

TITLE ISSUES

TENANCY BY THE ENTIRETY

by Richard F. Bales

Effective October 1, 1990, the estate of tenancy by the entirety was created by the Illinois legislature. Public Act 86-966 originally amended various portions of the *Illinois Revised Statutes*. The amended sections include the Act to revise the law in relation to husband and wife (Ill. Rev. Stat., ch. 40, new par. 1022), the Act to revise the law in relation to joint rights and obligations (Ill. Rev. Stat., ch. 76, pars. 1, 1b. 2, and new par. 1c), and the Code of Civil Procedure (Ill. Rev. Stat., ch. 110, par. 12-112). Public Act 86-966 was further refined by Public Act 87-421, effective January 1, 1992. This act amended portions of the aforesaid law, see Ill.Rev.Stat. 1991, ch. 40, par. 1022, Ill.Rev.Stat., ch. 110, par. 12-112, and Ill.Rev.Stat. 1991, ch. 76, par. 1c.

Tenancy by the entirety is an estate that exists in half of the states.¹ Illinois' version, though, appears to be unique in that the use of this estate is limited to homestead property.² Unfortunately, "homestead property" was not defined in Public Act 86-966. Public Act 87-421 apparently tried to rectify this by referring to "homestead property" in the following manner: "...transfer of homestead property maintained as a homestead by both husband and wife during coverture..."³ Such wording is not entirely satisfactory; perhaps it would have been better to reflect, to a degree, the language of Ill.Rev.Stat. 1991, ch. 110, par. 12-901:

Every individual is entitled to an estate of homestead to the extent in value of \$7,500, in the farm or lot of land and buildings thereon, a condominium or in personal property, owned or rightly possessed by lease or otherwise and occupied by him or her as a residence, or in a cooperative that owns property that the individual uses as a residence; and such homestead...

To create a tenancy by the entirety, the devise or conveyance must expressly state that the parties to whom it is made are husband and wife and that they hold title "not as joint tenants or tenants in common but as tenants by the entirety."⁴

Once validly created, this estate has several distinct characteristics. For example, it has the "right of survivorship" attributes of an estate of joint tenancy.⁵ Similarly, this estate, like an estate of joint tenancy, may be created even though one or both of the grantees act as grantors in the instrument creating the estate.⁶

A joint tenancy can be "broken" by a conveyance of one party's interest. Indeed, one joint tenant, unbeknownst to another joint tenant, can convey his or her interest to himself or herself and thus sever the joint tenancy, creating a tenancy in common.⁷

This cannot be done with a tenancy by the entirety. Once created, it remains unbroken as long as the spouses remain alive and married to each other; it can be severed only by a conveyance signed by both parties⁸, the dissolution or annulment of the marriage, or the death of one (or both) of the parties. Note that upon a judgment of dissolution or declaration of annulment, the estate becomes a tenancy in common until and unless the court directs otherwise.⁹

When Public Act 86-966 first became law, several critics raised various questions relating to the estate of tenancy by the entirety.¹⁰ What happens, for example, to an estate of tenancy by the entirety in the residence of a husband and wife that is retained by the couple after they move into another home that then becomes their new homestead? What estate is created if a devise or conveyance to two persons as tenants by the entirety identifies them as husband and wife, when in fact they are not married? Public Act 87-421 answers these questions; in both instances the estate is one of joint tenancy.¹¹

It is not clear as to why the Illinois legislature enacted the legislation that now permits the estate of tenancy by the entirety.¹² It has been suggested, though, that the statutes were written in order to protect the homestead from the creditors of one spouse.¹³

Public Act 87-421 provides as follows:

All the lands, tenements, real estate, goods and chattels (except such as is by law declared to be exempt) of every person against whom any judgment has been or shall be hereafter entered in any court, for any debt, damages, costs, or other sum of money, shall be liable to be sold upon such judgment. Any real property held in tenancy by the entirety shall not be liable to be sold upon judgment entered on or after October 1, 1990 against only one of the tenants. However, any income from such property shall be subject to garnishment as provided in Part 7 of this Article XII, whether judgment has been entered against one or both of the tenants.¹⁴

At first it may appear that the waiving of liens from title insurance commitments insuring tenancy by the entirety property would be fairly straightforward and rudimentary. However, a careful analysis of the applicable statutes makes it clear that tenancy by the entirety is not the panacea it may appear to be.

A judgment against both spouses is still enforceable against property held in tenancy by the entirety. Further, the “protection from creditors” aspects of this tenancy is only afforded “homestead property;” commercial, industrial, rental, or vacant property receives no such protection.¹⁵

Finally, even a “judgment entered on or after October 1, 1990,”¹⁶ solely against one tenant by the entirety, would still be shown as an exception to any owner’s title insurance policy issued, as long as the spousal judgment debtor remains in title to the homestead property. The reason for this is that the judgment is still a lien on the land; it just cannot be enforced against the land as long as title is held in a tenancy by the entirety. If the parties divorce or choose to break the tenancy, the lien of the judgment would then be enforceable against that spouse’s interest in the land. However, the judgment could be waived upon a conveyance of the land to a bona fide purchaser,¹⁷ assuming the land has been continuously held in tenancy by the entirety.¹⁸ Similarly, if a tenant by the entirety dies, an earlier judgment solely against that spouse may be waived when insuring title to the homestead property after the death of that spouse, assuming the title insurance company receives the appropriate clearance material relative both to the death of the spouse and to the tenancy by the entirety.

A title insurance company will probably not waive a judgment entered after October 1, 1990 from a loan policy that is solely against one spouse, even using the above guidelines. Again, the judgment is still a lien on the land, it just is not enforceable against the land. The lien of the judgment predates the lien of the mortgage; upon the death of the non-judgment debtor spouse, the tenancy by the entirety would be broken, and this judgment, until now inchoate, would suddenly prime the mortgage. Similarly, if the two spouses divorce or otherwise voluntarily break the tenancy by the entirety, the judgment would also become a first lien.

Originally, Public Act 86-966 permitted a “tax obligation of either tenant to any unit of government” to be enforced against property held in tenancy by the entirety. Public Act 87-421 deleted this reference, thus affording such tax liens the same protection given to post-October 1, 1990 judgments. However, Public Act 87-421 did not make a distinction between pre-Public Act 87-421 and post-Public Act 87-421 tax liens. It is doubtful, then, that any title insurance company would waive such a tax lien, using the above guidelines relative to judgments, unless the tax lien arose out of a post-January 1, 1992 tax delinquency.¹⁹

When tenancy by the entirety first became law, it was

generally felt that an assignee of beneficial interest in a land trust could not hold such beneficial interest as a tenant by the entirety. Public Act 87-421 has clarified this issue, referring to “...the creation...of the estate of tenancy by the entirety with respect to any...assignment, or other transfer of homestead property...”(emphasis added).²⁰ This is consistent with the 1983 amendment to the Homestead Act, making the homestead exemption applicable to personal property.²¹ As a beneficial interest in a land trust is a personal property,²² it seems clear that a husband and wife, beneficiaries of a land trust, can hold such beneficial interest as tenants by the entirety. Many institutional land trust departments now permit this, including the land trust department of Chicago Title and Trust Company.

As previously noted, Public Act 87-421 corrected some of the deficiencies in the legislation relative to tenancy by the entirety. Other questions, though, remain:²³ What estate is created if the language on the deed does not meet the statutory requirements of Ill.Rev.Stat. 1991, ch. 76, par. 1c? What estate is created if a husband and wife take title to non-homestead property as tenants by the entirety?

There is no doubt that the title companies will, in the future, have to wrestle with problems caused by shortcomings in this legislation. For example, Ill.Rev.Stat. 1991, ch. 76, par. 1c states: “No deed, contract for deed, mortgage, or lease of homestead property held in tenancy by the entirety shall be effective unless signed by both tenants.” Notwithstanding this, consider the following scenario: H and W take title to their homestead as tenants by the entirety. H and W later separate; H heads off for parts unknown, but not before H deeds his interest in the land to W. Two years later, W now wants to sell the property to X. How would a title company underwrite this?²⁴ Or, consider this situation: Mother and Father want to help their Son and his new Wife buy a home in which the latter two will live. All four parties take title as follows: Mother and Father, as to a 50% interest, as joint tenants, and Son and Wife, as to a 50% interest, not as joint tenants or tenants in common but as tenants by the entirety. All statutory requirements seem to be met, but would a title insurance company insure it in this manner? Would it make a difference if all four titleholders lived in the home?

Finally, would a title company insure as a tenancy by the entirety a property in which the first floor is used for commercial purposes and the second floor is used by the owners, who are husband and wife, as their living quarters? Again, all the statutory requirements appear to be satisfied, but, nonetheless, would it be possible for a judgment creditor of one of the spouses to execute and levy on his judgment against the first floor only?

It is the underwriting of these and other problems relative to tenancy by the entirety that will keep the creative juices of the title insurance companies flowing, not only in this year but in the years to come.

1. 4 A. R. Powell, REAL PROPERTY ch. 52, at par. 620 [4] (1992)
 2. Turano, *Until Death Do Us Part - Or We Move To Another Home*, 35 REAL PROPERTY, January, 1990, at 4.
 3. When Public Act 86-966 became law, questions arose as to whether or not this tenancy would be applicable to spouses who maintain two homesteads - e.g., a professional couple who, because of career demands, maintain two separate residences. Public Act 87-421 makes it clear that tenancy by the entirety would not be applicable in this situation.
 4. Ill.Rev.Stat.1991, ch. 76, par. 1c
It appears that many title companies are insisting that any deed creating a tenancy by the entirety reflect this exact statutory wording. This is prudent, as there is no other law - statutory law or case law - to guide the practitioner as to the legal consequences of merely indicating on a deed that the grantees are taking title as "husband and wife, as tenants by the entirety." Ironically, it seems that the drafters of this legislation simply mirrored the definition of joint tenancy as set forth in Ill.Rev.Stat. 1991, ch. 76, par. 1: "No estate in joint tenancy in any lands...shall be held...unless the premises therein mentioned shall expressly be thereby declared to pass not in tenancy in common but in joint tenancy..." Of course, subsequent case law makes it clear that the exact wording of the statute is not needed in order to create a joint tenancy, as long as the language used indicates clearly that the parties intended that the land be held in joint tenancy. See *Douds v. Shipley*, 392 Ill. 477, 64 NE.2d 729 (1946); *Engelbrecht v. Engelbrecht*, 323 Ill. 208, 153 N.E. 827 (1926).
- Note that there is an Illinois commercially prepared "Warranty Deed - Tenancy by the Entirety" form that contains all the needed statutory language. It is deed No. 2811, available from American Legal Forms, Chicago Illinois, telephone (312) 372-1922.**
5. Ill.Rev.Stat.1991, ch. 76, par. 1c
 6. *Id.* Compare to other jurisdictions, which subject the tenancy by the entirety to the "four unities" test of time, title, interest, and possession. These unities were what the common law required of a joint tenancy. Thus, joint tenants were required to have one and the same interest, stemming from one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. Consequently, in other jurisdictions, a deed from H to "H and W, not as joint tenants or tenants in common but as tenants by the entirety" might not create a valid tenancy by the entirety. See *Pegg v. Pegg*, 165 Mich. 228, 130 N.W. 617 (1911); *In re Walker's Estate*, 340 Pa. 13, 16 A.2d 28 (1940); but see *Boehringer v. Schmid*, 254 N.Y. 355, 173 N.E. 220 (1930).
 7. *Minonk State Bank v. Grassman*, 95 Ill.2d 392, 447 N.E.2d 822 (1982).
 8. Ill.Rev.Stat.1991, ch. 76, par. 1c states that "no deed, contract for deed, mortgage, or lease of homestead property held in tenancy by the entirety shall be effective unless signed by both tenants." Thus, it appears that, in order to convey property held as tenants by the entirety, both tenants must execute *one* document; two documents, each executed by one of the tenants, would be ineffective in conveying, transferring or otherwise encumbering the property.
 9. Ill.Rev.Stat.1991, ch. 76, par. 1c.
 10. See e.g., Babiarz, *Some Unanswered Questions Relating to Estates of Tenancy by the Entirety*, REAL PROPERTY LAW COMMUNICATOR, Fall, 1990.
 11. As to the latter situation, it is interesting to note that most courts in other jurisdictions have treated such unmarried grantees as being tenants in common, even though this result disregards the parties' apparent preference for a survivorship right. See, e.g., *Collins v. Norris*, 314 Mich. 145, 22 N.W.2d 249 (1946); but see *Jackson City Bank & Trust Co. v. Frederick*, 271 Mich. 538, 260 M.W. 908 (1935); see also *Kepner, The Effect of an Attempted Creation of an Estate by the Entirety in Unmarried Grantees*, 6 RUTGERS L. REV. 550 (1952).
 12. See, e.g., Hammond & Otto, *The Illusion of Reform: Illinois Statutory Tenancy by the Entirety*, 78 ILLINOIS BAR JOURNAL 198, 199 (1990), wherein the authors stated that "no one has made clear the motivation for the reincarnation of this form of ownership."
 13. However, note that Hammond and Otto, *id.* at 200, suggest that this protection is largely illusory: "And if a goal is to protect this entirety property from the debts of one spouse, the statute offers only the illusion of protection." They point out that the greatest financial risk to the family home is loss due to the catastrophic illness of a family member; yet, the Family Expense Statute (Ill.Rev.Stat. 1991, ch. 40, par. 1015 (1989) has been held to impose liability upon one spouse for the other spouse's hospital and medical expenses. (*Fortner v. Norris*, 19 Ill. App.2d 212, 153 N.E.2d 433 (1958)). They note further that should the spouse die, the family home is not protected because title to the home was held in a tenancy by the entirety; the surviving spouse, now the sole owner, is still obligated to pay the hospital and medical debts. Clearly not proponents of tenancy by the entirety, Hammond and Otto suggest, instead, an increase in the amount of the homestead exemption. See also Huber, *Creditors' Rights in Tenancies by the Entireties*, 1 BOSTON COLLEGE INDUSTRIAL AND COMMERCIAL L. REV. 197 (1960).
 14. Ill.Rev.Stat.1991, ch. 110, par.12-112.
 15. Originally, questions arose as to how couple "A" could deed their residence to couple "B" and create a tenancy by the entirety in couple "B." After all, the property was not yet the homestead of couple "B." Public Act 87-421 (Ill.Rev.Stat.1991, ch. 76, par. 1c) remedied this, referring to a "...conveyance...of homestead property maintained or intended for maintenance as a homestead by both husband and wife...(emphasis added). However, since the act refers to the conveyance of homestead property, a deed to couple "B" as tenants by the entirety of a vacant lot upon which couple "B" intend to construct their personal residence may not be a valid tenancy by the entirety. Unfortunately, the statutes do not indicate what is created when there is a transfer of land that does not meet this and other prerequisites of Ill.Rev.Stat. 1991, ch. 76, par. 1c. Since Illinois appears to be unique in limiting this estate to homestead property, the law of other jurisdictions may not be of assistance. Clearly the statutes are in need of further revision.
 16. This wording of Ill.Rev.Stat.1991, ch. 110, par. 12-112 refers to the date of the judgment order, and not a recording date of the judgment, or memorandum thereof. Note how this language parallels that of Ill.Rev.Stat.1991, ch. 110, par. 12-101, which refers to the statute of limitations of judgments: "A judgment is not a lien on real estate for longer than 7 years from the *time it is entered* or revived." (Emphasis added.)
 17. It is doubtful that a title insurance company would waive a judgment if it appeared that a transfer, either to third parties or to the spouses themselves, were a fraudulent transfer. See, in this regard, Ill.Rev.Stat.1991, ch. 59, par. 101 *et seq.*
 18. In order for the title insurance company to determine that the land has been continuously held in tenancy by the entirety, it will probably require evidence that the husband and wife were still married and that they have occupied, without interruption, the land as their homestead.
 19. Ill.Rev.Stat. 1991, ch. 110, par. 12-112. That is, in order to consider waiving the recorded lien, the tax delinquency would have to arise after January 1, 1992, which is the effective date of Public Act 87-421. The mere assertion that the tax lien was dated or recorded after January 1, 1992 would not necessarily be sufficient to waive the tax lien.
 20. Ill.Rev.Stat. 1991, ch. 40, par. 1022.
 21. Ill.Rev.Stat 1991, ch. 110, par. 12-901.
 22. *Chicago Federal Savings and Loan Association v. Cacciatore*, 25 Ill.2d 535, 185 N.E.2d 670 (1962); see also KENOE ON LAND TRUSTS (Ill. Inst. for CLE, 1989) 1-7.
 23. Babiarz, *supra* note 10.
 24. Turano, *supra* note 2, at 4 indicates that in some jurisdictions such a deed is void, while in other states the deed would be given some effect, especially if the spouse who executes the deed becomes the surviving sole owner.