Michigan Law Review

Volume 44 | Issue 6

1946

CO-TENANCY-CONVEYANCE BY GRANTOR TO HIMSELF AND ANOTHER

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CO-TENANCY—CONVEYANCE BY GRANTOR TO HIMSELF AND ANOTHER—Decedent, owning land and personal property thereon, executed a deed purporting to convey to herself and her son a life estate in the property "as joint tenants during their joint lives and an absolute fee forever in the remainder to the survivor of them. . . ." *Held*, the deed created a tenancy in common in both of them during their lives and an estate in fee to the survivor. *Hass v. Hass*, (Wis. 1946) 21 N.W. (2d) 398.

It seems certain that at common law, an attempt to create a joint tenancy in this manner could not succeed, for it was regarded as an impossibility that one could convey property to himself,[1] and since that was impossible, the unities of time and title, required for a joint tenancy[2] were not present in the estate.[3] This was the view taken by the Wisconsin court in an earlier case,[4] and the principal case affirms that decision insofar as that point is concerned. In very few jurisdictions have the courts, without statute, held clearly that a grantor may convey a joint tenancy to himself and another.[5] But certainly the modern tendency has been to avoid the effect of this strict interpretation, and a recent Nebraska decision [6] in line with the traditional view was displaced by statute.[7]

[1] Cameron v. Steves, 9 N.B. 141 (1858).

[2] 2 Blackst. Comm. (Cooley and Andrews 4th ed.) 180 (1899).

[3] Deslauriers v. Senesac, 331 Ill. 437, 163 N.E. 327 (1928), noted, 38 YALE L. J. 682 (1929); 14 IOWA L. REV. 352 (1929), 62 A.L.R. 514 (1929); Stuehm v. Mikulski, 139 Neb. 374, 297 N.W. 595 (1941), noted 26 MINN. L. REV. 128 (1941), 27 IOWA L. REV. 149 (1941), 137 A.L.R. 348 (1942).

[4] Breitenbach v. Schoen, 183 Wis. 589, 198 N.W. 622 (1924).

[5] Greenwood v. Commissioner of Internal Revenue, (C.C.A. 9th, 1943) 134 F. (2d) 915; Irvine v. Helvering, (C.C.A. 8th, 1938) 99 F. (2d) 265; Edmonds v. Commissioner of Internal Revenue, (C.C.A. 9th, 1937) 90 F. (2d) 14; Cadgene v. Cadgene, 17 N.J. Misc. 332, 8 A. (2d) 858 (1939); Johnson v. Landefeld, 138 Fla. 511, 189 S. 666 (1939); Boehringer v. Schmid, 254 N.Y. 355, 173 N.E. 220 (1930); In re Horler's Estate, 180 App. Div. 608, 168 N.Y.S. 221 (1917); Saxon v. Saxon, 46 Misc. 202, 93 N.Y.S. 191 (1905); Colson v. Baker, 42 Misc. 407, 87 N.Y.S. 238(1904).

[6] Stuehm v. Mikulski, 139 Neb. 374, 297 N.W. 595 (1941).

[7] Neb. Rev. Stat. (1943) § 76-118.

Statutes in Pennsylvania,[8] Rhode Island,[9] and Massachusetts,[10] have been held to permit the grantor to convey to himself and another in joint tenancy or tenancy by the entireties. The New York courts have reached the same view in the absence of statute by holding that the conveyance by the grantor to himself and another creates a new estate in both and therefore satisfies the requirements that there be unity of time and title.[11] The federal courts attained the same result by ignoring the technical requirements.[12] When the Wisconsin court faced this problem, in the principal case, it was confronted with the old decision [13] which held that one could not convey to himself, and also by a nice question of statutory interpretation. The applicable law [14] permitted a husband or wife to convey to both of them in joint tenancy by so indicating and further that a conveyance to two grantees will be held to be a joint tenancy if the deed "evinces" an intent so to convey. The court decided that the latter subsection [15] did not apply, since the former [16] provided the only exception to the general rule that one could not convey to himself in this sort of situation. In order to give effect to the deed as far as possible, then, the court set up the tenancy in common for the lives of both followed by a vested remainder in the survivor. Substantially the same result was reached in an earlier Oregon case,[17] cited in the principal case, although there the court did not attempt to name the estate created during the lives of both, but said merely that the deed conveyed a half interest in the property to the other party with a remainder in fee in the other half if she survived. Of course, the safe method to create a joint tenancy such as this is to convey to a third person first, thus avoiding technical difficulties, but from the number of reported cases, it is evident that this situation will continue to arise. It is submitted then, that the decision in the principal case is desirable. In an earlier note

[8] 21 Pa. Ann. Stat. (Purdon, 1930) §§ 551-556; construed, Re Vandergrift, 105 Pa. Sup. Ct. 293, 161 A. 898 (1932).

[9] R. I. Gen. Laws (1938) c. 435, § 17; construed, Lawton v. Lawton, 48 R. I. 134, 126 A. 241 (1927).

[10] Mass. Gen. Laws (1932) c. 184, § 8; construed, Ames v. Chandler, 265 Mass. 428, 164 N.E. 616 (1929).

[11] In Colson v. Baker, 42 Misc. 407, 87 N.Y.S. 238 (1904), the court at page 409 quotes 1 COKE ON LITTLETON, Thomas ed., 732, as justification for the view that unity of time is unnecessary; "If a man make a feoffement in fee to the use of himself and of such wife as he should afterwards marry, for the term of their lives, and after he taketh wife, they are joint tenants; and yet they come to their estates at several times." Citing Brent's case, 3 Dyer 340 a, 73 Eng. Rep. 766 (1575). However, it should be mentioned that the editor appends a note to this comment; "See contra as to an estate at common law, . . . The reason of the difference is, that in the case of the use, the estate is vested and settled in the feoffees till the future use comes into esse."

[12] Greenwood v. Commissioner of Internal Revenue, (C.C.A. 9th, 1943) 134 F. (2d) 915; Irvine v. Helvering, (C.C.A. 8th, 1938) 99 F. (2d) 265, noted 23 MINN. L. REV. 385 (1939); Edmonds v. Commissioner of Internal Revenue, (C.C.A. 9th, 1937) 90 F. (2d) 14.

[13] Breitenbach v. Schoen, 183 Wis. 589, 198 N.W. 622 (1924).

[14] Wis. Stat. (1937) § 230.45 (2), (3).

[15] Wis. Stat (1937) § 230.45 (3).

[16] Wis. Stat. (1937) § 230.45 (2).

[17] Dutton v. Buckley, 116 Ore. 661, 242 P. 626 (1926), noted 5 ORE. L. REV. 235 (1926); 24 MICH. L. REV. 726 (1926).

in this *Review* commenting on the Oregon decision [18] it is said: "The view of the principal case that the wife gains an undivided one-half interest for life with a right to the remainder of the entire fee contingent upon surviving her husband seems preferable to the Michigan cases cited,[19] in that it more nearly approximates the intent of the grantor, and is to be preferred to the New York view in that it more nearly accords with established legal principles." [20]

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[18] Ibid.

[19] Michigan State Bank v. Kern, 189 Mich. 467, 155 N.W. 502 (1915); Wright v. Knapp, 183 Mich. 656, 150 N.W. 315 (1915), noted in 28 HARV. L. REV. 631 (1915); Pegg v. Pegg, 165 Mich. 228, 130 N.W. 617 (1911). These cases held that a tenancy in common was created.

[20] 24 MICH. L. REV. 726 at 727 (1926).