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THE OHIO ENTIRETY ESTATE: ALTERNATIVE APPROACHES TO ANTICIPATED PROBLEMS

I. INTRODUCTION

Section 5302.17 of the Ohio Revised Code¹ provides for the creation of estates by the entirety in real property by use of a deed in form prescribed by statute. At the time of its enactment² in 1972 this section was thought to have reversed the nonrecognition of common law sur-

1. Sec. 5302.17. Estate by the entireties

A deed conveying any interest in real property to a husband and wife, and in substance following the form set forth in this section, when duly executed in accordance with Chapter 5301. of the Revised Code, creates an estate by the entireties in the grantees, and upon the death of either, conveys such interest to the survivor, his or her separate heirs and assigns.

"ESTATE BY THE ENTIRETIES WITH SURVIVORSHIP DEED

. . . . (marital status), of county, for valuable consideration paid, grant(s), (covenants, if any), to and , husband and wife, for their joint lives, remainder to the survivor of them, whose tax-mailing address is , the following real property:

(Description of land or interest therein and encumbrances, reservations, and exceptions, if any)

Prior Instrument Reference: Volume , Page , wife (husband) of the grantor, releases all rights of dower therein.

Witness hand this day of"

(Execution in accordance with Chapter 5301. of the Revised Code)

A husband and wife who are the sole owners of real property as joint tenants or tenants in common, may create in themselves an estate by the entireties in such real property, by executing a deed as provided in this section conveying their entire, separate interests in such property to themselves.

A spouse who is the sole owner of any real property may create in himself or herself and the other spouse an estate by the entireties in such real property, by executing a deed as provided in this section conveying his or her entire interest in such property to themselves. The provisions of this paragraph shall be applied retroactively to cover transactions occurring on or after February 9, 1972.

When an estate by the entireties vests in a surviving spouse, the transfer of the interest of the decedent spouse may be recorded by presenting to the county auditor, and filing with the county recorder either a certificate of transfer as provided in Section 2113.61 of the Revised Code, or an affidavit or certificate of death, reciting the names of the spouses, the residence of the surviving spouse, the date of death of the decedent spouse, and a description of the property. The county recorder shall make index reference to any certificate or affidavit so filed in the record of deeds.

OHIO REV. CODE ANN. § 5302.17 (Page Supp. 1978).

2. The statute was originally enacted by the 109th General Assembly, taking effect on February 9, 1972. The 110th General Assembly amended the spousal conveyance provisions on November 22, 1973, providing for retroactive application.

vivorship estates that had prevailed in Ohio's courts for almost one and one-half centuries.³ Although the statute has not had the impact originally supposed,⁴ it is evident that this casual intrusion⁵ by the legislature in an area of settled law has raised questions not heretofore addressed by the Ohio judiciary.

This comment will review the principles of concurrent estates as developed at common law, and exhibit the modifications adopted by Ohio courts prior to 1972. By a detailed analysis of the statute's construction, two alternative theories on the nature of Ohio's estate by the entirety will be proposed. Solutions to anticipated problems in the operation of the statute will then be suggested under each alternative theory.

II. A BACKGROUND

A. *The Common Law of Concurrent Estates.*

At common law, ownership of property by two or more persons, where the possessory interest of each person was coextensive with the property, constituted a concurrent tenancy. Concurrent tenancies were generally of three kinds: in common, joint, and by the entirety.⁶

The tenancy in common existed when the owners had interests in undivided shares of a property. Nothing more than unity of possession, the threshold requirement for all concurrent tenancies, was required.⁷ The cotenants had ownership in several freeholds, independent of each other, and there was no survivorship⁸ between

3. *Sergeant v. Steinberger*, 2 Ohio 305 (1826). See text accompanying notes 29-33 *infra*.

4. It has been suggested that the statute would have "anything but a casual effect upon those practitioners whose legal fort   lies in the areas of real property, estate planning, probate, debtor-creditor, and domestic relations." Magee, *Tenancy by the Entirety: Ohio's New Estate*, 2 N. KY. ST. L.F. 69, 70 (1974) (footnote omitted). Nonetheless, a search of reported decisions in the jurisdiction for the seven years since enactment reveals no litigation in these areas, nor in any other area involving the statute.

5. The legislature did not receive the advice of the state conveyancing bar or title associations prior to enactment. 2 T. McDERMOTT, OHIO REAL PROPERTY LAW AND PRACTICE § 8-16E (3d ed. Supp. 1978).

6. 4A R. POWELL, THE LAW OF REAL PROPERTY ¶ 599 (1978).

7. 2 W. WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY § 118 (1947).

8. Survivorship is the ownership of a property maintained or obtained by a person by virtue of the death of another person having an interest in the property. Survivorship generally takes one of two forms: (1) technical survivorship, developed at common law as an implicit attribute of joint and entirety tenancies, see text accompanying notes 11 & 12 *infra*; or (2) express survivorship as the manifested intention of the grantor or grantee in property, see text accompanying notes 30-32 *infra*. In the former case, it is the estate itself which requires survivorship while, in the latter, survivorship

them.⁹ Upon death, a cotenant's interest in his share passed only to his heirs or devisees, and, during tenancy, the power of each cotenant to convey his respective interest in the property was not limited by the existence of the cotenancy. Conversely, the existence of the cotenancy was not affected by a cotenant's disposition because the acquiring party merely took the position of his grantor in the cotenancy. Conveyance by all cotenants to one party, however, or other partition of the property among the cotenants, would destroy the tenancy in common: in each case, the resulting ownership would be by one or more persons in severalty.¹⁰

Joint tenancy existed where the cotenants' interests were identical, were derived from the same instrument of title, and were created simultaneously.¹¹ Although each joint tenant owned the property in its undivided whole, each owned subject to the equal rights of the other joint tenants. The cotenants, therefore, also had interests in undivided shares and accordingly held *per my et per tout*.¹²

The most significant characteristic of joint tenancy was survivorship between the cotenants.¹³ Where *A*, *B*, and *C* so held a property, *A*'s ownership in the undivided whole would not pass to his heirs or devisees upon his death but would be extinguished in favor of the interests of his surviving cotenants, *B* and *C*, in the undivided whole. The estate would merely be freed from *A*'s participation.¹⁴ Similarly, upon *B*'s death, the joint tenancy would terminate and the sole survivor, *C*, would own the whole in severalty. When *C* died, the property would then pass only to his heirs or devisees.

Joint tenancy was subject to severance by any act which destroyed a prerequisite unity.¹⁵ Conveyance *inter vivos* of a cotenant's interest

obtains regardless of the estate created. In either case, survivorship operates to defeat the potential interests of the heirs or devisees of the decedent in favor of the immediate interests of the named survivor.

9. 4 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1793 (repl. 1961). See also 4A R. POWELL, *supra* note 6, at ¶ 602.

10. 4A R. POWELL, *supra* note 6, at ¶ 610; 4 G. THOMPSON, *supra* note 9, at § 1820. In the former case, the shares are merged in the acquiring cotenant; in the latter, the cotenants each acquire their respective shares and surrender their possessory interests coextensive with the whole property.

11. Together with the threshold concurrent tenancy requirement of coextensive possessory interests, these items constitute the traditional four unities of interest, time, title, and possession. C. SMITH & R. BOYER, SURVEY OF THE LAW OF PROPERTY 56 (2d ed. 1971).

12. "By the half and by the whole."

13. 4 G. THOMPSON, *supra* note 9, at § 1779.

14. *Id.*; 2 W. WALSH, *supra* note 7, at § 115.

15. 4 G. THOMPSON, *supra* note 9, at §§ 1780-1781; 2 W. WALSH, *supra* note 7, at § 116.

in jointly held property would destroy the unities of time and title, and the acquiring party would therefore hold only as a tenant in common in the property. A partitioning among cotenants would destroy the unity of possession and result in each owning the divided shares in severalty. In either case, the survivorship attending joint tenancy would be destroyed with the joint tenancy.

The tenancy by the entirety was a peculiar form of concurrent tenancy reserved for husband and wife. The estate's existence, as in joint tenancy, was dependant upon the four unities of possession, time, title, and interest, and, to this extent, it was similar to joint tenancy. Ownership was in the undivided whole of the property and, upon the death of a cotenant, his interest did not pass to his heirs or devisees but was extinguished in favor of the surviving cotenant's whole ownership. Estates by the entirety, however, differed from joint tenancy in one crucial unity: a husband and wife at common law were considered one person.¹⁶ Seisin was *per tout et non per my* because there were no separable persons to hold the moieties. Purchase of a cotenant's interest in joint tenancy, while destroying necessary unities and thereby working a severance of the joint tenancy, would be effective because the cotenants held conveyable interests in the moieties in addition to their interests in the undivided whole. But any purchase from a tenant by the entirety would be ineffective because it destroyed the other tenant's interest. Only the unified person, husband¹⁷ or husband and wife together, could effectively dispose of the property, and if the husband conveyed alone the purchaser's interest was subject to the wife's absolute ownership if she survived the husband. Similarly, creditors of a joint tenant could levy upon that tenant's interest in the concurrent estate because the tenant's interest was conveyable; but the interest of a cotenant by the entirety was immune to creditors because the interest was not conveyable.¹⁸

Survivorship in entirety properties also demonstrated a subtle difference in the character of ownership. In joint tenancy, the death of a cotenant resulted in enlargement of the interests of the surviving cotenants because the estate was freed from the decedent's interest in the moieties. But the survivor in an entirety estate gained nothing, having held only the whole before and after the cotenant's death.¹⁹ Insofar

16. 4A R. POWELL, *supra* note 6, at ¶ 620; 4 G. THOMPSON, *supra* note 9, at § 1784; 2 W. WALSH, *supra* note 7, at § 121.

17. The common law recognized the husband's *seisin jure uxoris* of the wife's freeholds. See note 22 *infra*.

18. 4 G. THOMPSON, *supra* note 9, at §§ 1780, 1790; 4A R. POWELL, *supra* note 6, at ¶¶ 618, 623.

19. 4 G. THOMPSON, *supra* note 9, at § 1784; 2 W. WALSH, *supra* note 7, at § 121.

as ownership of the property was concerned, the death of a tenant by the entirety merely converted the survivor's estate to one in severalty.

In feudal times, maintenance of tenurial responsibility for incidents and services in the fewest number of tenants was preferred. Survivorship was an important feature in avoiding the split of responsibility that accompanied descent.²⁰ Therefore, ambiguous conveyances indicating a concurrent tenancy were construed under a presumption of joint tenancy.²¹ Further, because of the inferior status of the married woman, and the husband's *seisin jure uxoris*²² of her freeholds, a presumption of tenancy by the entirety was operative when the grantees were husband and wife.²³

B. *The Modern Law of Concurrent Estates.*

The modern law recognizes that, with the decline of the tenurial system, the primary reason for survivorship no longer exists. Equitable and statutory modifications have arisen to abolish the presumption of joint tenancy in favor of a preference for tenancy in common.²⁴ In some jurisdictions, joint tenancy has been abolished altogether, with survivorship permitted as an appended characteristic of the tenancy in common only when the grantor expressly manifests that intent.²⁵

The artificial unity of the husband and subservient wife in tenancies by the entirety has been particularly thought to be repugnant to the status of married women in modern law.²⁶ The Married Woman's Property Acts abolished *seisin jure uxoris*,²⁷ and in states where entire-

20. 4 G. THOMPSON, *supra* note 9, at § 1775; 2 W. WALSH, *supra* note 7, at § 115.

21. 4A R. POWELL, *supra* note 6, at ¶ 602.

22. Literally, it is "in right of the wife." As a practical matter, the married woman did not constitute a legal entity in the eyes of the law. She could not sue or be sued except through her husband. Management of the wife's properties was vested in the husband who, while nominally acting only by virtue of the wife's ownership, was actually permitted to control and dispose of the property at will.

23. 4A R. POWELL, *supra* note 6, at ¶ 622; 4 G. THOMPSON, *supra* note 9, at §§ 1784, 1785. For example, where A, B, and C were grantees in a concurrent tenancy and A and B were married, without evidence of the grantor intending the contrary, A and B held as tenants by the entirety, of an interest equal to C's, in a joint tenancy with C.

24. See, e.g., *Case v. Owen*, 139 Ind. 22, 38 N.E. 395 (1894); VA. CODE §§ 55-20, 55-21 (1950); UTAH CODE ANN. § 57-1-5 (1953).

25. See, e.g., *Dover Coop. Bank v. Tobin's Estate*, 86 N.H. 209, 166 A. 247 (1933); *Gore v. Gore*, 250 Ala. 417, 34 So. 2d 580 (1948); OR. REV. STAT. § 93.180 (1977).

26. 2 T. MCDERMOTT, *supra* note 5.

27. As adopted in Ohio, the acts did not create new rights for a wife, but eliminated the husband's control over her rights. *Smiley v. Smiley*, 18 Ohio St. 543 (1869). See generally 28 O. JUR. 2D *Husband and Wife* § 21 (1958).

ty properties have not been abolished outright, the legal rights of the spouses during tenancy have generally been equalized.²⁸

In 1826, the Ohio Supreme Court recognized the modern law approach with respect to joint tenancy in *Sergeant v. Steinberger*.²⁹ In that case, the operation of a devise to a husband and wife was challenged by one of the wife's heirs. The wife had predeceased her husband and, by the time the action was brought, the property had been willed by the husband to the defendants. They contended that the original devise "vested [the husband and wife] with an entirety of the interests, so that neither could separate it without the consent of the other, and consequently, by the death of the wife, the whole survived in the husband"³⁰ The court acknowledged that "the joint tenancy of husband and wife varies in many principles from other joint tenancies."³¹ Nonetheless, insofar as the characteristic of survivorship was an attribute of joint tenancy in any form, the estate would not exist in Ohio.

The reasons which gave rise to this description of estate in England, never existed with us. The *jus accrescendi* is not founded in principles of natural justice, nor in any reasons of policy applicable to our society or institutions. But, on the contrary, it is adverse to the understandings, habits and feelings of the people.³²

The original devise was then construed as one of tenancy in common with distribution of the wife's interest to her heirs upon death. As a result, the court did not merely adopt the presumption of tenancy in common, but unequivocally rejected technical survivorship and, a posteriori, any estate in which such survivorship was an implicit characteristic.³³

Elimination of technical survivorship was the only effect of the *Sergeant* decision. In *Lewis v. Baldwin*,³⁴ a wife conveyed her holdings through a trustee to herself and her husband, granting the property

28. See, e.g., MICH. COMP. LAWS ANN. § 557.71 (Supp. 1978-1979) (equalizing each spouse's rights in entirety properties with respect to control, management, rents, products, income, and profits).

29. 2 Ohio 305 (1826).

30. *Id.* at 306.

31. *Id.* at 307.

32. *Id.* at 306.

33. Although the *Sergeant* decision recognized in dicta that entirety estates might be valid for purposes of creditor immunity or limitation of inter vivos conveyance, the failure of technical survivorship in entirety estates has since been determined. See, e.g., *Kipp v. Kipp*, 101 N.E.2d 782 (Ohio Ct. App. 1950) (*per curiam*) (rejection with respect to personality).

34. 11 Ohio 352 (1842).

“to them ‘jointly, their heirs and assigns, and to the survivor of them’”³⁵ It was contended that they held as tenants in common under the *Sergeant* rule and upon the wife’s death her heirs should have shared in the distribution. The court implicitly accepted the proposition that the tenancy created could not itself produce survivorship. Nonetheless, survivorship would result because of the wording of the deed.

No perpetuity is created by such a grant. He holds title, not upon the principle of survivorship, as an incident to a joint tenancy, but as grantee in fee, as survivor, by the operative words of the deed. The entire estate . . . is vested in him and his heirs. This is the effect of the words of grant, contained in the instrument of conveyance.³⁶

This had been the extent of judicial development of survivorship concurrent estates in Ohio prior to 1972. Joint tenancy with technical survivorship did not exist in the jurisdiction although property might be held jointly with express provision for survivorship in the granting instrument.³⁷ Tenancy by the entirety, as a form of joint tenancy with technical survivorship, was also not recognized, and where survivorship was expressly intended there was no discernible variation in treatment attributable to the marital status of the owners. Because the recognition of survivorship itself in concurrent tenancies appears to have been the only reason for litigating potential joint and entirety estates, there have been no reported decisions in Ohio concerning the operation of other common law characteristics of these estates.

III. THE NATURE OF THE OHIO ESTATE

The Ohio legislature entered the void in 1972 with the enactment of

35. *Id.* at 354.

36. *Id.*

37. These conclusions are questioned in Martin, *The Incident of Survivorship in Ohio*, 3 OHIO ST. L.J. 48 (1937). After a review of the line of cases under *Sergeant* and *Lewis*, the author concluded that the ratio decidendi in each instance was not incompatible with the existence of joint or entirety tenancies. The refusal to recognize technical survivorship was “simply another way of stating the view generally held in other states that, while there is a preference for the tenancy in common as a matter of construction, the estate of joint tenancy will be recognized where the language of the conveyance clearly indicates an intention to create it.” *Id.* at 59. Nonetheless, Ohio courts continue to reject common law cotenancies with technical survivorship, *see, e.g.*, *Casey v. Gallagher*, 11 Ohio St. 2d 42, 58, 227 N.E.2d 801, 813 (1967) (rejecting survivorship in class gift of trust income as reestablishment of common law survivorship cotenancy), while accepting and characterizing express survivorship as an investiture in the survivor rather than a continuation in ownership, *see, e.g.*, *In re Evans*, 173 Ohio St. 137, 180 N.E.2d 827 (1962); *Curtis v. Pursley*, 10 Ohio Misc. 266, 277 N.E.2d 276 (C.P. Clermont County 1967).

section 5302.17 of the Ohio Revised Code,³⁸ which provides for the creation of entirety tenancies in the state. It is not altogether clear that the nominal objective of the legislation was achieved, however, because of the peculiar draftsmanship involved. A detailed analysis leads to two alternative conclusions regarding the character of the concurrent tenancy which is created under the statute.

In determining the nature of the estate provided by the legislation it is inappropriate to begin with an assumption that the common law tenancy by the entirety has been authorized in the jurisdiction. The declaration in the title of the section and throughout its text is that the prescribed deed "creates an estate by the *entireties*."³⁹ Under common law theory, however, the estate is by the "entirety" because the spouses are not several persons in ownership; their interest is similarly singular in the undivided whole of the property.⁴⁰ At the threshold, then, there are indications that the subject estate involves multiple interests. Were it not for use of the term of art "entirety," even in an incorrect form, the indication of such multiple interests would probably preclude the existence of a common law tenancy by the entirety.⁴¹

Further, the survivorship mechanism detailed in the statute's preamble, prescribed deed form, and recording provisions, reinforces the proposition that common law tenancies by the entirety are not the object of the legislation. The preamble provides that "upon the death of either [husband or wife, the deed] *conveys* such interest to the sur-

38. OHIO REV. CODE ANN. § 5302.17 (Page Supp. 1978). See note 1 *supra*. The body of the statute is divisible into five parts: a preamble, generally providing for creation of the new estate; a prescribed deed form; a provision for creation of the new estate in property held by husband and wife in cotenancy; a provision, inserted by amendment in 1973, for creation of the new estate in property held by only one spouse; and a provision for recording the occurrence of survivorship upon the death of a spouse.

39. *Id.* (emphasis added).

40. 4 G. THOMPSON, *supra* note 9, at § 1784; 2 W. WALSH, *supra* note 7, at § 121; 2 T. McDERMOTT, *supra* note 5.

41. The title of the bill when passed by the 109th General Assembly indicated that its purpose was "[t]o amend section 319.54 and to enact section 5302.17 of the Revised Code to authorize creation of an estate by the *entireties*." 1971-1972 Ohio Laws 2213 (emphasis added). The 1973 amending bill stated that its purpose was "[t]o amend section 5302.17 of the Revised Code relative to the creation of an estate by the *entireties* by a husband or wife." 1973 Ohio Laws 1857 (emphasis added). The title of an act is given great weight by Ohio courts in ascertaining the act's meaning. See 50 O. JUR. 2D *Statutes* §§ 259-262 (1961) and cases cited therein. The problem here is that the title, in itself, is ambiguous. The Ohio Constitution, however, provides that "[n]o bill shall contain more than one subject, which shall be *clearly* expressed in its title." OHIO CONST. art. 2, § 16 (emphasis added). Although there are no Ohio cases directly on point, the use of the term "entireties" may provide a source of constitutional attack on the statute's validity.

vivor”⁴² The deed itself grants the “*remainder* to the survivor,”⁴³ and the recording provision operates “[w]hen an estate by the entirety *vests* in a surviving spouse”⁴⁴ These three characterizations of the survivorship mechanism, arguably inconsistent among themselves,⁴⁵ are not consistent with common law entirety survivorship. At common law, there are no separable interests to convey, vest, or remain upon a spouse’s death because the spouses during tenancy together hold a single interest in the whole.⁴⁶ More importantly, regardless of the interest during tenancy, the estate survives, and belongs to the surviving spouse, not by conveyance, vesting, or remainder, but by virtue of the title held by the survivor from the time of the original grant.⁴⁷

What then is the estate created by a section 5302.17 deed? There are two plausible alternative characterizations. First, it may be that the entirety designation in the title and text, and the contradictions between common law theory and the survivorship mechanism in the act, are only illustrative of legislative confusion about the theoretical characteristics of entirety estates; and that despite the peculiar draftsmanship, the legislature did intend to provide for a modern law entirety estate, at least within the limiting parameters of the Act. If this is the case, then Ohio courts will be left to construe the operative characteristics of the estate, choosing between pure common law principles and the modifications adopted in other jurisdictions that recognize the estate in some form.⁴⁸

The second and, in view of the inconsistencies noted, more tenable alternative is that the entirety designation in the act is an awkward attempt to limit availability of survivorship to husband and wife. Under this approach, the intent of the legislature was merely to provide a statutory form of the judicially recognized survivorship deed for spouses.⁴⁹ The Act’s requirement that the grantees under deed be hus-

42. OHIO REV. CODE ANN. § 5302.17 (Page Supp. 1978) (emphasis added).

43. *Id.* (emphasis added).

44. *Id.* (emphasis added).

45. Magee, *supra* note 4, at 82.

46. 4 G. THOMPSON, *supra* note 9, at § 1784; 2 W. WALSH, *supra* note 7, at § 121.

47. *Palmer v. Treasurer*, 222 Mass. 263, 265, 110 N.E. 283, 284 (1915). In addition to these contradictions between common law theory and survivorship under the act, when originally introduced in the legislature the bill was designated as a “statutory form for joint tenancy with survivorship.” BULLETIN, 109th General Assembly 1971-1972.

48. Magee, *supra* note 4, at 84 n.75 (identifying 25 other jurisdictions recognizing the entirety tenancy).

49. *Lewis v. Baldwin*, 11 Ohio 352 (1842). *See also In re Hutchison*, 120 Ohio St. 542, 166 N.E. 687 (1929) (survivorship in personalty was based on contract rather than on the operation of an undefined survivorship tenancy).

band and wife is, in this view, relatively insignificant in determining the nature of the estate. Indeed, Ohio courts have ignored the husband-wife relationship in prior rejection of technical survivorship or acceptance of express survivorship.⁵⁰ According to this second alternative, the estate created is a concurrent tenancy reserved for husband and wife with express survivorship between them.

IV. THE OPERATION OF THE OHIO ESTATE

A. *Estate Creation.*

At common law, estates by the entirety could be created by will, deed, or act of the parties;⁵¹ the estates could be created in realty or personalty;⁵² and they could be created for any interest in such property.⁵³ Section 5302.17 addresses each of these principles and directly limits the flexibility in creation that was available at common law

First, section 5302.17 permits creation of the estate by deed alone and only by deed conforming in substance with that provided by the statute. It has been suggested by one author that it would not be logical to recognize that estate when created by deed and to ignore attempts to create it by other means.⁵⁴ Another author has commented that, after a search of treatises and reported decisions, he could discover no well-founded reasons for prohibiting creation of the entirety estate by will.⁵⁵

If Ohio courts treat the section 5302.17 estate under the express survivorship approach, then the deed form in the act should not be the only method for its creation. There is no materially distinguishing feature between the estate under the express survivorship approach and

50. Compare *Sergeant v. Steinberger*, 2 Ohio 305 (1826), with *Lewis v. Baldwin*, 11 Ohio 352 (1842). Nonetheless, it may be argued that the statutory requirement of the spousal relationship indicates, by negative implication, that the legislature disapproves of nonspousal survivorship arrangements. The continued viability of nonspousal joint and survivorship bank accounts in Ohio, however, opposes this construction of legislative intent. The legislature has not amended the statutes providing for such accounts, OHIO REV. CODE ANN. §§ 1107.08, 1151.19 (Page 1968 & Supp. 1978), and the courts have continued to recognize survivorship in them irrespective of the relationship of the joint owners. *Vetter v. Hampton*, 54 Ohio St. 2d 227, 375 N.E.2d 804 (1978); *Gregory v. Harper*, 48 Ohio App. 2d 184, 356 N.E.2d 500 (1975). On joint and survivorship bank accounts in Ohio generally, see Note, *Joint Bank Accounts with Rights of Survivorship: A Conceptual Maze*, 6 CAP. U.L. REV. 477, 482-88 (1977).

51. C. SMITH & R. BOYER, *supra* note 11, at 61, 65.

52. 4 G. THOMPSON, *supra* note 9, at § 1788.

53. 4 G. THOMPSON, *supra* note 9, at § 1784.

54. Baker, *The New Ohio Estate by the Entireties—A Medieval Pandora's Box Opened*, 45 OHIO B. 1663, 1666 (1972).

55. Magee, *supra* note 4, at 84-85.

a survivorship tenancy in common by devise. The creation of cotenancies with expressly intended survivorship between the cotenants has generally been permitted in the jurisdiction irrespective of the instrument by which it is manifested.⁵⁶ In essence, the statute addresses creation of survivorship estates only by deed and should not affect a court's willingness to recognize intended survivorship not embodied in a deed. If courts characterize the estate as one in the entirety, however, then the opposite result should occur. Permitting an entirety estate outside of the limiting parameters of the act would necessarily be development at common law. The courts will still face the rule of *Sergeant v. Steinberger*⁵⁷ in approaching this development. The dispositive issue, then, would be whether the enactment of section 5302.17 indicates a legislative intent to abrogate the *Sergeant* rationale. Because section 5302.17 does not imply a legislative judgement that all technical survivorship estates are consistent with modern institutions, expansion of the estate beyond the statutory limits would probably not be justified.

Second, section 5302.17 provides for creation of the estate only in real property. The common law entirety could also be held in personalty. Jurisdictions currently recognizing the entirety estate in some form are split over its application to personal property. In some cases, the estate is not limited;⁵⁸ in others, the estate exists only in the proceeds of realty held by the entirety;⁵⁹ in others, there is no entirety estate in personalty and the proceeds from realty held by the entirety are held in common.⁶⁰

Under the first alternative characterization of the Ohio estate, it is again clear that personalty may not be held by the entirety under the statute. The expansion of the estate beyond the limitations of the statute would unjustifiably abrogate the continued viability of the *Sergeant v. Steinberger* rationale.⁶¹ The difficulty of this approach is

56. Because words of survivorship in a devise to two or more persons are presumed in Ohio to refer to the devisees surviving at the time of the testator's death, *see, e.g., Sinton v. Boyd*, 19 Ohio St. 30 (1869); *Renner v. Williams*, 71 Ohio St. 340, 73 N.E. 221 (1905), clear manifestation of an intent to have the devisees take and hold with survivorship between them is rare. It is, however, a question of the adequacy of the manifestation of intent and not of the acceptability of the result. *Cf. Taylor v. Foster*, 17 Ohio St. 166 (1867) (devise with survivorship contingent on a devisee's death without issue); *Casey v. Gallagher*, 11 Ohio St. 2d 42, 227 N.E.2d 801 (1967) (devise with implied plan of survivorship in trust income).

57. 2 Ohio 305 (1826). *See* text accompanying notes 29-33 *supra*.

58. 4 G. THOMPSON, *supra* note 9, at § 1788.

59. *See, e.g., Ronan v. Ronan*, 339 Mass. 460, 159 N.E.2d 653 (1959).

60. *See, e.g., Wilson v. Ervin*, 227 N.C. 396, 42 S.E.2d 468 (1947).

61. *See* note 57 and accompanying text *supra*.

the treatment of the proceeds of realty held by the entirety, such as are received upon joint sale or in conversion by eminent domain. This obstacle can be overcome, however, by recognizing that if the estate does not exist for personalty, but conversion from realty to personalty does not destroy cotenancy, then the proceeds must be held by tenancy in common.⁶² If Ohio courts treat the section 5302.17 estate under the express survivorship alternative, then, as in dealing with instruments of creation, no judicial development will be required to extend the estate to personalty. Express survivorship has been permitted in the jurisdiction for personalty.⁶³

Finally, section 5302.17 appears to agree with the common law principles by providing, in the preamble, for the estate in "any interest in real property."⁶⁴ The provisions relating to creation of the estate out of one or both spouses' current holdings, however, require that the conveying spouse or spouses be "the sole owners of real property"⁶⁵ Hence, if *A* and *B* are husband and wife, and if *A* or *B* are tenants in common in property with *C*, then *A* and *B* are precluded from granting the statutory estate to themselves. This anomaly is probably unintentional and it has been suggested that the spousal conveyance provisions in the statute be amended to provide that spouses who are "the sole owner[s] of any interest in real property . . ." may create the estate.⁶⁶

If Ohio courts adopt the first alternative of entirety under the statute, the suggested amendment should not be required. The only purpose of the provisions is to avoid the circuitous conveyancing that was required at common law in order for spouses to create the entirety estate. They merely circumvent the objection that one spouse cannot create the estate for both spouses in that spouse's property because the prior holding of that spouse would preclude the unities of time and

62. This conclusion merely characterizes the underlying estate. The survivorship attending entireties will not be implicitly found in the resulting tenancy in common because that estate is incapable of producing survivorship. The express survivorship embodied in the statutory entirety deed form, however, might also be found in the tenancy in common in proceeds. In view of the legislative recognition of joint and survivorship bank accounts, OHIO REV. CODE ANN. §§ 1107.08, 1151.19 (Page 1968 & Supp. 1978), a presumption to this effect would not be inconsistent with the limits of title to personalty in Ohio. Cf. MICH. COMP. LAWS ANN. § 557.81 (1967) (provides for survivorship in notes or other obligations secured by mortgage upon sale of land held by entirety).

63. See, e.g., *In re Hutchison*, 120 Ohio St. 542, 166 N.E. 687 (1929); *Berberick v. Courtade*, 137 Ohio St. 297, 28 N.E.2d 636 (1940); *In re Hatch*, 154 Ohio St. 149, 93 N.E.2d 585 (1950).

64. OHIO REV. CODE ANN. § 5302.17 (Page Supp. 1978).

65. *Id.*

66. Magee, *supra* note 4, at 84.

title in the estate created.⁶⁷ As such, the spousal conveyance provisions are not intended to be restrictive. They should be read in conjunction with the broader language of the preamble and not prevent the creation of an entirety estate from a tenancy in common interest held with a nonspouse. If Ohio courts adopt the express survivorship approach to the section 5302.17 estate, then the anomalous provisions should also not prevent its creation from a cotenancy held with a stranger. Because a tenancy in common interest is conveyable, a spouse having such interest is not prohibited from conveying it to himself and the other spouse.⁶⁸ The attachment of an express survivorship provision to the conveyance should have no effect on the validity of the conveyance or the estate created.

B. Characteristics During Marriage.

The nature of individual spousal interests under the Ohio estate, and the rights of creditors in those interests, present various problems under either alternative characterization. At common law, entirety cotenants held as a single unit with a single interest. Because conveyance by one spouse would necessarily affect the whole interest in which the other spouse participated such conveyance was impermissible. If a sole spouse had no conveyable interest then no interest existed for attachment by that spouse's creditors.⁶⁹

67. See, e.g., *Stuehm v. Mikulski*, 139 Neb. 374, 297 N.W. 595 (1941) (retaining the common law requirement for an intervening grantee); *Milliken v. First Nat'l Bank*, 290 A.2d 889 (Me. 1972) (abolishing the requirement); MICH. COMP. LAWS ANN. § 565.49 (1967) (giving effect to all conveyances as if grantor was not among named grantees). The "straw man" technique, of granting to a stranger for reconveyance to the original grantor and his cotenant, has not been necessary in this context in Ohio because of the nonrecognition of joint and entirety tenancies in realty. See, e.g., *Cleaver v. Long*, 126 N.E.2d 479 (C.P. Licking County, Ohio, 1955) (estate created was not defined but survivorship was permitted when spouses manifested that intent by deed of property to themselves). To the extent that joint and survivorship bank accounts parallel joint tenancy in personalty, see *In re Kirkham*, 21 Ohio Op. 342 (P. Ct. 1941) (application and analysis of common law joint tenancy principles in a survivorship account), the "straw man" would appear necessary. Failure to use the technique, however, has not resulted in voided account contracts. See, e.g., *Shipman v. Hance*, 109 Ohio App. 321, 165 N.E.2d 678 (1959).

68. There are no Ohio cases directly on point. The problem is that a conveyance to one's self is not generally recognized and that, despite such conveyance, the grantor who attempts to convey to himself continues in his original title. Nonetheless, it is generally accepted that a conveyance to one's self and another creates a tenancy in common. The unity of time is not required. See generally cases collected in 44 A.L.R.2d 595 (1955).

69. This is the rule adopted by the majority of jurisdictions recognizing the common law entirety estate. See, e.g., *Baker v. Cailor*, 206 Ind. 440, 186 N.E. 769 (1933). Where the spouses are jointly liable as debtors, however, it follows that the entirety tenancy, as a jointly conveyable asset, may be employed in satisfaction of the debt.

The rule of immunity, however, operated as a practical matter only against the wife's creditors. Creditors of the husband could reach his entirety properties and attach the present possessory interest of both spouses.⁷⁰ This was a logical corollary of the preemptive right of the husband, recognized at common law, in control of the wife's freeholds and their use for credit. Massachusetts, which is the only state retaining the entirety estate with this characteristic has relied on the continued viability of *seisin jure uxoris* in that jurisdiction to explain the result.⁷¹

If Ohio courts treat the section 5302.17 estate as one in the entirety, then it will probably be immune from the creditors of either individual spouse. This would be consistent with the single interest concept of common law entirety theory. To the extent that preferential treatment of the husband's creditors has been justified by his control over his wife's property interests, such treatment should not obtain in Ohio. *Seisin jure uxoris* was abolished in the jurisdiction by enactment of the Married Woman's Property Acts. Recognition of the husband's creditors would imply a superior interest of the husband in control of the estate, parallel to *jure uxoris*, and as a matter of policy, generally conflict with the equalization of property rights otherwise accomplished by the Married Woman's Property Acts.⁷²

In jurisdictions where the common law rule of creditor immunity has been abrogated, the entirety estate is generally characterized as a concurrent tenancy with an indefeasible right of survivorship.⁷³ If Ohio courts adopt the express survivorship approach to the section 5302.17 estate then, as in the abrogating states, the spouses will hold separate conveyable interests subject to attachment by creditors. There are two distinct views regarding the extent to which creditors may reach interests in survivorship property.

First, some jurisdictions hold that, where the interest of each spouse in the property is equal, neither spouse may interfere with the other's interest by conveyance of an immediate right to possession.⁷⁴

70. See notes 17 & 22 and accompanying text *supra*. There is no authority to suggest that the wife's survivorship right in an entirety estate could be defeated, under any characterization of the husband's control, through attachment by the husband's creditors. Cf. 4 G. THOMPSON, *supra* note 9, at § 1790.

71. Licker v. Gluskin, 265 Mass. 403, 165 N.E. 613 (1929).

72. See note 27 *supra*. This is the implication of section 3103.07 of the Ohio Revised Code, which provides that the fact of marriage will not alter the nature of the ownership of property by either spouse. OHIO REV. CODE ANN. § 3103.07 (Page 1972).

73. Magee, *supra* note 4, at 89.

74. The limitation on transfer of the possessory interest of a spouse has one parallel in Ohio. In a case involving a joint and survivorship bank account held by a husband and wife it was held that the account itself was not assignable by the husband,

With respect to possession, then, the estate parallels the limited alienation character of the common law entirety. The survivorship interests of the spouses, however, are separately considered. Because the transfer of one spouse's right of survivorship does not interfere with the other spouse's interest in present possession, the right is conveyable. Creditors can, therefore, attach the survivorship right of the debtor spouse and, although they obtain no right to present possession, they obtain the whole property if the nondebtor predeceases the debtor spouse. If the debtor dies first the creditor's attached interest is ineffective.⁷⁵

Under the second view of elimination of creditor immunity, all identifiable individual interests in a cotenancy are conveyable by the spouses, and attachable by their respective creditors, including the interest in present possession. In this respect, the underlying estate is certainly not in the entirety, and it has been held that upon attachment the creditor becomes a tenant in common with the nondebtor cotenant. Attachment of the debtor's interests in the property includes attachment of his survivorship right, with the creditor's exclusive right to the whole property, again depending on the order of death of the spouses.⁷⁶

The evident difference between the two views of attachable interests is in the conveyability of the interest in present possession. The second view more closely parallels the character of ownership under the express survivorship cotenancies recognized by Ohio courts. The first view appears unsound in that it conceptually mixes an entirety theory of present possession with a modern law view of survivorship. If Ohio courts elect an express survivorship approach to the section 5302.17 estate, then they will have determined that the legislature did not intend to authorize the common law theory of entirety ownership. They may, therefore, be reluctant to apply entirety theory, even if only with respect to the interest in present possession.

although the funds therein might have been withdrawn by him in toto and then given to the intended assignee. *Schwartz v. Sandusky County Sav. & Loan*, 65 Ohio App. 437, 30 N.E.2d 556 (1939).

75. See, e.g., *Hoffman v. Newell*, 249 Ky. 270, 60 S.W.2d 607 (1932).

76. See, e.g., *Franks v. Wood*, 217 Ark. 10, 228 S.W.2d 480 (1950). The opportunity to collect current income from property obviously lies with the tenant in possession. Section 5307.21 of the Ohio Revised Code provides, however, that the income obtained by a tenant in common in possession may be recovered by other cotenants "according to the justice and equity of the case." OHIO REV. CODE ANN. § 5307.21 (Page 1970). It has been held that this statute imposes a duty on the tenant in possession to account for rents and profits to the tenants out of possession. *Lipps v. Lipps*, 90 Ohio App. 578, 100 N.E.2d 862 (1951) (*per curiam*). A creditor attaching the possessory interest of a tenant in or out of possession would thereby gain access only to that tenant's share of income from the property.

A mechanics lien, resulting from construction authorized by one spouse, is generally permitted only where attachment by one spouse's individual creditors would be allowed.⁷⁷ Under either alternative characterization of the section 5302.17 estate, however, a lien may also be imposed against both spouse's interests in the property where the nonauthorizing spouse benefits from necessary repair to the property, or consents expressly or impliedly to the other spouse's authorization of improvements.⁷⁸

A partitioning of entirety property, by one spouse or that spouse's creditors, was not permitted at common law.⁷⁹ The rule is retained in those jurisdictions maintaining the common law entirety estate⁸⁰ and should be adopted in Ohio under the first alternative characterization of the section 5302.17 estate.

Partitions of joint tenancies and tenancies in common, however, are generally available in equity.⁸¹ To the extent that the underlying estate in Ohio express survivorship cotenancies is held by undivided shares, as in joint tenancy and tenancy in common, it would appear that the right of partition should be available under the second alternative characterization of the section 5302.17 estate. But the effect of partition on the survivorship right under this approach is a conceptual anomaly. In partition of joint tenancy, survivorship attending the cotenancy is destroyed because of the destruction of necessary unities.⁸² In express survivorship cotenancies, however, the right of survivorship is not dependent on necessary unities of the underlying estate, but on the intention manifested in the instrument of creation.⁸³ In theory, therefore, the destruction of unities by partition should not affect the intention of survivorship with respect to the whole property, and the partitioned estate should be reunited in the survivor on the death of the first spouse. Nonetheless, the partition of tenancy in common in Ohio has been said to locate all the rights of each cotenant in respective physical shares of the property.⁸⁴ Application of this principal to partitioned express survivorship estates would result in effective destruction of the survivorship right because each tenant after

77. See Magee, *supra* note 4, at 91; Baker, *supra* note 54, at 1671.

78. See *Wilson v. Logue*, 131 Ind. 191, 30 N.E. 1079 (1892) (implied consent of spouse in common law entirety); *Gleason v. Squires*, 39 Ohio App. 88, 176 N.E. 593 (1931) (stating Ohio rule that one tenant in common cannot bind cotenants except for necessary items).

79. C. SMITH & R. BOYER, *supra* note 11, at 62.

80. See, e.g., *Hoag v. Hoag*, 213 Mass. 50, 99 N.E. 521 (1912).

81. 2 AMERICAN LAW OF PROPERTY §§ 6.19-26 (A.J. Casner ed. 1952).

82. See note 15 and accompanying text *supra*.

83. *Lewis v. Baldwin*, 11 Ohio 352 (1842).

84. *Tabler v. Wiseman*, 2 Ohio St. 207, 211 (1853).

partition would maintain the right only in his physical share of the property.

C. *Divorce.*

Divorce dissolves the limiting marital relationship required by statute for the section 5302.17 estate. It does not, however, invalidate the title, concurrent tenancy, or intended survivorship manifested by the prescribed deed. These same characteristics have been judicially recognized and operative in Ohio in other express survivorship estates.⁸⁵ Therefore, under the express survivorship characterization of the section 5302.17 estate, divorce will merely, in theory, remove the tenancy from the ambit of the statutory provision and should have no other effect on its recognition and operation.

The majority of jurisdictions recognizing common law entirety estates have adopted the view that termination of a marriage terminates the requisite unity of person. Hence, the entirety estate, where joint tenancy is not recognized, converts to tenancy in common.⁸⁶ The theoretical consistency of this view has been thought to obscure a latent flaw: if a spouse may not effectively convey an interest in an entirety state—because to do so would destroy the estate by destroying the unities of time and title and thereby destroy the other spouse's interest in the whole—then the same spouse should not be able to obtain a conveyable tenancy in common interest through destruction of the unity of person by precipitating divorce. This argument has been accepted in at least one jurisdiction where fault in divorce is recognized.⁸⁷

The argument, however, is incorrect. Conveyance of an entirety interest is ineffective for two reasons. First, a sole spouse has no undivided interest; the conveyance is ineffective because the sole spouse has nothing to convey. Second, the conveyance is also ineffective, not because it has destroyed requisite unities, but because if given effect it will prospectively destroy them. The difference in divorce is that the unity of person has been destroyed, thus giving rise to the tenancy in common.⁸⁸ Logical application of the argument against permitting one spouse to convey a separate interest should not result in continuing the

85. See *Lewis v. Baldwin*, 11 Ohio 352 (1842).

86. See, e.g., *Youree v. Youree*, 217 Tenn. 53, 394 S.W.2d 869 (1965); *Hillery v. Hillery*, 342 Mass. 371, 173 N.E.2d 269 (1961).

87. *In re Lewis*, 85 Mich. 340, 48 N.W. 580 (1891).

88. This change creates a problem parallel to the treatment of proceeds from the joint sale of an entirety estate. See note 62 *supra*. Characterization of the estate after divorce as a tenancy in common does not dispose of the survivorship right. To the extent that the statutory deed expressly manifests an intent of survivorship, survivorship should be presumed to be a characteristic of the resulting tenancy in common.

entirety interest after divorce, but should result in holding the divorce ineffective because it is the event that prospectively destroys the requisite unity of person.

D. Characteristics at Death.

The nature of a concurrent tenancy has immediate consequences upon the death of a cotenant. In some of these areas, however, the alternative characterizations of the section 5302.17 estate will not vary the consequences.

First, recordation of the cotenant's death is not mandatory to perfect the survivor's title. Under entirety theory, the survivor's title is perfect from the time of the original grant and is not changed by the tenant's death.⁸⁹ It therefore follows that the recordation of death will not enhance the survivor's title. With respect to the express survivorship estates already recognized in Ohio, it has been suggested that recordation be accomplished to constitute "sufficient proof of . . . death"⁹⁰; but the cases indicate that valid title vests upon death⁹¹ and not upon recordation. In either event, the terms of section 5302.17 recognize title in the survivor upon the death of the cotenant and only provide for permissive recordation after the "estate by the entireties vests in a surviving spouse."⁹²

Second, section 5302.17 property is probably not subject to probate. The express survivorship estate already recognized in Ohio has been considered to vest title in the survivor by the operative words of the instrument of creation,⁹³ and thereby leave no interest of the decedent for administration or satisfaction of his debts.⁹⁴ Moreover, in

89. *Palmer v. Treasurer*, 222 Mass. 263, 110 N.E. 283 (1915).

90. OHIO STATE BAR ASSOCIATION, OHIO STANDARDS OF TITLE EXAMINATION § 3.4 (1952), *reprinted in* 52 OHIO B. 77, 84 (1979).

91. *Ross v. Bowman*, 32 Ohio Op. 27, 28 (C.P. Hamilton County 1945).

92. OHIO REV. CODE ANN. § 5302.17 (Page Supp. 1978). *But cf.* MICH. COMP. LAWS ANN. § 565.48 (1967) (requires recorded certification of cotenant's death before recordation of any conveyance by a survivor in former joint or entirety property).

93. *Lewis v. Baldwin*, 11 Ohio 352 (1842).

94. H. DEIBEL, PROBATE LAW § 253 (1954). *See, e.g.,* *Ross v. Bowman*, 32 Ohio App. at 28. In *Sheard, Avoiding Probate of Decedents' Estates*, 36 U. CIN. L. REV. 70, 80 (1967), the viability of joint and survivorship bank accounts as a probate avoidance device in Ohio is questioned in view of the decision in *Fecteau v. Cleveland Trust Co.*, 171 Ohio St. 121, 167 N.E.2d 890 (1960) (bank signature card not conclusive as to ownership). The similarity between these accounts and express survivorship cotenancies is sufficiently close to bring the probate avoidance potential of the latter into question. The author correctly points out, however, that the mechanics of signature cards are such that they do not necessarily reflect true owners of the account or intended survivors. In express survivorship cotenancies, the beneficiary of survivorship is necessarily designated in the granting instrument.

common law entirety theory, the interest of the decedent is clearly extinguished upon death and there is no estate or interest upon which a will can take effect. The common law entirety estate has, therefore, generally been considered to be a "convenient mode of protecting a surviving spouse from inconvenient administration of the decedent's estate and from the other's improvident debts."⁹⁵

In taxation of the decedent's estate and survivorship in simultaneous death, the alternative characterizations of the section 5302.17 estate present different problems. Although federal estate taxation has been structured to prevent tax avoidance by variation of the character of a cotenancy,⁹⁶ Ohio estate tax law does not provide such a gloss. Section 5731.10 of the Ohio Revised Code⁹⁷ provides for estate taxation of property held jointly at the time of death provided that the survivor obtains the right of possession of the whole property upon the other's death. As anticipated, Ohio taxing authorities have indicated that property held under section 5302.17 will be treated as jointly held property subject to section 5731.10 taxation.⁹⁸ This treatment is appropriate if Ohio courts take the express survivorship view of the section 5302.17 estate because the survivor does obtain the possessory right in the whole upon the other's death.⁹⁹ If the estate is considered to be one in the entirety, however, the survivor does not obtain possession upon the spouse's death, but merely continues in ownership and possession of the whole by virtue of the original grant.¹⁰⁰ Therefore, the terms of section 5731.10 do not provide authority for inclusion of entireties property in a decedent's estate and the anticipated treatment by taxing authorities would be inappropriate.

While title by survivorship is a mechanical process in most situations, the simplicity of its application can present problems when the

95. G. THOMPSON, *LAW OF WILLS* § 7 (3d ed. 1947).

96. I.R.C. § 2040.

97. OHIO REV. CODE ANN. § 5731.10 (Page 1973).

98. [Current Service] 1 OHIO TAX L. & RULES (BALDWIN) 146 (1977).

99. In [1922] OP. ATT'Y GEN. 1001 (Ohio), it was held that in express survivorship the survivor acquired an estate in fee simple whereas each cotenant had previously owned only undivided one-half interests for their joint lives with a contingent remainder to the survivor. Survivorship would therefore not be a taxable succession because the survivor did not succeed to anything previously owned by the decedent. This position was reversed, in [1941] OP. ATT'Y GEN. 164 (Ohio), by construing the statutory designation of jointly held property to include all cotenancies irrespective of the existence of survivorship.

100. *Palmer v. Treasurer*, 222 Mass. 263, 110 N.E. 283 (1915). The 1941 opinion of the Ohio Attorney General, *see* note 99 *supra*, suggested that if joint and entirety tenancies existed in the state then such estates would be taxed upon survivorship because they are jointly held property under the statute. This view ignores the statutory requirement for accrual of property interests by the survivor upon the cotenant's death.

cotenants die simultaneously. Section 3 of the Uniform Simultaneous Death Act provides for the distribution of entirety estates, when the tenant spouses die simultaneously, "one-half as if one had survived and one-half as if the other had survived."¹⁰¹ The act has not been adopted in Ohio. Instead, section 2105.21 of the Ohio Revised Code provides only a presumption on the order of death so that "no one of such persons shall be presumed to have died first and the estate of each shall pass and descend as though he had survived the others."¹⁰² This section is not amenable to estates by the entirety because the distribution can vary with the spouse first considered. If the Ohio courts adopt the entirety approach to the section 5302.17 estate, then they should also adopt the logic of *McGhee v. Henry*¹⁰³ in solving the dilemma. The Tennessee Supreme Court there decided, in considering circumstances under a similar statutory vacuum, that the entirety estate converts to tenancy in common upon simultaneous death. The court reasoned that death, like divorce, destroys the requisite unity of person, and where joint tenancy is not recognized, a tenancy in common must result. Because this approach would convert the entirety estate into shares for distribution under section 2105.21, the result is similar to that reached under the Uniform Simultaneous Death Act.

If Ohio courts adopt the express survivorship characterization of the section 5302.17 estate, then the conversion logic of *McGhee* need not be employed. Upon simultaneous death, intended survivorship is impossible as in *McGhee*. The underlying estate, however, is not held by the entirety, but by moieties. The distribution of moieties under section 2105.21 does not vary with the spouse first considered.¹⁰⁴

101. UNIFORM SIMULTANEOUS DEATH ACT § 3.

102. OHIO REV. CODE ANN. § 2105.21 (Page 1976).

103. 144 Tenn. 548, 234 S.W. 509 (1921).

104. The presumption of the existence of moieties or undivided one-half shares in express survivorship cotenancies was recognized in *Lewis v. Baldwin*, 11 Ohio 352 (1842), and *In re Hutchison*, 120 Ohio St. 542, 166 N.E. 687 (1929). The problem, however, is whether the impossibility of determining survivorship is sufficient reason to ignore it and proceed directly to section 2105.21 distribution. In White, *Notes on Survivorship Deeds—So-Called*, 24 Ohio Op. 119 (1943), the author concluded that survivorship under deed should not be ignored simply because of difficulty in determining who survived: "Now if a [survivorship] deed is valid when made, nothing that happens thereafter will affect its validity." *Id.* at 120. In addressing the ultimate question of distribution (under the predecessor to section 2105.21) the author provides a less than clear answer:

But someone says "What would a court do if it were impossible to determine which died first?" Well, after all, that is a question for the court to puzzle over. That is not my problem—it is a problem for the court. My hunch is that the court might take the bull by the horns and divide the property equally among the heirs of the victims of the common accident.

It is practically impossible for two persons to die at the same hour, minute and

V. CONCLUSION

It has been suggested that section 5302.17 be extensively revised by amendment or repealed altogether.¹⁰⁵ Common law entirety theory is thought, at best, to be an anachronistic regression to a system of holding land inconsistent with current theories on the ownership of property.¹⁰⁶ On the other hand, the estate may be considered beneficial in protecting a family from the creditors of an improvident spouse.¹⁰⁷ Nonetheless, the Ohio statute is particularly considered to be an act of legislative improvidence because of its ambiguous language.

Despite the difficulties perceived in the section 5302.17 estate there has been no legislative attempt at meaningful reform or repeal in the seven years since its enactment.¹⁰⁸ Ohio courts are therefore left to deal with the law as they find it. As they construe the statute in litigation, it is imperative that they arrive at a consistent characterization of the estate, whether it be an express survivorship or entirety tenancy, in

second. One of the two was the survivor and the survivor takes the property by the terms of the deed. The question as to which one survived is a question for the court. Difficult? Sure. But the courts have to settle a lot of difficult questions.

Id. In Barsch, *Survivorship Deeds* (address before the Real Estate Section of the Ohio Bar, May 13, 1949, reprinted in 22 OHIO B. 184 (1949)), the author made no mention of mandatory factfinding in lieu of the statutory presumption on the order of death, but did accept Mr. White's "hunch." In view of the presumption of moieties in survivorship cotenancies, however, equal division between the decedents' estates seems more tenable than equal division among heirs. *Cf. In re Markiewitz*, 129 N.E.2d 328 (P. Ct. Ohio 1955) (survivorship in joint bank account failed because of the manner of death, and there was equal division between the spouses' estates).

105. See Magee, *supra* note 4, at 83, 84, 86-88.

106. It has been suggested that entirety theory is antithetical to the women's rights movement. 2 T. McDERMOTT, *supra* note 5. Since the rights of spouses in entirety properties have been equalized in most jurisdictions, see note 28 and accompanying text *supra*, it is difficult to understand why this conclusion is drawn. As a matter of policy, it should be noted that the entirety estate is consistent with concepts of fostering family ownership and the enduring marriage. It may be, however, that the entirety estate is thought to portend a return of the *seisin jure uxoris*, see note 22 *supra*; or it may be simply that the attachment of a greater significance to marriage, in the ownership of property, is somehow not as acceptable to the supporters of women's rights as it may be to others.

107. See note 94 and accompanying text *supra*.

108. The statutory deed form has been subject to some use by Ohio practitioners. See Magee, *supra* note 4, at 93. It appears, therefore, that repeal of the statute or clarification of legislative intent by amendment should not be attempted unless existing titles created under section 5302.17 are reasonably accommodated. Any repeal or amendment at this point in time that is only prospective may create a trap for the unwary attorney by establishing an anomalous seven year period, during which the estate by the entireties was recognized, and which must be separately considered during future title searches. On the other hand, simple retroactive repeal will produce a negative result in that the status of outstanding section 5302.17 estates will not be certain. [NOTE: S.B. 173, which "defines the characteristics of . . . an estate by the entireties," was introduced in the Ohio Senate on April 18, 1979. BULLETIN, 113th General Assembly, 1979-1980 (May 30, 1979, p. 38).]

order to resolve problems arising under the section in a consistent manner.

If the estate is approached as one in the entirety, then the courts will have to explore unfamiliar areas of common and modern law in developing guidelines for its treatment. If the estate is treated as one of express survivorship, however, there will be little need for judicial enlargement of the Ohio law of concurrent tenancies. The characteristics of the estate have been developed in the express survivorship estates heretofore recognized in the jurisdiction, and the section itself essentially serves to provide nothing more than a limited statutory survivorship deed form. The ready interface between this view of the statutory estate and the express survivorship estate appears to suggest that it would be the more prudent option for selection by Ohio courts. The alternative entirety identification of section 5302.17 will produce unnecessary uncertainty, if only because of the inconsistencies between the statutory language and common law theory,¹⁰⁹ until the characteristics of the estate are defined by adjudication of successive controversies in Ohio courts.

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109. See notes 38-47 and accompanying text *supra*.