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Concurrent Ownership and Oil and Gas Leasing in Arkansas

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Tenancy in Common

Tenancy in Common is a form of concurrent ownership which does not entail a right of survivorship.

The overwhelming majority view is that it is not waste for a tenant in common to explore for or produce the minerals. *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566 (8th Cir. 1924). Arkansas embraced this view in *Fife v. Thompson*, 288 Ark. 620, 708 S.W.2d 611 (1986).

A tenant in common’s interest is alienable, devisable and inheritable.
The Statutory Presumption in Favor of Tenancy in Common

- “Every interest in real estate granted or devised to two (2) or more persons, other than executors and trustees as such, shall be in tenancy in common unless expressly declared in the grant or devise to be a joint tenancy.


- Hypo: O by deed or will conveys or devises:
  - “to A, B & C and their heirs.” A, B & C take as tenants in common with each owning an undivided one-third (1/3) interest.
Joint Tenancy

- Form of Concurrent Ownership that has a right of survivorship.

- Joint Tenants are seised “pur my” (undivided shares) and “pur tout” (the whole).
  
  - A & B, as joint tenants with the right of survivorship each own an undivided one-half (1/2) and of the whole. When A dies, B’s interest “swells” to the ownership of the whole.
The Four Unities

'In order to have a joint tenancy, there must coexist four unities: (1) Unity of interest. (2) Unity of title. (3) Unity of time. (4) Unity of possession. That is, each of the owners must have one and the same interest, conveyed by the same act or instrument, to vest at one and the same time and each must have the entire possession of every parcel of the property held in joint tenancy as well as of the whole.'

Stewart v. Tucker, 208 Ark. 612, 616, 188 S.W.2d 125, 127 (1945).
Severing the Joint Tenancy: Destroying the Right of Survivorship

- A&B, hold title as “joint tenants with the right of survivorship.”

- A thereafter conveys by deed his interest in the land to C. A’s deed to C destroys the unity of time and title of the four unities.

- Thus, B & C hold as tenants in common.

- The severance of the joint tenancy destroys B’s right of survivorship.
Creating the Joint Tenancy Estate: Rebutting the Statutory Presumption in Favor of Tenancy in Common

Traditional language to create a joint tenancy:

- “to A&B, as joint tenants with a right of survivorship.”

- “to A&B, as joint tenants, and not as tenants in common, with the right of survivorship.”
Non-traditional language and the Arkansas test:

Survivorship is the distinctive characteristic of a joint tenancy. Where, from the four corners of an instrument, a court can interpret the intention of the grantor or testator as creating a survivorship estate, the court will deem the estate to be a joint tenancy with the right of survivorship. *Wood v. Wood*, 62 Ark. App. 130, 134, 969 S.W.2d 672,675 (Ark. App. 1998)
Rebutting the Statutory Presumption - continued

- O conveys by deed

  - “to A, B & C, jointly and severally, and unto their heirs and assigns”

  - Held: “Jointly and severally” language is not indicia of intent to create a right of survivorship. A, B, and C each own an undivided one-third (1/3) as a tenant in common. [James v. Taylor](https://doi.org/10.1016/S0193-1154(98)80056-9), 62 Ark. App. 130, 969 S.W.2d 672 (Ark App. 1998).
O conveys by deed

“to A & B as joint tenants”


The result in Arkansas?
Conveyance by one to herself and another as joint tenants: The trap for the unwary.

- A owns land

- A conveys “to A & B, as joint tenants with a right of survivorship.”

- Common Law Result: A & B own as tenants in common. The lack of the requisite “four unities” foiled A’s attempt to create a joint tenancy with B. A acquired his title from his predecessor-in-interest, not from his deed to A & B. B acquired his title from A’s deed. Thus, the requisite unity of time and title is lacking and a joint tenancy is not created. To create a joint tenancy at the common law, A would have to convey to a strawman, O, who would then re-convey to A & B as joint tenants with a right of survivorship.
Arkansas and the trap for the unwary.

- A can convey to A & B as joint tenants without using a strawman in Arkansas.

- Miller v. Riegler, 243 Ark. 251, 419 S.W.2d 599 (1967).

- See also, Ark. Code Ann. § 18-12-106(b) (Repl. 2002).
The Problem with Joint Tenancy and Oil and Gas Leasing: Failing to Lease all Joint Tenants

- The Hypo
- A & B, own the surface and mineral estate as joint tenants with the right of survivorship.
- Thereafter, A executes an oil and gas lease to x, her lessee.
- X drills a producing well.
- A then dies.
- Who owns what?
Failing to Lease all Joint Tenants - continued

- Scenario #1

If the execution of the oil and gas lease *severed* the joint tenancy, the ownership interests are as follows:

- B owns an undivided one-half (1/2) interest of the fee (surface and minerals);

- A’s heirs under the Intestate Act own an undivided one-half (1/2) interest in the surface estate, and an undivided one half (1/2) interest in the royalty from the well’s production and, also, the possibility of reverter in the undivided one-half (1/2) interest in the mineral estate.

- A owns its working interest as to an undivided one-half (1/2) interest in the minerals.
Failing to Lease all Joint Tenants - continued

- That's good for A – he does not lose his ownership interest in the producing well. But it is bad for B who lost his right of survivorship, and the ownership of the whole, when A leased to X.

- Scenario #2

- The execution of the Oil and Gas Lease did not sever the joint tenancy.

- B owns the whole, including X’s well.

- X and A’s heirs own nothing.

- B is ecstatic and A is unhappy.
Failing to Lease all Joint Tenants - continued

- Scenario #3: The Reasonable Solution.

- The execution of the Oil and Gas Lease severs the joint tenancy as to the lessee’s working interest.

- But it does not sever the joint tenancy as to the surface estate, the royalty or the possibility of reverter.
Failing to Lease all Joint Tenants - continued

- Which scenario prevails??

- Lesson: Lease all joint tenants under one lease form.

Tenancy by the Entireties

- Form of concurrent ownership for Married Couples that has an Indefeasible Right of Survivorship.

Requires “Spousal Unity” plus the “4 Unities” of Joint Tenancy.

Spousal Unity is based on the Marital Relationship and the old common law concept that Husband and Wife are one entity, one legal personality, i.e., “indissolubly joined as one flesh.”
The Common Law Presumption

- The common law presumption that a conveyance to husband and wife creates a tenancy by the entirety prevails in Arkansas.

- O by deed or will → to A & B

  - If A & B are husband and wife, they take as tenants by the entirety. Even though "tenants by the entirety" does not appear in the deed or their marital relationship is not recited in the deed. Foster v. Schmiedeskamp, 260 Ark. 898, 545 S.W.2d 624 (1977).

Spousal Unity at the Common Law

- Husband & wife as Tenants by the Entirety do not own equal undivided shares (pur my) in the land.

  - “Tenants by the entirety do not take by “moieties,” but both are seised of the entirety. ... Husband and wife are but one person in law, and a conveyance to husband and wife is, in legal contemplation, a conveyance to but one person.” Roulston v. Hall, 66 Ark. 305, 50 S.W. 690, 692 (1899).
The Problem with Spousal Unity

- Note the force of the doctrine of “spousal unity” of husband & wife:

  - O conveys by deed to H, W, his wife, & C

  - Held: H & W, husband & wife, own an undivided one-half (½) interest as tenants by the entirety and C owns an undivided one-half (½) interest as a tenant in common. Mosser v. Dolsay, 27 A.2d 155 (NJ 1942).
The Arkansas Case

O conveys by deed as follows:

- “to R.N. Shinn and Mary Shinn, his wife; Billy W. Shinn (single); Wayne M. Newton and Sarah Newton, his wife, & Shinn Investments Ltd. ----Grantees .... as tenants in common.”

- Held: R.N. & Mary Shinn, own an undivided 1/4th as tenants by the entirety; Billy Shinn, an undivided 1/4th as a tenant in common, Wayne M. Newton and Sarah Newton, an undivided 1/4th as tenants by the entirety, and, Shinn Investments Ltd, an undivided 1/4th as a tenant in common.

Conveyance to Non-married Parties as Tenants by the Entireties

- O conveys by deed
  - “to A&B, husband & wife, as tenants by the entirety.”
    A & B are not married.

- Held: A&B own as joint tenants with a right of survivorship. Lack of a marital relationship between A&B precluded a tenancy by the entirety. However, the words “as tenants by the entirety” is sufficient indicia of intent to create a joint tenancy with a right of survivorship. *Wood v. Wood*, 264 Ark. 304, 571 S.W.2d 84 (1978).

- See also, Ark. Code Ann. §§ 18-12-106(C) (Repl. 2002).
Conveyance to Non-married Parties as Husband & Wife

- O conveys by deed
- “to A&B, Husband & Wife.” A&B are not married.

- Held: A&B each own an undivided one-half (1/2) as tenants in common. No right of survivorship language is present to rebut the presumption in favor of tenancy in common. Brissett v. Sykes, 313 Ark. 515, 855 S.W.2d 330 (1993).
Problems with the Four Unities: Failing the Bar Exam

- O by deed conveys → to Husband. Husband is married to Wife.

- The wrong bar exam answer: Husband & wife own as tenants by the entireties!

- The right answer: Husband owns solely as his separate property.

- To create a tenancy by the entirety the deed must convey the land to the Husband & Wife. The four unities, the unity of time, title, interest and possession must exist to create a tenancy by the entirety.
Another Problem with the Four Unities: The trap for the unwary again.

- Husband by deed " to Husband & Wife, as tenants by the entirety"

- Common Law result: Husband & Wife hold as tenants in common. The lack of the requisite “four unities” foiled husband’s attempt to create a tenancy by the entirety with his wife. Wife acquired her title from the deed. However, Husband had previously acquired his title from his predecessor-in-interest. Thus, husband and wife do not share the requisite unity of time and title and the attempt to create a tenancy by the entirety fails.

- To create a tenancy by the entirety at the common law, husband would have to convey to a strawman, O, who would then re-convey to husband & wife.
Arkansas and the Trap for the Unwary

- Husband can convey to husband & wife as tenants by the entirety without a strawman in Arkansas.

Tenancy by the Entireties and the Married Women’s Property Act

- The Hearty Survivor


- Married Women’s Property Act confers on Wife the ’s Right to Active Management of her share of the entirety estate.

- Married Women’s Property Act allows married woman to control all property owned by her including her interest in the estate of entirety. She can convey her estate in the entirety subject to her husband’s right of survivorship. Branch v. Polk, 61 Ark. 388, 33 S.W. 424 (1895).
The effect of a conveyance of a spouse’s share of the entireties estate in the minerals.

- Husband and wife own a mineral estate as tenants by the entirety. Husband conveyed his share of the entireties estate (1/2) in the minerals to X.

- Held: X acquired all of husband’s interest in the minerals. The deed, however, would not effect the wife’s right of survivorship or her right to one-half (1/2) of the rents and profits from her share of the mineral estate. *Tyler v. Boucher*, 225 Ark. 806, 285 S.W.2d 524 (1956).

- *Nota bene*: Assume X acquires an oil and gas lease from the husband and drills a producing well. If the husband predeceases the wife, X’s lease terminates and wife owns the well.
Some Arcane Arkansas Rules on Dissolution of Tenancy by the Entirety on Divorce

- **Divorce Decrees after 1975**
  - An Arkansas divorce decree entered after 1975 dissolves a tenancy by the entirety, creating a tenancy in common between the parties, unless the divorce decree specifically provides to the contrary. Ark. Code Ann § 9-12-317 (Repl. 2002).

- **Divorce Decrees before 1975**
  - An Arkansas divorce decree entered prior to 1975 does not dissolve a tenancy by the entirety, creating a tenancy in common, unless the divorce decree specifically provides to the contrary.
Tenancy by the Entireties created before 1947

A tenancy by the entirety created prior to 1947 could not be dissolved by Chancery Court in a divorce action and a provision in a divorce decree dissolving such an estate is void. *Jenkins v. Jenkins*, 219 Ark. 219, 242 S.W.2d 124 (1951).

*Jenkins* is premised on the rationale that Act 340 of 1947 that conferred on Chancery Court the discretion to dissolve tenancy by the entirety in divorce actions applied retroactively and did not effect entirety estates created prior to the Act. *Jenkins* is a rule of property in Arkansas. *Spotts v. Lewis*, 243 Ark. 272, 419 S.W.2d 622 (1967).