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# NOTES

## JUDICIAL AND STATUTORY TERMINATION OF A TENANCY BY THE ENTIRETY

A tenancy by the entirety is a form of co-ownership. It is an estate which is created when husband and wife hold property jointly. There are five requisites for its creation:

- 1) The parties must be husband and wife.
- 2) The parties must have one and the same interest.
- 3) The interest must commence at one and the same time.
- 4) The interest must accrue by one and the same conveyance.
- 5) The parties must have one and the same undivided possession.<sup>1</sup>

The estate is not confined to realty, but includes personalty as well.<sup>2</sup> The death of one tenant terminates the estate and the surviving spouse takes the whole estate because the husband and wife are seised of the whole and have no interest which is divisible.<sup>3</sup> Because of this indivisibility it cannot be severed or divided into interests by the act or acts of one of the spouses alone. No single tenant can convey anything; both must join.<sup>4</sup> Nor can a creditor of one tenant subject it to sale under execution for the debts of that tenant<sup>5</sup>, unless the judgment debtor survives or is the one in whom complete title is vested by virtue of a transfer to himself by himself and the other party.<sup>6</sup> Upon the death of one tenant the survivor is the complete owner, not because of a transfer, but by a blotting out of the decedent's interest, and there is no death transfer tax because there is no transfer.

From the foregoing brief summary of the characteristics and incidents of a tenancy by the entirety it will readily be seen that such a tenancy is practically indestructible, other than from the joint action of the parties or from the attachment of the right of survivorship. The advantages of this security from destruction in protecting the husband and wife from the machinations of others, or each other, is obvious. But there are many conceivable factual situations where this quality of indestructibility can work hardship as well as benefit upon the parties. What happens

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<sup>1</sup> Walker's Estate, 340 Pa. 13, 16 A. 2d 2 (1940); *Madden v. Gastony Savings and Trust Co.*, 331 Pa. 476, 200 A. 624 (1938).

<sup>2</sup> *In re Parry's Estate*, 188 Pa. 33, 41 A. 448 (1898).

<sup>3</sup> *Gillan v. Dixon*, 65 Pa. 395; *Sharp v. Sharp*, 51 Ind. App. 547, 96 N. E. 627 (1911).

<sup>4</sup> *Supra*, note 1.

<sup>5</sup> *Beihl v. Martin*, 236 Pa. 519, 84 A. 953 (1912).

<sup>6</sup> *Fleek v. Zillhaver*, 117 Pa. 213, 12 A. 420 (1887); see also Hutton: TENANCY BY ENTIRETIES IN PENNSYLVANIA, 29 Dick. L. Rev. 125, 163; See also Act of May 13, 1927, P. L. 984, 69 P. S. 541.

for example when the parties become divorced; or one of the parties becomes incompetent; or one of the parties dies, the victim of the other? The purpose of this note is to try to supply the answer to some of these questions.

*Divorce:* It is the prevailing rule in the United States that a divorce terminates a tenancy by the entirety ipso facto.<sup>7</sup> The rationale of this rule seems to be that the severance of the marriage relationship makes it impossible for them to hold as one in the eyes of the law. In Pennsylvania a contrary position is taken.<sup>8</sup> The courts of this state reason that a subsequent unity of persons cannot change a tenancy in common into a tenancy by the entirety, and that therefore the severance of that unity should not change a tenancy by the entirety into a tenancy in common.<sup>9</sup> The divorced parties may voluntarily destroy the estate by partitioning it,<sup>10</sup> and should one of them prove recalcitrant and refuse to cooperate, the other may petition the court to partition, which the court is specifically empowered to do by statute<sup>11</sup>, provided the tenancy was created subsequent to the enactment of the statute.<sup>12</sup>

From a practical standpoint the fact that a tenancy by the entirety survives divorce in Pennsylvania is comparatively unimportant for our purposes in discussing judicial termination. The important thing is that the court can *compel* the one tenant to submit to the petition of the other and force partition of the property, and we find that the rule that "one spouse cannot sever an estate by the entirety" is subject to the exception that the successful party in a divorce proceeding can bring about a severance of the estate with the assistance of the law.<sup>13</sup>

*Slayer:* We now come to the problem of how the course of conduct of one of the tenants may affect the rights that accrue from the tenancy. We have already seen that one tenant cannot subject the other to liability for his debts,<sup>14</sup> and that the right of survivorship attaches to the one upon the death of the other.<sup>15</sup> But to this right of survivorship there is a definite limitation, which is applicable when the death of one of the tenants is "feloniously effected by the other."<sup>16</sup>

The Slayers Act of 1941 provides that:

"One-half of any property held by the slayer and the decedent as tenants by the entireties shall pass upon the death of the decedent to his estate,

<sup>7</sup> 10 L. R. A. 463, see also Gordon: TERMINATION OF A TENANCY BY THE ENTIRETIES, S. '32, Penna. B. A. Q., p. 15.

<sup>8</sup> Micholski v. Kruszewski, 330 Pa. 62, 198 A. 673 (1938).

<sup>9</sup> Hornak v. Hornak, 309 Pa. 281, 165 A. 512 (1932); O'Malley v. O'Malley, 272 Pa. 528, 116 A. 500 (1922); Wakefield v. Wakefield, 149 Pa. Super. 9, 25 A. 2d 841 (1942); see also Rehr: A TENANCY BY THE ENTIRETY AS AFFECTED BY SEPARATION, 47 Dick. L. Rev. 228.

<sup>10</sup> Supra note 8.

<sup>11</sup> Act of May 10, 1927, P. L. 884, 23 P. S. 94-97.

<sup>12</sup> Ibid.

<sup>13</sup> See Berg: EFFECT OF DIVORCE ON A TENANCY BY THE ENTIRETY, 10 Oreg. L. Rev. 206.

<sup>14</sup> Supra, notes 4, 5, 6.

<sup>15</sup> Supra, note 3; Tiffany: REAL PROPERTY, sec. 430-436, 3rd. edition (1909).

<sup>16</sup> Ibid.

and the other half shall be held by the slayer during his life, subject to pass upon his death to the estate of the decedent."<sup>17</sup>

This act applies against one who participates either as a principal or an accessory<sup>18</sup> in a wilful or unlawful killing. The remaining spouse, as far as a tenancy by the entirety is concerned, is treated as though he or she pre-deceased the decedent. Both the Wills Act of 1947<sup>19</sup>, and the Intestate Act of 1947<sup>20</sup> provide that a slayer shall get absolutely nothing, but here the slayer had a vested interest to begin with and the design seems to be to merely prevent him from collecting as an incident of survivorship. There is no conviction necessary by this act.<sup>21</sup>

From the foregoing we can see that the rule that upon the death of one spouse holding as a tenant by the entirety, the property as a whole vests in the other, is limited by the conduct of the survivor in causing the death of the other, in that said survivor takes only a life estate in one-half with remainder over to the first decedent's estate.

*Non-Support:* Similar to the Slayer's Act in that *conduct* may affect the rights of a tenant by the entirety is the Act of 1923.<sup>22</sup> It provides in essence that when a husband is ordered by the court to support his wife and or children and refuses to do so, and the said husband is a tenant by the entirety, the court may authorize a sheriff's sale and the proceeds be divided equally. Just as the court compels the tenant to convey upon divorce and petition<sup>23</sup> it compels action to forestall neglect of his family by the tenant.

*Simultaneous Death:* Having noted the right of survivorship<sup>24</sup> and the limitation imposed upon it by "feloniously effecting" by the one of the "death of the other" spouse<sup>25</sup>, we come now to the problem of what happens if both parties die at the same time. Obviously one cannot survive the other when both meet death simultaneously. To whom then does the estate go? The answer to that question is supplied by the Uniform Simultaneous Death Act of 1941.<sup>26</sup> This act imposes a burden of proving that the death was caused *other* than simultaneously and where there is not enough evidence to satisfy that burden, the property shall be distributed "one-half as if one had survived and one-half as if the other had survived."<sup>27</sup> This act has the effect of changing the tenancy into a tenancy in common with the share of each tenant going to the individual estate of the separate tenant, just as though the property were held severally to begin with.

<sup>17</sup> Act of Aug. 5, 1941, P. L. 816, 20 P. S. 3445.

<sup>18</sup> *Ibid.*

<sup>19</sup> Wills Act of 1947, P. L. 89, 20 P. S. 180. 1.

<sup>20</sup> Intestate Act of 1947, P. L. 80, 20 P. S. 1. 1.

<sup>21</sup> Act of Aug. 5, 1941, P. L. 816, 20 P. S. 3454.

<sup>22</sup> Act of May 24, 1923, P. L. 446, 48 P. S. 137.

<sup>23</sup> *Supra*, notes 11, 12, 13.

<sup>24</sup> *Supra*, notes 3, 15.

<sup>25</sup> *Supra*, note 15.

<sup>26</sup> Act of June 19, 1941, P. L. 138, 68 P. S. 523.

<sup>27</sup> *Ibid.*

*Mental Incompetency:* The fifth exception to the rule that a tenancy by the entirety can only be terminated without impairment of rights by the joint conveyance or death of one of the parties, is that which takes place when one of the parties is incapable of joining by virtue of being insane or weak-minded.

By statute, the Orphans' Court has the power to authorize, in certain specified situations, the sale or mortgaging of real estate "in all cases where the real estate.... shall be or have been acquired by descent or last will, or by purchase by a trustee, executor, or guardian, and in all other cases the Court of Common Pleas..... shall have jurisdiction."<sup>28</sup> The statute goes on to list eight situations where the Orphans' Court has the power to authorize conveyances of property, the title to which is in persons unable to convey. The eighth situation is "By a husband and wife as tenants by the entireties."<sup>29</sup>

Thus where tenants by the entirety acquired title in whole or in part by descent or last will or by purchase of a trustee, executor or guardian, the property can be alienated by the consent of only one party with the court acting in the place of the other.<sup>30</sup> But suppose title is acquired in some other manner? In that case the Court of Common Pleas has jurisdiction,<sup>31</sup> and that court does not have a statutory power comparable to that given to the Orphans' Court.<sup>32</sup>

The recent case of *In re Prichard*<sup>33</sup> seems to supply the answer to the problem created by this factual situation: The sane husband and the guardian of the insane wife petitioned the court for permission to terminate the estate, but the guardian later petitioned for modification of the decree granting such permission on the grounds that the sane spouse wanted one-half of the proceeds realized. The court did modify the decree but said that the sane spouse was entitled to one-half. The guardian appealed, conceding that the court had the power to direct the sale, but denying that the court by its division of the net proceeds, had the power to *terminate* an estate by the entireties.

Starting with the rule that a tenancy by the entirety may be terminated by agreement of the parties,<sup>34</sup> the court placed itself in the shoes of the incompetent and authorized such an agreement. The Act of 1907,<sup>35</sup> said the court, "gives to

<sup>28</sup> Act of Aug. 5, 1941, P. L. 824, 20 P. S. 1561.

<sup>29</sup> Act of 1941, supra, 20 P. S. 1563.

<sup>30</sup> Cf., "The jurisdiction of a Court of Equity over the estate of a lunatic as provided for in 50 P. S. 941 - 964 is so broad as in effect to substitute the Court for the incompetent ward in all dealings with property and family, the ward remaining however, the *equitable* owner of the property." Italics supplied. In re Morrison, 37 D. & C. 694 (1941).

<sup>31</sup> Supra, note 29.

<sup>32</sup> Explicitly to authorize conveyance where there is a tenancy by the entirety. Supra, note 30.

<sup>33</sup> In re Prichard, 359 Pa. 315, 59 A. 2d 101, (1948). N. B. Where it was not specifically stated how title was acquired, but the action was brought in Common Pleas and in view of the statute (supra note 29), and since the Orphans' Court has jurisdiction where title is acquired by will or descent and Common Pleas in all other cases, by analogy we assume title was acquired other than by will or descent.

<sup>34</sup> Berhalter v. Berhalter, 315 Pa. 225, 173 A. 172 (1934).

<sup>35</sup> "Powers and Duties of a Guardian", Act of May 28, 1907, P. L. 292, 50 P. S. 961.

the guardian of a weak-minded person the same powers and subjects such guardian to the same duties as a committee in lunacy. The statute substitutes the court and its judgment for that of the ward in the care and disposition of property.<sup>86</sup>..... The court, possessed of all powers which the incompetent could have exercised, may likewise direct that the entireties estate be terminated and the guardian hold one-half of the net proceeds for her."<sup>87</sup>

Mr. Justice Stewart in *Beihl v. Martin*<sup>88</sup> said in speaking of a tenancy by the entirety, "This estate is too well established and too well defined to be subject to judicial impairment." When reading *In re Prichard* one is apt to wonder if the court has since changed its mind, for the doctrine there given certainly does furnish the genesis for "judicial impairment" of a tenancy by the entirety by analogy to applicable statutory law.

*Conclusion:* It is still the rule in Pennsylvania that a tenancy by the entirety may be terminated without impairment of rights, in the absence of death, only by agreement of the parties. But the rule is subject to several limitations, most of which are specifically authorized by statute and all of which claim a statutory origin. Thus: a tenancy by the entirety, in absence of death, may be terminated only by agreement, except that it may be terminated:

- 1) By judicial termination in case of petition by one of divorced spouses.
- 2) By judicial termination where one spouse has refused to comply with a court order for support.
- 3) By judicial action in applying limitations imposed on survivorship by the Slayers Act.
- 4) By judicial application of the Simultaneous Death Act, converting the estate into a tenancy in common for purposes of distribution.
- 5) By judicial termination where one of the parties has been declared an incompetent, a guardian appointed, and a petition for partition made to the court by said guardian and the sane spouse.

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<sup>86</sup> Cf., "A sale by a guardian of a weak-minded person is a judicial sale and statutory requirements must be fulfilled to confer upon the court jurisdiction to effect such a sale." *Foley v. Somy*, 352 Pa. 292, 42 A. 2d 453 (1945).

<sup>87</sup> *In re Prichard*, 359 Pa. 315, 59 A. 2d 101 (1948), p. 102.

<sup>88</sup> *Beihl v. Martin* supra, note (5); Marks and Moore: TENANCY BY THE ENTIRETY IN PENNSYLVANIA, 4 U. of Pitt. L. Rev. 184.