



1948

Should Husband and Wife Hold Real Property With Survivorship?

William E. Francis
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Estates and Trusts Commons](#), and the [Property Law and Real Estate Commons](#)
Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Francis, William E. (1948) "Should Husband and Wife Hold Real Property With Survivorship?," *Kentucky Law Journal*: Vol. 37 : Iss. 1 , Article 14.

Available at: <https://uknowledge.uky.edu/klj/vol37/iss1/14>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

SHOULD HUSBAND AND WIFE HOLD REAL PROPERTY WITH SURVIVORSHIP?

The increasing popularity of the practice of husband and wife taking title to real property as joint tenants, or as tenants by the entirety, suggests a need for careful consideration of the advantages and disadvantages which may result therefrom. The most cursory investigation indicates few generalizations can be made, but that advantages and disadvantages in each case must be determined by consideration of a number of factors, including a great variance in the laws of the several states. Tenancy by the entirety and joint tenancy differ from tenancy in common primarily as to the incident of survivorship. When a tenant in common dies his interest passes to his heirs or devisees. When a joint tenant dies, his cotenant *succeeds* to the whole estate by the right of survivorship.¹ Tenancy by the entirety exists only between husband and wife. When one tenant by the entirety dies, the entire estate *continues* in his surviving spouse.² The features of survivorship tenancies beneficial to the spouses will be considered first, followed by a discussion of some of the disadvantageous features.

ADVANTAGES

Generally, survivorship avoids the expense, delay, and hazards of wills, probate, and administration, because property held by husband and wife as joint tenants, or as tenants by the entirety, immediately vests in the survivor upon the death of one spouse.⁴ The survivor may immediately convey or encumber it. There are no probate, attorney's, or administrator's fees. The chance that a will may be lost, destroyed, suppressed, or inadequately prepared or executed is avoided. When the deed is made, the rights of the parties are determined, and these rights are made a matter of public record by recordation.

The important difference between joint tenancy and tenancy by the entirety relates to severance. A tenancy by the entirety can be severed during coverture only by the joint act of the parties,⁵

¹ Ashbaugh v Ashbaugh, 273 Mo. 353, 201 S.W. 72 (1918)

² Carlisle v Parker, 188 Atl. 67 (Del. 1936).

³ Ashbaugh v Ashbaugh, 273 Mo. 353, 201 S.W. 72 (1918).

⁴ Petty v Petty, 220 Ky. 569, 295 S.W. 863 (1927), Elliott v. Nichols, 67 Ky. (4 Bush) 502 (1868), 2 Bl. Comm.* 180.

⁵ Cochran and Fulton v. Kerney and Wife, 72 Ky. (9 Bush) 199 (1872), Elliot v. Nichols, 67 Ky. (4 Bush) 502 (1868), Croan v. Joyce, 66 Ky. (3 Bush) 454 (1867), Rogers v. Grider, 31 Ky. (1 Dana) 242 (1833).

while a joint tenancy may be severed by the separate act of either.⁶ Thus it appears that by taking title as tenants by the entirety, the parties may secure a measure of protection to the interest of the survivor greater than that provided by joint tenancy. An estate by the entirety is advantageous when the parties wish that both shall own the property but neither shall have the power to defeat the other's right of survivorship. In neither instance will a charge⁷ or devise⁸ by the decedent defeat his spouse's right of survivorship.

Where the financial hazards of one's business are considerable, he may value highly the protection from creditors afforded by the survivorship tenancies. Property so held is not liable for the debts of a deceased spouse,⁹ nor is it liable for his federal income tax.¹⁰ By this method a husband may secure to his surviving family a homestead more adequate than that provided in Kentucky's meagre homestead exemption.¹¹

Kentucky has held that during the joint lifetime of the parties the expectancy of the debtor spouse, whether a joint tenant or a tenant by the entirety, can be sold under levy and execution,¹² but that the right of possession and enjoyment of the non-debtor, as well as the right of survivorship, cannot be disturbed.¹³ This amounts to the creation of a sort of inchoate lien on the property, which will mature when and if the non-debtor predecease the debtor, or which will be defeated if the debtor die first. Dictum in a Kentucky case states that this lien is not defeated by a conveyance of the property by the joint tenants.¹⁴

DISADVANTAGES

The principal disadvantages incident to survivorship tenancies derive from the federal tax laws. If the property is acquired by gift or devise, and one of the spouses later dies, only one-half is taxable

⁶ *Whitney v. Dorsey*, 268 Ky 773, 105 S.W. 2d 1025 (1937), Note (1940) 129 A.L.R. 813; cf. *Lacy v. Overton*, 9 Ky. (2 A.K. Marsh.) 440 (1820) (holding a "verbal division" not sufficient to sever a joint tenancy)

⁷ *Petty v. Petty*, 220 Ky. 569, 295 S.W. 863 (1927) *Elliot v. Nichols*, 67 Ky. (4 Bush) 502 (1868), *Martin v. Jackson*, 27 Pa. 504, 67 Am. Dec. 489 (1856).

⁸ *Bassler v. Rewodlinske*, 130 Wis. 26, 109 N.W. 1032 (1906), *Ashbaugh v. Ashbaugh*, 273 Mo. 353, 201 S.W. 72 (1918).

⁹ *Elliot v. Nichols*, 67 Ky. (4 Bush) 502 (1868).

¹⁰ *Tooley v. Comm.*, 121 F. 2d 350 (C.C.A. 9th 1941) *Irvine v. Helvering*, 99 F. 2d 265 (C.C.A. 8th 1938).

¹¹ Ky. R. S. (1946) sec. 427.060.

¹² Cf. Ky. R. S. sec. (1946) 426.190.

¹³ *Hoffman v. Newell*, 249 Ky 270, 60 S.W. 2d 607 (1932), *Petty v. Petty*, 220 Ky. 569, 295 S.W. 863 (1927), *Cochran and Fulton v. Kerney and wife*, 72 Ky. (9 Bush) 199 (1872), Ky. R. S. (1946) sec. 381.120 and 381.130.

¹⁴ *Hoffman v. Newell*, 249 Ky 270, 60 S.W. 2d 607, 613 (1932). *But see Beihl v. Martin*, 236 Pa. 519, 84 Atl. 953 (1912).

to his estate.¹⁵ But if acquired by purchase the entire value is included in the gross estate of the deceased tenant, except to the extent the consideration is shown to have been furnished by the survivor,¹⁶ and the burden of proof is on the survivor.¹⁷ As to federal estate taxes it appears that survivorship tenancies have no advantages over other forms of tenure, and there is always the possibility that evidence as to what portion of the consideration was furnished by each tenant will be difficult to obtain. If the parties take title as tenants in common, only one-half the value of the property is included in the decedent's gross estate, even though the survivor had paid none of the consideration.¹⁸ A tenancy in common will minimize the gross taxable estate.

In a few states it seems that the interest obtained as survivor of an estate by the entirety escapes state inheritance taxation,¹⁹ but generally this is not true.²⁰ Even where it is true, the saving is unlikely to be significant when one takes into consideration the credit against the basic federal estate tax of 80% of the state tax.²¹ Should two spouses owning property by the entirety die within one five year period, there was until recently a possibility that federal estate taxes would be applied in full each time, despite the generally available deduction of the value of identifiable property which has been subjected to federal estate taxation within the five years preceding the decedent's death.²² One case has held that the deduction was allowable where property was held by the entirety, and the parties died within five years of each other, on the ground the survivor took by inheritance.²³ This decision cannot be explained by established real property doctrine, and a subsequent decision of the Supreme Court holds that the survivor of a tenancy by the entirety does not take by inheritance.²⁴ This decision apparently overrules the holding of the lower court in the earlier case, and leaves the deduction not allowable in this situation. However, the regulation presently in effect allows the deduction.²⁵

¹⁵ INT. REV. CODE (1947) sec. 811 (e)

¹⁶ INT. REV. CODE (1947) sec. 811 (e)

¹⁷ U. S. v. Jacobs, 306 U. S. 363, 59 Sup. Ct. 551, 83 L. ed. 763 (1939).

¹⁸ INT. REV. CODE (1947) sec. 811 (a)

¹⁹ IND. STAT. ANN. (Burns 1933) 6-2401, *Palmer v. Mansfield*, Treasurer, 222 Mass. 263, 110 N.E. 283 (1915).

²⁰ KY. R. S. (1946) sec. 140.050.

²¹ INT. REV. CODE (1947) sec. 813 (b).

²² INT. REV. CODE (1947) sec. 812 (c).

²³ *Comm. v. Fletcher Savings and Trust Co.*, 59 F. 2d 508 (C.C.A. 7th 1932).

²⁴ *Lang v. Comm.*, 289 U.S. 109, 53 Sup. Ct. 534, 77 L. ed. 1066 (1933).

²⁵ INT. REV. CODE (1947) Regs. 105, sec. 81.41 (a) (1).

When property is purchased by husband and wife as joint tenants or tenants by the entirety, and one spouse pays the entire consideration, a taxable gift to the other results.²⁶ Where the estate cannot be severed by either party alone, as in a tenancy by the entirety, the value of the gift is the entire value of the property less the value of the donor's right to income and enjoyment during their joint lives and the value of his right of survivorship. The tax commissioner will compute the amount of the gift, using mortality tables, upon application after the gift is completed.²⁷ Where the estate may be severed by either party, as in a joint tenancy, the value of the gift is one-half the value of the property.²⁸ Therefore, it is necessary to consider the life expectancies of the spouses and the probable income from the property in determining whether the gift tax will be greater for tenancy by the entirety, joint tenancy, or tenancy in common. It is obvious, of course, that only a tenancy in common affords an opportunity for successive annual gifts of fractional interests within the \$3000 annual gift tax exclusion.²⁹ It also appears that this annual exclusion applies to gifts of present interests only, and that the value of the survivorship right in a tenancy by the entirety, which neither party acting singly can destroy, is a gift of a future interest, and cannot fall within the \$3000 exclusion.

The gift tax credit against the estate tax³⁰ gives only partial relief from double taxation and no relief for the loss of use, during the remainder of the donor's life, of the money paid as a gift tax. By taking title individually, the purchasing spouse would avoid paying a gift tax, and would not have any larger gross estate than had title been taken with survivorship. Further, should the donee predecease the donor, the amount paid as gift tax will have failed to benefit the parties, and will not be available upon the death of the donor as a credit against his estate tax.³¹

Ownership of property with survivorship will, in some cases, make possible a saving on income tax. Each spouse may report one-half the ordinary income from the property,³² except in states following the common law rule for estates by the entirety, that

²⁶ The same principles will apply whenever the proportion of the contribution of one spouse to the purchase price exceeds the proportion of his interest in the property purchased.

²⁷ INT. REV. CODE (1947) Regs. 108, sec. 86.19 (h).

²⁸ INT. REV. CODE (1947) Regs. 108, sec. 86.2(a) (5).

²⁹ INT. REV. CODE (1947) sec. 1003 (b) (3)-1.

³⁰ INT. REV. CODE (1947) sec. 813 (a).

³¹ *Ibid.*

³² Edwin F. Sandberg, 8 T.C. 423, 47-4 C.C.H. (1947) Fed. Tax. Serv. paragraph 7331; George K. Brennan, 4 T.C. 1260 (1945), Alfred Hafner, 31 B.T.A. 338 (1934), William R. Tracy, 25 B.T.A. 1055, 70 F. 2d 93 (1934).

the husband is entitled to the full use of the land, in which case, the entire income is taxable to him.³³ However, if such tenancies are used merely to juggle income to avoid taxation, the whole will be taxed to the one who received it.³⁴ Either tenant may deduct taxes and interest actually paid by him.³⁵

Capital gains and losses may be allocated equally between the parties.³⁶ Although the full value of the property is included in the gross estate of the donor, the cost basis to the survivor for gain or loss is the original cost to the donor,³⁷ and not the value for estate tax purposes upon succession, as would be true of other forms of tenancy.³⁸ Thus on a rising market, an earlier cost basis date probably would result in a greater taxable gain upon sale of the property by the survivor. A tenancy in common would make the cost basis to the survivor the value of the property at the time of death, thus reducing the taxable gain.

CONCLUSION

It is suggested that people of considerable means normally should take title in the name of the purchasing spouse, or as tenants in common, to avoid onerous taxation. If the value of the property is not great and it appears there will not be an estate tax, the advantages of the survivorship tenancies can be had without additional tax expense, other than that resulting from the change in cost basis in computing capital gains. In many cases, however, the general advantages of survivorship may outweigh the tax disadvantages even where the estate is large.

WILLIAM E. FRANCIS

³³ *Cooley v. Comm.*, 75 F 2d 188 (C.C.A. 1st, 1935), *cert. denied* 295 U.S. 747, 55 Sup. Ct. 825, 79 L. ed. 1692 (1935).

³⁴ E. M. Godson, T. C. Memo. Dock. 4913, 46-4 C.C.H. (1946) Fed. Tax Serv. paragraph 7614 (M).

³⁵ *William R. Tracy* 25 B.T.A. 1055, 70 F 2d 93 (1934), F. C. Nicodemus, 26 B.T.A. 125 (1932).

³⁶ *Edwin F Sandberg*, 8 T.C. 423, 47-4 C.C.H. (1947) Fed. Tax Serv paragraph 7331.

³⁷ *Lang v. Comm.*, 189 U.S. 109, 53 Sup. Ct. 534, 77 L. ed. 1066 (1933), *Edward v Schiesser ex'r*, 28 B.T.A. 640 (1933), INT. REV. CODE (1947) sec. 113 (a), *Helen G. Carpenter*, 27 B.T.A. 282, *app. dismissed* 68 F 2d 995 (1934).

³⁸ INT. REV. CODE (1947) sec. 113 (a) (5), Regs. 111, sec. 19.113 (a) (5)-1.