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# Partition Deed Cannot Create Tenancy By Entireties

the male and 7-12 for the female], and have relocated this span between the limits of the valid age of consent at common law, [14 for the male and 12 for the female] and the legal age of consent as set by statute.

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## PARTITION DEED CANNOT CREATE TENANCY BY ENTIRETIES

A partition deed is an instrument whereby joint tenants[1] effect a division of land held in common, alloting to each party his portion in severalty. For example, where X deeds a tract of land to A and B, creating a joint tenancy or tenancy in common, or where X devises a tract to A and B, creating a coparcenary, and subsequently the parties want to finally determine their separate portions so that each may hold the fee of a designated tract, they may, if they can agree on the share of each,[2] achieve this end by partition deeds between themselves.[3]

When a partition deed between joint tenants joins as grantee the spouse of the tenant-grantee, the problem arises as to what estate is created. Normally, a deed whereby husband and wife take as joint grantees creates a form of concurrent estate, whether it be a tenancy in common,[4] a joint tenancy,[5] or a tenancy by entireties;[6] and in each instance the marital rights of a spouse without prior interest are enlarged, in the latter two estates to the extent of the right of survivorship.[7] But by the almost unanimous weight of authority, no such enlargement of marital rights is created by a partition deed joining as grantee a spouse with no prior interest.[8]

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[1]A generic term embracing, for the purpose of this comment, joint tenancies, tenancies in common, and coparcenaries.

[2]"Whenever persons interested in land as owners and cotenants cannot, by consent and agreement among themselves, make a division thereof... any one or more of them may apply for a partition by judicial proceedings—a compulsory partition,—which takes place without regard to the wishes of one or more of the owners." 40 Am. Jur. Partition § 27 (1942).

[3]Michalski v. Kruszewski, 330 Pa. 62, 198 Atl. 673 (1938).

[4]McCallister v. Folden's Assignee, 110 Ky. 732, 62 S.W. 538 (1901).

[5]Bassler v. Rewodlinski, 130 Wis. 26, 109 N.W. 1032 (1906).

[6]26 Am. Jur. Husband and Wife § 66 (1940).

[7]2 American Law of Property §§ 6.1, 6.6 (Casner ed. 1952).

[8]E.g., Jelly v. Lamar, 242 Mo. 44, 145 S.W. 799 (1912); Snyder v. Elliot, 171 Mo. 362, 71 S.W. 826 (1903); Whitsett v. Wamack, 159 Mo. 14, 59 S.W. 961 (1900); Shull v. Cummings, 174 Mo. App. 569, 161 S.W. 360 (1913); Wood v. Wilder, 222

The recent North Carolina case of *Smith v. Smith*[9] follows this prevailing view. Benjamin Smith owned a tract of land, and on his death he left as his heirs at law a widow, Minnie Smith, and two sons, John and Frank Smith. Frank Smith then conveyed all of his interest in the tract to his mother, with the result that she and John Smith held as tenants in common. On September 15, 1949, mutual deeds were executed between John Smith and his mother: one by John and his wife,[10] who conveyed a tract (unspecified in the record) to his mother; the other by Minnie Smith, who conveyed a tract (also unspecified in the record) to John and his wife, reserving a life estate to herself. The latter deed *recited* that it created a tenancy by the entirety. Nine years later John Smith's ex-wife, who had since remarried, sued for partition of the tract described in the deed from Minnie Smith, alleging that she and John Smith had held the land as tenants in common, subject to Minnie's life estate. The trial court assumed that the mutual deeds were partition deeds and held that as a result the deed which recited that it created an estate by entireties did not do so, in that an estate by entireties cannot be created by a partition deed which names as co-grantee the partition-grantee's spouse, where the spouse had no prior interest in the land. The court went on to say that this partition suit was prematurely brought because a portion of the land involved was subject to the life estate of Minnie Smith.

The Supreme Court of North Carolina remanded the case on two grounds: The trial court erred in treating the mutual deeds as partition deeds, because there was insufficient evidence to indicate such an intent by the parties. It also erred in holding that the suit was prematurely brought, because "the existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof...."[11]

The appellate court, however, concurred with the reasoning of

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N.C. 622, 24 S.E.2d 474 (1943); Speas v. Woodhouse, 162 N.C. 66, 77 S.E. 1000 (1913); Sprinkle v. Spainhour, 149 N.C. 223, 62 S.E. 910 (1908); Harrington v. Rawls, 131 N.C. 39, 42 S.E. 461 (1902); Harrison v. Ray, 108 N.C. 215, 12 S.E. 993 (1891); Rhodes v. Peery, 142 Ore. 165, 19 P.2d 418 (1933); Holt v. Holt, 185 Tenn. 1, 202 S.W.2d 650 (1947); Cottrell v. Griffits, 108 Tenn. 191, 65 S.W. 397 (1901); Foster v. Foster, 153 Va. 636, 151 S.E. 157 (1930); Yancey v. Radford, 86 Va. 638, 10 S.E. 972 (1890).

[9]248 N.C. 194, 102 S.E.2d 868 (1958).

[10]In order to terminate the rights of the grantor's spouse, the grantor customarily has his spouse join with him in the conveyance. See 3 American Law of Property § 12.51 (Casner ed. 1952).

[11]248 N.C. 194, 102 S.E.2d 868, 872 (1958).

the trial court with regard to the aforementioned majority rule, notwithstanding the fact that the deed recited an intent to create an estate by entireties. The court said that "if it should be determined [at a new trial] the deeds are partition deeds, the petitioner would derive no title. 'Accordingly, a deed made by one tenant in common to a cotenant and the latter's spouse in partitioning inherited land or land held as a tenancy in common, does not create an estate by the entirety or enlarge the marital rights of the spouse as previously fixed by law.' "[12] Thus the court not only follows the majority rule, but seems to extend it by applying the rule in derogation of the grantor's intent as expressed in the deed.

In order to understand such a seemingly illogical result, some inquiry into the reasoning behind the prevailing view is necessary. By its very nature a partition deed does not really convey, strictly speaking, but merely operates to sever the unity of possession,[13] designate boundaries,[14] and adjust the rights of the interested parties to the possession;[15] it does not create new rights. The grantee does not take by the partition deed, but has already taken by the prior joint deed or will. The claimant spouse, unmentioned in the prior instrument, was intended to have no interest by the actual grantor. Therefore, the partition-grantor, who in effect merely releases his claim to a part, cannot now presume to create a nonexistent interest in the spouse. As a requisite to the creation of a tenancy by entireties, the parties must be jointly entitled as well as jointly named in the deed.[16] The intent of the grantor, in order to control, must be consistent with some rule of law.[17] An intent such as that expressed in the *Smith* case was reasoned to be in derogation of a rule of law, and hence no larger an estate was created than had the deed omitted the spouse's name entirely.[18]

An opposing view adopts the concept that a partition deed does in fact convey, and consequently such a deed should be governed by

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[12]Id. at 871.

[13]Foster v. Foster, 153 Va. 636, 151 S.E. 157 (1930).

[14]Palmer v. Alexander, 162 Mo. 127, 62 S.W. 691 (1901).

[15]Harrison v. Ray, 108 N.C. 215, 12 S.E. 993 (1891).

[16]Sprinkle v. Spainhour, 149 N.C. 223, 62 S.E. 910, 911 (1908).

[17]In re Vandergrift's Estate, 105 Pa. Super. 293, 161 Atl. 898 (1932). See also 161 A.L.R. 462 (1946).

[18]This rule has been applied even where a decedent's heirs, to effect a partition, executed deeds to his widow, who simultaneously executed deeds back to each heir for his share of the land, the deed for a daughter's share, at her direction, being made to herself and her husband; such husband acquired no title as tenant by the entirety. Powell v. Powell, 267 Mo. 117, 183 S.W. 625 (1916).

principles applicable to ordinary conveyances. This view finds expression more in theory than in law, but it is nevertheless advocated by two early cases.

An 1869 Iowa case[19] adopted this view with regard to a judgment of partition. The court said that if the estate created would have been one by entireties, then the fact that it arose out of a partition proceeding would not preclude this result.[20] The same view was followed by New York in *Wright v. Sadler*,[21] wherein a partition deed naming as grantee a coparcencer and spouse was held to create a tenancy by entireties.[22] The New York court used the persuasive argument that if a simple partition, wherein a spouse with no prior interest would gain only dower or curtesy rights, was intended, then that end was attainable by naming the coparcener alone as grantee. But where the grant was in express terms to both spouses, the court found that something *more* was intended: that is, the vesting of a concurrent estate in the coparcener's wife.[23]

However persuasive this argument may seem, it is said to pale in the light of the true nature of a partition proceeding.[24] The partition-grantee already has what the deed "conveys"; the deed merely describes it. A named grantee with no prior interest could no more take as a tenant by entirety than could a new bride claim an estate by entirety in land owned by her husband for ten years prior to the marriage. The husband took under the conveyance ten years ago; the partition-grantee took under a conveyance some time before the parties decided to partition—a conveyance from which the spouse's name was absent.

There appears to be a third view, which, if it does not frontally attack the majority view, at least casts considerable doubt on the soundness of the *Smith* decision. This view facilitates the creation of an estate by entireties and is harmonious with the current trend toward streamlining the law and overlooking technicalities which contradict a clearly expressed and lawful intent. This trend finds ample

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[19]Hoffman v. Stigers, 28 Iowa 302 (1869).

[20]28 Iowa 302, 304 (1869). The case is distinguishable, however, in that both spouses had a prior interest, and is valuable only for its implication that a partition deed is equivalent to an ordinary conveyance.

[21]20 N.Y. 320 (1859).

[22]One spouse, however, was an alien who failed to file a deposition required by statute alleging his intent to become a United States citizen. The court held that on the death of his spouse, the estate vested in him nevertheless, subject to the right of escheat in the state.

[23]20 N.Y. 320, 323 (1859).

[24]See note 8 supra.

expression in situations where one party owns land and wishes to confer on his spouse the right of survivorship through a tenancy by entireties. The most orthodox method for achieving this end has been for the grantor to convey to a third person, who in turn reconveys the land to the husband and wife as joint grantees.[25] The courts do not hesitate to indulge in this obvious fiction, in order to carry out the parties' intent. Some jurisdictions go further and allow a party to convey to himself and his spouse in a joint deed, thereby creating an estate by entireties.[26] These courts rationalize the maxim that one cannot convey to himself, by declaring that the spouse merely conveyed "to a legal unity or entity which was the consolidation of himself and another."[27] Other jurisdictions go still further in streamlining this phase of the law by allowing the creation of estates by entirety by one spouse's conveyance of a one-half undivided interest in his land to the other, where his intent is clear,[28] or simply by allowing one spouse to convey the whole to the other, where the intent is likewise clear.[29] Such drastic departures from the common law are justifiable; they are pursuant to a just and legitimate end.[30]

There is no reason why this view should not be applied to partition deeds, *a fortiori* to partition deeds which express an intent to create estates by entirety. When one considers the scope and purpose of reform doctrines which abolish needless technicalities, the injustice of the *Smith* case becomes manifest. Minnie Smith intended to create a tenancy by the entireties in her son and his wife; her intent was both patent and lawful. The estate, however, was never vested in the spouses. The reason was that a sweeping proposition of law—one

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[25]Davis v. Clark, 26 Ind. 424 (1866); Taul v. Campbell, 7 Yerg. 319 (Tenn. 1835); Kratovil, Real Estate Law § 445 (1946); 26 Cornell L.Q. 508 (1941).

[26]Boehringer v. Schmid, 254 N.Y. 355, 173 N.E. 220 (1930); Coon v. Campbell, 138 Misc. 567, 240 N.Y. Supp. 772 (Sup. Ct. 1930); In re Vogelsang's Estate, 122 Misc. 599, 203 N.Y. Supp. 364 (Surr. Ct. 1924); Dutton v. Buckley, 116 Ore. 661, 242 Pac. 626 (1926); In re Vandergrift's Estate, 105 Pa. Super. 293, 161 Atl. 898 (1932). But see Stone v. Culver, 286 Mich. 263, 282 N.W. 142 (1938); Wright v. Knapp, 183 Mich. 656, 150 N.W. 315 (1915); Pegg v. Pegg, 165 Mich. 228, 130 N.W. 617 (1911).

[27]In re Klatzl's Estate, 216 N.Y. 83, 110 N.E. 181, 185 (1915) (dissenting opinion). The dissent in this case actually represents the majority view regarding the ability of the husband to create a tenancy by the entirety by conveying to himself and his wife. It has since been adopted as the law in New York. See In re Lyon's Estate, 233 N.Y. 208, 135 N.E. 247 (1922). See also the New York cases cited in note 26 supra.

[28]Runions v. Runions, 186 Tenn. 25, 207 S.W.2d 1016 (1948). See 21 Tenn. L. Rev. 339 (1950).

[29]1 Fla. L. Rev. 433 (1948).

[30]2 Tiffany, Real Property § 432 (3d ed. 1939).