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TENANCIES

By

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Introduction

Two or more people may own land in Illinois in one of three ways: tenants in common, joint tenancy, and tenancy by the entirety.

Tenancy in Common

If a deed to two or more people makes no mention as to the type of tenancy, then it is presumed in Illinois that the parties own the land as tenants in common. See 765 ILCS 1005/1.

This form of ownership does not provide any benefits of survivorship.

- *Example*: A and B take title to Blackacre as tenants in common. A dies. B still owns a half interest in the land; the heirs of A own the other half interest.

So assume that Adam and Betty take title to their home in 2010 as tenants in common. Adam dies *intestate* in 2014. (That is, Adam died without a will.) Adam and Betty had one child, a son named Charlie. Who owns the home?

The examiner will have to be familiar with the "rules of descent and distribution" set forth in the Probate Act at 755 ILCS 5/2-1. See below:

> *The intestate real and personal estate of a resident decedent and the intestate real estate in this state of a nonresident decedent, after all just claims against his estate are fully paid, descends and shall be distributed as follows:*
>
> *(a) If there is a surviving spouse and also a descendant of the decedent: 1/2 of the entire estate to the surviving spouse and 1/2 to the decedent's descendants per stirpes.*
>
> *(b) If there is no surviving spouse but a descendant of the decedent: the entire estate to the decedent's descendants per stirpes.*

(c) If there is a surviving spouse but no descendant of the decedent: the entire estate to the surviving spouse.

Thus, pursuant to paragraph (a) above, Adam's share goes one-half to his wife and one-half to his son. Thus, his wife has a three-quarter interest in the home and his son has a one-quarter interest. (His wife already owned a half interest. She and her son thus split Adam's half interest.)

Consider another example:

If John and Jane owned their home as tenants in common, and they had two children, Tom and Teresa, and John dies, Jane would own a half interest in John's estate, and Tom and Teresa would together own a half interest in John's estate. (Tom would own a quarter interest in John's estate, and Teresa would own a quarter interest in John's estate.)

End result: Jane would own a 3/4 (or 6/8) interest in the land, Tom would own a 1/8 interest in the land, and Teresa would own a 1/8 interest in the land.

Note that the above statute indicates that a decedent's descendants would inherit real estate, "per stirpes." This means that if a descendant of a decedent is also deceased, then that descendant's heirs get that descendant's share. (Compare "per stirpes" to "per capita." If ownership is "per capita," and a descendant of a decedent is also deceased, then that descendant's heirs *do not* get that descendant's share.)

Continuing with the above example, consider this "per stirpes" scenario. If John and Jane owned their home as tenants in common, and John dies, and they had two children, Tom and Teresa, but Tom was deceased, but Tom had a son named Sam, Jane would own a 3/4 (or 6/8) interest in the land, Teresa would own a 1/8 interest, and Sam (the child of Tom) would own a 1/8 interest.

This tenancy can result in some unfortunate consequences if the child of a decedent is a minor.

- *Example*: John and Jane own their home as tenants in common pursuant to a deed recorded in 2010. They have a five-year-old daughter named Janet. Who owns the property if John dies in 2015?

Again, see 755 ILCS 5/2-1(a): "If there is a surviving spouse and also a descendant of the decedent: one-half of the entire estate to the surviving spouse and one-half to the decedent's descendants. . . ."

This means that Jane (the widow) would own a half interest pursuant to the 2010 deed. Then, by virtue of this statute, Jane would own an additional one-quarter interest, and

the daughter (Janet) would own a one-quarter interest. (The two quarter interests equal John's half interest.)

Janet would automatically own the land, even if she is a minor. Jane (Janet's mother) would not automatically be the guardian for Janet. Janet, although a minor, would own a one-quarter interest by operation of law. But if Jane wanted to sell "her" home after her husband died, she would have to have a guardian appointed for her daughter, who is now an owner of a fractional interest of the home.

If A, B, and C take title to the land as tenants in common, and the deed does not indicate the percentage interest, then it is presumed that the grantees take equal shares. See *Keuper v. Unknown Heirs of William E. Mette*, 239 Ill. 586, 88 N.E. 218 (1909). See also *Ward on Title Examinations*, Section 4.10, p. 4-19.

Joint Tenancy (765 ILCS 1005/1 *et seq.*)

Joint Tenancy: An Introduction

Traditionally, to own land as joint tenants, the four unities of time, title, interest, and possession had to be present.

- *Unity of time*—that is, all joint tenants must acquire their interest at the same time.

- *Unity of title*—that is, all joint tenants must acquire their interest by the same instrument of conveyance.

- *Unity of interest*—that is, all joint tenants must hold equal ownership interests. (That is, two joint tenants cannot own a 75% and 25% interest.)

- *Unity of possession*—that is, all joint tenants must hold an undivided right to possession.

That is, the tenants had to have one and the same interests accruing by one and the same conveyance, commencing at the same time, and held by one and the same undivided possession. See *Minonk State Bank v. Grassman*, 103 Ill. App.3d 1106 (1982).

This tenancy does have survivorship aspects.

- *Example*: A and B take title to Blackacre as joint tenants. A dies. Without the need of probate or a will, B, as a surviving joint tenant, succeeds to A's interest and now owns all of Blackacre.

This is the chief advantage of joint tenancy; it renders probate of an estate unnecessary.

- Example: X makes a deed to A, B, C, and D, in joint tenancy. D dies. A, B, and C now own the land in joint tenancy. A dies. B and C now own the land in joint tenancy. B dies. C is now the sole owner.

Unlike other states, Illinois does not require exact statutory language in a deed in order to create a valid joint tenancy. All that is needed is a clear intent that such a joint tenancy was created. See *Engelbrecht v. Engelbrecht*, 323 Ill. 208 (1926); see also 765 ILCS 1005/1;765 ILCS 1005/1b.

What is evidence of this intent? Years ago the Company issued a title insurance commitment wherein the husband and wife took title as "I.J.T." (i.e., "In Joint Tenancy)." The husband then died. Upon the death of the husband, who owned the land? Did the wife own the land as a surviving joint tenant, or did the deed create a tenancy in common due to ambiguity? Because of the holding in the *Engelbrecht* case, the Company decided to insure the transaction as if the deed created a joint tenancy.

Joint Tenancy v. Tenancy in Common

Why would anyone want to take title as tenants in common, when joint tenancy clearly appears to be superior?

- Tenancy in common is often preferred when unrelated people pool their resources and buy investment property.

- Tenancy in common may be preferred when a husband and wife take title, both of whom have been married before, and both have adult children from their respective prior marriages.

- Taking title as tenants in common might lessen estate taxes, in that the entire estate won't be taxed upon the death of the one surviving tenant.

- Two young people who are unmarried who choose to live together might want to own their home as tenants in common.

  Example: John and Jane are 21 years old. They are planning a December wedding. They decide to buy a home on June 1st. Both of them have good jobs. Each person contributes $10,000 towards the down payment. Both John and Jane's parents are still alive, and both of them have brothers and sisters. Is it really wise to always assume that joint tenancy is the default tenancy of choice for any one who is not married?

Sometimes joint tenancy will be combined with tenancy in common:

Example: John and Mary Smith want to buy a two-flat with William, their

> son, and Helen, his wife. The two couples would probably take title as tenants in common, as to the couples, but as to the couples themselves, they would own as joint tenants. Thus, the vesting would be as follows:
>
> > *John Smith and Mary Smith, as to an undivided one-half interest, in joint tenancy, and William Smith and Helen Smith, as to an undivided one-half interest, in joint tenancy.*

Or consider this example:

> John Jones conveys and quitclaims to Fred Smith, as to an undivided 25% interest, and Robert Smith and Carol Smith, husband and wife, in joint tenancy, as to the remaining 75% interest.

But sometimes the drafting of this combination "joint tenancy and tenancy in common" language can be confusing. Consider this true example. What did the parties intend?

> The deed reads exactly as follows: "To Mary and Suzie, as joint tenants, as to an undivided one-half interest, and as tenants in common with Bill as to an undivided one-half interest."

At first one might think that the drafter intended that Mary and Suzie own a half interest in joint tenancy, and then Bill would own the other half interest. Thus, if Bill dies, his heirs would succeed to his interest, as he owns his interest as a tenant in common with Mary and Suzie.

But is this correct? Note that the deed reads, "*and as tenants in common with Bill*." Perhaps the drafter intended that Mary and Suzie would own half an interest in joint tenancy, and that Mary, Suzie, and Bill, would own half an interest as tenants in common.

Either way, the deed is ambiguous. The following examples are much clearer:

- John conveys an undivided one-half interest to Mary and Suzie, as joint tenants, and an undivided one-half interest to Bill.

- John conveys an undivided one-half interest to Mary and Suzie, as joint tenants, and an undivided one-half interest to Mary, Suzie, and Bill, as tenants in common.

A deed creating a joint tenancy must give the joint tenants equal shares as to the property. The reason for this is the four unities; time, title *interest*; possession. The joint tenants need the same interest in the property.

Thus, an owner of land could not convey Blackacre "to A, as to 3/4 interest, and to B, as

to 1/4 interest, in joint tenancy.

But, notwithstanding this rule, a joint tenant can still own more than a 50% interest in land.

> *Example*: X conveys a half an interest in Blackacre to A and a half an interest in Blackacre to A and B, as joint tenants. End result: A owns a 75% interest in Blackacre, and B owns a 25% interest in Blackacre.

Although there is no statute or court case in Illinois that specifically states this, it appears that a corporation, trust, partnership, limited liability company, or other non-human entity cannot take title to property as a joint tenant.

The reason for this is that a corporation can have perpetual duration; perpetual duration is contrary to the concept of joint tenancy, with its survivorship aspects.

Breaking the Joint Tenancy

These are things that will *not* break the joint tenancy:

- A will by the deceased joint tenant will not break a joint tenancy.
- A lien against one of the joint tenants will not break a joint tenancy. Even an execution and levy of a judgment (with no deed) against one of the joint tenants will not break a joint tenancy.
- An easement or lease created by one joint tenant will not break a joint tenancy.
- The execution of a mortgage will not break a joint tenancy. See *Harmes v. Sprague*, 105 Ill.2d 215, 473 N.E.2d 930, 85 Ill.Dec. 331 (1984); *Jackson v. Lacey*, 408 Ill. 530, 97 N.E.2d 839 (1951).
- The filing of a bankruptcy petition will not sever the joint tenancy. See *Maniez v. Citibank*, 937 N.E.2d 237 (2010).

These are things that *will* break the joint tenancy:

- A deed by a joint tenant to a third party will break a joint tenancy.

  > *Example*: A conveys to B and C in joint tenancy. C conveys his interest to D. B and D now own as *tenants in common*.
  >
  > *Example*: A conveys to B and C in joint tenancy. C conveys his interest to D. D immediately deeds back to C. B and C own as tenants in common; the reconveyance deed does not bring back

the joint tenancy.

Example: Assume that B and C own the land in joint tenancy. C conveys his interest To D. B and D now own the land as tenants in common. Note that it is not necessary that B be told that C is breaking the joint tenancy in order to effectively break the joint tenancy. See *Olney Trust Bank v. Pitts*, 200 Ill. App. 3d 917, 558 N.E.2d 398 (1990).

Example: A, B, and C own land as joint tenants. C conveys his one- third interest to D. A and B continue to hold their two-thirds interest as joint tenants. But, as between all three of them, there is a tenancy in common. That is, if D were to die, his heirs--not A and B--would own D's interest. See *Sathoff v. Sutterer*, 373 Ill. App. 3d 795, 869 N.E.2d 354, 311 Ill. Dec. 680 (5th Dist. 2007).

Example: A, B, and C own land in joint tenancy. A conveys his interest to B. B and C continue to own a two-thirds interest in joint tenancy, and B owns a one-third interest as a tenant in common.

Example: A, B, and C own land in joint tenancy. C conveys a 1/20 share of her interest to X. A and B continue to own their 2/3 interest in joint tenancy. C and X are tenants in common.

Example: Years ago the Company issued a title insurance commitment. The attorney for the seller explained the unusual title vesting as follows: A man and his wife owned their home in joint tenancy. The man thought that the two of them were happily married. After she died, he found out that she had conveyed her interest in the home to her daughter from her first marriage. He and this daughter “did not get along.” The deed was a valid breaking of the joint tenancy. End result: the man and the daughter own the home as tenants in common.

Example: Although a judgment, alone, will not sever the joint tenancy, if the judgment is levied on and eventually a deed to a third party (presumably to the creditor) is issued, that deed would break the joint tenancy. However, the levy alone will not break the joint tenancy. See *Van Antwerp v. Horan*, 390 Ill. 449, 61 N.E.2d 358 (1945).

Example: Consider this true story: Andrew and Betty are married. They buy a home in joint tenancy. Andrew dies. After his death Betty discovers that Adam had earlier conveyed his interest in the land to their three children, Charlie, Eddie, and Frankie.

> Do Charlie, Eddie, and Frankie own the land, as to a 50% interest, and Betty owns the land, as to a 50% interest?
>
> Possibly, or possibly not. Was there a valid *delivery and acceptance* of the deed? If the three children know nothing of what the dad did (in other words, if they did not accept the delivery of the deed), then the deed may not be valid. See *Redmond v. Gillis*, 346 Ill. 223, 178 NE 504 (1931); *Evans v. Tabor*, 350 Ill. 206, 182 NE 809 (1932); *Buck v. Garber*, 261 Ill. 378, 103 NE 1059 (1913).

A deed by a joint tenant to himself or herself will break the joint tenancy

One joint tenant can convey his interest in the land to himself and thus break the joint tenancy.

> *Example*: A, B, and C own the land in joint tenancy. A and B convey their interest in the land to themselves (A and B), in joint tenancy. This is not only a valid conveyance, but the conveyance from A and B to A and B broke the joint tenancy with C. See *Sathoff v. Sutterer*, 373 Ill. App. 3d 795, 869 N.E.2d 354, 311 Ill. Dec. 680 (5th Dist. 2007); 765 ILCS 1005/2.1. A and B would continue to own the land as joint tenants between themselves, but they would the land as a tenant in common with C.
>
> *Example*: Consider this true story: Alice buys a home with her boyfriend, Adam. Alice and Adam take title in joint tenancy. Alice is no longer in a relationship with her boyfriend. She knows that she cannot (in her words), "kick him off title." In addition, she has a new boyfriend. So what does she do?
>
> > Alice conveys her interest in the land to herself and to Ben, her new boyfriend, in joint tenancy. This results in Adam, the old boyfriend, owning a 50% interest, and Alice and Ben owning a 50% interest, in joint tenancy. Now, if Alice dies, at least Adam won't acquire Alice's interest in the land.

Judgments against a Joint Tenant

Generally speaking, when land is held in joint tenancy, and the joint tenancy is not severed, a judgment or other general lien against one joint tenant is not enforceable against the land if that joint tenant dies. (Of course, the lien is enforceable against the personal estate of the decedent.)

In other words, provided that the joint tenancy was never severed, the title of the surviving joint tenant(s) is free of the lien of most judgments that were entered solely against the deceased joint tenant.

> *Example:* Anne and Andy own Blackacre in joint tenancy. In 2014 a judgment is entered against Andy and is promptly recorded. In 2015, before there is an execution and levy and enforcement of the judgment pursuant to 735 ILCS 5/12-119 *et seq*., Andy dies. Anne, as a surviving joint tenant, owns Blackacre free and clear of the judgment.

But now change the facts slightly. What if the judgment debtor is the surviving joint tenant?

> *Example:* Anne and Andy own Blackacre in joint tenancy. In 2014 a judgment is entered against Andy and is promptly recorded. In 2015, before there is an execution and levy and enforcement of the judgment pursuant to 735 ILCS 5/12-119 *et seq*., Anne dies. Andy, as a surviving joint tenant, owns Blackacre, but he owns the land, subject to the judgment.

Consider the facts of *Gayton v. Kovanda*, 368 Ill.App.3d 363, 857 N.E.2d 929 (1st. Dist. 2006).

Monica and Joseph Gayton owned the land as joint tenants. Louis Kovanda was a creditor of Joseph's. In February of 2001 Joseph deeded the land to Monica via quit claim deed. In November of 2003 Kovanda got a judgment against Joseph. Joseph died six days later. After Joseph died, Kovanda recorded a memorandum of judgment in December 2003 against the land. Monica filed suit to quiet title, saying that he had wrongfully recorded the judgment against her property, as she was the sole owner pursuant to the quit claim deed.

The appellate court said that Joseph's deed to Monica was a fraudulent transfer under the Fraudulent Transfer Act. Kovanda said that since the deed was fraudulent, the quit claim deed must be voided, rendering the title to be tenants in common, based on a violation of the four unities of time, title, interest, and possession.

The court disagreed, though, stating that the determining that the deed was fraudulent meant that one must treat the conveyance as if it never existed. Thus, title to the land was held in joint tenancy until Joseph died. Then, Monica owned the land as a surviving joint tenant, and as Joseph died before the memorandum of judgment was recorded, the judgment did not attach. That is, the memorandum of judgment was not recorded until Joseph died. Thus, the memorandum was recorded at a time when only Monica, as surviving joint tenant, owned the land.

Public Aid Liens and the Deceased Joint Tenant

Tax liens and judgments in favor of governmental bodies that are against joint tenants should continue to be treated as liens against the real estate, even after the debtor joint tenant dies.

For example, the Illinois Public Aid Code is found at 305 ILCS 5/1-1 *et seq.* 305 ILCS 5/3-10.8 provides that Illinois public aid liens survive the death of a joint tenant. That is, public aid liens are enforceable against the land owned by the surviving joint tenant(s) as long as the lien is recorded while the public aid recipient is alive.

- Note that if the lien is recorded after the person dies, it is too late to enforce the lien against the land. Similarly, if the land is sold to a bona fide purchaser for value before the lien is recorded, it is too late to enforce the lien against the land. (However, the lien might still be enforceable against the personal estate of the decedent.)

- On the other hand, if the land is conveyed into a trust or to someone for no consideration, and later the lien is recorded, then the examiner should continue to show the lien, even if it is recorded after the conveyance. In this case, the conveyance might be deemed to be a *fraudulent transfer.* See 740 ILCS 160/1 *et seq*. See also 305 ILCS 5/3-1.3; 305 ILCS 5/3-11.

In Illinois the Department of Human Services and the Department of Healthcare and Family Services (formerly the Department of Public Aid) provides aid to the aged, blind or disabled and aid to families with dependent children. It also provides for medical assistance. See 305 ILCS 5/1-6; 305 ILCS 5/2-12; 305 ILCS 5/3-1 *et seq.;* 305 ILCS 5/5-1 *et seq.*

The State of Illinois has a lien on real property of a recipient for money received pursuant to these programs. See 305 ILCS 5/3-10 and 305 ILCS 5/5-13.5. The lien is enforceable for five years from the date it is recorded. The lien may be extended for additional five year periods upon the recording of a new notice prior to the expiration of said five year period. See 305 ILCS 5/3-10.2. Upon the death of the public aid recipient, the lien may be foreclosed in a judicial proceeding. See 305 ILCS 5/3-10.7.

Again, 305 ILCS 5/3-10.8 provides that Illinois public aid liens survive the death of a joint tenant, as long as the lien is recorded while the public aid recipient is alive. This statute provides in part as follows:

> *A joint tenancy interest in real property shall be subject to the lien created by Section 3-10. The filing and approval of an application for aid . . . shall constitute a severance of the joint tenancy, effective on the date of the filing or recording of the notice of lien. The severance shall be solely for the purpose of enforcing the lien. For all other purposes, the joint tenancy shall remain in effect and be unimpaired. The lien shall be enforceable*

only to the extent of the interest of the recipient. . . .

Rule of Title Practice:

Because the state's recorded lien survives the death of a recipient joint tenant, the Company cannot waive the recorded public aid lien simply because the recipient joint tenant is deceased. To clear the lien from title, the lien must be either paid off or be subordinated to the insured interest. (See, e.g., Cook County document 0413450085.)

Note that in 2006 the Illinois Supreme Court issued its opinion, *Hines v. The Department of Public Aid*, 221 Ill.2d 222, 850 NE2d 148 (2006), in which the court ruled that the Department of Public Aid could not assert a claim against a decedent ***spouse's*** estate. Under these set of facts, the husband and wife owned their home jointly. The husband received Medicaid assistance. The husband died, and the wife succeeded as sole owner of the home. The wife then died. The Illinois Department of Public Aid tried to assert its claim against the husband against the wife's estate. The court said that the law did not allow this.

- *Rule of Title Practice*: Any request to waive a recorded public aid lien because it falls within the fact pattern set forth in the *Hines* case should be referred to a title officer.

Dissolution of Marriage and Joint Tenancy

Question—Does the Judgment of Dissolution of Marriage Sever the Joint Tenancy?

Answer—No, but. . . .

- *Example*: John and Jane are married. They buy a home in 2005. They take title in joint tenancy. In 2014 they get divorced. In January of 2015 John dies in an auto accident. Two months later, Jane schedules a closing. Jane now wants to sell "her" home to a third party, take the sale proceeds, and leave town. At the closing Jane's attorney tells the closer that John and Jane took title as joint tenants and that Jane is the surviving joint tenant. The attorney gives the closer John's death certificate and a joint tenancy affidavit. Is there a problem?

Yes, there may be a problem! There are three Illinois cases that discuss this situation. By far the most important is *In Re Marriage of Dowty*, 146 Ill. App. 3d (1986), but the others are *In Re Marriage of Dudek*, 201 Ill. App. 3d 995 (1990) and *Sondin v. Bernstein*, 126 Ill. App. 3d 703 (1984). (These cases will hereafter be referred to as *Dowty*, *Dudek*, and *Sondin*.)

In *Dowty* Janice and Ronald Dowty got divorced. There was a property settlement agreement (bolstered by oral testimony) that provided that "the property be sold as soon

as reasonably possible." The agreement also indicated that upon a sale, the proceeds would be shared equally.

But Janice died before the property could be sold. Ronald felt that he owned the land as a surviving joint tenant, but the administrator of Janice's estate brought suit to enforce the property settlement agreement—that is, the administrator felt that the property should be sold *and the proceeds should be divided according to the agreement*.

The appellate court indicated that *a divorce decree, in and of itself, does not sever the joint tenancy.* However, the court instead will look to the intent of the parties and then try to carry out what the parties intended to do.

The court found that the divorce decree, the property settlement agreement, and testimony at the dissolution hearing, all evidenced an intent to divide up the property, and hence, a severance of the joint tenancy. This is what the court stated:

> *An agreement between joint tenants to hold property as tenants in common will sever an existing joint tenancy, and may be inferred from the way in which the parties deal with the property when they treat their interest as belonging to them in common. . . . Where, however, it may be seen from the language of the judgment, and the property agreement incorporated therein, together with the matters disclosed in the transcript of the dissolution hearing, that the parties intended a division of the property, the joint tenancy will have been severed. . . .*

The court in *Dowty* distinguished other cases when it stated that "the language in a marital property settlement agreement which provides only for the *possible or contingent future sale* of jointly held real estate is insufficient evidence of an intent to sever the joint tenancy."

For example, the *Dudek* and *Sondin* cases both concerned similar fact situations. However, the courts in both *Dudek* and *Sondin* held that there was no severance of the joint tenancy.

Why did the courts in Dudek and Sondin determine there was no severance of the joint tenancy?

- In *Dudek* the settlement agreement indicated that the property *should remain in joint tenancy*, and so again the court recognized the intent of the parties.

- In *Sondin* the decree included the words "in the event of a future sale." As the court indicated in *Dowty*, such words that provide for a "possible or contingent future sale" are not sufficient evidence of an *intent* to break the joint tenancy.

What can we learn from these cases?

Despite the above wording of the *Dowty* decision, the Company takes the position that joint tenancies are broken by deed and not by oral agreements, court transcripts, or settlement agreements. However, the settlement agreement may provide some form of equitable rights in favor of the estate of a deceased joint tenant or tenant by the entirety. Thus, the title company must consider the settlement agreement in the disposition of sale proceeds.

Rule of Title Practice: Reviewing the Settlement Agreement When Title is Held in Joint Tenancy, the Parties are Divorced, and One of the Parties is Deceased:

When insuring the sale of property when property was owned by a married couple in joint tenancy and the parties have divorced and one of the parties has subsequently died, the examiner should obtain and review a copy of the settlement agreement. The examiner and closer should consider the terms of the settlement agreement in closing the transaction and disbursing sale proceeds. However, in order to insure a sale of the property, the examiner needs to have only the surviving joint tenant execute the deed.

Partition and the Severance of Joint Tenancy

When title to land is held "in joint tenancy or tenancy in common or other form of co-ownership," any one or more of the co-owners can petition the court for a division of the property. This division is called a *partition*. See 735 ILCS 5/7-101 *et seq*.

- *Example*: Mary is a widow; she has five adult children. She owns a forty-acre farm in Kendall County, Illinois. Mary dies without a will. Her five children cannot agree on what to do with the family farm. Three children want to sell the farm to a developer. Two children want to keep the farm and rent it out to a tenant farmer. Any one of the children can petition the court in a partition suit and ask that the court decide what to do with the property.

If possible, the court will "fairly and impartially" divide the land between the parties. If that is not possible (assume, e.g., that Mary owned a single family residence and not a farm), then the court will order the property sold at public sale and the proceeds divided between the parties. See 735 ILCS 5/17-105; 735 ILCS 5/17-119.

Consider the Illinois Supreme Court case, *Schuck v. Schuck*, 413 Ill. 390, 108 N.E.2d 905 (1952). This case concerned the four common law unities of joint tenants—*time, title, interest, and possession*.

In *Schuck v. Schuck* there was a final court decree that ordered a partition of the real estate. Before there were further proceedings, the ex-husband died.

The trial court determined that the ex-wife owned the land as a surviving joint tenant.

But the appellate court reversed that decision. The court determined that the decree of partition *severed the unity of possession* between the former husband and the former wife. The joint tenancy was destroyed, creating a tenancy in common.

What Are the Ramifications of *Schuck v. Schuck* to the Title Company?

- Consider this not-too-far-fetched example: Husband and Wife (who have one child) own the land in joint tenancy. Husband and Wife get divorced. The divorce decree awards exclusive possession of the land to Wife.

Is it possible that this divorce decree that grants possession (like the decree of partition in the *Schuck* case) destroys the unity of possession, thus severing the joint tenancy? If this is so, then if, for example, Wife were to die, Husband would not own the land as a surviving joint tenant. Rather, Husband and his child would own the land. And if this result is possible, is there a way for the prudent attorney to draft an order of dissolution that would award the home to one spouse but still preserve the unity of possession?

This may be possible, but this issue is outside the responsibilities of the title examiner.

But when faced with a *Dowty*, *Dudek*, or *Sondin* fact situation, should the examiner be especially concerned if the judgment of dissolution grants one spouse exclusive possession of the property?

- *Rule of Title Practice*: No, the examiner should not be unduly concerned. Again, it is the Company's position that deeds break a joint tenancy and not court orders. When insuring the sale of property when property was owned by a married couple in joint tenancy and the parties have divorced, and exclusive possession of the land is awarded to just one ex-spouse, and one of the parties has subsequently died, the examiner should obtain and review a copy of the settlement agreement. The examiner and closer should consider the terms of the settlement agreement in closing the transaction and disbursing sale proceeds. However, in order to insure a sale of the property, the examiner needs to have only the surviving joint tenant execute the deed.

Joint Tenancy - Pitfalls for the Unwary

As previously discussed, at common law, in order for there to be a valid joint tenancy, the "four unities" of time, title, interest, and possession had to be met.

- *Unity of time*—that is, all joint tenants must acquire their interest at the same time.

- *Unity of title*—that is, all joint tenants must acquire their interest by the same instrument of conveyance.

- *Unity of interest*—that is, all joint tenants must hold equal ownership interests. (That is, two joint tenants cannot own a 75% and 25% interest.)

- *Unity of possession*—that is, all joint tenants must hold an undivided right to possession.

Example: Adam buys a home. He later marries. Adam executes a deed to himself and his wife, "as joint tenants." At common law, no joint tenancy was created, as the unities of time and title were not present--Adam and his wife did not acquire title at the same time and by the same conveyance, since A owned the home before he drafted this deed.

This was why, prior to 1982, there were straw people--Adam should have conveyed his home to a third party, who would then convey back to Adam and his wife, as joint tenants.

This is not the case today. Today, this would be a valid joint tenancy, as Illinois statutory law makes it clear that one can convey property to himself and another party and create a valid joint tenancy. (See 765 ILCS 1005/1b; see also *Minonk State Bank v. Grassman*, 95 Ill.2d 392 (1983); "Voluntary Termination of Joint Tenancies: Illinois Eliminates the Strawman," by Jeffrey W. Jackson, *The John Marshall Law Review*, vol. 17, no. 3 (summer, 1984).

> See 765 ILCS 1005/1b: [Whenever a joint tenancy is created], the estate so created shall be an estate with right of survivorship notwithstanding the fact that the grantor is or the grantors are also named as a grantee or as grantees in said instrument of grant or conveyance. Said estate with right of survivorship, so created, shall have all of the effects of a common law joint tenancy estate.

This statute, therefore, has eliminated the requirement that all four unities be present in order to have a valid joint tenancy. That is, there is now a statutory exception to the four unities requirement.

But one must still be careful. Consider the following true scenario:

- *Example*: Father and his first wife own property in joint tenancy. First wife dies. Father then deeds the property to himself and his daughter in joint tenancy. Father then gets married. Daughter then deeds the property to her father and his new wife, in joint tenancy. Is this a valid joint tenancy?

No, it is not. The father already owned an interest in the property, and thus the common law unities of time and title were not met. The deed was not from a party to himself or herself, and thus there is no 765 ILCS 1005/1b statutory exception.

What should have been done? The daughter should have either used a nominee or the father and daughter should have deeded to the father and the new wife.

In the above example, the new wife died after the father's daughter deeded the land. The father thought that he owned the home as a surviving joint tenant. But he did not; because of the failed joint tenancy, the new wife's daughter from a previous marriage owned an interest, and the father and the new wife's daughter did *not* get along!

- *Example*: Father, Son, and Son's Girlfriend own a home as tenants in common. Son and his girlfriend are going to get married, and so Father quit claims his interest in the home to Son and Son's Girlfriend in joint tenancy. This joint tenancy is invalid. Son and Son's Girlfriend already owned an interest in the home, and so the common law unities of time and title were not met.

Now change the tenancy from tenancy in common to joint tenancy. Does that make a difference?

- *Example*: Father, Son, and Son's Girlfriend own a home in joint tenancy. Son and his girlfriend are going to get married, and so Father quit claims his interest in the home to Son and Son's Girlfriend in joint tenancy. Again, this new joint tenancy is invalid. Son and Son's Girlfriend already owned an interest in the home in joint tenancy with Father, and so this new joint tenancy with just Son and Son's Girlfriend is invalid. Again, the common law unities of time and title were not met as to this new joint tenancy.

- *Question*: Farmer owns a one-half interest in a farm. He wants to convey this interest to his brother. Is there a problem if Farmer prepares a quit claim deed, wherein he states that he "conveys and quit claims a one-half interest in the following described real estate . . . .?"

Perhaps there is a problem. One might consider this to be ambiguous. If Farmer owns a half interest, by noting on the deed that he is conveying a half interest, could one argue that he is actually conveying a half interest of what he owns, or a 1/4 interest, and still retains the other fourth interest?

The better solution might be to word the deed as follows:

> *Farmer conveys and quit claims to Brother all of grantor's interest in the following described real estate, being an undivided one-half interest, situated in the county of Madison, described as follows: . . . .*

- *Example*: John owns his home. John gets married to Jane. Jane moves into the home. Later, John wants to refinance his home. The lender insists that both John and Jane take title to the home. The lender prepares the deed, but

> prepares it so that John and Jane own the land as tenants in common. Jane dies. Only then does John discover that he and his now-deceased wife owned their home as tenants in common and not joint tenancy. Is there anything that John can do?

It is possible that John could go into court and *reform* the deed. However, this may be difficult. Illinois courts will usually not use extrinsic evidence ("But I wanted joint tenancy!") to reform otherwise unambiguous documents. See *In re Estate of McInerny*, 289 Ill. App. 3d 589 (1987). Is it possible that a court may allow for the correction of a scrivener's error? See *Handelsman v. Handelsman*, 366 Ill. App. 3d 1122, 852 N.E.2d 862 (2nd Dist. 2006); *In re Estate of Hurst*, 329 Ill.App.3d 326 (4th Dist 2002); *Reinberg v. Heiby*; 04 Ill.2d 247 (1949).

The wrong tenancy on a deed is probably not a scrivener's error. Case law indicates that a scrivener's error is akin to a typographical error, and it would be hard to construe the tenancy on a deed as being a typographical error. See *Midwest Real Estate Investment Company v. Anderson*, 295 Ill. App. 3d 703 (1998). It seems clear that attorneys must caution their homeowner clients to talk to lawyers *before* the lenders ask these homeowners to execute deeds that the lenders have prepared.

Joint Tenancy and the Mortgage

Consider the case of *Harmes v. Sprague*, 107 Ill.2d 215 (1984):

In this case, Adam and Baker held title as joint tenants. Adam, by himself, mortgaged the property. Adam then died. The court ruled that upon the death of Adam, who was the sole mortgagor, Baker then owned the property as sole surviving joint tenant, free and clear of the mortgage.

Therefore, the mortgage did not sever the joint tenancy. This case established Illinois as a *lien theory state* and not a *title theory state*. That is, this case makes it clear that a mortgage is a *lien* on the land. A mortgage is not a *conveyance* of the land.

The ramifications of this case arise frequently. For example: Husband and Wife own property in joint tenancy. Lender sends mortgage documents to the title company to be executed only by Wife, with Husband to waive homestead. This is incorrect. This is not a homestead issue; it is a title issue. All owners of the land must execute the mortgage of the land.

Tenancy by the Entirety

Introduction

See 735 ILCS 5/12-112; 750 ILCS 65/22; 765 ILCS 1005/1c

Beginning in 1990, married people can own their home as tenants by the entirety. This estate is unique in that it couples the survivorship attributes of joint tenancy with limited protection against creditors.

A subsequent judgment creditor of just *one* of the homeowners cannot enforce his lien against the residence of the homeowners when they own their residence as tenants by the entirety, as long as they are both alive, are both married to each other, and both live in the residence.

A Tenancy by the Entirety Situation

Example: Adam and Betty, husband and wife, take title to their home in 2011 as tenants by the entirety. Adam is a mechanic and owns his own garage.

One of Adam's customers walks into the grease pit, falls, and breaks his leg. The customer sues Adam and gets a judgment for $50,000. A memorandum of judgment is recorded in 2014 against Adam.

In 2015 Adam and Betty now want to sell their marital home and buy a new home. Chicago Title prepares two title commitments—one for the sale of their old home, and one for the purchase of their new home. Both commitments show the judgment in Schedule B. How can this judgment be underwritten by Chicago Title?

The Sale of the Old Home:

In order to insure the sale of Adam and Betty's old home, the Company should get an affidavit from Adam and Betty. The affidavit must make it clear that they are both still alive, and, that they have lived continuously in their home since they bought it, and, they have remained married all this time. The Company will want to make sure there has been no deed recorded since the original deed to Adam and Betty. Such a deed might sever the tenancy by the entirety. The Company will want to make sure that the conveyance to husband and wife, as tenants by the entirety, was not a fraudulent transfer—that is, a conveyance to avoid the enforcement of a judgment or other lien.

- In other words: A conveyance signed by both Adam and Betty, death, or dissolution or annulment of their marriage, or moving out of their residence, can sever the tenancy by the entirety.

Assuming the affidavit is acceptable, then upon the sale of the land, it is possible that the judgment can be waived. While the lien is valid, it simply cannot be enforced against the home of Adam and Betty. Why? Adam and Betty have continued to own the land as tenants by the entirety.

Note that other title companies might not waive the judgment. They appear to take the

position that upon the sale of the marital home, the judgment should be paid off.

Question: What is the status of proceeds when a home owned as tenants by the entirety is sold? Does ownership of the proceeds remain as tenancy by the entirety? In other words, could the judgment creditor seek to attach the sale proceeds of the home, or are the proceeds exempt from attachment by a creditor?

Answer: Different states have different views. Unfortunately, Illinois' statute is silent on the matter. See Michael A. DiSabatino, *Proceeds or Derivatives of Real Property Held by Entirety as Themselves Held by Entirety*, 22 A.L.R.4th 459 (1983).

The Purchase of the New Home:

So what about Adam and Betty's purchase of their new home? If Adam and Betty take title to their new home as tenants by the entirety, will the Company waive the judgment that was not paid off at the closing of their old home?

Assuming that this new mortgage is a purchase money mortgage (i.e., a mortgage used to purchase property) with Adam and Betty not receiving any of the mortgage proceeds, then the Company could show the judgment in Part II, Schedule B of the loan policy as being subordinate to the lien of the insured mortgage. The Company would show the judgment on the owner's title policy. Even if Adam and Betty take title to their new home as tenants by the entirety, the judgment is still valid; it just is not currently enforceable at the time they take title to their home.[1]

But note: The judgment is being shown in Part II, Schedule B of the loan policy because the insured mortgage is a purchase money mortgage, *not* because the title to the land will be held as tenants by the entirety!

The Purchase Money Mortgage Doctrine

As indicated above, a *purchase money mortgage* is used to purchase property. The mortgage does not necessarily have to be taken back by the seller (that is, the seller of the property acts as the buyer's lender) in order to be a purchase money mortgage.

Compare a purchase money mortgage with a *junior mortgage, second mortgage,* or

[1] The bankruptcy court in *In re Yotis*, 518 B.R. 481 (2014) somewhat creatively bifurcates the debtor's interest in the land. The court stated that to the extent that the lien "extends" to the fee simple interest in the land, the fee simple interest is exempt from attachment. The court then refers to "possible future interests"; these interests are not exempt from attachment. These "possible future interests" would include, e.g., an interest as a tenant in common in the event of divorce; an interest as a joint tenant in the event that another homestead is established; and a survivorship interest in the entire property in the event of the other tenant's death.

refinance mortgage. All of these three latter mortgages are executed *after* the mortgagor takes title to the property.

A purchase money mortgage carries with it a unique property. Even though a purchase money mortgage may be recorded *after* the recording date of a judgment or other general lien, such as a state or federal income tax lien, the purchase money mortgage will still be a first lien on the land. The prior general lien, recorded against the owner/mortgagor, is automatically subordinated to the purchase money mortgage, even though the purchase money mortgage is recorded *after* the prior general lien is recorded. See *Application of Busse*, 124 Ill. App. 3d 433 (5th Dist. 1984); *Bank of Homewood v. Gembella*, 48 Ill. App. 2d 316 (1st Dist. 1964).

- *Example*: In 2013 a creditor sues Pete for breach of contract and is awarded a $25,000 judgment against Pete. The creditor records a memorandum of judgment in 2014. In 2015 Pete wants to buy a home. The title search reveals the recorded memorandum of judgment. Nonetheless, the closing can probably still take place, as the title company should be able to show the judgment in Part II, Schedule B of the loan policy as being subordinate to the lien of the insured mortgage. The title company would show the judgment as an exception on the owner's policy.

Rationale: The doctrine of the purchase money mortgage is similar to a "but for" test. That is, "but for" the mortgage, Pete could not buy the home. Therefore, when the seller's deed is delivered to Pete at closing, a legal "fiction" is created. That is, the deed is passed from seller to buyer as if the deed is already subject to the lien of the purchase money mortgage.

Accordingly, the judgment of Pete's creditor is automatically subordinated to the lien of the purchase money mortgage, even though the judgment was recorded before the mortgage was executed, dated, and recorded.

Summary and Rule of Title Practice:

Before the examiner relies on the purchase money mortgage doctrine and shows a judgment or other general lien on Part II of the loan policy, the examiner should make sure that whatever the examiner does is satisfactory to the insured lender. The lender may insist that the judgment or general lien be paid off.

With the lender's approval, the examiner should show the judgment in *Part II, Schedule B* of the loan policy. *The judgment must appear in Schedule B of any owner's policy issued as an exception to title!*

Part II, Schedule B is a special provision of the loan policy. This part of the loan policy is for those matters that affect the land being insured. However, by showing these matters in Part II, Schedule B, the title company is assuring the lender that these

matters *are subordinate to the lien of the insured mortgage*.

Regardless of how Adam and Betty take title to the land (tenants in common, joint tenancy, or tenancy by the entirety), the Company will show the judgment on the owner's policy. Why? The judgment is still valid. If Adam and Betty take title to the land as tenants by the entirety, the judgment may not be enforceable against the land. But the death of the non-debtor spouse, a divorce, or the use of the property as something other than the couple's homestead, can make the judgment enforceable.

If Adam and Betty later wish to refinance their purchase money mortgage or get a second mortgage, and the Company is asked to issue a new title commitment and policy, then the judgment must be shown on the new commitment and loan policy in Schedule B (and not in Schedule B, Part II) as an exception, unless it is underwritten in the traditional manner.

Question: Why should the examiner show the judgment in Schedule B of a loan policy that insures a mortgage that is not a purchase money mortgage, even if the borrowers own their home as tenants by the entirety?

Answer: If the tenancy by the entirety were to be broken—for example, if Betty (the non-debtor spouse) were to die, if Adam and Betty were to divorce, or if Adam and Betty were to move to another home, the judgment would immediately become enforceable and be a prior lien, ahead of the mortgage the title company insured.

- *Example*: John and Jane are married. They own their home as tenants by the entirety. A judgment creditor records a judgment against John in 2013. In 2014 John and Jane decide to refinance their mortgage, and a new mortgage is recorded in 2014. Jane dies in 2015. The 2013 judgment is immediately enforceable against the home. It is a valid lien that is prior to the mortgage recorded in 2014.

- *Example*: Carl and Cathy are married. They own their home as tenants by the entirety. A judgment creditor records a judgment against Carl in 2013. In 2014 Carl and Cathy decide to refinance their mortgage, and a new mortgage is recorded in 2014. Carl and Cathy get divorced in 2015. The 2013 judgment is immediately enforceable. It is a valid lien that is prior to the mortgage recorded in 2014.

- *Example*: David and Donna are married. They own their home as tenants by the entirety. A judgment creditor records a judgment against David in 2013. In 2014 David and Donna decide to refinance their mortgage, and a new mortgage is recorded in 2014. In 2015 David and Donna decide to move to a new home. They intend to continue to own their old home; they will lease it to their son and his college friends. When David and Donna move to their new home, the 2013 judgment is immediately enforceable. It is a valid lien that is prior to the

mortgage recorded in 2014.

Other Aspects of Tenancy by the Entirety

At one time, parties who took title as tenants by the entirety had to make sure that their deed conformed exactly to the statute.

For example, at one time the deed *had* to reflect the fact that the man and woman were husband and wife.

See the case, *Travelers Indemnity Company v. Engel*, 81 F.3d 711 (1996). This case held that a tenancy by the entirety was not created because the deed failed to meet the statutory requirement of the grantees being *expressly identified* as being husband and wife. This was the case, even though the parties were married.

The statute (765 ILCS 1005/1c) originally required that the deed state that the grantees are taking title "not as joint tenants or tenants in common but as tenants by the entirety." Thus, at one time people were concerned that the deed must reflect this exact statutory language. This was the case, even though court cases in Illinois have made it clear that statutory language is not necessary to create a valid joint tenancy. The courts have used an “intent of the parties” approach. See, e.g., *Engelbrecht v. Engelbrecht*, 323 Ill. 208 (1926).

However, this has now changed. See Public Act 92-0136, effective January 1, 2002, which amended 765 ILCS 1005/1c. This Act did two things:

- One, it eliminated the strict requirement that a tenancy by the entirety deed contain the exact statutory language,

- Two, it eliminated the requirement that the deed reflect the fact that the grantees are “husband and wife.”

Note that tenancy by the entirety is used in other jurisdictions. It is unique in Illinois, though, it that in Illinois it is only applicable to the homestead of the married couple. Thus, an Illinois couple could not own investment property as tenants by the entirety.

Note that a joint tenancy can be broken or conveyed by one person signing a deed. This is not possible with tenancy by the entirety. With tenancy by the entirety, *both* parties must sign *one* deed.

See 765 ILCS 1005/1c: “No deed, contract for deed, mortgage, or lease of homestead property held in tenancy by the entirety shall be effective unless signed by both tenants.”

- *Example*: John and Jane take title to their home as tenants by the entirety. A

year later John quit claims his interest to Jane, but continues to be married to Jane and both John and Jane continues to live in the home. (In other words, John and Jane are still married and occupy the home as their homestead.) The deed is ineffective.

(The intent of the above statute seems to be that when property is held as tenants by the entirety, both spouses must evidence their consent to the conveying, leasing, or mortgaging of the land. But did the drafters of this legislation forget about a grant of easement?)

Rule of Title Practice: Title companies should be very cautious and very conservative about vesting title pursuant to a strict interpretation of this statute—that is, vesting title by ignoring a recorded deed because it was not executed by both tenants by the entirety. The deed may be ineffective on its face, but does the title examiner know if the husband and wife are still married and are still occupying the home as their homestead?

- *Example*: John and Jane take title to their home as tenants by the entirety. A year later John quit claims his interest to Jeff. The land is being sold. The examiner has been asked to prepare a title commitment. What does the examiner do? How should the examiner underwrite this situation?

- *Answer*: The examiner may need deeds from all three people, or at least a good explanation. For example, the examiner could vest title in Jane and Jeff, as tenants in common, but the examiner would also raise a Schedule B exception as to the right, title and interest of John, because the deed from John may be ineffective. (Keep in mind, though, that if, for example, John moved out of the home, established a new residence elsewhere, and then executed a quit claim deed to Jake, the deed would then be an effective conveyance. By moving out of the home, John broke the tenancy by the entirety.

But the issue may not be as obvious as this example. Consider the following:

> *Example*: Sam and Sandy are married and own their family home in Chicago as tenants by the entirety. Both have very active work lives. Sandy has just been given a huge job promotion involving a job transfer to Colorado. They have decided to sell their home and move to Colorado.
>
> Sandy is flying back and forth to Colorado. She doesn't even know if she will be in town for the closing. And so their attorney sends each of them a deed to sign. Sam signs his deed and Sandy signs her deed. Both Sam and Sandy FedEx their respective deeds to their attorney, who brings them to the closing. Is there a problem?
>
> Yes, there is. The deeds are invalid. The statute requires that both spouses sign one deed.

Tenancy by the Entirety—Title Insurance Problems and Issues

- Adam and Betty are husband and wife. They buy a two-flat. They plan to live upstairs, and rent out the downstairs. They want to take title as tenants by the entirety.

Some title people may feel that title to a two-flat cannot be insured as tenants by the entirety, as the downstairs living area (the only area occupied by Adam and Betty) is separate from the upstairs living area. However, Illinois court decisions have taken a very liberal view in interpreting the size and nature of one's homestead. Accordingly, a title company would probably not suffer a loss if it issued a title policy for a residential two-flat with the married couple shown in Schedule A as owning the land as tenants by the entirety.

In this regard, see the author's article, "Does Size Matter? Homestead and Tenancy by the Entirety," which appeared in the August 2007 issue of *Real Property*, the real estate newsletter of the Illinois State Bar Association.

Rule of Title Practice:

Title companies probably do not have to be zealous in noting possible defective tenancy by the entireties when they issue commitments.

- *Example*: Adam and Betty take title to a small commercial building as tenants by the entirety. They operate a stained glass store on the first floor, and they live in a small apartment on the second floor. Adam and Betty wish to refinance their mortgage, and so their lender orders a title insurance commitment. Should the examiner indicate that the tenancy may be defective?

No, he should not. The commitment is being issued to the lender. Adam and Betty will never see it.

- *Example*: Adam and Betty take title to a small commercial building as tenants by the entirety. They operate a stained glass store on the first floor, and they live in a small apartment on the second floor. They now want to sell the building and move to Michigan. Their attorney orders a title insurance commitment. Should the examiner indicate that the tenancy may be defective?

No, he should not. Adam and Betty own the land, and both Adam and Betty will be signing the deed and conveying the property. There is no reason to say anything about a tenancy that will not even be an issue when Adam and Betty leave the closing table.

- *Example*: Tenancy by the entirety is limited in its application to a married couple's homestead. But could someone argue that because 765 ILCS 1005/1c states

> that a tenancy by the entirety is created when there is a transfer of property, "maintained *or intended for maintenance as a homestead* ," a couple could buy a vacant lot as tenants by the entirety because they intend to build their marital home on it in the future?

Such reasoning seems specious. The above highlighted language was added as an amendment to this statute; it was not part of the original statute. The legislative history of this language indicates that it was meant to cover those situations when Husband and Wife were selling their home and buying a new one. For example, they were selling on Friday and intending to move in during the weekend. Since they *intended* to move into the new home on the weekend, they could take title to this new property as tenants by the entirety, even though technically it was not yet their homestead.

Judgments, Death, and Tenancy by the Entirety

- *Example:* Anne and Andy own their home as tenants by the entirety. In 2014 a judgment is entered against Andy and is promptly recorded. In 2015, before there is an execution and levy, Andy dies.

Yes, it is true that the death of a tenant by the entirety terminates the tenancy by the entirety, and that normally, a judgment against one tenant by the entirety would then be enforceable, as there would no longer be the entirety protection. But remember, too, that under the law of joint tenancy, a surviving joint tenant would own the property free and clear of the judgment entered against the other tenant.

Thus, under this set of facts, Anne, now sole owner of the land, would own the home free and clear of the judgment.

But now change the facts:

- *Example:* Anne and Andy own their home as tenants by the entirety. In 2014 a judgment is entered against Andy and is promptly recorded. In 2015, before there is an execution and levy, Anne dies.

When Anne dies first, Andy, the judgment debtor, owns the land as surviving joint tenant. But Andy owns the land, subject to his own judgment. In this instance the protection of tenancy by the entirety is gone.

Some "What-Ifs"

Question: What if Adam and Betty own and live in Blackacre as tenants by the entirety? Both of them move to Whiteacre and live there, but continue to own Blackacre. How do they own Blackacre?

Answer: They own Blackacre as joint tenants. See 765 ILCS 1005/1c.

Question: What if Adam and Betty take title to Blackacre as tenants by the entirety, but they actually are not married?

Answer: They own Blackacre as joint tenants. See 765 ILCS 1005/1c.

Question: What if Adam and Betty take title to Blackacre as tenants by the entirety, but then they get divorced?

Answer: Upon a judgment of dissolution, the estate becomes a *tenancy in common* unless and until the court directs otherwise. See 765 ILCS 1005/1c.

- *Example*: In one instance where Husband and Wife owned the land as tenants by the entirety, the couple got divorced, the divorce degree was silent as to the land ownership, and the ex-husband died, leaving minor children.

  Because the divorce decree said nothing about the land tenancy, after the divorce the man and woman owned the land as tenants in common. When the man died, the minor children succeeded to his interest in the land.

- *Example*: In at least one instance, in downstate Illinois, the court decreed that the ex-married couple continued to own the land as tenants by the entirety! This is contrary to the statute, and in this case, the Company refused to recognize the tenancy.

Question: What if Husband and Wife take title to their home as tenants by the entirety, but then they get divorced, but before they sell their home, one of them dies?

Answer: This can be a “perfect storm” for the unwary title examiner. The divorce severs the tenancy by the entirety; 765 ILCS 1005/1c provides that upon a judgment of dissolution, the estate becomes a tenancy in common until and unless the court directs otherwise.

Thus, if the judgment of dissolution is silent, the tenancy becomes a tenancy in common. Before the couple can sell the home, one of the parties dies. If the couple had children, then pursuant to 755 ILCS 5/2-1, the surviving spouse would own one-half an interest in the home, and the children of the couple would own the other half. If the children were minors, a guardian would have to be appointed before the house could be sold.

- *Rule of Title Practice*: a situation involving tenancy by the entirety, dissolution of marriage, and a deceased title holder must be analyzed very carefully!

Question: What if Husband and Wife take title to Blackacre as tenants by the entirety, but the property is not the Husband and Wife's homestead? In other words, what would the tenancy then "default" to in the event the property is not the couple's homestead?

Answer: No one knows; the statute is silent on the matter. Even *Travelers Indemnity Company v. Engel*, 81 F.3d 711 (1996), which indicated that the tenancy at issue was not a valid tenancy by the entirety, did not indicate what that tenancy was.

One the one hand, one could argue that since Husband and Wife intended ownership with the rights of survivorship, the tenancy should default to joint tenancy.

But on the other hand, one could argue that since the tenancy by the entirety failed, the deed vests title as if there were no tenancy noted on the deed. In Illinois, a deed that is silent as to tenancy is a tenancy in common, and thus, the "busted" tenancy by the entirety deed should default to a tenancy in common.

In other words: With one exception, there is no "default" tenancy in the event a tenancy by the entirety is not validly created. The one exception is the default tenancy mentioned above, relating to two people taking title as tenants by the entirety when they are not married. But otherwise, there is no "default" tenancy as to the tenancy of non-homestead property!

Question: Assume that Husband and Wife take title to Blackacre as tenants by the entirety. A year later Wife files for a dissolution of marriage, and Husband moves out and establishes a new homestead elsewhere. Before the divorce is final, however, Husband dies. What was the tenancy at the time Husband died?

Answer: No one knows; the statute is silent on this matter, too. 765 ILCS 1005/1c states only that the tenancy by the entirety estate "shall, by operation of law, become a joint tenancy upon the creation and maintenance by *both spouses together* of other property as a homestead." (emphasis added.) The statute does not address the issue of what tenancy is created when only *one* spouse moves out.

Summary of tenancy by the entirety issues:

In the examples below, assume that Adam and Betty are married to each other unless otherwise stated.

765 ILCS 1005/1c provides as follows:

- If Adam and Betty, husband and wife, own and live in Blackacre as tenants by the entirety, and both of them move to Whiteacre and live there, but continue to own Blackacre, they own Blackacre in joint tenancy.

- If Adam and Betty take title to Blackacre as tenants by the entirety, but they are not married, they own Blackacre as joint tenants.[2]

- If Adam and Betty, husband and wife, take title to Blackacre as tenants by the entirety, but then they get divorced, upon a judgment of dissolution, the estate becomes a tenancy in common unless and until the court directs otherwise.

The Illinois statute as to tenancy by the entirety is silent as to:

- What is the default tenancy for a residence in a situation where a married couple takes title to non-homestead property as tenants by the entirety?

- What is the default tenancy for a residence in a situation where a married couple establishes a valid tenancy by the entirety, but later only one spouse moves out of the residence?

- What is the default tenancy for a residence in a situation where a married couple establishes a valid tenancy by the entirety, both spouses move out of the residence, but they no longer live together?

Tenancy by the Entirety and the Fraudulent Transfer

Shortly after Illinois provided for the ownership of real estate as tenancy by the entirety, courts were faced with having to decide when a conveyance of land was a fraudulent transfer.

The appellate court in *E.J. McKernan Co. v. Gregory*, 268 Ill.App.3d 383 (1994), a second district case from DuPage County, held that a judgment debtor's transfer of property into tenancy by the entirety in order to shield that property from a judgment creditor did not violate the Illinois Uniform Fraudulent Transfer Act (IUFTA). See 740 ILCS 160/1 *et seq*. This case created a great deal of publicity.

The first district held otherwise in the case, *In re Marriage of Del Guidice,* 287 Ill. App. 3d 215 (1997), stating that transfers that are otherwise lawful could still violate the Illinois Uniform Fraudulent Transfer Act.

This same year the General Assembly attempted to define more clearly when a transfer of a residence into tenancy by the entirety is fraudulent. It amended 735 ILCS 5/12-112 via Public Act 90-514 to provide as follows:

> Any real property, any beneficial interest in a land trust, or any interest in

[2] See 765 ILCS 1005/1c: "A devise, conveyance, assignment, or other transfer to 2 grantees who are not in fact husband and wife that purports to create an estate by the entirety shall be construed as having created an estate in joint tenancy."

> real property held in a revocable inter vivos trust or revocable inter vivos trusts created for estate planning purposes, held in tenancy by the entirety shall not be liable to be sold upon judgment entered on or after October 1, 1990 against only one of the tenants, *except if the property was transferred into tenancy by the entirety with the sole intent to avoid the payment of debts existing at the time of the transfer beyond the transferor's ability to pay those debts as they become due . . . . This amendatory Act of 1997 is intended as a clarification of existing law and not as a new enactment.*

But now there was a new problem. The General Assembly failed to define the meaning of "sole intent" to avoid the payment of existing debts. The "sole intent" standard is different and higher than the "actual intent" standard found in the IUFTA. Did the General Assembly mean that if a debtor and spouse transferred their home into tenancy by the entirety to place it beyond the reach of creditors and also to accomplish some other legitimate end, the transfer cannot be attacked?

The Illinois Supreme Court finally decided this issue in February of 2000 in the case *Premier Property Management, Inc. v. Chavez*, 191 Ill.2d 101, 728 N.E.2d 476, 245 Ill. Dec. 394 (2000).

The Illinois Supreme Court stated that the amendment to the tenancy by the entirety provision makes it clear that a creditor may break through the tenancy by the entirety protection only when the property is transferred into tenancy by the entirety with the *sole intent* to avoid the payment of debts existing at the time of the transfer.

This sole intent standard is different from the actual intent standard of the Fraudulent Transfer Act. Under the Fraudulent Transfer Act, a creditor may avoid a transfer if the debtor made the transfer with the *actual intent* to hinder, delay, or defraud any creditor of the debtor.

The Fraudulent Transfer Act (740 ILCS 160/5(b)) lists eleven factors that may be considered in determining the debtor's actual intent in making the transfer. If enough of these factors are present, the requisite actual intent may be found.

The sole intent standard of the amended tenancy by the entirety provision is substantially different from the actual intent standard of the Fraudulent Transfer Act.

The sole intent standard provides greater protection from creditors for transfers of property to tenancy by the entirety.

- Under the sole intent standard, if property is transferred to tenancy by the entirety to place it beyond the reach of the creditors of one spouse *and also to accomplish some other legitimate purpose*, the transfer is not avoidable; the transfer is valid. Thus, if Adam and Betty own their home in joint tenancy, and

> they convey their home to themselves as tenants by the entirety to avoid the enforcement of a judgment *and also as part of a legitimate estate plan*, the conveyance is not avoidable; the deed is valid.

But such a transfer would be avoidable under the actual intent standard, which only requires any actual intent to defraud a creditor.

By adopting the sole intent standard, the General Assembly has made it clear that it intends to provide spouses holding homestead property as tenants by the entirety with greater protection from the creditors of one spouse than the protection provided by the Fraudulent Transfer Act.

Rule of Title Practice: Tenancy by the Entirety and the Fraudulent Transfer

Generally speaking, title companies stop searching the name of an owner of land when the owner conveys the land. But what if the owner of the land conveyed the property, into, e.g., an Illinois land trust with the apparent intent to defraud a creditor? Consider this example:

> *Example:*
>
> David and Darlene and married. They buy a home in Naperville, in DuPage County. The deed is recorded on March 2, 2013. They take title as husband and wife, in joint tenancy. David owns a small business in neighboring Wheaton, also in DuPage County. David enters into a contract with Frank. Frank is to deliver one hundred precast concrete forms to David's business in exchange for $50,000. Frank delivers the forms to David's business. However, David does not pay Frank, so Frank sues David for breach of contract. The complaint is filed on July 7, 2015, in DuPage County.
>
> David gets concerned. The trial has begun, and he already can see that the court proceeding is not going well. David knows that he should have paid Frank, and he knows that he has no defenses to his non-performance of his contract with Frank. David knows that if the court rules against him by issuing a judgment in favor of Frank for $50,000 (that judgment is a court order whereby the court orders David to pay $50,000 to Frank), this judgment, once recorded in DuPage County, will attach to his home in Naperville. So David hurriedly prepares a deed wherein he and his wife convey their home to themselves as tenants by the entirety. On August 11, 2015, David records the deed. The deed is exempt from the payment of transfer tax stamps. A week later, on August 18, 2015, David's worst fears become true—the judge issues a court order, ordering David to pay $50,000 to Frank. Frank records a memorandum of judgment in the DuPage County Recorder's Office the next day.

What did David do here? David recorded a deed of his home from himself and his wife to themselves as tenants by the entirety with the *sole intent* to avoid having a judgment attach to his home. This type of deed is called a *fraudulent transfer*. A court might very well see through this subterfuge and set aside the deed and enforce the judgment. See *Advocate Financial Group, LLC v. 5434 North Winthrop, LLC*, 2015 IL App (2d) 150144.

Rule of Title Practice:

When the examiner sees a deed recorded from one or more individuals to related parties as tenants by the entirety (e.g., John Edwards deeds to John Edwards and Janice Edwards, husband and wife, as tenants by the entirety), or to a so-called "personal trust" or land trust for no consideration, the examiner should continue to search the names of all parties for any and all general liens. If the search reveals a lien recorded against a grantor, the examiner should discuss the lien with an underwriter. The examiner should not attempt to decide if the grantor conveyed the property with the "sole intent" or the "actual intent" to avoid the enforcement of the lien.

Tenancy by the Entirety and the Federal Tax Lien

***United States v. Craft*, 122 S. Ct. 1414 (2002)**

The facts of this important case are as follows: Don Craft owed $482,500 in federal income taxes. The IRS recorded a federal revenue lien against him. At the time the lien was recorded, Craft and his wife owned land in Michigan as tenants by the entirety. After the lien was recorded, Craft and his wife Sandra deeded the land to only Sandra.

The U.S. Court of Appeals for the Sixth Circuit held that tenancy by the entirety property is exempt from federal revenue liens, stating that under Michigan law, a tenant by the entirety has no separate interest in entireties property.

The U.S. Supreme Court reversed this decision, holding that, despite the state law fiction, each tenant in a tenancy by the entirety possesses individual rights in entireties property that are sufficient to constitute property or rights to property for purposes of collecting federal taxes.

Note: The U.S. Supreme Court ruled that a federal tax lien can attach to these property rights, even though the land is held as tenants by the entirety.

Rule of Title Practice:

- Tenancy by the entirety gives limited protection against the creditors of one spouse as to the enforcement of judgments and state liens.

- Chicago Title has taken the position that any judgment entered after October 1,

1990 (the effective date of the tenancy by the entirety statute), against only one spouse may be waived upon a conveyance to a bona fide purchaser, if the land has been continuously and successfully held in tenancy by the entirety (That is, when the land is the homestead of both spouses and both parties are still alive and still married to each other.)

But note: a deed conveyed to a trust for no consideration is not a deed to a bona fide purchaser! In other words, assume that a husband and wife own their home as tenants by the entirety and a judgment is recorded against just one of the spouses. Assume that they convey their home to their own "living" trust. The above guideline does not authorize the examiner to insure a mortgage executed by the trustee free and clear of the judgment!

- But all federal revenue liens against either spouse must be shown as title exceptions. These liens cannot be waived simply because title to the land is held as tenants by the entirety.

Tenancy by the Entirety—More Traps for the Unwary

Mortgage Execution Problems

Tenancies can create drastic consequences when mortgages are improperly executed. Consider this simple fact situation: Adam and Betty are married. They own the home in which they live. The closing package is delivered to the closer, and the closer sees that the lender has prepared the mortgage so that only Betty will execute the mortgage but Adam will waive homestead. What are the problems?

- This is not a homestead issue at all. Homestead will be an issue when man and woman are married, but only one spouse owns the family home. Here, both spouses own the home. Remember the one important rule: In a mortgage situation, all owners of the land must execute the mortgage!

- If Adam and Betty owned the home as tenants in common, then the mortgage is a lien on only 50% of the land.

- If Adam and Betty owned the home as joint tenants, then the mortgage would also be a lien on only a 50% interest in the land. But if Betty died before Adam, then pursuant to *Harmes v. Sprague*, 105 Ill.2d 215, 473 N.E.2d 930, 85 Ill. Dec. 331 (1984), Adam would not only own the land as a surviving joint tenant, he would own the land free and clear of the mortgage.

- If Adam and Betty owned the home as tenants by the entirety, then pursuant to 765 ILCS 1005/1c, the mortgage may be completely invalid! This statute states that "no deed, contract for deed, mortgage, or lease of homestead property held in tenancy by the entirety shall be effective unless signed by both tenants."

For more issues concerning tenancy by the entirety, see the following articles:

- "Unresolved Issues Concerning Tenancy by the Entirety," by Richard F. Bales, which appeared in the February 2005 issue of *Real Property*, the real estate law newsletter of the Illinois State Bar Association.

- "Does Size Matter? Homestead and Tenancy by the Entirety," by Richard F. Bales, which appeared in the August 2007 issue of *Real Property*.

- "Random Thoughts on Tenancy by the Entirety," by Richard F. Bales, which appeared in the July 2008 issue of *Real Property*.

New Developments in the Law of Tenancy by the Entirety

Beneficial Interest in Land Trusts

735 ILCS 5/12-112 extends tenancy by the entirety protection to the beneficial interest in a land trust. See also 765 ILCS 1005/1c.

- 735 ILCS 5/12-112 provides that "any real property, any beneficial interest in a land trust, or any interest in real property held in a revocable inter vivos trust or revocable inter vivos trusts created for estate planning purposes, held in tenancy by the entirety shall not be liable to be sold upon judgment entered on or after October 1, 1990 against only one of the tenants. . . ."

In *Marquette Bank v. Heartland Bank and Trust Company*, 2015 IL App. (1st) 142627 both husband and wife owned the beneficial interest of the land trust. The husband signed the mortgage note, but both husband and wife directed the land trustee to execute the mortgage. The court determined that the tenancy by the entirety was not a defense to the mortgage foreclosure. The court stated that the wife's signing of the letter of direction was her consent to the mortgage, which was a joint debt.

Shares of Stock in a Cooperative

In *Maher v. Harris Trust and Savings Bank*, 506 F.3d 560 (2007), the 7th U.S. Circuit Court of Appeals ruled that the shares of stock in a cooperative represented an interest in homestead property that may be held as tenants by the entirety.

- The appeals court said that the Illinois courts had not yet addressed the issue of whether shares of cooperative stock could be held as tenants by the entirety.

- The court wrote, though, as follows: "However, we conclude that in reviewing the Illinois homestead and tenancy statutes the state courts would similarly conclude that because [the plaintiffs'] interest in the cooperative qualifies as a homestead

> and that interest is maintained as a homestead by both husband and wife, the estate created shall be deemed to be in tenancy by the entirety."

Beneficial Interest in Inter Vivos Trusts

765 ILCS 1005/1c has been amended by Public Act 096-1145, allowing a husband and wife to hold their beneficial interest in a revocable inter vivos trust as tenants by the entirety. 735 ILCS 5/12-112 was also amended.

The relevant new language is as follows:

> *Where the homestead is held in the name or names of a trustee or trustees of a revocable inter vivos trust or of revocable inter vivos trusts made by the settlors of such trust or trusts who are husband and wife, and the husband and wife are the primary beneficiaries of one or both of the trusts so created, and the deed or deeds conveying title to the homestead to the trustee or trustees of the trust or trusts specifically state that the interests of the husband and wife to the homestead property are to be held as tenants by the entirety, the estate created shall be deemed to be a tenancy by the entirety.*
>
> *Any real property, any beneficial interest in a land trust, or any interest in real property held in a revocable inter vivos trust or revocable inter vivos trusts created for estate planning purposes, held in tenancy by the entirety shall not be liable to be sold upon judgment entered on or after October 1, 1990 against only one of the tenants. . . .*

Some attorneys have misinterpreted this statute. Examiners have seen deeds wherein the trustee or trustees own the land as tenants by the entirety. This is not correct. The interest of the husband and wife, the primary beneficiaries of the trust or trusts, is held as tenants by the entirety. The trustees do not own the land as tenants by the entirety.

- Not correct: *John Smith and Jane Smith, husband and wife, convey and quit claim to John Smith and Jane Smith, co-trustees of the Smith Family Trust dated January 2, 2013, as tenants by the entirety.*

- Correct: *John Smith and Jane Smith, husband and wife, convey and quit claim to John Smith and Jane Smith, husband and wife, as co-trustees of the provisions of a declaration of trust dated January 2, 2013, and known as the Smith Family Trust, of which John Smith and Jane Smith are the primary beneficiaries, said beneficial interest to be held as tenants by the entirety.*

Court Cases

***Marquette Bank v. Heartland Bank & Trust Co*., 2015 IL App (1st) 142627**

Lawrence Gesiakowski owned his home and his business. He owned them in a land trust, the beneficial interest of which was owned as tenants by the entirety with his wife. He took out a business loan in 2007 with Marquette Bank. As security for the loan, Marquette Bank wanted a mortgage against both his home and his business. The land trustee, at the express written direction of the sole beneficiaries of the land trust, executed the mortgage.

Lawrence defaulted on the mortgages, and Marquette Bank filed two foreclosure actions, one for the home and one for the business.

Mr. and Mrs. Gesiakowski filed an affirmative defense. They claimed that the bank could not foreclose against their home to satisfy the debt of Lawrence, as they owned the beneficial interest in the land trust as tenants by the entirety. The trial court disagreed and granted summary judgment to Marquette Bank. Mr. and Mrs. Gesiakowski appealed.

The appellate court affirmed the decision of the trial court. The appellate court noted that "where both spouses are judgment debtors, borrowers, or guarantors, their real estate is not protected from judgment based on their ownership as tenants by the entirety." In this case, both Lawrence and his wife directed the land trustee to execute the mortgage.

***Loventhal v. Edelson*, 15-C-6397 (N.E. Illinois, 2016)**

A married couple purchased a home as tenants by the entirety in 2001. In April of 2014 they conveyed the home to the husband's living trust. The deed stated that "the beneficial interest of said trust held by Claude J. Edelson and Zisl Taub Edelson, husband and wife, as tenant by the entirety." In November of 2014 Zisl petitioned the court for Chapter 13 bankruptcy relief. She had a judgment of $66,000 against her in favor of Loventhal. Zisl listed Loventhal as an unsecured credior. When Zisl claimed the tenancy by the entirety exemption for the family home, Loventhal objected. Loventhal argued that the Edelsons severed the tenancy by the entirety when they conveyed their home to Claude's living trust because the trust agreement gave Claude unilateral powers over the property that are inconsistent with a tenancy by the entirety.

The district court affirmed the decision by the bankruptcy court upholding the exemption. The court look to the statute and said that the conveyance to the trust was a valid tenancy by the entirety.

This case was subsequently appealed to the U.S. Court of Appeals, 7th Circuit. See *Leventhal v. Edelson*, 16-1290 (U.S. Court of Appeals, 7th Circuit) The judgment of the district court was affirmed.

***Onewest Bank FSB v. Cielak*, 2016 IL App (3d) 150224**

Husband and Wife took out a mortgage. Both husband and wife executed the mortgage, but only the husband signed the note. When the mortgage went into foreclosure, the parties claimed that the mortgage could not be foreclosed as to the wife's interest in the home because only her husband signed the note and the parties owned the home as tenants by the entirety.

The appellate court disagreed. The court stated that a mortgage is a consensual lien on real property owned by another party. The mortgage secures a debt. In this case, the loan to Michael is the underlying debt secured by the mortgage executed by both Michael and Jean. The fact that only Michael signed the note does not invalidate the mortgage. The court noted that the wife signed the mortgage, knew the amount owed under the note, and consented to creating a lien on the real estate to secure the payment of the loan. The court stated that tenancy by the entirety "protects an innocent spouse from losing the marital home because of the individual debts of his or her spouse." See *Marquette Bank v. Heartland Bank & Trust Co*., 2015 IL App (1st) 142627. This is not the case here. In this case, the husband and wife jointly agreed to place a lien on their home when they signed the mortgage.