

1-1-1986

S. 201: Ohio's Statue Creating a New Survivorship Tenancy

Patricia J. Reedy
University of Dayton

Follow this and additional works at: <https://ecommons.udayton.edu/udlr>



Part of the [Law Commons](#)

Recommended Citation

Reedy, Patricia J. (1986) "S. 201: Ohio's Statue Creating a New Survivorship Tenancy," *University of Dayton Law Review*. Vol. 11: No. 2, Article 9.

Available at: <https://ecommons.udayton.edu/udlr/vol11/iss2/9>

This Legislative Notes is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in University of Dayton Law Review by an authorized editor of eCommons. For more information, please contact mschlengen1@udayton.edu, ecommons@udayton.edu.

LEGISLATION NOTE

S. 201: OHIO'S STATUTE CREATING A NEW SURVIVORSHIP TENANCY

I. INTRODUCTION

On April 4, 1985, the 115th Ohio General Assembly passed Substitute Senate Bill 201 (S. 201),¹ amending section 5302.17 of the Ohio Revised Code. This amendment abolishes the estate of tenants by the entirety in Ohio and provides for the estate of survivorship tenancies. The estate of tenants by the entirety was initially created in 1971 when the Ohio General Assembly passed House Bill 878² in an attempt to establish certainty in the law regarding concurrent tenancies.³ How-

1. Act of Dec. 18, 1984, 1984 Ohio Legis. Serv. 5-752 (Baldwin) (codified in scattered sections of tits. 3, 13, 17, 53, and 57 OHIO REV. CODE ANN. (Page Supp. 1984)).

2. Act of Nov. 9, 1971, 1971 Ohio Legis. Serv. 4-298 (Baldwin) (codified as amended at OHIO REV. CODE ANN. § 5302.17 (Page 1981) (amended 1985)).

3. See generally 4A R. POWELL, THE LAW OF REAL PROPERTY ¶¶ 602-624.1 (1982). Concurrent tenancies consist of ownership or possession of property by two or more persons at the same time. Under common law, there are three ways to own property concurrently: (1) tenants in common, (2) joint tenancy, and (3) tenants by the entirety.

A tenancy in common estate requires only the unity of possession. Each tenant owns an undivided fractional portion of the property, although the portions are not necessarily equal. The estate can be subjected to partition by the cotenants or by creditors. Because there is no right to survivorship, an interest in tenancy in common property can be transferred by deed, will, or operation of law. Hence, upon the death of a person holding such an interest, the interest descends to the legal heirs. R. BOYER, SURVEY OF THE LAW OF PROPERTY 90 (3d ed. 1981). See also 2 T. McDERMOTT, OHIO REAL PROPERTY LAW AND PRACTICE §§ 5-21A to -21B (3d ed. 1966); 4A R. POWELL, *supra*, ¶ 602.

In contrast, joint tenancies require four unities: (1) time, (2) title, (3) interest, and (4) possession. Any act inconsistent with one or more of the unities will destroy the joint tenancy. Each joint tenant owns an interest in the undivided whole and is subject to the equal rights of the other joint tenants. Because joint tenancies carry the right of survivorship, the interest at a joint tenant's death will not pass to his or her heirs or devisees; rather, the interest will be extinguished in favor of the interests of his or her surviving cotenants. Thus, while a joint tenancy can be created by deed or will, it can only be destroyed by deed during the life of the tenants. However, because the joint tenancy is subject to the equal interest of each cotenant, a creditor can reach the estate and force partition, creating a tenancy in common in the remaining cotenants. R. BOYER, *supra*, at 80-81. See also 2 T. McDERMOTT, *supra*, § 5-22A; 4A R. POWELL, *supra*, ¶¶ 616-618.

A tenancy by the entirety is a special form of joint tenancy. In addition to the four unities required for a joint tenancy, the unity of person, i.e., marriage, is needed. This estate, under common law, only existed between a husband and wife, with each spouse owning an undivided whole in the property. Mutual consent was the only available method to defeat this estate. Like joint tenancies, a cotenant cannot make a valid testamentary transfer of his or her interest in the estate. Because tenancies by the entirety under common law were created to protect the family

ever, the characteristics of this statutory estate were not described in the statute, making it unclear whether it was equivalent to the common law tenants by the entirety or rather, a joint tenancy with the right of survivorship.⁴ Hence, it was left to the judiciary to resolve ambiguities arising from the provisions of the original section 5302.17. Lower court decisions interpreting section 5302.17 were inconsistent.⁵ It was not until 1984 that the Ohio Supreme Court addressed the issue in *Central National Bank v. Fitzwilliam*,⁶ holding that the statute created an estate equivalent to the common law tenants by the entirety.⁷ Dissatisfied with this holding, the Ohio General Assembly enacted S. 201.

While S. 201 resolves much of the uncertainty resulting from the 1971 enactment of section 5302.17, it is clear that questions concerning the rights of creditors⁸ and the sale of survivorship tenancy property⁹ remain unanswered. This note will address those areas where S. 201 has brought certainty to the law and it will also explore those areas requiring further clarification.

unit, a creditor of one spouse could neither levy upon the interest or enforce a lien against the interest of that spouse's entirety estate. R. BOYER, *supra*, at 88. See also 1 R. HAUSSER & W. VAN AKEN, OHIO REAL ESTATE LAW AND PRACTICE §§ 17.07-.13 (1985); 2 T. McDERMOTT, *supra*, § 5-24A; 4A R. POWELL, *supra*, ¶¶ 622-623.

4. 2 T. McDERMOTT, *supra* note 3, § 8-16A. See also 3 T. McDERMOTT, *supra* note 3, §§ 26-26C (3d ed. Supp. 1980).

In many states, under common law, a husband and wife can create an estate known as a tenancy by the entirety, where the interest is singular in the undivided whole of the property. See 2 T. McDERMOTT, *supra* note 3, § 8-16E. The enactment of § 5302.17 of the Ohio Revised Code in 1971 created a tenancy by the entireties. Although the terms appear similar, the presumption that the statutory estate is equivalent to the common law estate is erroneous. The use of the word "entireties" appears to indicate that multiple interests are involved. This discrepancy and confusion has been noted by commentators. See, e.g., Magee, *Tenancy by the Entirety: Ohio's New Estate*, 2 N. KY. ST. L.F. 69, 82 (1974); Comment, *The Ohio Entirety Estate: Alternative Approaches to Anticipated Problems*, 4 U. DAYTON L. REV. 425, 432-33 (1979). It should be noted, however, that a recent Ohio appellate decision rejected this argument, stating: "Although the word 'entirety' might be intellectually preferable to 'entireties,' the two words are used interchangeably in the literature, in the case law and in the statutes of other states when referring to the tenancy at issue herein." *Donvito v. Criswell*, 1 Ohio App. 3d 53, 56, 439 N.E.2d 467, 471 (1982). The author of this legislation note, nevertheless, has attempted to conform to the aforementioned distinction.

5. See *Donvito*, 1 Ohio App. 3d 53, 439 N.E.2d 467 (1982) (section 5302.17 created a common law tenancy by the entirety); *Jones v. Veit*, 6 Ohio Misc. 2d 4, 453 N.E.2d 1299 (C.P. Ct. 1984) (section 5302.17 created a statutory joint tenancy with the right of survivorship). For a discussion of the *Donvito* and *Jones* decisions, see *infra* notes 24-34 and accompanying text.

6. 12 Ohio St. 3d 51, 465 N.E.2d 408 (1984). See also *infra* notes 35-37 and accompanying text.

7. *Fitzwilliam*, 12 Ohio St. 3d at 54, 465 N.E.2d at 411.

8. See *infra* notes 83-107 and accompanying text.

9. See *infra* notes 107-16 and accompanying text.

II. THE LAW PRIOR TO SENATE BILL 201

As early as 1826, the Ohio Supreme Court addressed the establishment and characteristics of joint tenancies in Ohio.¹⁰ In *Sergeant v. Steinberger*,¹¹ the Ohio Supreme Court held that a devise to a husband and wife and their heirs created a presumption of a tenancy in common, and that the surviving spouse had no right of survivorship.¹² However, the supreme court also recognized that survivorship rights could be created by an express provision in the granting instrument.¹³ Therefore, while a devise to cotenants created a presumption of a tenancy in common, a joint tenancy with a right of survivorship could be created by "express language" in a deed or other granting instrument and would be upheld by the Ohio courts.¹⁴

Although the Ohio Supreme Court recognized that survivorship rights could be created, it never specifically indicated what "express language" was necessary to create a joint tenancy with the right of survivorship. This failure to clarify "express language" resulted in much confusion. It appeared that any *clear* intention by the parties to the conveyance creating a joint tenancy with the right of survivorship would suffice.¹⁵ The courts, however, disagreed as to the degree of in-

10. See *Sergeant v. Steinberger*, 2 Ohio 305 (1826).

11. *Id.*

12. *Id.* at 306. The court refuted the contention that the surviving spouse had a right of survivorship, stating:

The reasons which gave rise to this description of estate in England, never existed with us. The *jus accrescendi* is not founded in principles of natural justice, nor in any reasons of policy applicable to our society or institutions. But, on the contrary, it is adverse to the understandings, habits, and feelings of the people.

Id. See also *Farmers' & Merchants' Nat'l Bank v. Wallace*, 45 Ohio St. 152, 165, 12 N.E. 439, 452 (1887) ("Under the laws of Ohio, estates in joint tenancy do not exist, and the decisions have always been averse to estates by entireties. When land, therefore, is granted to husband and wife, they take by moieties as tenants in common."); *Kerwhacker v. Railroad Co.*, 3 Ohio St. 172, 178 (1854) ("The common law, so far as it is related to the subject of the estate by joint tenancy, would not be recognized in Ohio . . ."); *Penn v. Cox*, 16 Ohio 30, 32 (1847) ("[O]n the death of the wife, her legal heirs become tenants in common with the surviving husband.") (citing *Sergeant*, 2 Ohio 305 (1826)); *Lessee of Miles v. Fisher*, 10 Ohio 1, 5 (1840) (joint tenancies with common-law incidents do not exist in Ohio).

13. See, e.g., *In re Estate of Hutchinson*, 120 Ohio St. 542, 166 N.E. 687 (1929). *Hutchinson* involved a stock certificate, held by a husband and wife. The ownership clause of the certificate stated that each spouse, as tenants in common, had an undivided equal ownership interest in the certificate, remainder to the survivor. *Id.* at 543, 166 N.E. at 688. The funds for the stock were derived from the sale proceeds of real estate previously held by the husband and wife as tenants in common. *Id.* The court held: "If . . . 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." *Id.* at 552, 166 N.E. at 691.

14. See *id.* at 552, 166 N.E. at 691. Express language creating a joint tenancy with rights of survivorship was the only form of joint ownership recognized in Ohio until the passage of § 5302.17 in 1971. See OHIO REV. CODE ANN. § 5302.17 (Page 1981) (amended 1985).

15. See, e.g., *Lewis v. Baldwin*, 11 Ohio 352 (1842). The *Lewis* court stated:

tent and the language necessary to create such an estate.¹⁶ Hence, practitioners and their clients were uncertain whether the estate they created would be recognized as intended. If a court determined that the granting instrument created a tenancy in common, then upon death a cotenant's estate would be subject to Ohio's probate law.¹⁷ However, if a court found that the instrument created a joint tenancy with a right of survivorship, the property would not be subject to probate as the surviving cotenant would succeed to his or her interest by virtue of deed form.¹⁸ Therefore, "sufficient language" in the granting instrument indicating the intent to create a joint tenancy with right of survivorship was critical, although what constituted sufficient language was never established.

The Ohio General Assembly's dissatisfaction with the Ohio Supreme Court's interpretation of concurrent tenancies, and the uncertainty involved in creating such estates, led to the enactment of section 5302.17¹⁹ in 1971. The statute permitted a husband and wife²⁰ to create a tenancy by the entireties if the deed conveyed a real property interest to the husband and wife, was executed in accordance with the law, and substantially complied with the deed form set out in the statute.²¹ The statute, however, failed to define many of the characteristics

He holds title, not upon the principle of survivorship, as an incident to a joint tenancy, but as a grantee in fee, as survivor, by the operative words of the deed. The entire estate, by the death of the wife, is vested in him and his heirs. This is the effect of the words of grant, contained in the instrument of conveyance.

Id. at 355. See also *Hutchison*, 120 Ohio St. 542, 166 N.E. 687 (1929).

16. While a preference exists for tenancies in common as a matter of construction, most states will recognize the estate of joint tenancy when the language of the conveyance clearly indicates an intention to create that estate. Martin, *The Incident of Survivorship in Ohio*, 3 OHIO ST. L.J. 48, 49 (1937). Hence, a joint tenancy can generally be created by the conveyance of a property interest by deed or will to two or more persons as joint tenants. 4A R. POWELL, *supra* note 3, ¶ 616. Ohio courts, however, continually rejected common-law cotenancies as a means of automatically vesting sole ownership in the survivor. See, e.g., *Casey v. Gallagher*, 11 Ohio St. 2d 42, 58, 227 N.E.2d 801, 813 (1967). Nonetheless, an express survivorship deed has been accepted in Ohio. See *Curlis v. Pursley*, 10 Ohio Misc. 266, 270, 266 N.E.2d 276, 280 (C.P. Ct. 1967) ("[I]f there is proper language, a joint and survivorship deed may be created."). See also *supra* notes 13-15 and accompanying text.

17. This is because a cotenant's interest can be passed by will or, if intestate, it descends to the decedent's legal heirs. See R. BOYER, *supra* note 3, at 90.

18. See 4A R. POWELL, *supra* note 3, ¶ 619.1.

19. OHIO REV. CODE ANN. § 5302.17 (Page 1981) (amended 1985).

20. It appears that the Ohio General Assembly limited tenancies by the entireties in real property to solely husbands and wives. See OHIO LEGISLATIVE SERV. COMM'N, BILL ANALYSIS: AM. H.B. 878 (AS REPORTED BY S. JUDICIARY) 2 (1971) [hereinafter cited as BILL ANALYSIS: H.B. 878] (on file with University of Dayton Law Review). In the absence of any case law, however, it is uncertain whether an estate created as a statutory tenancy by the entireties would have been effective if created by persons who were not married.

21. See OHIO REV. CODE ANN. § 5302.17 (Page 1981) (amended 1985). The statute also permitted other persons to convey to the husband and wife as tenants by the entireties. See *id.*

of the new estate²² and, unfortunately, was not accompanied by explanatory comments. Consequently, it was uncertain whether the Ohio General Assembly had intended to create a statutory joint tenancy with right of survivorship or a common law tenancy by the entirety.²³

The judiciary's efforts to interpret the legislature's intent resulted in conflicting decisions. The Ohio Court of Appeals for the Ninth District, in *Donvito v. Criswell*,²⁴ noted the technical inconsistencies raised by the appellant regarding the statutory language of section 5302.17.²⁵ The court concluded, however, that the Ohio General Assembly intended to create the common law estate of tenancy by the entirety.²⁶ In *Donvito*, the court was faced with the issue of whether creditors of one spouse could reach property held by a husband and wife as tenants by the entireties under section 5302.17. The court in *Donvito* reviewed the characteristics of the common law entirety estate and determined that the five unities required to create a common law entirety estate (time, title, interest, possession, and person) were also necessary to create a statutory tenancy by the entireties.²⁷ Consequently, as only a married couple could satisfy all five unities, the statutory estate was limited to devises or conveyances to a husband and wife. Because the property was held as a single "entity," neither spouse could alienate or sever the property without the other spouse's consent. Therefore, a creditor of

22. For example, a creditor's rights against one spouse's interest in an entirety estate and the effects of the probate process against such an estate remained unanswered. Thus, the judiciary was forced to address these issues. See *infra* notes 24-34 and accompanying text.

23. Until the enactment of § 5302.17 in 1971, it was clear that the common-law tenancy by the entirety did not exist in Ohio. See *Sergeant*, 2 Ohio at 305.

24. 1 Ohio App. 3d 53, 439 N.E.2d 467 (1982).

25. *Id.* at 56, 439 N.E.2d at 469. The word *entireties*, as used in the statute, was challenged by the appellant who argued that it indicated multiple interests in the estate rather than a single interest of the husband-wife entity. In addition, the phrases "conveys such interest to the survivor," "remainder to the survivor," and "vest in the surviving spouse" were challenged as being inconsistent with the theory of survivorship adhered to by the common-law tenancy by the entirety. See *id.* at 56, 439 N.E.2d at 471. *Donvito* argued that because "both spouses are vested with the entire estate from its inception [under common law], there is nothing to vest upon one spouse's death . . ." *Id.* Therefore, *Donvito* argued, the estate created was a joint tenancy with the right of survivorship. *Id.* at 55, 439 N.E.2d at 471. See also Magee, *supra* note 4, at 73; Comment, *supra* note 4, at 432-33.

26. *Donvito*, 1 Ohio App. 3d at 56, 439 N.E.2d at 471. In support of its decision, the court noted that the legislature amended the statute before enactment, removing any reference to joint tenancy, and inserted the words "estate by the entireties." *Id.* at 55, 439 N.E.2d at 471. As the court noted, "The conscious use of the term 'estate by the entireties' evidence[d] an intent to statutorily create a unique common law estate previously abolished in Ohio." *Id.* at 56, 439 N.E.2d at 471. See also H.B. 878, 109th Ohio General Assembly, Reg. Sess., 134 OHIO HOUSE J. 347-48, 737 (1971) (language in bill changed from "joint tenancy with survivorship" to "estate by the entireties").

27. *Donvito*, 1 Ohio App. 3d at 55, 439 N.E.2d at 468. For a discussion of the five unities,

one spouse could not force partition or reach the debtor-spouse's interest in the entirety property.²⁸ Furthermore, because no interest was conveyed at the death of a spouse, the entirety property would not be included in the probate estate.²⁹

Shortly, after *Donvito* was decided, the Ohio Court of Common Pleas for Lake County, in *Jones v. Veit*,³⁰ also addressed the issue of whether creditors of one spouse could partition property held by a husband and wife as tenants by the entirety under the statute. In *Veit*, however, the court reached an entirely different conclusion from that reached in *Donvito*. The *Veit* court held that the common law estate of tenants by the entirety did not exist in Ohio, and that section 5302.17 merely created a right of survivorship between cotenant parties to a deed.³¹ Under this interpretation, it was possible for the creditor of one spouse to reach the debtor-spouse's interest in the estate or levy upon the entirety property.³² The court rejected *Donvito's* interpretation of section 5302.17, stating: "Each man under the law is responsible for his just debts and cannot change his obligations by changing the title to his assets."³³ The court held that although the statutory estate created a mechanism to avoid the cost and delay of probate, such an estate could not be used to hold creditors at bay.³⁴

28. *Donvito*, 1 Ohio App. 3d at 56, 439 N.E.2d at 472. The court, however, noted that a debt mutually incurred by the husband and wife was reachable by a creditor. *Id.*

29. *Id.* at 55, 439 N.E.2d at 470-71 (citing *Magee*, *supra* note 4, at 73). See also *In re Application of County Recorder*, 13 Ohio App. 3d 292, 468 N.E.2d 1147 (1984). The court in *County Recorder* held that real property, registered on the Torrens Land Title Register and owned as an estate by the entirety, was not subject to probate costs because title automatically vested in the surviving spouse. *Id.* at 296, 468 N.E.2d at 1151. Whereas each tenant owned an undivided whole in the property during their lives, upon the death of one spouse, the surviving spouse became the owner of the whole.

30. 6 Ohio Misc. 2d 4, 453 N.E.2d 1299 (C.P. Ct. 1984).

31. *Id.* at 5, 453 N.E.2d at 1301.

32. See *id.* at 6, 453 N.E.2d at 1302. The court explained that the right of survivorship created by § 5302.17 provided a mechanism to avoid cost and delay probate. *Id.* at 5, 453 N.E.2d at 1301. It was not the intention of the legislature, however, to "create any rights or . . . [limit the] rights of third persons by the voluntary election of the husband and wife to create a contract between them." *Id.* at 4-5, 453 N.E.2d at 1300-01.

33. *Id.* at 5, 453 N.E.2d at 1301.

34. *Id.* The court in *Veit* favored the "all interest reachable rule" discussed in *Sawada v. Endo*, 57 Hawaii 608, 561 P.2d 1291 (1977), which provides that a creditor may levy upon the individual interest of either spouse. *Id.* at 611, 561 P.2d at 1294. However, under the "all interest reachable rule," a spouse's interest is subject to the other spouse's contingent right of survivorship. *Id.*

The court in *Sawada* identified three additional theories concerning cotenancy property and its amenability to levy and execution by the creditors of one spouse. The states that follow a very strict interpretation of the common-law rule, unaffected by the Married Woman's Act, hold that a husband has exclusive control of the tenancy property and it cannot be reached by creditors. *Id.* Under the "right of survivorship reachable rule," the contingent right of survivorship of either spouse is separately alienable and attachable by creditors; however, the use and profits may

The inconsistent results in *Donvito* and *Veit* finally led the Ohio Supreme Court, in *Central National Bank v. Fitzwilliam*,³⁶ to address the issue of a creditor's ability to force partition of spousal property owned as tenants by the entirety. In *Fitzwilliam*, the supreme court adopted the position taken by the appellate court in *Donvito* and held that "the estate by the entirety created by [section] 5302.17 [was] equivalent to a common-law estate by the entirety [and was] not alienable by one spouse without the consent of the other."³⁶ Thus, the Ohio Supreme Court adopted the common-law interpretation that a creditor of an individual spouse could not attach, sell, or place a levy upon property held as a tenancy by the entirety.³⁷

The *Fitzwilliam* decision expressly resolved the question of creditors' rights and probate costs under the provisions of section 5302.17, as enacted in 1971. However, certain characteristics of the statutory estate remained undefined. Although the *Fitzwilliam* court held that the Ohio General Assembly authorized an estate equivalent to the common law tenancy by the entirety, in actuality, variations between the statutory and the common-law estates existed. For example, the statute explicitly specified the language and the form necessary to create a tenancy by the entirety estate in Ohio.³⁸ If strictly construed, the statutory language required the tenancy by the entirety estate to be created by deed.³⁹ To the contrary, the majority of jurisdictions that

neither be alienated or attached during coverture. *Id.* at 612, 561 P.2d at 1294. The "no interest reachable rule," followed by the majority of jurisdictions, holds that an attempted conveyance by either spouse is completely void and the estate is not subject to the separate debts of only one spouse. *Id.* See also Yzenbaard, *Ohio's Beleaguered Entirety Estate*, 49 U. CIN. L. REV. 99, 102-04 (1980).

35. 12 Ohio St. 3d 51, 465 N.E.2d 408 (1984). In *Fitzwilliam*, the trial court had entered judgment for the husband and wife, holding that the marital property could not be partitioned to satisfy the debts of only one spouse, because the property was held as an estate by the entirety under § 5302.17. *Id.* A divided court of appeals reversed, ruling that § 5302.17 simply created a joint tenancy with right of survivorship that could be reached by judgment creditors of either joint tenant. This decision conflicted with *Donvito*, and the record of this case was certified to the Ohio Supreme Court for final determination. *Id.*

36. *Id.* at 54, 465 N.E.2d at 411. The Ohio Supreme Court also accepted the other characteristics of a common-law estate by the entirety. See *id.* at 53, 465 N.E.2d at 410. For a summary of those characteristics, see *supra* note 3.

37. *Fitzwilliam*, 12 Ohio St. 3d at 53-54, 465 N.E.2d at 410-11. The supreme court's adoption of the common-law definition indicates that it would not subject property held as a tenancy by the entirety to probate, thus avoiding probate costs. See *id.* See also *supra* note 29 and accompanying text.

38. OHIO REV. CODE ANN. § 5302.17 (Page 1981) ("A deed conveying any interest in real property to a husband and wife, and in substance following the form set forth in this section, creates an estate by the entirety in the grantees . . .") (emphasis added) (amended 1985).

39. See *id.* But see Baker, *The New Ohio Estate by the Entireties—A Medieval Pandora's Box Opened*, 45 OHIO ST. B.A. REP. 1663, 1666-67 (1972) (contending that it would be illogical for the Ohio General Assembly to allow an estate to be created in one type of document (deed),

recognize the common-law tenancy by the entirety allow the estate to be created from a conveyance or devise to husband and wife whether by deed, will, or other instrument.⁴⁰ These jurisdictions regard it as immaterial whether the instrument makes express reference to the marital relationship⁴¹ or the parties' understanding of the estate that has been created.⁴²

In addition, the method for conveying property under former section 5302.17 was inconsistent with the method accepted in most jurisdictions for conveying common law entirety estates. Under the common-law tenancy by the entirety, a conveyance from a grantor to himself and his or her spouse was ineffective, unless the property was first conveyed from the grantor to a third party, often referred to as a "strawman,"⁴³ who then conveyed the entire interest back to the husband and wife.⁴⁴ Ohio's 1971 statute, however, eliminated the necessity for a third-party transfer, providing: "A husband and wife who are the sole owners of real property, as joint tenants or tenants in common, may create in themselves an estate by the entireties"⁴⁵ The statute also provided: "A spouse who is the sole owner of any real property may create in himself or herself and the other spouse an estate by the entireties"⁴⁶ Therefore, while it was apparent the legislature in-

while prohibiting use of other means (i.e., a will)); Magee, *supra* note 4, at 84-85 (after a search of treatises and unreported decisions, the author could find no reason to prevent the creation of a tenancy by the entireties by will).

40. See, e.g., *Hunt v. Blackburn*, 128 U.S. 464 (1888); *Matthews v. McCain*, 125 Fla. 840, 170 So. 323 (1936); *Hiles v. Fisher*, 144 N.Y. 306, 39 N.E. 337 (1895); *In re Meyer's Estate*, 232 Pa. 89, 81 A. 145 (1911).

41. See, e.g., *United States v. Ragsdale*, 206 F. Supp. 613 (W.D. Tenn. 1962); *McLaughlin v. Rice*, 185 Mass. 212, 70 N.E. 52 (1904).

42. See, e.g., *American Cent. Ins. Co. v. Whitlock*, 122 Fla. 363, 165 So. 380 (1936); *Odum v. Russell*, 179 N.C. 6, 101 S.E. 495 (1919).

43. The use of a "strawman" was necessary under common law to create a concurrent estate, especially between spouses. Under the common law, in order to create a joint tenancy or a tenancy by the entirety, it was necessary for one spouse to first convey the entire estate to a "strawman," who would then convey the estate back to the husband and wife as joint tenants or tenants by the entirety. E. RABIN, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* 298 (2d ed. 1981).

44. See 4A R. POWELL, *supra* note 3, ¶ 622.

45. OHIO REV. CODE ANN. § 5302.17 (Page 1981) (amended 1985).

46. *Id.* This provision was added to the original § 5302.17 on November 22, 1973, by the 110th Ohio General Assembly after much criticism from practicing attorneys. Act of Nov. 22, 1973, 1973 Ohio Legis. Serv. 6-335 (Baldwin) (codified at OHIO REV. CODE ANN. § 5302.17 (Page 1981) (amended 1985)). See *Baker, supra* note 39, at 1667 (explaining the concerns and implications of § 5302.17 as it was originally enacted). See also OHIO LEGISLATIVE SERV. COMM'N, BILL ANALYSIS: AM. H.B. 571 (AS REPORTED BY S. JUDICIARY) 1 (1973) [hereinafter cited as BILL ANALYSIS: H.B. 571] (on file with University of Dayton Law Review). The purpose of the bill was to allow a person to convey an equal interest with survivorship rights directly to the spouse, thereby eliminating any uncertainties as to whether it was necessary to first convey the property to a third party. Nonetheless, even the amended statute remained unclear about whether

tended to eliminate the need for transferring property to a third-party "strawman" by creating the statutory estate,⁴⁷ it was uncertain whether Ohio courts would recognize an estate under the statute as the equivalent of a common-law tenancy by the entirety where it was created in a transfer inconsistent with the common law.

In hindsight, it is fairly clear that former section 5302.17 did not resolve the confusion that existed prior to its enactment by the Ohio General Assembly.⁴⁸ Moreover, the judiciary's attempt to define the characteristics of the estate were ineffective.⁴⁹ Numerous complaints by practitioners prompted the Ohio Legislature along with the Ohio State Bar Association,⁵⁰ to re-evaluate section 5302.17. Governor Rhodes, however, vetoed the first attempt to amend the statute, fearing the proposed amendment would further confuse the issue.⁵¹ Finally, fourteen years after the enactment of section 5302.17, the Ohio General Assembly enacted S. 201,⁵² eliminating the estate of tenancies by the entireties in Ohio and creating a statutory survivorship tenancy.

III. SENATE BILL 201

The Ohio Supreme Court interpreted former section 5302.17 of the Ohio Revised Code as creating an estate equivalent to a common-law tenancy by the entirety.⁵³ This action by the court resolved many of the questions generated by the statute. However, section 5302.17

spouses who were not the sole owners of property could convey their interests to themselves as tenants by the entireties.

47. BILL ANALYSIS: H.B. 571, *supra* note 46, at 1.

48. See *supra* notes 15-19 and accompanying text.

49. See *supra* notes 24-34 and accompanying text.

50. See "LEGIS-letter", 58 OHIO ST. B.A. REP. 94, 95 (1985) (stating that S. 201 was the product of the Ohio State Bar Association Real Property Section). See also Telephone interview with Sherman S. Hollander, of Terrell, Salim, Hollander & Esper, Cleveland, Ohio, chairman of the Ohio State Bar Association Real Property Section (Sept. 6, 1985); telephone interview with Dwight Shipley, Grove City, Ohio, past chairman of the Ohio State Bar Association Real Property Section (Sept. 5, 1985) (speaking on the numerous problems § 5302.17 created and the active role taken by the Ohio State Bar Association to amend the statute).

51. Governor Rhodes' Veto Message, 138 OHIO HOUSE J. ____ (July 28, 1980) (concerning Amended Senate Bill 173) (on file with University of Dayton Law Review). In 1980, the Ohio House and the Senate passed S. 173 in an attempt to remove the confusion created by the original statute. S. 173 set out the characteristics of the estate created. The bill, however, was vetoed by Governor Rhodes because of his concern that S. 173 "negate[d] the tenancy by the entireties estate in Ohio but [did] not repeal that statute which created this estate, section 5302.17." *Id.* at _____. In his veto message, the Governor indicated that if it was "the General Assembly's intent[ion] to negate the estate of tenancy by the entireties in Ohio, then it should be done so cleanly." *Id.*

52. Act of Dec. 18, 1984, 1984 Ohio Legis. Serv. 5-752 (Baldwin) (codified in scattered sections of tits. 3, 13, 17, 53, and 57 OHIO REV. CODE ANN. (Page Supp. 1984)).

53. Central Nat'l Bank v. Fitzwilliam, 12 Ohio St. 3d 51, 53-54, 465 N.E.2d 408, 410-11 (1984). See *supra* notes 35-37 and accompanying text.

contained characteristics inconsistent with a common-law tenancy by the entirety.⁵⁴ Specifically, it remained unclear whether a grantor could create a tenancy by the entireties estate by way of a transfer to himself or herself, or to his or her spouse, without a prior transfer to a third-party "strawman,"⁵⁵ and whether the courts would allow the estate to be created by various granting instruments or by deed only.⁵⁶ These questions, and the general discontent of Ohio practitioners with the law concerning concurrent tenancies, led the Ohio General Assembly to pass S. 201.⁵⁷

S. 201 appeared to answer many of the unresolved questions surrounding concurrent tenancies in Ohio. The estate of tenancies by the entireties was eliminated and a statutory survivorship tenancy, available to all persons, married or unmarried, was created.⁵⁸ In addition, the characteristics and ramifications of this statutory estate were expressly enumerated,⁵⁹ thus enabling legal practitioners to accurately create the desired estate.

The Ohio General Assembly specifically identified the language necessary to create a survivorship tenancy under S. 201. Strictly construed, the statutory estate, under former section 5302.17, could only be created by deed and in the form contained within the statute.⁶⁰ Under the new statute, a survivorship tenancy may be created by deed, will, or any other granting instrument, provided the document contains language which expresses a clear intent to create a statutory survivorship tenancy.⁶¹ The new statute permits a liberal and more practical construction of the language in the granting instrument.⁶² Accordingly, strict adherence to the form outlined in section 5302.17 is no longer required to create a statutory survivorship tenancy. Nonetheless, adherence is recommended. In the event the intention of the parties is uncertain, the presumption is that title was conveyed as tenants in

54. See *supra* notes 38-48 and accompanying text.

55. See *supra* notes 43-48 and accompanying text.

56. See *supra* notes 38-43 and accompanying text.

57. Act of Dec. 18, 1984, 1984 Ohio Legis. Serv. 5-752 (Baldwin) (codified in scattered sections of tits. 3, 13, 17, 53, and 57 OHIO REV. CODE ANN. (Page Supp. 1984)).

58. See OHIO REV. CODE ANN. § 5302.17 (Page Supp. 1984).

59. See *infra* notes 60-75 and accompanying text.

60. OHIO REV. CODE ANN. § 5302.17 (Page 1981) (amended 1985).

61. *Id.* § 5302.20(A) (Page Supp. 1984). See also OHIO LEGISLATIVE SERV. COMM'N, BILL ANALYSIS: SUB. 201 (AS REPORTED BY H. CIVIL & COMMERCIAL LAW) 3 (1984) [hereinafter cited as BILL ANALYSIS: SUB. S.B. 201] (on file with University of Dayton Law Review).

62. See OHIO REV. CODE ANN. § 5302.20(A) (Page Supp. 1984). For example, the statute applies a liberal construction to "[t]he use of the word 'or' between the names of two or more grantees or devisees," by interpreting it as if the word "and" had been used between the names. *Id.* Moreover, the 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." *Id.*

common.⁶³

The amended statute also clarifies the issue of whether third-party "strawman" transfers are required to create the statutory estate.⁶⁴ Whereas the use of a "strawman" in the transfer of real property was quite prevalent at common law, the Ohio General Assembly has always viewed it as an unnecessary step.⁶⁵ The legislature first attempted to eliminate this needless transaction in 1971. However, this attempt was not entirely successful because it remained uncertain which types of granting instruments could be used to create a statutory tenancy by the entireties estate and whether such an estate could be created without the use of a third-party "strawman."⁶⁶ Section 5302.17, as amended by S. 201, expands the statutory language so that a grantor of a survivorship tenancy estate, who also became a grantee, can effectively convey his or her interest to all grantees, including himself or herself, by deed, will, or other conveyance, "in the proportion and manner indicated in the deed."⁶⁷ Thus, regardless of the combination of parties that are involved in the transfer and acceptance of a deed creating a survivorship tenancy, a third-party "strawman" transfer is clearly no longer required.

The new law continues to treat probate costs in a manner identical to the treatment under former section 5302.17. Prior law did not require the assessment of probate charges as the property interest "vested" automatically in the survivor of a tenancy by the entireties estate.⁶⁸ Under the new statute, property interests also "vest" automatically in the survivor of the survivorship tenancy estate.⁶⁹ To avoid assessment of probate charges under the new law, section 319.54(F)(3)(n) was amended to include in its list of non-probate transfers the following: (1) transfers between spouses creating survivorship tenancies; (2) transfers to surviving spouses of survivorship tenancies; and (3) transfers from the grantor to himself or herself and others creating survivorship tenancies.⁷⁰

63. See *id.* § 5302.19. See also W. Heaphy, *Tenancies by the Entireties in Ohio 2-3* (Nov. 16, 1984) (unpublished manuscript) (on file with University of Dayton Law Review); BILL ANALYSIS: SUB. S.B. 201, *supra* note 61, at 5-6.

64. See OHIO REV. CODE ANN. § 5302.18 (Page Supp. 1984).

65. BILL ANALYSIS: SUB. S.B. 201, *supra* note 61, at 5. See also "LEGIS-letter", *supra* note 50, at 95.

66. BILL ANALYSIS: SUB. S.B. 201, *supra* note 61, at 5.

67. OHIO REV. CODE ANN. § 5302.20 (Page Supp. 1984).

68. See *id.* § 5302.17 (Page 1981) (amended 1985). See *supra* note 29 and accompanying text for discussion of the common-law treatment of probate costs.

69. OHIO REV. CODE ANN. § 5302.17 (Page Supp. 1984). See also BILL ANALYSIS: SUB. S.B. 201, *supra* note 61, at 5-6.

70. OHIO REV. CODE ANN. § 319.54(F)(3)(n) (Page Supp. 1984).

Additionally, the elimination of tenancy by the entirety and the adoption of a survivorship tenancy will not cause the gross estate of a decedent-spouse to be treated any differently for federal estate tax purposes. Under section 2040(b) of the Internal Revenue Code, the gross estate of a decedent-spouse will include one-half the value of any interest in which a husband and wife were cotenants with rights of survivorship, provided the husband and wife were the only cotenants.⁷¹ Ohio's new survivorship tenancy statute permits a husband and wife to be cotenants in real property with rights of survivorship.⁷² Therefore, with respect to the federal estate tax, the gross estate of a decedent-spouse will not be affected by S. 201.

Possibly the most important area addressed by the Ohio General Assembly in the amended statute was the right of creditors to compel partition of the property or to place a lien against the interest of the survivorship tenant. The 1971 statute was silent in this area, thereby necessitating judicial determination of a creditor's rights against a cotenant debtor.⁷³ The amended statute, however, explicitly states that a creditor can enforce a lien against the interest of a survivorship tenant and compel partition of real property held as a survivorship tenancy.⁷⁴ The determination that there is a legitimate lien destroys the survivorship tenancy, creating a tenancy in common which gives each tenant an equal undivided share in the title; the court is then entitled to order the sale of the fractional interest of the lien debtor.⁷⁵

71. I.R.C. § 2040(b)(1) (1982) ("[I]n the case of any qualified joint interest [held by husband and wife], the value included in the gross estate with respect to such interest by reason of this section is one-half of the value of such qualified joint interest."). Section 2040(b) of the Internal Revenue Code of 1954 has eliminated the inclusion of qualified joint interests in the decedent spouse's estate based on their proportionate contribution to the joint tenancy. *Id.* § 2040(b). Under this section, the court simply includes one-half of the value of all qualified joint interests held by a husband and wife, and any argument contending that estate tax should not be assessed on a tenancy by the entirety estate because the property is held as an undivided whole is without merit. It should be noted, however, that under § 2040(a) of the Internal Revenue Code, the estate of a decedent-cotenant includes property held by cotenants other than husband and wife, to the extent of the decedent's proportionate contribution to the joint tenancy. *Id.* § 2040(a).

Section 2040(b) has defined "qualified interests" as property held by a husband and wife as joint tenants with right of survivorship or as tenants by the entirety if the husband and wife are the only cotenants. *Id.* § 2040(b)(2). This interpretation raises the question of whether Ohio's survivorship tenancy will be deemed a qualified interest under § 2040(b). Section 2040(b) is not governed by the labels applied to various interests by state law. Nevertheless, where a husband and wife are the only cotenants in an estate with rights of survivorship, the interest should be considered a qualified joint interest for purposes of § 2040(b).

72. OHIO REV. CODE ANN. § 5302.17 (Page Supp. 1984).

73. See *supra* notes 24-37 and accompanying text.

74. OHIO REV. CODE ANN. § 5302.20(C)(4) (Page Supp. 1984).

75. *Id.*

IV. QUESTIONS UNANSWERED BY SENATE BILL 201

S. 201,⁷⁶ which amended section 5302.17 of the Ohio Revised Code, is a complete and comprehensive law, defining the characteristics and ramifications of a survivorship tenancy in Ohio. Nevertheless, several important questions remain unanswered. First, the language used within the statute is apparently inconsistent with the intent of the Ohio General Assembly, thus creating confusion regarding the characteristics of the estate.⁷⁷ Second, the legislature has still not completely addressed the rights of creditors, as well as the intent of the parties creating a survivorship tenancy.⁷⁸ Finally, the legislature has added a new characteristic to concurrent estates, thereby making transferability of the estate undesirable.⁷⁹

The statute authorizes the creation of a survivorship tenancy which is characteristically different from a joint tenancy at common law.⁸⁰ Provisions throughout the Code were amended, eliminating reference to joint tenancies and tenancies by the entireties.⁸¹ Thus, it appears that the Ohio General Assembly intended to completely abolish future joint tenancies in Ohio. However, two sections of the statute speak of the "joint interest"⁸² of the tenants, and such language is inconsistent with the intent to abolish joint tenancies. If the legislature intended to strike joint tenancies from Ohio law, the use of the word "joint" within the new statute only frustrates the desired purpose. A reference to the "cotenant's interest" would have alleviated this potential source of confusion.

The second area of potential difficulty presented by S. 201 involves

76. Act of Dec. 18, 1984, 1984 Ohio Legis. Serv. 5-752 (Baldwin) (codified in scattered sections of tits. 3, 13, 17, 53, and 57 OHIO REV. CODE ANN. (Page Supp. 1984)).

77. See *infra* notes 80-83 and accompanying text.

78. See *infra* notes 83-107 and accompanying text.

79. See *infra* notes 107-16 and accompanying text.

80. See R. BOYLE, *supra* note 3, at 80-81; 4A R. POWELL, *supra* note 3, ¶¶ 616-619.2 (analysis of common law joint tenancies). See also Jones v. Veit, 6 Ohio Misc. 2d 4, 5-6, 453 N.E.2d 1299, 1300-01 (C.P. Ct. 1984); 2 T. McDERMOTT, *supra* note 3, § 8-16A (defining the characteristics of a statutory joint tenancy with a right of survivorship). A prime distinction between the statutory and common-law joint tenancies is the method of creation. For instance, the use of a third-person "strawman" is necessary in the transfer of real property to a husband and wife to create a common-law joint tenancy, whereas statutory joint tenancies have eliminated this requirement. See *supra* notes 43-48 and accompanying text.

81. See, e.g., OHIO REV. CODE ANN. §§ 323.151, 323.46, 1339.60, 5705.61, 5721.26, 5723.15, 5747.052 (Page 1979, 1980 & Supp. 1984). Although the General Assembly has attempted to abolish joint tenancies in Ohio, it is apparent that joint tenancies can and do continue to exist in Ohio, as evidenced by the fact that *In re Estate of Hutchison*, 120 Ohio St. 542, 166 N.E. 687 (1929), has not yet been overruled, and based on the legislature's continued reference to co-ownership of property as creating a "joint interest." See OHIO REV. CODE ANN. §§ 5302.19, 5302.20(A) (Page Supp. 1984).

82. See OHIO REV. CODE ANN. §§ 5302.19, 5302.20(A) (Page Supp. 1984).

the rights of creditors. Although section 5302.20(C)(4)⁸³ was enacted to clarify the rights of creditors, certain questions were not addressed completely. It is unclear, for instance, what effect the new statute will have on liens arising after April 4, 1985 (the effective date of S. 201), against property interests created under the old statute. In addition, the new statute does not consider the effect a judgment, entered after April 4, 1985, will have on real property conveyed to a debtor-spouse prior to April 4, 1985, that is subject to a lien which also arose before April 4, 1985. Hence, it is not certain which law the Ohio General Assembly intended to govern these situations—the law at the time the deed was conveyed or the law that existed when the lien or judgment was issued.

The new statute states that deeds executed prior to April 4, 1985, which create a tenancy by the entireties in a husband and wife or a joint tenancy with the right of survivorship, are not affected by the amended statute.⁸⁴ Accordingly, the validity of a joint property estate created before April 4, 1985, is assured.⁸⁵ The new law is silent, however, regarding the right of creditors to partition an estate created under the prior law in order to satisfy liens and judgments arising after the effective date of the new statute.⁸⁶ Under the previous law, creditors of one spouse could not partition a tenancy by the entireties estate.⁸⁷ The new law permits creditors of one spouse to compel partition of the estate.⁸⁸ If the new law governs estates created under the prior law, a right previously enjoyed by the estate tenants—immunity from partition—has been abrogated. Therefore, the constitutionality of retroactive application of the new law is brought into question.⁸⁹

83. *Id.* § 5302.20(C)(4).

84. *Id.* § 5302.21(A), (B). These provisions not only apply to conveyances or devises creating tenancies by the entireties, but they also apply to *all* real property conveyances or devises creating joint tenancies with rights of survivorship prior to April 4, 1985. Thus, all transfers continue to be valid after April 4, 1985, if they were valid at the time the estates were created.

85. This is in accord with other jurisdictions which uphold conveyances made prior to the enactment of a statute eliminating the right of survivorship in a joint tenancy. *See, e.g., King v. King*, 107 Cal. App. 2d 257, 236 P.2d 912 (1951); *Spikings v. Ellis*, 290 Ill. App. 585, 8 N.E.2d 962 (1937).

86. Given the potential for litigation in the area of creditors' rights, it is odd that the Ohio General Assembly chose not clarify this situation.

87. *See supra* notes 35–37 and accompanying text.

88. OHIO REV. CODE ANN. § 5302.20(C)(4) (Page Supp. 1984). *See also supra* text accompanying notes 73–75.

89. Where a court finds a substantive or absolute right violated, as opposed to a purely procedural right, retroactive application is denied. *See, e.g., Lakengren, Inc. v. Kosydar*, 44 Ohio St. 2d 199, 339 N.E.2d 814 (1975) (the retroactive application of a statute increasing the franchise tax obligation of a corporation for an accounting year already closed at the time of enactment is unconstitutional); *Gregory v. Flowers*, 32 Ohio St. 2d 48, 290 N.E.2d 181 (1972) (although the court recognized a statute of limitation as procedural, retroactive application was unconstitutional when an accrued substantive right to file for an increase in workmen's compensation was destroyed).

Section 28, article II, of the Ohio Constitution provides: "The General Assembly shall have no power to pass retroactive laws" ⁹⁰ This prohibition against the enactment of retroactive laws has been interpreted to apply only to substantive rights; where procedural rights ⁹¹ are involved, retroactive application is permitted. ⁹² The Ohio Supreme Court has held that a creditor's right of partition is a procedural right. ⁹³ However, the supreme court has not specifically found immunity from partition to be a procedural right.

In *Chandler v. Horne*, ⁹⁴ the Ohio Court of Appeals for the Ninth District held as constitutional the retroactive application of a statute diminishing debtors' exemptions, which became effective after the cred-

90. OHIO CONST. art. II, § 28.

91. It has generally been held that procedural or remedial rights are those which provide rules of practice, courses of procedure, or methods of review, while substantive rights create duties, rights, and obligations. See, e.g., *Shady Acres Nursing Home, Inc. v. Rhodes*, 7 Ohio St. 3d 7, 10, 455 N.E.2d 489, 492 (1983); *Denicola v. Providence Hosp.*, 57 Ohio St. 2d 115, 117, 387 N.E.2d 231, 233 (1979); *Coca-Cola Bottling Corp. v. Lindley*, 54 Ohio St. 2d 1, 6, 374 N.E.2d 400, 408 (1978); *Gregory*, 32 Ohio St. 2d at 53-54, 290 N.E.2d at 186-87; *Kilbreath v. Rudy*, 16 Ohio St. 2d 70, 72, 242 N.E.2d 658, 660 (1968).

92. See, e.g., *Wilfong v. Batdorf*, 6 Ohio St. 3d 100, 103-04, 451 N.E.2d 1185, 1188 (1983) ("[W]hen a statute affects procedural rights, as opposed to substantive rights, the constitutional restraints on retrospective application are lifted."); *Denicola*, 57 Ohio St. 2d at 117, 387 N.E.2d at 233; *Kilbreath*, 16 Ohio St. 2d at 72, 242 N.E.2d at 660; *State ex rel. Holdridge v. Industrial Comm'n*, 11 Ohio St. 2d 175, 179, 228 N.E.2d 621, 625 (1967) (Prohibition against passing retroactive laws "has reference only to laws which create and define substantive rights and has no reference to remedial legislation.") (citing *State ex rel. Slaughter v. Industrial Comm'n*, 132 Ohio St. 537, 542, 9 N.E.2d 505, 508 (1937)); 75 Op. Ohio Att'y Gen. 42 (1975). These decisions are not inconsistent with § 1.48 of the Ohio Revised Code which provides: "A statute is presumed to be prospective in its operation unless expressly made retrospective." OHIO REV. CODE ANN. § 1.48 (Page 1984). These decisions are also not inconsistent with § 1.58 (A) of the Ohio Revised Code which provides:

The reenactment, amendment or repeal of a statute does not . . . (1) [a]ffect the prior operation of the statute . . . ; (2) [a]ffect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder; (3) [a]ffect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal; (4) [or a]ffect any investigation, proceeding, or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture, or punishment

Id. § 1.58(A).

93. See *Hatch v. Tipton*, 131 Ohio St. 364, 368, 2 N.E.2d 875, 877 (1936) (holding that the right to partition is remedial, depending for its existence on the action or inaction of another); *Black v. Sylvania Producing Co.*, 105 Ohio St. 346, 350, 137 N.E. 904, 905 (1922) (right to partition is "naturally and necessarily remedial in character . . . and . . . should be liberally construed"). See also 72 Op. Ohio Att'y Gen. 62, at 2-252 (1972) ("The right to enforce a judgment is not an absolute and unlimited right.") (quoting 32 OHIO JUR. 2D *Judgments* § 480 (1975)).

94. 23 Ohio App. 1, 154 N.E. 748 (1926). This case involved a creditor who filed a complaint against the defendant in May, 1925, and was granted a judgment in September, 1925. During the interim period, a law was passed diminishing the amount of the debtor's wages that were exempt from judgment. *Id.* at 2, 154 N.E. at 749. The court ruled that the debtor had no vested statutory right in the exemptions and thus they could be decreased retroactively "without depriving the debtor of any constitutional rights." *Id.* at 5, 154 N.E. at 749.

itor filed the complaint, but before the court declared judgment.⁹⁵ By diminishing a debtor's exemptions, the court permitted more of a debtor's property to be reached by creditors. Ohio's new statute has a similar effect. By eliminating the debtor's immunity from partition, creditors are able to reach more of the debtor's property. Therefore, although there are no recent decisions by the Ohio courts dealing with immunity from partition, given the decision reached in *Chandler*, the decisions holding a creditor's right of partition to be procedural, and the large number of cases involving procedural rights where the constitutionality of retroactive application has been upheld,⁹⁶ it is possible that the retroactive application of the new law will also be upheld.

In addition, the debtor-cotenants' immunity from creditors' right of partition, enjoyed under the former law,⁹⁷ was only a common-law rule; the former statute failed to provide for such immunity. There is no property or vested right in any of the rules of common law, and such rules may be added to or repealed retroactively by legislative authority.⁹⁸ Therefore, the enactment of the new statute, retroactively eliminating the debtor-cotenants' judicially created immunity from partition, does not violate a constitutionally protected property right. Based on the foregoing, it would appear that creditors holding judgments obtained after the effective date of the enactment, can partition property interests held as tenancies by the entireties under the former statute. This is true, regardless of the fact that such judgments, if received prior to the effective date, could not have been used to obtain a partition because of the common-law bar.

Although the law seems to favor the constitutionality of retroactive application of the new statute to allow partition of estates created under former section 5302.17, an argument can be made by the debtor

95. *Id.* at 5-6, 154 N.E. at 749-50.

96. *See, e.g., Shady Acres Nursing Home*, 7 Ohio St. 3d at 10, 455 N.E.2d at 492 (vested right was not retroactively impaired where the amended statute was enacted in 1977, and the defendant was taxed in 1978, based on data taken from the two previous years); *Wilfong*, 6 Ohio St. 3d at 100, 451 N.E.2d at 1185 (recently enacted comparative negligence statute abolishing common-law contributory negligence applied retroactively where the statute became effective after the complaint was filed but before the trial commenced); *Kilbreath*, 16 Ohio St. 2d at 72, 242 N.E.2d at 660 (newly enacted long-arm statute could be retroactively applied where the cause of action existed but was not filed before the statute's enactment).

97. *See supra* notes 35-37 and accompanying text.

98. *See, e.g., Wilfong*, 6 Ohio St. 3d at 104, 451 N.E.2d at 1188. In *Wilfong*, the Ohio Supreme Court recognized the retrospective application of Ohio's comparative negligence statute. *Id.* *See* OHIO REV. CODE ANN. § 2315.19 (Page 1981). The *Wilfong* decision focused on the legislative abrogation of a common-law doctrine—contributory negligence. *Wilfong*, 6 Ohio St. 3d at 104, 451 N.E.2d at 1188. *See also Bickle v. Bickle*, No. 81 C.A. 62, slip op. at 4 (Ohio Ct. App., 7th Dist. Mar. 9, 1982) (quoting 9 OHIO JUR. 2D *Common Law* § 7 (1954)); 39 Op. Ohio Att'y Gen. 1443, 1449 (1939).

against such application. First, the language in the amended statute does not specifically address the law regarding prior conveyances. Moreover, the statute states that these prior estates are valid and are not affected by the amended statute.⁹⁹ Thus, the debtor-cotenant might argue that the Ohio General Assembly intended the applicable law to be that which was in effect at the date the estate was created.¹⁰⁰ However, it is unreasonable to read the provisions of the new statute to mean that estates created under the prior law cannot be affected in any way. It is more reasonable to interpret this provision to provide for the continued vitality of these estates, subject to the provisions of the new law. There is little justification for treating an estate created one day before the effective date of the new statute any differently than an estate created one day after. The new law should be interpreted in order to fully effectuate its purposes. Therefore, it is arguable that a court will find that the Ohio General Assembly intended that creditors be able to obtain partition of estates created in Ohio before April 4, 1985.

Another concern involving the creditor's right of partition is the Ohio General Assembly's failure to expressly address the significance of the intent of the parties creating a survivorship tenancy. Section 5302.20(C)(4) states that a creditor can now enforce a lien against the interest of a survivorship tenant.¹⁰¹ To do so, the court must first find that the creditor's lien is legitimate.¹⁰² Upon the court's determination that a lien is legitimate, the property ceases to be a survivorship tenancy and becomes a tenancy in common; all cotenants and creditors must be made parties to the action.¹⁰³ Each tenant in common, including the debtor, then owns an equal undivided share of the property previously held as a survivorship tenancy, regardless of the cotenants' con-

99. OHIO REV. CODE ANN. § 5302.21 (A), (B) (Page Supp. 1984).

100. The Ohio Supreme Court has acknowledged that an Ohio Legislative Service Commission summary of a statutory enactment will serve as a strong source of persuasive authority for the proper interpretation of legislative provisions. See *Weiss v. Porterfield*, 27 Ohio St. 2d 117, 120, 271 N.E.2d 792, 795 (1971). See also 72 Op. Ohio Att'y Gen. 62 (1972). The commission's analysis of S. 201 indicates that one of the characteristics of a survivorship tenancy is that a creditor may "enforce a lien against the interest of one or more of the survivorship tenants." OHIO LEGISLATIVE SERV. COMM'N, BILL ANALYSIS: AM. S.B. 201 (AS REPORTED BY S. JUDICIARY) 3 (1984) [hereinafter cited as BILL ANALYSIS: AM. S.B. 201] (on file with University of Dayton Law Review). The bill analysis indicates that the new statute was silent regarding the effect of the new law on estates created under former § 5302.17. *Id.* at 6. Because the Ohio General Assembly was aware that the law did not address this issue, and because of the supreme court's decision in *Central Nat'l Bank v. Fitzwilliam*, 12 Ohio St. 3d 51, 465 N.E.2d 408 (1984), it can be argued that the intent was *not* to establish rights for creditors against the interests of tenants by the entireties.

101. OHIO REV. CODE ANN. § 5302.20(C)(4) (Page Supp. 1984).

102. *Id.*

103. *Id.*

tributions.¹⁰⁴ The new statute, however, does not indicate whether unequal contributions by the cotenants or the cotenants' reasons for creating such an estate have any bearing on the creditor's ability to reach the survivorship tenancy property. Under a literal interpretation of the new statute, a grantor who creates a survivorship tenancy in real property, by contributing all the property for the sole purpose of insuring that the property passes to the cotenants after his or her death, will be subject to the debts of the cotenants, regardless of the *intention* of the grantor in creating the statutory estate and despite the fact that the debtor-cotenants did not contribute to the purchase of the property.¹⁰⁵ This is a harsh result for grantors who contribute all of the property to the estate with the sole intention of having the property escape probate. When faced with the possibility of partition by creditors, these grantors may very well seek to obtain repossession of their property in order to avoid partition.¹⁰⁶ The legislature could have avoided the possibility of

104. *Id.*

105. In a recent Ohio Supreme Court decision, *In re Estate of Thompson*, 66 Ohio St. 2d 433, 423 N.E.2d 90 (1981), the supreme court indicated that the intent of the parties at the time a joint bank account with rights of survivorship was created is to be considered when determining the respective ownership interests. *Id.* at 437, 423 N.E.2d at 93. Whether this decision, involving personal property, is applicable to situations involving real property is uncertain. Nevertheless, because the Ohio General Assembly did not address the relevance of intent when a survivorship tenancy is created and as the Ohio Supreme Court has recently held that the goal of the statute concerning personal property is to effectuate the intent of the joint tenants, it is possible that litigation will be necessary to resolve this issue.

In *Thompson*, the Ohio Supreme Court cited §§ 6-103(a) and 6-104(a) of the Uniform Probate Code (UPC), even though the UPC has not been adopted in Ohio. *Id.* at 438, 423 N.E.2d at 94 (citing UNIF. PROBATE CODE §§ 6-103(a), 6-104(a) (1977)). These provisions deal with the intentions of the parties at the time a joint survivorship account is created. Under the UPC, a joint tenant is entitled to only the net contributions of his individual deposits, unless there is "clear and convincing evidence of a different intent." UNIF. PROBATE CODE § 6-103(a) (1977). The surviving tenant is entitled to the remaining sum, as against the estate of the decedent, unless there is clear and convincing evidence of a different intention" *Id.* § 6-104(a). The Ohio Supreme Court concluded that joint accounts with survivorship rights are often created merely to avoid probate costs or for use in the event of death or illness of the person actually creating the joint account, and that it would be inappropriate to strictly impose a joint tenancy with survivorship rights without first identifying the original intentions of the parties. *Thompson*, 66 Ohio St. 2d at 440, 423 N.E.2d at 97. Accordingly, in the real property context, it can be argued that it would be unfair to strictly impose a joint tenancy with survivorship rights without initially identifying the original intentions of the parties.

106. A question then arises whether a party who has created a survivorship tenancy in real property, with no intention of conveying a present interest, can repossess his property to avoid loss through partition. This issue has not been addressed by the Ohio courts. However, the rights of joint bank account holders have been addressed by the Ohio Supreme Court, which has held that a joint bank account belongs to its owners in proportion to their contributions. See *Thompson*, 66 Ohio St. 2d at 440, 423 N.E.2d at 97. See also *supra* note 105. Accordingly, if the creator of a joint bank account is the sole contributor to the account, that individual is entitled to withdraw all deposited funds. *Thompson*, 66 Ohio St. 2d at 440, 423 N.E.2d at 97.

Although *Thompson* involved personal property, its application to cases involving survivorship tenancies in real property would seem proper. When one survivorship tenant contributes nothing,

litigation on this issue simply by indicating that intent is relevant to the issue of partition.

Finally, by enacting section 5302.20(C)(2),¹⁰⁷ the Ohio General Assembly has created an additional concern for practitioners and their clients. The new statute expressly states that the voluntary assignment, either by gift or by sale, from a survivorship tenant does not destroy the survivorship tenancy, but rather, "vests the title of the grantor . . . in the grantee, *conditioned* on the survivorship of the grantor . . ."¹⁰⁸ This is a rare exception under real property law and is unique to Ohio.¹⁰⁹ This new statute has created serious ramifications for persons buying an interest in a survivorship tenancy. In general, joint tenancies and tenancies in common are more difficult to convey than fee simple estates, because most persons are hesitant to become involved in a transaction where they are unfamiliar with other cotenants.¹¹⁰ Receiving an interest for the life of a *grantor* has made transferring a survivorship tenancy in Ohio even more difficult.

Generally, a joint tenancy is destroyed by any act which is inconsistent with one or more of the essential unities of time, title, possession, and interest.¹¹¹ When one of the unities is destroyed, the joint tenancy interests become tenancies in common.¹¹² Unlike the majority of jurisdictions with joint tenancies, Ohio's newly created survivorship tenancy is not destroyed by sale or gift. The interest simply vests in the

an argument can be made that when no gratuitous transfer is intended and no present interest is conveyed, the grantor has the right to dissolve the survivorship tenancy. If the Ohio courts, however, interpret the provisions of S. 201 literally, it would appear that a grantor's attempt to dissolve the tenancy would result in that individual's receipt of only a portion of the contributed property. Section 5307.041 of the Ohio Revised Code provides: "If partition is granted among survivorship tenants, the court shall determine the share to which each is entitled as if the tenants were tenants in common." OHIO REV. CODE ANN. § 5307.041 (Page Supp. 1984).

107. OHIO REV. CODE ANN. § 5302.20(C)(2) (Page Supp. 1984).

108. *Id.* (emphasis added).

109. For cases recognizing that a joint tenancy estate may be terminated by conveyance, see *Nunn v. Kieth*, 289 Ala. 518, 523-24, 268 So. 2d 792, 797-98 (1972); *Dean v. Auble*, 109 Cal. App. 3d 156, 159-60, 167 Cal. Rptr. 138, 140 (1980); *First Nat'l Bank v. Energy Fuels Corp.*, 618 P.2d 1115, 1118 (Colo. 1980); *Harelik v. Teshoney*, 337 So. 2d 828, 828-29 (Fla. Dist. Ct. App. 1976). Most courts also recognize that where three or more persons own property as joint tenants, and one of them conveys his share to another, the tenancy is severed as to that share. *See, e.g., In re Baglione's Estate*, 65 Cal. 2d 192, 196, 417 P.2d 683, 686-87, 53 Cal. Rptr. 139, 142-43 (1966); *Johnson v. Johnson*, 11 Ill. App. 3d 681, 684, 297 N.E.2d 285, 288 (1973); *Alexander v. Boyer*, 253 Md. 511, 516, 253 A.2d 359, 364-65 (1969); *Giles v. Sheridan*, 179 Neb. 257, 260, 137 N.W.2d 828, 831 (1965). *See also* Annot., 64 A.L.R.2d 918, 918-56 (1959); 20 AM. JUR. 2D *Cotenancy and Joint Ownership* §§ 15-21 (1965 & Supp. 1985).

110. Interview with E. Dale Searcy, Professor of Law, University of Dayton School of Law, Dayton, Ohio (Sept. 15, 1985).

111. *See* 4A R. POWELL, *supra* note 3, ¶ 618; 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 16 (1965 & Supp. 1985).

112. *See* 4A R. POWELL, *supra* note 3, ¶ 618.

new tenant for the life of the grantor.¹¹³ Thus, if the "new" survivorship tenant outlives all other survivorship tenants, he is vested with the sole title.¹¹⁴ However, if the grantor dies prior to the other cotenants, the new tenant is divested of his or her entire interest.

The same result can occur if an assignor gratuitously conveys his or her survivorship interest by will. Under this arrangement, if the assignor conveys his or her interest to the assignee and then subsequently dies prior to the other survivorship tenants, the assignee will lose his or her inheritance. Title immediately vests in the surviving survivorship tenants.¹¹⁵

The only way a grantor or assignor can prevent the preceding result is to compel partition of the property through the courts, which allows the court to destroy the survivorship tenancy, leaving the cotenants as tenants in common.¹¹⁶ This is an expensive and time-consuming procedure which was unnecessary before the adoption of section 5302.20(B) of the Ohio Revised Code. Therefore, this provision of the new statute will probably work to deter transfers of interests in survivorship tenancy estates.

V. CONCLUSION

Prior to the adoption of S. 201,¹¹⁷ both the judiciary and the Ohio General Assembly attempted to define precisely the characteristics of concurrent estates in Ohio. Their attempts, however, were generally unsuccessful. Section 5302.17 of the Ohio Revised Code, as enacted in 1971, failed to define many of the important characteristics of the newly created estate. This failure became increasingly noticeable as Ohio courts struggled to interpret its provisions. The legislature's dissatisfaction with the confusion caused by the varying interpretations of former section 5302.17 led to the enactment of S. 201. While the new statute has resolved many of the previous problems, questions remain unanswered. More importantly, the amended statute has generated cer-

113. See OHIO REV. CODE ANN. § 5302.20(C)(2) (Page Supp. 1984). See also BILL ANALYSIS: SUB. S.B. 201, *supra* note 61, at 4; BILL ANALYSIS: AM. S.B. 201, *supra* note 100, at 3. Neither of these bill analyses indicates the reason for such a drastic change in this area of real property law. However, at least one author has commented on the change. See Memorandum from E. Dale Searcy, Professor of Law, University of Dayton School of Law, Dayton, Ohio, to Board of Governors, Real Property Section, Ohio State Bar Association (Sept. 11, 1981) (on file with University of Dayton Law Review).

114. See OHIO REV. CODE ANN. § 5302.20(C)(2) (Page 1984).

115. See *id.*

116. *Id.* § 5307.041. With such a wide deviation from the vast majority of states, one can anticipate much confusion and frustration for practicing attorneys, as well as for lay persons, attempting to convey property by sale or gift.

117. Act of Dec. 18, 1984, 1984 Ohio Legis. Serv. 5-752 (Baldwin) (codified in scattered sections of tits. 3, 13, 17, 53, and 57 OHIO REV. CODE ANN. (Page Supp. 1984))

tain new problems, particularly in the area of creditors' rights. If past history is any indication, litigation of these issues is likely. Thus, the judiciary will once again be called upon to interpret the statutory incidents of survivorship tenancies in Ohio.

Patricia J. Reedy

Code Sections Affected: To amend sections 319.54, 323.151, 323.46, 1339.60, 1775.06, 5302.17, 5307.01, 5705.61, 5721.26, 5723.15, and 5747.052; to enact sections 5302.18, 5302.19, 5302.20, 5302.21, 5307.041, and 5309.081.

Effective Date: April 4, 1985

Sponsor: Schwarzwaldner (S)

Committees: Judiciary (S)

Civil & Commercial Law (H)

