

TUTE Fall 2022

Description

This column was written (anonymously) for many years by Doug Dewing, who died in April far too young. Doug was a recognized authority on real property law in Virginia, a mentor and friend to many of us in the Commonwealth and beyond. This author succeeds Doug, but no one can replace him; this column and those that will follow are dedicated to his wisdom, which he readily shared with anyone who asked.

For our initial foray into the world of TUTE, let's delve into tenancy by the entirety^[1] in the Commonwealth.

First, though, a brief review of the ways title to property can be held:

1. Tenants in common: this is the default in Virginia. If no other tenancy is specified in the instrument, the parties are tenants in common. The interest of a tenant in common passed to that person's heirs or devisees upon death; those successors in interest then become tenants in common with the survivor(s).
2. Joint tenants: the definition of a joint tenancy is simply two or more persons owning property.^[2] Without more, it is a tenancy in common. Usually, words of survivorship are added; if that's the case, then the part of any joint tenant in survivorship passes to the survivors.^[3]

Joint tenancies (with or without survivorship) or tenancies in common can be partitioned and are subject to the claims of creditors of any party with an ownership interest.

- Tenants by the entirety: a joint tenancy with survivorship between married persons.^[4]

Tenancy by the entirety (hereinafter T/E, to save the author's typing fingers) is purely a creature of statute in Virginia.^[5] The current statute is *Â§55.1-136*, the revision to prior statute *Â§55-20.2*:

Â§ 55.1-136. Tenants by the entirety in real and personal property; certain trusts.

A. Spouses^[6] may own real or personal property as tenants by the entirety for as long as they are married. Personal property may be owned as tenants by the entirety whether or not the personal property represents the proceeds of the sale of real property. An intent that the part of the one dying should belong to the other shall be manifest from a designation of the spouses as "tenants by the entireties" or "tenants by the entirety."^[7]

B. Except as otherwise provided by statute, no interest in real property held as tenants by the entirety shall be severed by written instrument unless the instrument is a deed signed by both spouses as grantors.

(Subsection C provides that T/E protection continues if property owned as T/E is conveyed to the owners' joint or separate trusts.)

The estate or interest in land must be created in the deed conveying the interest in the property. Reciting tenancy in the first paragraph is not sufficient; it should appear in the *habendum* (where the words of grant are recited) or in a separate paragraph following the *habendum*, for example:

For and in consideration of the sum of Three Dollars and sixty-four cents (\$3.64) and other good and valuable consideration, the grantors hereby grant, bargain, sell, and convey unto the grantees, as tenants by the entirety, all of the following described property with improvements thereonâ?!

Or

The above described property is conveyed to the grantees as tenants by the entiretyâ?!

Joint tenancy with survivorship between married persons has been held to be sufficient to establish a tenancy by the entirety.[\[8\]](#)

The â??legal fictionâ?• is that a tenancy by the entirety is an entity separate and distinct from the married persons who are in it. Thus, one party to a T/E cannot sever the tenancy by his or her individual conveyance; both parties must join any instrument for the conveyance to be valid. Creditors of only one tenant in a T/E do not have a lien against the property (and cannot compel partition) until and unless the debtor obtains an individual interest resulting from the termination of the estate (i.e., death or divorce).

[Time for an interlude.[\[9\]](#) Justice Oâ??Connor in *United States v. Craft*, 535 U.S. 274 (2002), equated a personâ??s interest in T/E property to a bundle of sticks,[\[10\]](#) thereby entitling the United States to a lien against the property even if only one person is indebted to the US. This applies to Federal Tax Liens (FTLs) as well as other federal judgments. The lien extends only to the interest of that person and cannot reach the interest of the innocent spouse.

In 2017, the feds brought a forfeiture action against Michael Franco after a drug conviction.[\[11\]](#) Michael and Darlene Franco owned an interest in property[\[12\]](#) in Virginia as T/E. The court found that Darlene was an innocent spouse and after an exhaustive analysis, Judge Urbanski ruled that the US could forfeit Michaelâ??s possessory interest, but Darlene retained hers, and the government could not compel partition. The ruling essentially created a T/E between Darlene and the government[\[13\]](#) measured by Michaelâ??s life; if Michael died first, Darlene would acquire the property free of the governmentâ??s interest, but if Darlene died first, the feds would then have the entire property.]

The protections of tenancy by the entirety extend to the proceeds of sale of entireties property for as long as the parties are marriedâ??with one notable exception.[\[14\]](#) In 2018, the Bankruptcy Court in Harrisonburg[\[15\]](#) affirmed a line of cases that held that once parties take any actions in furtherance of severing a tenancy by the entirety, the protection of the proceeds from the sale of entireties property ends.

Philip and Amanda Roadcap owned property as T/E, which they sold after they separated. They agreed that the closing agent would hold the proceeds until they could agree to a division either via property settlement agreement or court order. Harrisonburg Printing had a judgment against Philip (only); upon learning of the escrow of proceed, Harrisonburg Printing executed on its judgment by garnishment upon the escrow agent. Philip made multiple arguments to the Bankruptcy Court on why the garnishment should be quashed, but ultimately the court cited *Phillips v. McCullen* (244 B.R. 73, Bankr. E.D. Va.

1999):

â??If there is an agreement or an understanding between the parties to sever the entireties tenancy upon the sale of the real property, then under Virginia law the proceeds from the sale will not be held by the entireties.â?•

Is a settlement agent liable to pay a judgment against a married T/E if the agent knows the parties have separated or are divorcing? No. Unless the divorce is final, a judgment creditor of one party in a T/E has to execute on the judgment to reach the proceeds (i.e., deliver a garnishment summons to the person holding funds).

Please submit your questions to the Editor of the Examiner, who may or may not be successful tracking down the author. Now back to your regularly scheduled programming.

[1] We will save a discussion on the unities of title for another day. (Please hold your applause.) Suffice it to say that tenancy by the entirety requires a fifth unityâ??that of marriage.

[2] â??Automaticâ?• survivorship between joint tenants was abolished (now Â§55.1-134) around the same time tenancy by the entirety was established.

[3] Joint tenancies with survivorship are not limited to natural persons; any entity (corporation, LLC, etc.) capable of being vested in title can also be in a survivorship tenancy.

[4] What, you may ask, if you are in a polygamous marriage under the polity of your religion? Can a tenancy by the entirety have more than two persons? You may ask, but it makes the authorâ??s hair hurt. IOW, youâ??re not getting an answer here.

[5] Not all states recognize tenancy by the entirety. West Virginia doesnâ??t; nor does Ohio, which still (gasp!) mandates dower. D.C. and Maryland do have tenancy by the entirety, and in Pennsylvania, tenancy by the entirety is presumed if the grantees are married.

[6] The original statute specified the relationship had to be husband and wife to qualify to be held as T/E. The statute was changed in response to the Supreme Courtâ??s decision in *Obergefell v. Hodges*, (2015). It will be interesting to see what Virginia and other states do if *Obergefell* is overturned.

[7] Itâ??s not necessary to include survivorship language in a deed creating a tenancy by the entirety.

[8] *Allen v. Parkey*, 154 Va. 739 (1929).

[9] Random thought: if these paragraphs were added at the end of the article, would they be outeludes?

[10] Yeah, I know. Me either.

[11] *United States v. Franco*, 2017 WL 3187392.

[12] The property was not used as an instrument of the crime, but forfeiture was sought to satisfy other criminal penalties.

[13] Hold your jokes. The author has heard them all.

[14] Other than the Feds, that is.

[15] *In re Roadcap*, Case No. 17-51132, US Bankruptcy Court, WD Virginia, Harrisonburg Division.

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