, 175 (Or. 1941) (quoting 3 RESTATEMENT (FIRST) OF PROP. 1445 (1940)).

210. OHIO REV. CODE ANN. § 5302.20(A) (LexisNexis 2012) (emphasis added).

> *creates a presumption of a joint tenancy with rights of survivorship* unless a contrary intent is expressed in the instrument and subject to subsection 3:
>
> a. The instrument identifies two or more grantees as married to each other at the time the instrument is executed.
>
> b. The instrument describes the conveyance to the grantees with the phrase "joint tenants," "joint tenancy," or words of similar import.
>
> c. The instrument describes the conveyance to the grantees with the phrase "or their survivor" with reference to the grantees, or words of similar import.[211]

Iowa's progressive stance exemplifies the modern trend toward embracing joint tenancies where the intent of the transferor is clear. By modifying the statutory presumption in favor of joint tenancies to more closely reflect the intent of parties expressly creating these estates, the Iowa statute offers appropriate assurance to those utilizing joint tenancies for an array of individual purposes and serves as a model for modern construction practices.[212]

2. Creating Joint Tenancies: What's the Magic Word?

Absent progressive legislative or judicially recognized presumptions in favor of joint tenancies, avoiding ambiguities in the terminology employed to create a joint tenancy becomes all the more important. At common law, the four unities of time, title, interest, and possession defined joint tenancies and their creation.[213] With the convergence of these four unities, the joint tenancy estate was established without any need for special or technical words to give it life.[214] Now that common law joint tenancies have been abrogated throughout the states, creating joint tenancies is entirely dependent on employing language that sufficiently demonstrates a manifest

211. Act of Apr. 3, 2014, ch. 1054, 2014 Iowa Acts 128 (to be codified at IOWA CODE § 557.15 (2012) (emphasis added).

212. Notably, the Iowa Supreme Court has also taken a progressive stance on approaching creation and severance issues by casting aside all unities based analysis in favor of a pure intent approach to joint tenancies. *See In re* Estate of Johnson, 739 N.W.2d 493, 497–98 (Iowa 2007).

213. 7 POWELL, *supra* note 79, § 51.01[2], at 51-3.

214. Hannah v. Towers, 3 H. & J. 147, 149 (Md. 1810) (finding no need for technical or other words to confer a joint tenancy at common law); Holohan v. Melville, 249 P.2d 777, 782 (Wash. 1952) (en banc) ("Joint tenancy, distinguished by its grand incident of survivorship, was a favorite of the common law and no special words or limitations were necessary to call it into being.").

intent to establish the estate.[215] Thus, where technical or other words were once unnecessary to establish a right of survivorship in concurrently held property, they very much are required today.[216] The primary question then becomes: "What are the magic words necessary to create a joint tenancy?"[217] The answer greatly depends on the words chosen and the state where the estate is being created.

Statutes that go no further than to say that a joint tenancy may be created by express terms are the least helpful to solicitors and scriveners alike. Unfortunately, most statutes addressing joint tenancies are noticeably silent on the words that may be considered sufficient to create them. This silence is not surprising given the historic context in which most of these statutes were passed. At the time, the purpose of most state enactments addressing joint tenancies was to abrogate the common law rule concerning the creation of joint tenancies and to adopt a construction in favor of tenancies in common.[218] As originally conceived, joint tenancy statutes were not designed to assist courts, practitioners, or parties in creating the very estate being abrogated. It is little wonder then that most statutes fail to offer any drafting guidance for creating joint tenancies.

a) And By That You Meant What Exactly?

Without legislative guidance, courts have turned to the difficult task of balancing the intent of the parties against presumptions in favor of tenancies in common when construing language purporting to create joint tenancies.[219] The use of "jointly"[220] or "jointly and severally"[221] has been held insufficient to create a joint tenancy as has "share and share alike, or to the survivor."[222] A grant "unto the survivor of them"[223] has been considered a sufficient expression of

215. *See* 7 POWELL, *supra* note 79, § 51.02[1], at 51-7.

216. *See id.*

217. *See id.*

218. *See, e.g.*, Palmer v. Flint, 161 A.2d 837, 841–42 (Me. 1960).

219. *See, e.g.*, Kipp v. Chips Estate, 732 A.2d 127, 130 (Vt. 1999).

220. *See, e.g.*, Mustain v. Gardner, 67 N.E. 779, 780 (Ill. 1903); Taylor v. Taylor, 17 N.W.2d 745, 748–49 (Mich. 1945) ("[T]he mere use of the word 'jointly' in the introductory paragraph of a deed, with nothing in the granting or habendum clauses to indicate a joint tenancy, 'is not by itself a sufficient declaration of an intent to create an estate in joint tenancy to overcome the statutory presumption.' "); Overheiser v. Lackey, 100 N.E. 738, 740 (N.Y. 1913). *But see* WIS. STAT. § 700.19 (2001) ("Any of the following constitute an expression of intent to create a joint tenancy: 'as joint tenants', 'as joint owners', '*jointly*' . . . .") (emphasis added).

221. *See, e.g.*, James v. Taylor, 969 S.W.2d 672, 675 (Ark. Ct. App. 1998); *In re* Kwatkowski's Estate, 29 P.2d 639, 640 (Colo. 1934).

222. Cross v. Cross, 85 N.E.2d 325, 327 (Mass. 1949).

223. Gardner v. Gardner, 335 A.2d 157, 160–61 (Md. Ct. Spec. App. 1975).

intent to create a joint tenancy, whereas use of the phrase "and to the survivors of them" has not.[224]

Conveyances to individuals "as tenants by the entireties" who are not spouses have generated significant questions for courts concerning the nature of the estate intended.[225] The predominate attribute shared by joint tenancies and tenancies by the entirety is the right of survivorship in property.[226] As a result, courts appropriately focused on construing the intent of the parties have found that ineffective attempts to create tenancies by the entirety establish joint tenancies nonetheless.[227] These have included tenants by the entirety conveyances to brothers,[228] mothers and daughters,[229] unmarried individuals,[230] and persons in bigamous[231] or incestuous void marriages.[232] However, the conclusion that an ineffective attempt to create a tenancy by the entirety sufficiently demonstrates intent to create a joint tenancy has not been universal. Courts that strictly guard tenancies by the entirety as only allowable between spouses have refused to construe its misapplication as an expression of intent to create a joint tenancy.[233]

For courts in Massachusetts, this issue is quickly resolved by referring to its joint estates statute that provides: "A conveyance or devise of land to two persons as tenants by the entirety, who are not married to each other, *shall create an estate in joint tenancy and not a tenancy in common.*"[234]

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224. Gagnon v. Pronovost, 71 A.2d 747, 749 (N.H. 1949) (holding the use of such phrase "too sketchy and speculative to comply with the statutory requirement of a clear expression to create a joint tenancy"), *aff'd on reh'g*, 71 A.2d 747, 749 (N.H. 1950).

225. *See, e.g.*, Coleman v. Jackson, 286 F.2d 98, 100 (D.C. Cir. 1960) (considering the creation of a tenancy between unmarried individuals and holding that the court is not excused "from the duty of determining and effecting the intention of the grantor as it appears on the face of the conveyance").

226. *See, e.g.*, *id.* at 102 ("Survivorship, the salient feature of joint tenancy, is also perhaps the most important feature of tenancy by the entireties...."); Pa. Bank & Trust Co. v. Thompson, 247 A.2d 771, 771–72 (Pa. 1968) ("[A] joint tenancy best fulfills an intent to create a tenancy by the entireties because both contain the survivorship feature.").

227. *See supra* notes 206–10.

228. *Pa. Bank & Trust Co.*, 247 A.2d at 773–74.

229. Powers v. Buckowitz, 347 S.W.2d 174, 176 (Mo. 1961) (en banc).

230. *Coleman*, 286 F.2d at 103.

231. Wood v. Wood, 571 S.W.2d 84, 85–86 (Ark. 1978).

232. *In re* Estate of Everhart, 783 N.W.2d 1, 6–7 (Neb. Ct. App. 2010).

233. *See, e.g.*, *In re* Estate of Kappler, 341 N.W.2d 113, 114 (Mich. 1983) (per curiam) ("The addition of the language 'as tenants by the entireties' was not an express declaration of joint tenancy.").

234. MASS. ANN. LAWS ch. 184, § 7 (LexisNexis 2011) (emphasis added).

Massachusetts' statute is commendable. It offers courts, practitioners, and title abstractors clear guidance on how to interpret the intent behind occasional misuse of tenants by the entirety language by non-spouses.[235] Maine and Utah are the only other states to also offer statutory embrace of the misapplication of tenants by the entirety.[236] In fact, most states fail to offer guidance on this and the panoply of other more routine methods that may be acceptable for creating joint tenancies.

b) Creating Certainty: Words and Phrases Blessed by Statute

Statutes that clarify the method for creating joint tenancies obviate interpretational issues that inevitably arise from inartful drafting. And a few statutes are worth mentioning because of the clarity or confusion they offer to courts and drafters alike. Colorado's joint tenancy statute offers statutory guidance for crafting joint tenancies by christening use of the phrase "in joint tenancy," "as joint tenants," "as joint tenants with rights of survivorship," or "in joint tenancy with right of survivorship," and specifying that the abbreviation "JTWROS" has the same meaning.[237] Consequently, courts in Colorado apply a simple test when construing instruments purporting to create joint tenancies: Instruments that lack statutorily prescribed language will not create joint tenancies.[238] Even more noteworthy is Maine's joint tenancy statute that offers both a construction in favor of joint tenancies and suggestive language for creating the estate.[239] Under the Maine statute, three different methods are recognized for creating joint tenancies:

> Deeds in which 2 or more grantees anywhere in the conveyances are named as joint tenants *or* named as having the right of survivorship *or* that otherwise indicate anywhere in the conveyances by appropriate language the intent to create a joint tenancy between such grantees *must be construed* as vesting an estate in fee simple in such grantees with right of survivorship.[240]

235. *Id.*
236. ME. REV. STAT. tit. 33, § 159 (2012); UTAH CODE § 57-1-5 (LexisNexis 2012).
237. COLO. REV. STAT. § 38-31-101 (2012).
238. Taylor v. Canterbury, 92 P.3d 961, 964 (Colo. 2004) (en banc) (citing *In re* Kwatkowski's Estate, 29 P.2d 639, 640 (Colo. 1934)).
239. ME. REV. STAT. tit. 33, § 159.
240. *Id.* (emphasis added).

Maine's joint tenancy statue then goes on to offer perspicuous guidance to drafters and courts by specifying the phrases that may be used with assurance when creating joint tenancies when it says:

> A conveyance of real property by the owner of the real property to the owner and another or others, or by the owners of the real property to the owners or to the owners and another or others, as joint tenants or with the right of survivorship, or that otherwise indicates anywhere in the conveyance by appropriate language the intent to create a joint tenancy between such owner or owners and such other or others or between the owners by the conveyance, including language such as "*as joint tenants*," "*in joint tenancy*," "*as joint tenants with rights of survivorship*," "*with rights of survivorship*," "*to them and to the survivor of them*," "*to them and their assigns and to the survivor and the heirs and assigns of the survivor forever*" or "*as tenants by the entirety*" creates an estate in joint tenancy . . . .[241]

The Colorado and Maine statutes reflect a commendable, modern approach to addressing creation issues in joint tenancies. Statutes that leave open interpretational questions only serve to create confusion and litigation. Neither is necessary given the clear guidelines that comprehensive drafting can accomplish. Unfortunately, all too many statutes are silent on acceptable methods for creating joint tenancies. Worse still are statutes like North Carolina's that create potential litigation traps for those fully intending and expecting to create a joint tenancy estate.

c) Word Choice Traps for the Unsuspecting

The hallmark characteristic of the joint tenancy estate is the right of survivorship.[242] It is this salient characteristic that both defines the joint tenancy estate and uniquely distinguishes it from tenancies in common.[243] Consequently, because survivorship necessarily defines the joint tenancy estate, saying either "joint tenants" or "joint tenants with rights of survivorship" says the same thing. A joint tenancy by its nature includes the right of survivorship and any addition of "with rights of survivorship" is merely superfluous. Courts have routinely concluded that conveyances or devises to individuals as "joint tenants" are sufficient to establish a joint tenancy without the need

241. *Id.* (emphasis added).
242. *See, e.g.*, Tenhet v. Boswell, 554 P.2d 330, 334 (Cal. 1976) (en banc).
243. *Canterbury*, 92 P.3d at 964; 7 POWELL, *supra* note 79, § 51.01[1], at 51-3.

for any additional language.[244] Statutes in Colorado,[245] Connecticut,[246] Georgia,[247] Iowa,[248] Kansas,[249] Maine,[250] Massachusetts,[251] New Mexico,[252] Utah,[253] and Wisconsin[254] all confirm that conveyances to grantees "as joint tenants" alone creates a joint tenancy estate. Thus, although harmless, the use of "with rights of survivorship" is mere surplus when added to "as joint tenants"—at least in most states.

Notwithstanding the very nature of joint tenancies or the construction applied in other state courts and legislatures, the Oregon, Virginia, and North Carolina joint tenancy statutes create potentially dangerous traps for lawyers and laypersons who transfer property to grantees "as joint tenants." In Oregon and Virginia, a conveyance to two or more persons "as joint tenants" will not create a joint tenancy unless the specific addition of "with survivorship" is included in the instrument.[255] Incredibly, at least in Virginia, further specifying that the property is not to be held as tenants in common will not suffice. In a decision that can only be harmonized by fervent distaste for the joint tenancy estate, in *Hoover v. Smith*,[256] the Supreme Court of Virginia concluded that a conveyance to grantees

244. *See, e.g.*, Downing v. Downing, 606 A.2d 208, 212 (Md. 1992) ("[W]e believe that when a deed uses the words 'joint tenants,' as does the instrument in the instant case, this language can be sufficient to establish that the property granted is to be held in joint tenancy."); Barrett v. Barrett, 34 A.2d 579, 588 (N.J. Ch. 1943) ("I think the addition of the words 'or their heirs and assigns' did not in any wise indicate an intent to create any estate other than that which testator called it, a 'joint tenancy,' and if this is so, the added phrase may be discarded as mere surplusage."); Coudert v. Earl, 18 A. 220, 221 (N.J. Ch. 1889) ("The use of the words 'and not as tenants in common' adds nothing to the sense of the others, and is mere tautology and surplusage."); Holmes v. Beatty, 290 S.W.3d 852, 859 (Tex. 2009) ("A 'joint tenancy' or 'JT TEN' designation on an account is sufficient to create rights of survivorship in community property....").

245. COLO. REV. STAT. § 38-31-101 (2012).

246. CONN. GEN. STAT. § 47-14a (2012).

247. GA. CODE ANN. § 44-6-190 (2010).

248. IOWA CODE § 557.15 (2012).

249. KAN. STAT. ANN. § 58-501 (2005).

250. ME. REV. STAT. ANN. tit. 33, § 159 (2012).

251. MASS. ANN. LAWS ch. 184, § 7 (LexisNexis 2011).

252. N.M. STAT. ANN. § 47-1-16 (West 2012).

253. UTAH CODE ANN. § 57-1-5 (LexisNexis 2010).

254. WIS. STAT. ANN. § 700.19 (West 2001).

255. OR. REV. STAT. § 93.180 (2007) ("[J]oint tenancy in real property is abolished and the use in a conveyance or devise of the words 'joint tenants' or similar words without any other indication of an intent to create a right of survivorship creates a tenancy in common."); VA. CODE ANN. § 55-20.1 (2012) ("When any person causes any real or personal property... to be titled, registered, or endorsed in the name of two or more persons 'jointly,' as 'joint tenants' in a 'joint tenancy,' or other similar language, such persons shall own the property in a joint tenancy without survivorship as provided in § 55-20.").

256. 444 S.E.2d 546 (Va. 1994).

"as joint tenants, and not as tenants in common" failed to express sufficient intent to create a joint tenancy.[257] The court deemed this language "uncertain" and "insufficient, as a matter of law, to create a survivorship estate."[258] According to the court, "[t]here still does exist such an estate as a joint tenancy *without* survivorship," which created uncertainty because the parties may have intended such an estate.[259] The court offered no support or citation in claiming that there are estates in joint tenancy without survivorship and we can find none.[260] For practitioners and parties in Virginia, the message is loud and clear: An explicit reference to "survivorship" must be included in a conveyance or devise, or the joint tenancy attempted will fail.

Although not as explicit as Oregon and Virginia, North Carolina's convoluted joint tenancy statute offers a similar trap for the unwary by suggesting that a conveyance or devise must include a reference to survivorship when it says that a joint tenancy may be created "if the instrument creating the joint tenancy *expressly provides for a right of survivorship.*"[261] Given that the principal incident of a joint tenancy is the right of survivorship, a North Carolina instrument that conveyed property to grantees "as joint tenants" would, by the nature of the joint tenancy estate, provide for a right of survivorship. Unfortunately, if the statute remains unrefined, only litigation and subsequent interpretation will serve to confirm this analysis. Thus, it would seem that in Virginia and North Carolina, the surest method for creating a joint tenancy by express terms would be a conveyance or devise to two or more "as joint tenants with rights of survivorship, and not as tenants in common."[262]

B. Terminating Joint Tenancies: Intent and Transparency

The right of survivorship incident to the joint tenancy estate is more than a mere consequence or casual attribute; it is the essential and defining feature associated with this unique estate.[263] In fact, it is

257. *Id.* at 546, 548.

258. *Id.* at 548.

259. *Id.*

260. *Id.* To the contrary, the principal and defining characteristic of a joint tenancy is the *jus accrescendi*, or right of survivorship. *See supra* text accompanying note 242.

261. N.C. GEN. STAT. § 41-2 (2013) (emphasis added).

262. *Cf.* S.C. CODE ANN. § 27-7-40 (2007) ("[W]henever any deed of conveyance of real estate contains the names of the grantees followed by the words 'as joint tenants with rights of survivorship, and not as tenants in common' the creation of a joint tenancy with rights of survivorship in the real estate is *conclusively* deemed to have been created.") (emphasis added).

263. 7 POWELL, *supra* note 79, § 51.02[1], at 51-7.

this survivorship feature that "satisfies some near-permanent societal demand," as illustrated by its popular usage in today's culture.[264] Yet jurisprudentially, the "right" of survivorship is less of a *right* and more akin to a mere *hope*.[265] In truth, the moniker "right of survivorship" is a legal misnomer that has perpetuated for several centuries.[266] A joint tenant merely holds an expectancy to prevail in the survival battle with her fellow joint tenants.[267] She maintains no vested right in the survivorship feature appurtenant to the estate given that it is always subject to termination while other tenants are living.[268] Yet, like creation, the question becomes how and by what methods termination may be effectuated. This question has plagued property law for several centuries and today modern legislatures and courts continue to grapple with how severance issues should be construed and the methods by which terminating a joint tenancy should be effectuated.[269]

While few modern state statutes offer guidance on creating joint tenancies, fewer still suggest any mechanism for destroying the estate once established. As the New Mexico Supreme Court recently conceded, "[o]ur statutes, while voluble on the subject of creating a joint tenancy, are silent as to its termination."[270] Unfortunately, this statutory silence is the norm. As a consequence, the typical analysis applied to joint tenancy termination issues all too often remains marred in an ancient four-unities based construction.[271] Some modern courts have become increasingly frustrated with the inflexibility of a strict four-unities analysis and have begun augmenting it with additional methods by which termination may be effectuated. Under this augmented analysis, joint tenancies may be terminated by destruction of one or more of the four unities, mutual agreement, or

264. Orth, *supra* note 175, at 180 (describing modern usage of the estate in joint financial accounts, for avoiding probate expenses, as a will substitute, and among unmarried couples); *see supra* text accompanying notes 184–88; *see also* Helmholz, *supra* note 9, at 4 (explaining that despite presumptions favoring tenancies-in-common, joint tenancies are frequently used and appear to be growing in popularity).

265. 7 POWELL, *supra* note 79, § 51.04[1], at 51-16.1 ("The survivorship right is not a property interest, but is a mere expectancy incident to joint tenancy ownership—a mere gamble that the holder of the survivorship right will survive the other joint tenants without severance of the joint tenancy.").

266. *See* Taylor v. Canterbury, 92 P.3d 961, 965 (Colo. 2004).

267. *See id.*; *see also* Tenhet v. Boswell, 554 P.2d 330, 334 (Cal. 1976) (en banc).

268. *See Canterbury*, 92 P.3d at 965.

269. *See* Helmholz, *supra* note 9, at 6.

270. Edwin Smith, L.L.C. v. Synergy Operating, L.L.C., 285 P.3d 656, 663 (N.M. 2012).

271. *See* Helmholz, *supra* note 9, at 6.

inference implied by the course of conduct between joint tenants.[272] Meanwhile other courts have made the appropriate decision to adopt a purely intent-based analysis rather than trying to tinker with an outmoded system. Most notably, the Iowa Supreme Court recently cast aside entirely a unities-based analysis in favor of construing the intent of the parties for all purposes, whether creation or destruction.[273]

Unfortunately, many modern interpretational questions concerning termination remain strictly tied to a formalistic, unities-based analysis that ignores the clear intent and purposes of the parties.[274] As a consequence, the need for legislative guidance that focuses on objective manifestations of express intent is as important in the termination context as it is in the creation. As Professor Helmholz noted in his review of realism and formalism in joint tenancies, "[h]appy are the courts of states where the legislature has created a statutory presumption for determining severance questions, or at least set some exact requirements for severing a joint tenancy."[275] Having previously addressed the many issues joint tenants encounter in creating joint tenancies, we focus now on severance issues in the context of collective and unilateral actions taken by joint tenants with a special emphasis on model statutes offering guidance in fairly and efficiently terminating joint tenancies.

1. Collective Termination by All Joint Tenants

An ongoing question that has preoccupied courts and practitioners in the severance context is whether an instrument executed by all joint tenants operates as a conversion of the joint tenancy into a tenancy in common.[276] A conveyance strictly between joint tenants terminates the estate with respect to the interest conveyed, either in part or in whole.[277] And deeds executed by all

272. *See, e.g.*, *Edwin Smith, L.L.C.*, 285 P.3d at 663 (noting these three methods of terminating a joint tenancy).

273. *See In re* Estate of Johnson, 739 N.W.2d 493, 497 (Iowa 2007).

274. *See, e.g.*, Countrywide Home Loans, Inc. v. Reed, 220 N.C. App. 504, 510, 725 S.E.2d 667, 671 (2012); Walsh v. Reynolds, 335 P.3d 984, 996 (Wash. Ct. App. 2014) (concluding that a joint tenancy had been severed at its inception "[d]espite the parties' clear specification that they took the property as joint tenants with right of survivorship").

275. Helmholz, *supra* note 9, at 25 (citing NEB. REV. STAT. § 76-2,109 (2009)).

276. *See, e.g.*, Ball v. Mann, 199 P.2d 706, 708 (Cal. Dist. Ct. App. 1948); Buford v. Dahlke, 62 N.W.2d 252, 255 (Neb. 1954); Swenson & Degnan, *supra* note 9, at 475.

277. THOMPSON ON REAL PROPERTY, *supra* note 176, § 31.08(a).

joint tenants to third parties plainly destroy the joint tenancy estate.[278] However, transfers of lesser interests are not as clear.[279] For example, where A, B, and C enter into a contract to sell property held by the three of them as joint tenants, does the mere execution of the contract sever the joint tenancy?

Under the accepted common law theory of equitable conversion, an executory contract for the sale of real property effectively splits legal and equitable title such that equitable title inures to the buyer, whereas bare legal title remains with the seller as security for payment of the purchase price.[280] Some courts have reasoned that the equitable division of title with a third party operates as a severance of the joint tenancy estate.[281] According to this analysis, a joint tenancy is destroyed at the moment an agreement to sell is signed. The fact that an agreement is wholly silent on survivorship is inconsequential. The intent of the parties or the subsequent termination of the contract plays no role in the analysis.[282] This hyper-formalistic approach has been criticized before,[283] and some courts have appropriately refused to join in similar reasoning.[284] We agree. An analysis that blindly couples a legal fiction with an outmoded unities construction unnecessarily delivers a severance result that ignores the intent of the parties.

However, it is not always clear whether instruments signed by all joint tenants sever the joint estate, even when using an intent-based analysis. The parties may not express their intent to maintain or terminate their survivorship rights in the contracts, leases, and others documents they collectively execute. As a consequence, some courts have turned to amorphous considerations of whether the acts of the

278. *See, e.g.*, *Ball*, 199 P.2d at 708; Register of Wills for Montgomery Cnty. v. Madine, 219 A.2d 245, 247 (Md. 1966) ("We think there can be little doubt that a conveyance of the legal title by all the joint tenants destroys the joint tenancy in the property conveyed.").

279. 7 POWELL, *supra* note 79, § 51.04[1][b], at 51-20.

280. *Id.* § 81.03[1], at 81-82 to -83.

281. *See, e.g.*, *Buford*, 62 N.W.2d at 255–56 ("It logically follows from what has been said that if all the joint tenants enter into a joint contract to sell the joint property, receive and accept a part of the purchase price, and put the purchaser in possession of the property, this destroys the joint tenancy in the realty, even though the vendor retains legal title to the realty as security for the balance of the purchase price.").

282. *See generally* Hughes v. De Barberi, 107 N.W.2d 747, 749 (Neb. 1961) (asserting that an agreement to sell property per se destroys a joint tenancy without any mention or consideration of the intent of the parties).

283. *See, e.g.*, Swenson & Degnan, *supra* note 9, at 476.

284. *See, e.g.*, Watson v. Watson, 126 N.E.2d 220, 224 (Ill. 1955); Simon v. Chartier, 27 N.W.2d 752, 754 (Wis. 1947).

parties as a whole demonstrate a desire to terminate their survivorship interest in property held in joint tenancy.[285]

The Arizona Supreme Court confronted this issue for the first time in deciding *In re Estate of Estelle*[286] when a couple who owned property as joint tenants filed for divorce and subsequently entered into a comprehensive property settlement agreement.[287] The settlement agreement included provisions for the eventual sale and distribution of the joint tenancy property, but made no mention of the survivorship estate in the interim.[288] After its execution, but before the property was listed for sale, the former husband died.[289] His ex-wife then claimed full survivorship rights in the property maintaining that the settlement agreement did not operate as a severance.[290] The court began by noting that in many jurisdictions "a contract to convey operates, in equity, as a severance of the joint tenancy."[291] Yet no contract with a third party existed.[292] The parties had only agreed between themselves that the property would *eventually* be sold.[293] Nonetheless, the court decided that the joint tenancy had been severed.[294] The court concluded that the couple's agreement to divide the proceeds of the future sale of the property was "patently inconsistent with the continued right of survivorship."[295] As a consequence, the court concluded that the parties had severed the estate by *implication*.[296]

Legislative guidance and preventive drafting offer better solutions to severance issues where joint tenants act in concert. Wisconsin and South Dakota both have statutory presumptions in favor of maintaining survivorship where all joint tenants contract to sell their property, unless the parties expressly provide otherwise.[297]

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285. *See, e.g.*, Wardlow v. Pozzi, 338 P.2d 564, 565–66 (Cal. Ct. App. 1959).
286. 593 P.2d 663 (Ariz. 1979).
287. *Id.* at 664.
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.* at 665.
292. *Id.*
293. *Id.* at 664.
294. *Id.* at 667.
295. *Id.* at 666.
296. *Id.* at 667.
297. WIS. STAT. § 700.21 (2001); S. D. CODIFIED LAWS § 43-26-4 (2004). South Dakota also has promulgated title standards applicable to contracts for deeds to property held in joint tenancy that favor maintaining the survivorship incident to the property, stating "[a] contract for deed for the sale of real property held in joint tenancy does not have the effect of dissolving the joint tenancy relationship of the vendors if the contract for deed is

In fact, Wisconsin preserves survivorship in the proceeds from the purchase price.[298] Unfortunately, these statutes appear only to address real estate sales contracts and not the litany of other potential issues that may arise where all joint tenants join in a transaction—from property settlement agreements to leases and liens. Georgia takes a broader approach to collective agreements by stating that no severance occurs in recorded lifetime transfers signed by all joint tenants.[299] However, the best model is found in a Nebraska statute that offers a clear, straightforward approach to construing the acts of all joint tenants without the necessity of relying on a cumbersome unities analysis or implied destruction considerations: "There shall be no severance of an existing joint tenancy in real estate when all joint tenants execute any instrument with respect to the property held in joint tenancy, unless the intention to effect a severance expressly appears in the instrument."[300]

There are multiple benefits to the Nebraska presumption in favor of preserving survivorship. Joint tenants may freely execute contracts without worry that they may have to recreate their joint tenancy in the event that a deal collapses. They may collectively enter into leases, options, rights of first refusal, and other agreements without constantly having to reaffirm their intent to maintain the property with rights of survivorship. And joint tenants seeking to mortgage their interest in the property would not have their survivorship rights terminated, irrespective of whether they reside in a "lien theory" or "title theory" state.

Although an intent-based approach to severance is the preferred analysis, intent alone cannot always answer questions raised by the actions of joint tenants acting in concert. Legislative presumptions like those found in Nebraska assure the status quo but are rare indeed. Until such presumptions are adopted more broadly, preventive lawyering necessitates that practitioners drafting documents for joint tenants acting together affirmatively state within their instruments whether the transaction is intended to destroy the joint tenancy between the parties or is otherwise intended to be unaffected.

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executed by all the joint tenants, unless otherwise specifically provided in the instrument." S.D. CODIFIED LAWS § 43-30 tit. standard § 2-06 (2004).

298. WIS. STAT. § 700.21.

299. GA. CODE ANN. § 44-6-190 (2010).

300. NEB. REV. STAT. § 76-2, 109 (2009).

2. Unilateral Termination by Individual Tenants

The customary rule applied to individual severances by less than all joint tenants is generally stated as follows: joint tenants have the absolute, unilateral right to terminate a joint tenancy[301] and may do so at any time without the knowledge or consent of any other tenant.[302] Our discussion *supra* concerning predictable severance issues illustrates how courts have upheld unilateral severances, whether intended or not, by tenants conveying, encumbering, partitioning, divorcing, mutually agreeing, or even "acting inconsistently" with the right of survivorship.[303] Some courts have steadfastly maintained a unities-based approach to unilateral severances, irrespective of intent.[304] Others have sought a middle ground that augments a unities analysis with additional severance considerations involving course of conduct and mutual agreements.[305] Still others have shuttered unities entirely by adopting a purely intent-based approach to severance issues by joint tenants acting alone.[306]

A recurring theme with unilateral acts that terminate a joint tenant's right to survivorship concerns the method by which an act may be deemed sufficient to sever and the notice, consent, or knowledge that is deserving of fellow joint tenants. We begin by considering the opposing ends of the spectrum between indestructible joint tenancies and those terminable by stealth actions of a single tenant without the knowledge, notice, or consent of the other passive joint tenants. Standing in-between these poles we see the opportunity for a reasoned approach to severance that embraces the unilateral right of any joint tenant to sever the survivorship feature associated with her interest, while offering objective severance standards and reasonable notice to her fellow tenants. As we will demonstrate, transparency and fair dealings in the joint tenancy context are best promoted through statutory language that demands public recording

301. 7 POWELL, *supra* note 79, § 51.04[1], at 51-16 to 16.1.

302. *See, e.g.*, *In re* Estate of Hoffman, 653 N.W.2d 94, 98 (S.D. 2002).

303. See discussion *supra* at Section I.C.2.

304. *See, e.g.*, Helinski v. Harford Mem'l Hosp., Inc., 831 A.2d 40, 46 (Md. 2003); *In re* Estate of Potthoff, 733 N.W.2d 860, 867–68 (Neb. 2007).

305. *See, e.g.*, Nicholas v. Nicholas, 83 P.3d 214, 225 (Kan. 2004) (holding additional severance considerations should be included in severance analysis, but "intent alone will not sever the joint tenancy").

306. *See, e.g.*, *In re* Estate of Johnson, 739 N.W.2d 493, 497 (Iowa 2007) (formally and expressly adopting an intent-based approach); *In re* Estate of Knickerbocker, 912 P.2d 969, 976 (Utah 1996) (finding substantial support for the concept that severance should be governed by the intent of the parties rather than destruction of the four unities).

and actual notice to all other tenants of any instrument that terminates an interest in the joint tenancy estate.

a) Indestructible Estates: Thou Shalt Not Sever

At one end of the concurrent ownership spectrum are indestructible estates that may not be severed by individual tenants. As a general rule, unlike tenancies by the entirety, joint tenancies are not characterized by inseverability.[307] Of course, parties may always convey interests in property as joint life estates with cross-contingent remainders as a method of insuring the inseverability of the survivorship feature.[308] But those estates are vested interests distinctly separate and apart from joint tenancies. Nonetheless, some courts have recognized unique forms of joint tenancy estates that are inseverable.[309]

Michigan, for example, has long acknowledged a special form of joint tenancy that is indestructible. In *Albro v. Allen*,[310] the Michigan Supreme Court first recognized two types of joint tenancies: ordinary joint tenancies and indestructible joint tenancies.[311] In that state, granting instruments that include express words of survivorship create a joint estate characterized by joint life estates with contingent remainders.[312] These contingent remainders are vested survivorship rights that are indestructible.[313] In states that have abolished joint tenancies, other courts have recognized similar life estates with vested cross-contingent survivorship remainders that create indestructible survivorships when a joint tenancy is attempted.[314] Some courts have even endorsed a "tenants in common with rights of survivorship" estate with similar indestructible, vested, cross-contingent survivorship features in remainder.[315] Likewise, Oregon mandates by statute that "[a] declaration of a right to survivorship creates a

307. *See* 7 POWELL, *supra* note 79, § 51.04[1], at 51-16. Certainly, there are mechanisms that may be used to exercise more stringent control over property ownership, including trusts, corporate entities, and other methods beyond the scope of this article.

308. *See* Swenson & Degnan, *supra* note 9, at 469.

309. *See, e.g.*, Sanderson v. Saxon, 834 S.W.2d 676, 679 (Ky. 1992); Jackson v. Estate of Green, 771 N.W.2d 675, 677 (Mich. 2009); Albro v. Allen, 454 N.W.2d 85, 88 (Mich. 1990); Brown v. Brown, 706 N.E.2d 872, 874 (Ohio 1998).

310. 454 N.W.2d 85 (Mich. 1990).

311. *Id.* at 88.

312. *Id.*

313. *Id.*

314. *See, e.g.*, Hilterbrand v. Carter, 27 P.3d 1086, 1089 (Or. Ct. App. 2001) (quoting Halleck v. Halleck, 337 P.2d 330, 338 (Or. 1959)).

315. *See, e.g.*, Durant v. Hamrick, 409 So. 2d 731, 736 (Ala. 1981); Smith v. Cutler, 623 S.E.2d 644, 646–47 (S.C. 2005).

tenancy in common in the life estate with cross contingent remainders in the fee simple."[316] Ironically, Oregon's statute creates an even more rigid estate than the joint tenancy it abolishes.[317]

Most notably, the Ohio legislature has adopted an indestructible joint-tenancy-type estate its calls a "survivorship tenancy."[318] This special estate has the essential features of a concurrent estate held in joint tenancy but is significantly distinguished by its indestructibility:

> A conveyance from any survivorship tenant, or from any number of survivorship tenants that is from less than all of them, to a person who is not a survivorship tenant vests the title of the grantor or grantors in the grantee, *conditioned on the survivorship of the grantor or grantors of the conveyance*, and does not alter the interest in the title of any of the other survivorship tenants who do not join in the conveyance.[319]

In construing this "survivorship tenancy" statute, the Ohio court in *Brown v. Brown*[320] noted that the "clear purpose of these statutes is to ensure that title vests in the surviving joint tenant or tenants at the time of death."[321]

Thus, at one end of the spectrum we see survivorship estates and *quasi*-joint tenancies with inseverable qualities offering no opportunity for individual severance of the survivorship feature.[322] As much as these estates preserve and guarantee survivorship rights, they eviscerate the unique flexibility commonly associated with joint tenancies and serve to frustrate the intent of parties who are no longer desirous of maintaining the joint tenancy relationship.[323]

b) Termination At-Will, Transparency at Risk

At the other end of the spectrum are traditional joint tenancy estates that are severable at-will by any joint tenant without regard to

316. OR. REV. STAT. § 93.180 (2007).
317. *See id.*
318. OHIO REV. CODE ANN. § 5302.20 (LexisNexis 2012).
319. *Id.* § 5302.20(C)(2) (emphasis added).
320. 706 N.E.2d 872 (Ohio Com. Pl. 1998).
321. *Id.* at 873.
322. *See, e.g.*, OR. REV. STAT. § 93.180 (2007).
323. *See generally* Albro v. Allen, 454 N.W.2d 85, 89 (Mich. 1990) (holding that when a seller of a one-half interest in a joint tenancy entered into a purchase agreement to convey her interest to a buyer, the interest conveyed to the seller and the other cotenant was a joint life estate with indestructible dual contingent remainder).

transparency.[324] Within these estates an individual joint tenant may elect to terminate her survivorship interest without the knowledge, consent, or notice to any other tenant. Undoubtedly, one of the associated hazards with using the traditional joint tenancy estate is the right of an individual tenant to effectuate a termination, thereby destroying the right of survivorship.[325] Because the survivorship incident to the estate is not vested, any single tenant may decide to convert her interest into a tenancy in common at any time. However, the common hazard associated with unilateral termination becomes exacerbated by rules enabling or encouraging stealth severances by joint tenants who want to have their cake and eat it, too. How does the stealth severance operate? At the risk of perpetuating fraud, like so: An unscrupulous joint tenant makes a secret conveyance of his joint tenancy interest and places it in a secure place where it will be discovered upon his death. He then waits. If his unsuspecting fellow tenant dies first, he destroys the secret severance instrument and claims ownership of the entire property. If he dies first, he is secure in knowing his interest will pass to his heirs. In this heads I win, tails you lose scenario the unsuspecting tenant loses either way.

The stealth severance problem begins with courts that staunchly adhere to the notion that a joint tenant may sever without the consent or notice of the other tenants.[326] This "power" of a joint tenant to convey her interest in a joint tenancy without the knowledge or consent of other tenants has even been described as an "indisputable right."[327] Courts have parroted this sentiment for decades and some legislatures have adopted similar positions.[328] In New York, the rule is crystal clear by statute: "In addition to any other means by which a joint tenancy with right of survivorship may be severed, a joint tenant may *unilaterally* sever a joint tenancy in real property *without consent*

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324. *See, e.g.*, Crowther v. Mower, 876 P.2d 876, 878 (Utah Ct. App. 1994) (holding that the quitclaim deed by which deceased spouse had conveyed her interest in property to her son was valid and, thus, terminated the joint tenancy).

325. *See* Samuel M. Fetters, *An Invitation to Commit Fraud: Secret Destruction of Joint Tenant Survivorship Rights*, 55 FORDHAM L. REV. 173, 175 (1986); Swenson & Degnan, *supra* note 9, at 469.

326. *See, e.g.*, Smolen v. Smolen, 956 P.2d 128, 130 (Nev. 1998); *In re* Estate of Hoffman, 653 N.W.2d 94, 98 (N.D. 2002); Crowther v. Mower, 876 P.2d 876, 878 (Utah Ct. App. 1994).

327. *E.g.*, Sathoff v. Sutterer, 869 N.E.2d 354, 356 (Ill. App. Ct. 2007).

328. *See, e.g.*, COLO. REV. STAT. § 38-31-101 (2012); N.Y. REAL PROP. LAW § 240-b (McKinney 1998); WASH. REV. CODE ANN. § 64.28.010 (West 2013); Burke v. Stevens, 70 Cal. Rptr. 87, 91 (Cal. Ct. App. 1968); Johnson v. Beneficial Fin. Co. of Ill., Inc., 506 N.E.2d 1025, 1027 (Ill. App. Ct. 1987); Reicherter v. McCauley, 283 P.3d 219, 222 (Kan. Ct. App. 2012).

of any non-severing joint tenant or tenants . . . ."[329] California's joint tenancy statute is nearly verbatim, providing that a joint tenant may sever without the joinder or consent of any other tenant.[330]

A growing movement permitting joint tenants to sever their interest in a joint tenancy by self-conveyance further enhances the hazard associated with stealth termination.[331] At common law, a conveyance from an individual as grantor to herself as grantee had no legal effect on destroying any of the four unities, and therefore could not effectuate a severance.[332] Under a unities approach, a self-conveyance from the same grantor "as joint tenant" to the same grantee "as tenant in common" was impossible.[333] As a consequence, a joint tenant who wanted to effectively sever her interest in a joint tenancy would grant her interest in the property to a third-party straw-person who would then immediately convey the property back to the severing joint tenant.[334] Courts have found this process unnecessarily formalistic, and legislatures have agreed. This circuitous process has been largely eliminated for creating joint tenancies and is equally being scuttled in the severance context. Many modern courts and legislatures deride this tortuous process and have eschewed its requirement in the severance context.[335] Nebraska's joint tenancy statute explicitly rejects this formalistic unities requirement by stating: "the conveyance of all of the interest of one joint tenant to himself or herself as grantee, in which the intention to effect a severance of the joint tenancy expressly appears in the instrument, severs the joint tenancy."[336] As the Utah Supreme Court cautioned in *In re Estate of Knickerbocker*,[337] when endorsing severance by self-conveyance, "an unrecorded and unwitnessed unilateral transaction may allow one

329. N.Y. REAL PROP. LAW § 240-c (McKinney 1998) (emphasis added).

330. CAL. CIV. CODE § 683.2 (West 2015).

331. THOMPSON ON REAL PROPERTY, *supra* note 176, § 31.08(b), at 60.

332. *See, e.g.*, *In re* Estate of Knickerbocker, 912 P.2d 969, 974 (Utah 1996).

333. THOMPSON ON REAL PROPERTY, *supra* note 176, § 31.08(b), at 60.

334. Taylor v. Canterbury, 92 P.3d 961, 966–67 (Colo. 2004).

335. *See, e.g.*, COLO. REV. STAT. § 38-31-101 (2012); DEL. CODE ANN. tit. 25, § 311 (2014); ME. REV. STAT. ANN. tit. 33, § 159 (2012); NEB. REV. STAT. § 76-118 (2009); N.Y. REAL PROP. LAW § 240-c (McKinney 1998); UTAH CODE ANN. § 57-1-5 (LexisNexis 2012); Riddle v. Harmon, 162 Cal. Rptr. 530, 532 (Cal. Ct. App. 1980); *Canterbury*, 92 P.3d at 967; Minonk State Bank v. Grassman, 432 N.E.2d 386, 390 (Ill. App. Ct. 1982); *In re* Estate of Johnson, 739 N.W.2d 493, 496–97 (Iowa 2007); Reicherter v. McCauley, 283 P.3d 219, 222 (Kan. Ct. App. 2012); Johnson v. MacIntyre, 740 A.2d 599, 609 (Md. 1999); Hendrickson v. Minneapolis Fed. Sav. & Loan Ass'n, 161 N.W.2d 688, 691 (Minn. 1968); Edwin Smith, L.L.C. v. Synergy Operating, L.L.C., 285 P.3d 656, 664 (N.M. 2012); *In re* Knickerbocker, 912 P.2d at 974–75.

336. NEB. REV. STAT. § 76-118.

337. 912 P.2d 969 (Utah 1996).

joint tenant to defraud the other."[338] Undoubtedly that is true. And it is no wonder why the Utah legislature subsequently amended its joint tenancy statute to provide that self-conveyances must be "bona fide" to effectuate a severance.[339] The logic in permitting self-conveyances over formalistic straw-person conveyances is sound and one we endorse, but not without additional protections for other tenants. Those protections begin with demanding that instruments purporting to terminate a joint tenancy be recorded in order to be effective.

c) Effectuating Severance: Intent + Recording

Statutes and judicial opinions that sanctify self-conveyances exacerbate the potential for stealth termination. Unfortunately, self-conveyances are not the only mechanism available to deceive fellow tenants. A defrauding tenant may execute multiple deeds through a straw-person and then later dispose of them,[340] or a joint tenant may convey her interest directly to her preferred heir with specific wait-and-see instructions.[341] The common strategy in each of these schemes is for the severance instrument to remain unrecorded so that it may be later suppressed if the passive, non-severing tenant should die first. All of these schemes are easily remedied by statute.

A few states have addressed stealth termination by making severance of an individual share in a joint tenancy effective only after an instrument indicating an intent to sever has been publically recorded.[342] These states are notable both for inhibiting stealth severances and the guidance they provide to the bench and bar.[343] For example, Colorado's joint tenancy statute establishes a clear mechanism by which a tenant may effectively terminate her interest in a joint tenancy via unilateral self-conveyance.[344] In that state, "a joint tenant may sever the joint tenancy between himself or herself and all remaining joint tenants by unilaterally executing and recording an instrument conveying her interest in real property to

338. *Id.* at 976. The court recognized the inherent fraud associated with unwitnessed and unrecorded unilateral transactions whereby one tenant attempts to secretly destroy a joint tenancy. However, the court did not have to directly confront the secret severance issue because the terminating tenant promptly recorded her self-conveyance.

339. UTAH CODE ANN. § 57-1-5 (West 2012).

340. *See, e.g.*, *Knickerbocker*, 912 P.2d at 972.

341. *See, e.g.*, Crowther v. Mower, 876 P.2d 876, 877–78 (Utah Ct. App. 1994).

342. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-431 (2012); CAL. CIV. CODE § 683.2 (West 2015); COLO. REV. STAT. § 38-31-101 (2012); MINN. STAT. § 500.19 (2001); UTAH CODE ANN. § 57-1-5 (LexisNexis 2012).

343. ARIZ. REV. STAT. ANN. § 33-431; CAL. CIV. CODE § 683.2; COLO. REV. STAT. § 38-31-101; MINN. STAT. § 500.19; UTAH CODE ANN. § 57-1-5.

344. COLO. REV. STAT. § 38-31-101.

himself or herself as tenant in common."[345] The Colorado approach is notable for enabling user-friendly terminations by self-conveyance instruments while prohibiting secret, wait-and-see schemes. Mere execution of the self-conveyance instrument alone is insufficient to effectuate a termination of the joint tenancy.[346] The scheming joint tenant who quietly executes and retains an instrument conveying his interest in joint tenancy to himself as a tenant in common is foiled. Colorado law demands that severance instruments be recorded and directly ties the timing of the severance event to formal recording rather than the date of execution by proclaiming that "[t]he joint tenancy *shall be severed upon recording* such instrument."[347] Minnesota's joint tenancy statute offers even more comprehensive guidance by outlining the specific methods for and legal effectiveness of severance:

> Severance of estates in joint tenancy. A severance of a joint tenancy interest in real estate by a joint tenant shall be legally effective *only if* (1) the instrument of severance is recorded in the office of the county recorder or the registrar of titles in the county where the real estate is situated; or (2) the instrument of severance is executed by all of the joint tenants; or (3) the severance is ordered by a court of competent jurisdiction; or (4) a severance is effected pursuant to bankruptcy of a joint tenant.[348]

California goes one step further by prohibiting deathbed severances made within three days of the severing tenant's death.[349] Any individual who takes title from a severing tenant by unrecorded instrument merely holds a defeasible tenancy in common that is subject to divestment if the nonsevering joint tenant survives the severing joint tenant.[350]

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345. *Id.*

346. *Id.*

347. *Id.* (emphasis added). One door left slightly open by the Colorado statute concerns whether the heirs of a joint tenant who executed a secret severance could still record the instrument postmortem and then claim an interest in the property. The plain language of the entire statute would appear to foreclose this approach. To be effective, unilateral self-conveyances must be executed and recorded. The clear intent of coupling these two requirements appears to be aimed at prohibiting wait-and-see schemes. Moreover, any relation-back claim would appear to fail because the statute says that severance occurs upon recording rather than on the date of the instrument. Finally, because the statute declares that death terminates a joint tenant's interest, a post-mortem severance would be ineffective because the deceased tenant has no interest to sever.

348. MINN. STAT. § 500.19 (2014) (emphasis added).

349. CAL. CIV. CODE § 683.2 (West 2015).

350. *Id.*

Thus, unscrupulous tenants in these states must affirmatively choose between being equally yoked to the survivorship gamble or committing to an immediate severance. The defrauding tenant cannot take a wait-and-see approach and expect the post-death discovery of his unrecorded severance to be effective. These types of recording mandates are commendable for foreclosing fraudulent schemes by unscrupulous tenants. What they lack is any requirement for transparency in the severance context. Other than those tenants who spend their days combing through land records, recording statutes fail to promote actual notice among joint tenants, leaving the vast majority in the dark.

d) The Severance High Road: Recording and Actual Notice

As we have seen, in today's world, individuals in traditional and non-traditional relationships routinely use joint tenancies for asset management in an array of contexts.[351] The survivorship feature offers a will-substitute opportunity that avoids probate and eases transitions in property ownership. Another alluring aspect of these estates is that they are flexible. Any tenant may opt out of the survivorship feature in favor of a tenancy in common.[352] And, yet, their terminable nature should not be characterized by secrecy or the fear of unilateral severances being made unbeknownst to fellow tenants. A joint tenant should not be expected to gamble both on survivorship and transparency in the relationship. The nature of the relationship itself necessitates pellucidity, especially in the context of spouses, and courts have recognized that reliance and consideration often play a role in the survivorship estate as well as the expectations of the parties.[353]

A joint tenant who unilaterally severs without providing actual notice to her fellow tenants deprives them of the opportunity to plan their own disposition of the property both during life and after death. A tenant who is informed that she will no longer survive to full ownership may no longer desire to continue maintaining, improving, and paying taxes on the property. Instead, she may decide to sell what

351. *See supra* notes 184–88 and accompanying text.

352. *See supra* Section IV.A.

353. *See, e.g.*, Hendrickson v. Minneapolis Fed. Sav. & Loan Ass'n, 161 N.W.2d 688, 692 (Minn. 1968) ("If the survivor had taken some irrevocable action in reliance upon the creation or existence of the joint tenancy, or if some consideration was given or received when the joint tenancy was created, it would seem reasonable to insist that unilateral action would not be effective to deprive the passive joint tenant of the rights so created.").

is now a tenancy in common interest or, at a minimum, consider who among her heirs should receive her interest in the property.

On one end of the joint tenancy spectrum stands the inseverable joint tenancy whose incident of survivorship cannot be abolished. At the other stands the traditional joint tenancy estate that may be unilaterally severed by a single tenant at-will without notice or consent afforded other tenants. Neither inflexibility nor secrecy is an appropriate model for the modern joint tenancy estate. Recording statutes that offer constructive knowledge and objective criteria for effectuating severance by a single tenant are commendable, but fail to recognize that constructive notice is rarely notice at all. Thus, a middle-ground and higher road that embraces flexibility and transparency is needed—one that couples recording with actual notice.

As the Illinois Supreme Court acknowledged, "it is necessary for the common law to keep pace with the gradual changes of trade, commerce, arts, inventions, and the exigencies and usages of the country."[354] Modification of the rules applicable to creation and severance of joint tenancies should be no different.[355] The model for the modern joint tenancy estate is one that may be created or terminated only based upon express intent. Modern joint tenancies should continue to maintain flexibility through unilateral severability. However, in order to impede fraud by unscrupulous tenants, severance should be effective only upon the pre-death recording of an instrument stating an intent to terminate the survivorship. And, finally, because of the nature of the relationship and the ease in which notice may be effectuated in the technologically advanced age in which we live, severance should not be effective without actual notice to all other joint tenants.

CONCLUSION

Like the legend of the Seven Sleepers of Ephesus,[356] the North Carolina joint tenancy with right of survivorship slept sealed in a cave for several centuries and awoke to a changed world. Because traditional joint tenancy jurisprudence remained dormant until 1991,[357] no North Carolina appellate court decision existed

354. Minonk State Bank v. Grassman, 447 N.E.2d 822, 824 (Ill. 1983) (quoting Amann v. Eaidy, 114 N.E.2d 412, 418 (Ill. 1953)).

355. *See id.*

356. *See, e.g.*, *Catholic Encyclopedia: The Seven Sleepers of Ephesus*, NEW ADVENT, http://www.newadvent.org/cathen/05496a.htm (last visited Aug. 17, 2015).

357. *See generally* Orth, *supra* note 3 (describing the revision of G.S. 41-2).

interpreting joint tenancy law until a mother unintentionally severed a newborn joint tenancy by executing a deed of trust and mortgage note at a real estate closing without the signatures of her fellow joint tenants.

The lack of an inventory of appellate court decisions in this state to inform predictable joint tenancy issues of creation and severance presents a refreshing and challenging opportunity for members of the practicing bar, judiciary, and General Assembly. In our opinion, the opportunity presented requires adopting an intent-based approach to both creation and severance. The joint tenancy of this millennium is not the Colonial American unwanted vestige of British aristocracy. Today, it is a useful, necessary, and flexible form of concurrent property ownership for asset management and disposition.

While the traditional four unities may continue to be present in the creation of some joint tenancies, three of the four are no longer legal prerequisites. Modern joint tenancies come into being because of express intent, not medieval unities requirements of time, title, and interest. Likewise, severance should be primarily based on an express intent to sever. Condoning accidental, counterintuitive severances based on the destruction of archaic "unities" technicalities makes no sense, and judicial precedent from other jurisdictions locked in the past should be ignored when sufficient intent exists to preserve, not terminate, a joint tenancy. The express intent standard required to create a joint tenancy should likewise apply to terminating a joint tenancy.

G.S. 41-2(a) should be revised to accommodate any form of language intended to create a joint tenancy with right of survivorship. While use of the precise formula "as joint tenants with right of survivorship" is the real property expert's choice, any word combination evincing an intent to hold property as joint tenants should be honored. In the absence of clarification by the General Assembly, progressive judicial interpretation reflecting modern trends and usage should be based on intent, even in the absence magic words.

Severance issues should also be clarified by the General Assembly. G.S. 41-2(a1), the legislative reaction to the *Countrywide* decision, is fundamentally flawed. It is practically indecipherable when applied to predictable fact situations and, therefore, must be reconsidered and clarified. Some easily identifiable severance issues related to divorce, partition, or the execution of a contract to convey or lease by one or more joint tenants should also be addressed by clarifying legislation. The issue of "stealth" severances—allowed

under the common law without notice to the other joint tenant or joint tenants—should also be addressed by embracing actual notice and recording requirements for instruments that specifically include language of express intent to sever.

Finally, there is an important preventive law role to be played by practicing attorneys. The inclusion of provisions stating the intent of joint tenant parties in contracts to convey, leases, and other instruments may go a long way in avoiding later disputes and litigation. Attorneys should also be acutely aware of possible severance issues in partition and divorce proceedings until legislative and judicial guidance is afforded.