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TENANCY BY ENTIRETY IN WYOMING

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An estate by entirety is a form of property co-ownership held jointly by husband and wife. Each spouse is seized of the whole or entirety and not of a separate interest or divisible part. The whole estate is held as by a single person by reason of the legal unity in marriage.

An estate by entirety resembles a joint tenancy in that in each the surviving spouse takes the property as sole owner. However, in joint tenancy the survivor takes by the right of survivorship while in tenancy by entirety the survivor continues to hold the whole by virtue of the original title. A joint tenancy may be held by any number of natural persons, each seized of an undivided part of the whole. A tenancy by entirety is vested only in two persons regarded in law as one (husband and wife) and seized of the estate as a whole. A joint tenant may alienate or convey his interest to a stranger who then holds as a tenant in common with the other tenant. A tenant by entirety cannot sever the title or make a valid conveyance of any interest in the property to a third person. An entirety estate is easily distinguished from a tenancy in common. Each tenant in common holds an undivided one-half interest as separate property, though he has right of possession of the whole. Tenants in common may be any two or more natural persons who may acquire their titles at different times, in different modes and in different shares. Upon the death of a tenant in common his interest descends to his heirs or devisees.

A tenancy by entirety is created only by conveyance, gift or devise to husband and wife.¹ At common law a husband and wife are tenants by entirety unless the instrument by which they take title indicates intention to create a different estate. Where the instrument does not indicate how the grantees take, they take as tenants by the entirety if they are then husband and wife. If the grantees are not husband and wife they can not take as tenants by the entirety even though the instrument specifically so provides. In several states tenancy by entirety has been abrogated by statute. The common law rule applies in Wyoming and in states where it has not been changed by statutory law.

An estate by entirety can be terminated only by conveyance or partitioning jointly by the husband and wife, by death of one party or by divorce. In some states statutes specifically provide for partition-

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1. *Peters v. Dona*, 49 Wyo. 306, 54 P. (2d) 817 (1936); 4 *Thompson, Real Property*, sec. 1803 (perm. ed. 1940); 41 C. J. S. 458; 26 Am. Jur. 692.

ing at the instance of one spouse, and in case of insanity, for change to tenancy in common. A conveyance or partition can be effected at any time by mutual consent and joint act of the spouses. However, termination of a tenancy by entirety by death or divorce raises some questions of substantive and procedural law in Wyoming.

The common law rule that upon death of a tenant by entirety the survivor takes the property applies in this state.² However, the proper procedure to establish title in the survivor seems to be somewhat in doubt. Apparently there are at least four different procedures in this state for establishing title to property in a surviving tenant by the entirety (or joint tenant or remainderman).

1. Wyo. Comp. Stat. 1945 sec. 6-2715. A surviving tenant by entirety (or joint tenant or remainderman) may file a verified petition stating the facts in the District Court of the County where the property is situated and after two weeks notice by publication, or otherwise as the Court may order, the Court may upon hearing decree that the estate remain solely vested in the survivor. Thereafter a certified copy of the decree shall be recorded in the County Clerk's office and the record of the decree and the original instrument constitutes presumptive evidence of the creation and termination of the estate and survivorship thereof.

Prior to 1945 the above statute tried to give the recorded certified copy of the decree the same effect as a final decree of distribution of a decedent's estate. The Wyoming Supreme Court held in the *Bergman*³ case that where interested parties resided in Wyoming and notice by publication only was given the Court could determine only the fact of decedent's death. A special appearance objecting to jurisdiction of the Court over any persons interested and the subject matter of the proceeding was sustained. The Supreme Court pointed out that the proceeding was in the nature of an action to quiet title and that petitioner had ample remedy under the declaratory judgment statute and perhaps under the probate code provision authorizing actions by executors and administrators to quiet title or determine adverse claims to property.

In *Nussbacher v. Manderfeld et al.*⁴, a surviving joint tenant proceeded under this statute and, prior to hearing date, defendants filed an answer and cross petition seeking reformation of the joint tenancy deed. The matter was tried and the District Court found the deed created a joint tenancy, that upon the death of the joint tenant her interest ceased and terminated and that the survivor was the sole and absolute owner of the property. The District Court entered judg-

2. *Peters v. Dona*, supra note 1; *In Re Bergman's Survivorship*, 60 Wyo. 355, 151 P. (2d) 360 (1944).

3. Supra note 2.

4. *Nussbacher v. Manderfeld et al.*, 186 P. (2d) 548 (Wyo. 1947).

ment accordingly and upon appeal the judgment was affirmed. No objection was raised to the jurisdiction of the Court nor did the Supreme Court indicate that any further procedure was necessary to establish title in the survivor. In a somewhat similar case in Nevada the Supreme Court of that state pointed out that if the defendants, instead of appearing generally by filing answer and going to the merits, had appeared specially objecting to jurisdiction of the Court they would have prevailed.⁵

In proceeding under Wyo. Comp. Stat. 1945 sec. 6-2715 a surviving tenant by the entirety (or joint tenant or remainderman) can establish the fact of death of the other tenant. If the objectors answer and meet the issues, title can be determined as against them, but if they object specially to the jurisdiction of the Court only the fact of decedent's death can be determined. The interests of any persons not appearing generally in the proceeding undoubtedly would not be affected by it. Hence the proceeding under Wyo. Comp. Stat. 1945 sec. 6-2715 appears of no more value than the shorter procedure now to be discussed.

2. Wyo. Comp. Stat. 1945 secs. 6-2716, 6-2717. A surviving tenant by entirety (or joint tenant or remainderman) may record in the office of the County Clerk where the property is situated an affidavit describing the property, a description of the instrument under which the estate vested and the fact of death of the decedent, with a certified copy of the death certificate of decedent attached. The recorded affidavit constitutes prima facie evidence that the facts therein are true for the purpose of the legal effect they have from the operation of law.

No decision has been found construing this statute or the effect of a proceeding under it. However, the procedure appears to have exactly the same legal effect as that provided in Wyo. Comp. Stat. 1945 sec. 6-2715 and since it is considerably simpler and doesn't involve expense of publication it seems preferable.

3. A quiet title proceeding, a declaratory judgment action or a proceeding under Wyo. Comp. Stat. 1945 sec. 6-1902 can be taken to establish title to property in a surviving tenant by the entirety. As pointed out above, the last two of these procedures were suggested and the first was hinted at by the Wyoming Supreme Court as proper in the *Bergman* case. Apparently it was contended by the American National Bank of Cheyenne in that case that the deed under which the survivor claimed title was in fact to the husband as sole grantee, and that no deed to the suband and wife was ever executed. Hence, if there is some question of validity in connection with the original instrument under which the tenant by entirety claims sole ownership, a declar-

5. *Petition of Fuller*, 159 P. (2d) 579 (Nev. 1945).

6. *Supra* note 2.

atory judgment action, a proceeding under the above mentioned provision of the probate code, or a quiet title action doubtless would be necessary to determine judicially the title to the property as against all possible claimants. However, in the ordinary case where there is no question concerning the validity of the instrument establishing the tenancy by entirety either of these procedures probably would involve considerably more effort and expense than necessary.

4. In practice some attorneys have endeavored to establish title in a surviving tenant by entirety (or joint tenant or remainderman) in connection with probate proceedings on separate property of a decedent. It is clear that property held in entirety or joint tenancy is not part of the estate of a deceased tenant.⁷ However, the fact of death of a decedent is judicially established in every probate proceeding. In these cases the decree of distribution includes, in addition to the separate property of the decedent, a description of the property held in entirety or in joint tenancy and merely recites that upon death of the decedent the latter property became vested solely in the survivor. This procedure appears to accomplish everything that can be done under Wyo. Comp. Stat. 1945 secs. 6-2715 through 6-2717 and would seem to be equally effective in establishing title to the property in the survivor. If this procedure is not followed in the case of a decedent who owns separate property and also was a tenant by the entirety or joint tenant, then the survivor should, in addition to the probate proceedings in connection with the separate property, prepare and file the affidavit and death certificates under Wyo. Comp. Stat. 1945 secs. 6-2716 and 6-2717.

A divorce changes a tenancy by entirety into a tenancy in common according to the majority view.⁸ Some courts hold that an estate by the entirety is not affected by a divorce between the parties. The real question in most cases is whether the Court in awarding a decree of divorce has authority and jurisdiction to dispose of property held by the parties as tenants by the entirety.

Wyo. Comp. Stat. 1945 sec. 3-5916 provides that in granting a divorce the Court "shall also make such disposition of the property of the parties, as shall appear just and equitable. . . ." Although the Wyoming Supreme Court has held that this statute gives the Court broad authority in disposing of the properties in a divorce action, the specific point apparently has not yet been ruled on. In *Lovejoy v. Lovejoy*,⁹ the Supreme Court held that in granting a divorce the Court might dispose of the separate property of the parties in making a just and equitable disposition. In that case the District Court in dividing the property awarded the defendant wife land including the husband's

7. *Ibid.*

8. 4 Thompson, *Real Property*, sec. 1814 (perm. ed. 1940); 27 C. J. S. 839; 26 Am. Jur. 743; 52 A. L. R. 890; 59 A. L. R. 718.

9. 36 Wyo. 379, 256 Pac. 76 (1927).

homestead entry and the husband was awarded telephone stock held in the wife's name. The decree was affirmed with immaterial modification and in the decision the Court states:

"The defendant says the statute, in authorizing a disposition of the 'property of the parties,' refers only to property held jointly or in common, and does not authorize the disposition of the wife's separate property. We are of opinion that the interpretation contended for cannot be given the statute, but that the Court is authorized to dispose of separate as well as joint property."¹⁰

Although it is not clear whether "joint property" includes property held by the entirety there appears no reason why it does not.

In the case of *Crawford v. Crawford*,¹¹ the District Court set over to the husband 80 acres of land that had been purchased by the parties during their marriage and the deed was "to the Crawfords jointly". Unless the deed specified a joint tenancy a tenancy by entirety was created in the Crawfords in this property set over to the husband in the divorce decree. The decree was affirmed by the Supreme Court.

Both of the above cases clearly indicate that the Court in a divorce proceeding has full authority to dispose of property held by the entirety as well as other property of the parties in making a just and equitable division. The rule in other states depends upon the particular local statute. In Michigan the Court has authority by statute to determine in the decree of divorce the disposition of property held as tenants by the entirety.¹² The contrary rule is followed in some other states.¹³ In a few states the statute provides that the party obtaining a divorce is entitled to an undivided one-third in fee of the whole of the estate owned by the other party. In these states the Courts have held that the successful party is not entitled to one-half of the property held by entireties and in addition the one-third share of the other half.¹⁴ The theory of this ruling is that the statute does not contemplate that the decree shall first change the estate from an entirety to a tenancy in common and then take one-third of the share of the tenant in common who is unsuccessful. These statutes are much more restrictive with reference to disposition of property in divorce proceedings than the Wyoming statute.

Although the matter has not been conclusively determined in Wyoming, the Wyoming statute and the *Lovejoy*¹⁵ and *Crawford*¹⁶ decisions clearly indicate that the Court in a divorce proceeding has full jurisdiction to dispose of property held by the entirety or joint tenancy in making a just and equitable division of the property of the parties.

10. *Ibid* at 387, 256 Pac. at 79.

11. 176 P. (2d) 792 (Wyo. 1947).

12. *Allen v. Allen*, 196 Mich. 292, 162 N. W. 987 (1917).

13. 52 A. L. R. 894.

14. *Schafer v. Schafer*, 122 Ore. 620, 260 Pac. 206, 59 A. L. R. 707 (1927).

15. *Supra* note 9.

16. *Supra* note 11.