

The *periodic tenancy* is like the term of years in all respects but one. The term of the leasehold has no fixed expiration period but runs from period to period, subject to cancellation by either party's giving notice to the other within the time fixed by law. The most common periodic tenancies, although not the only ones permitted by law, are those from week-to-week, month-to-month, and year-to-year. At common law, in the absence of express agreement to the contrary, the notice periods for cancellation were one week, one month, and six months, respectively, prior to the end of the period. These periods have been subject to considerable statutory change. See DKM3, pp. 677–79.

The *tenancy at will* is an odd bird. It is a tenancy subject to cancellation by either party at any time. Because of its peculiarly personal character, such tenancies are not alienable. Attempted alienation, the death of either party, or alienation of the underlying fee destroys the tenancy. Tenancies at will are rarely created on purpose; rather they are normally the result of an unsuccessful attempt to create something more. When a tenant enters in good faith under a void lease, the courts frequently call him a tenant at will, so that he will not be liable for trespass unless and until the landlord gives him notice to quit.

Tenancy at sufferance is hardly a tenancy at all. It is never created consciously, but is used by the courts to describe the tenant who holds over after the end of his term. In these situations the landlord may, at his option, treat the tenant as a trespasser and eject him, or hold him for another term. Thus, the tenant at sufferance is one who is a tenant if the landlord allows (suffers) it. See DKM3, pp. 678–82.

E. MARITAL ESTATES

Feudal society was dominated by males, and this domination is reflected in its law. But no body of law, particularly one as complex as the common law of marital estates, reflects a single purpose. Thus, in addition to male dominance the common law also reflects views about the nature of transactions in the family and about protection of the economic interests of the widow or widower after the death of the spouse. It has fallen to the law today to try to sort these elements out in an effort to mollify or eliminate the elements of male dominance. See Section 4; DKM3, pp. 564–71.

1. The Rights of the Husband

In speaking of marital estates at common law we must differentiate carefully between real and personal property. As jurisdiction over realty came to center in the king's courts, we can be relatively certain about what the rules were. Personalty, on the other hand, was subject to multiple and conflicting jurisdictions, so that we can be far less certain of what the rules were, much less how they worked.

The unity of married persons is recognized for many purposes at common law, but never to the complete exclusion of the separate property [p*436] holding capacity of each spouse. The common law never developed a system of community property. See § 2E6; pp. S321–323 *infra*. When, however, the law was looking to the married couple as an entity, the husband clearly dominated that entity. While the husband could perform most legal acts independent of his wife, the wife could not do the same. She could not, without her husband's being a party to the transaction, convey property *inter vivos* or by will or enter into contracts, nor could she sue or be sued without her husband being a party to the action. (Modern research has shown this statement to be considerably overdrawn,¹ but we think it remains a reasonably accurate generalization about

¹ See, e.g., Sheehan, *The Influence of Canon Law on the Property Rights of Married Women in England*, 25 *MEDIAEVAL STUDIES* 109 (1963).

what the king's courts, at most times, thought the rules were.)

In addition to the requirement that the husband be a party to most of his wife's legal transactions, he also had considerable rights in her property, independent of her consent. In the case of personal property it is frequently, though probably somewhat inaccurately, said that he had complete control over it during his life. He could buy and sell it, it was liable to execution for his debts, and he could dispose of it by will, an exception being made in the last case for chattels real. Only if the husband predeceased the wife did what was left of her chattels become hers again.

In the case of land we can be a little more certain. The law recognized three distinct stages of the husband's rights in his wife's land. Upon marriage the husband obtained an estate *jure uxoris* (in the right of the wife) in all land of which his wife was actually seised or became seised during the marriage. This estate gave him the absolute right to all the rents and profits from that land, so long as both parties lived. The estate *jure uxoris* was freely alienable and subject to execution for the husband's debts, but the husband could not convey more than this estate unless the wife joined in the conveyance. Upon the death of either husband or wife without children having been born to the marriage or upon absolute divorce, the estate *jure uxoris* ceased.

Upon the birth of a child to the marriage, the estate of the husband in those lands in which his wife was seised of a beneficial interest which the issue of the marriage might inherit became known as *curtesy initiate*. The child had to be born alive and had to "cry to the four walls"—a curious requirement apparently based on the fact that men were not allowed to be present at births, and women could not be trusted to testify about such matters. Curtesy initiate was a larger estate than the estate *jure uxoris* since it lasted for the life of the husband even if his wife predeceased him. Upon the wife's predeceasing the husband, his curtesy initiate became *curtesy consummate*, and he became solely seised of an estate for life in all his wife's land.

With the rise of equitable estates curtesy was extended to include the wife's beneficial interest in such estates as well, but it did not cover future interests or interests which did not amount to estates of inheritance.

2. The Rights of the Wife (Dower)

The wife had no interest in her husband's personalty. Her interest in his realty may be summed up in one word—*dower*. Dower may be defined as [p*437] an estate for life in one-third of the lands of which her husband was seised² of a beneficial interest during coverture in fee simple or fee tail, of which the issue of the marriage, whether or not there were issue, might have been heir. During the marriage the dower is inchoate; it is not a transferable interest³ (contrast curtesy) and gives the wife no right of action. Upon her husband's predeceasing her the wife acquires no seisin (again in contrast to curtesy) but a right against her husband's heirs to have one-third of the land *assigned* to her. It is only after assignment that the law recognizes her as a life tenant with a transferable and defendable interest.

Dower is narrower in scope than curtesy. It only applies to one-third of the land rather than all of it, and at common law it does not attach to the husband's equitable interests. On the other hand, there is no requirement that issue be born to the marriage, nor that the husband be actually seised of the land, simply that he be seised in law, a rule apparently designed to ensure that the husband's failure to get squatters off his land did not defeat his wife's dower.

² Hence dower does not attach to leaseholds or to future interests.

³ Although it could be barred by certain forms of solemn conveyance of the land to which the wife consented.

3. A Glimpse at Marital Estates Today

Perhaps the most significant development in the field of marital estates is the married women's property acts of the nineteenth and early twentieth centuries. These acts abrogated many of the common law disabilities of the married woman, separating firmly her property from her husband's, and making the marriage partners more equal in the eyes of the law. The device chosen to achieve this effect was simple: The common law disabilities applied only to married women (*femes couvertes*) not to unmarried women or widows (divorcées were almost unheard of). Thus, the acts simply say that a married woman shall have the right to own and transfer property, make contracts, sue and be sued as if she were a single woman. This seemingly simple solution has not been without its problems as we shall see *infra* pp. S302–303.

The courts quickly came to hold that the estate *jure uxoris* was abolished by the married women's property acts. A similar holding was reached as to curtesy insofar as it gives the husband an interest in the rents and profits of the wife's property during her lifetime. Upon the wife's predeceasing her husband, however, curtesy becomes consummate as at common law. The married women's property acts had no effect on this aspect of curtesy any more than they had any effect on dower. Many jurisdictions have, however, altered or abolished dower and/or curtesy by statute. See *infra*, p. S313.

Problem

Fully describe the interests of all parties named or described in the following instrument. Assume the same statutes as in Problems 12–13, *supra*, p. S213.

18. *G* grants “to *A* for life, remainder to *B*.” *A* and *B* are both married at the time of the grant, to *C* and *D* respectively. *A* and *B* now convey all their right, title, and interest to *E*. *A* and *B* then die. Would it make any difference to your answer if the jurisdiction in question has passed a married women's property act? [p*438]

F. CONCURRENT INTERESTS

Concurrent interests are not a separate kind of estate in land; they are a quality which may attach to any estate, another way in which interests in land can be divided. Suppose that *G* wishes to give a parcel of land to his children *A*, *B*, and *C*. He may partition the tract, physically divide it, giving 1/3 to *A*, 1/3 to *B*, and 1/3 to *C*, but this may not be a very satisfactory solution if the parcel is small or if some part of it, say the part on which a house is built, is worth more than the other parts. He may also divide it temporally giving it “to *A* for life, remainder to *B* for life, remainder to *C* and his heirs,” but this will necessarily postpone the enjoyment of *B* and *C*. There is one more possibility: he may convey the land “to *A*, *B*, and *C* and their heirs” giving each of them a present possessory estate in the whole. The fact that *A*, *B*, and *C* are each entitled to possess the whole gives rise to obvious problems which we shall examine *infra*, pp. S291–295. Nonetheless, this form of landholding is extremely common. It is probably today the usual form of holding of husband and wife; it arises with any gift or devise to a class of people when there is more than one member of the class (“to *A* for life, remainder to his children”); and it necessarily arises upon intestate succession when there is more than one member of the group of closest degree of kinship to the deceased intestate.

1. Joint Tenancy

“To *A*, *B*, and *C*, as joint tenants, not as tenants in common, with right of survivorship.”

The common law preferred joint tenancies, so much so that a grant “to *A* and *B* and their heirs” created a joint tenancy if the other requirements of joint tenancy were met. This preference has been reversed in most jurisdictions, leading to the curious formula, above, which is sufficient

in most, but not all, jurisdictions to create a joint tenancy. *See* pp. S287–291 *infra*.

The principal distinguishing characteristic of a joint tenancy is the quality of survivorship—the *jus accrescendi*. Upon the death of one of the joint tenants his share passes not to his heirs but to the other joint tenants, the last surviving joint tenant obtaining the whole solely. It is possible for one joint tenant to sever the tenancy (defeat the survivorship feature) so far as his moiety is concerned by conveying his moiety to a third party or to one of his cotenants. The conveyee then takes as a tenant in common with the other joint tenants.

In order for there to be a joint tenancy at common law, there had to be unity of possession, time, title, and interests—the “four unities.” These unities are somewhat metaphysical developments of the basic common law notion that joint tenants were to be treated as one. The unity of possession simply means that each joint tenant must possess an undivided interest in the entire tract; it is a definitional requirement of all concurrent interests. The unities of time, title, and interest mean that joint tenants must acquire at the same time, by the same instrument, an equal share in the same interest (legal or equitable, fee simple or for life, present or future, etc.). The absence of any of these unities prevents the arising of a joint tenancy, and the subsequent breaking of any of these unities (as, for example, conveyance by one of the tenants) severs the tenancy so far as the tenant who has broken the unities is concerned. There is, however, authority for the proposition that the conveyance to the joint use of, or a devise of a joint [p*439] interest to, a class subject to open does not violate the unity of time and that new members of the class take as joint tenants as they become identified.

2. Tenancy by the Entirety

“To A and B, husband and wife, as tenants by the entirety.”

Tenancy by the entirety (or entireties) is a peculiar form of joint tenancy which may be held only by married couples. As with joint tenancies there is a right of survivorship, and as with joint tenancies the four unities must be obeyed. The distinguishing characteristic of tenancies by the entirety is that neither party can alone sever his estate, and thus destruction of the right of survivorship is not possible without both parties joining in the conveyance. At common law, however, by analogy to the estate *jure uxoris*, the husband was entitled to the rents and profits of the land during the marriage, and this right was alienable and could be reached by his creditors. There was also some authority for the proposition that the husband could alienate, and his creditors reach, his right of survivorship, i.e., the interest which he would have in the land if his wife predeceased him. The effect of the married women’s property acts on these rules is anything but clear. Probably a majority of the jurisdictions which retain the estate now adhere to the view that neither husband nor wife has an interest in the estate which he or she can alone alienate, and there is considerable support for the view that neither the estate nor any interest in it can be reached by either spouse’s creditors. *See* pp. 303–304 *infra*.

3. Tenancy in Common

“To A and B as tenants in common.”

Tenancy in common may best be defined negatively. It is the cotenancy in which none of the unities, other than the unity of possession, needs be present. There is no right of survivorship; the interest of a tenant in common passes to his heirs or devisees upon his death. Hence, it is usually held that dower and curtesy will attach to the interest of tenants in common but not to that of joint tenants or tenants by the entireties. (Why is this so? Review the definitions of dower and curtesy, *supra*, § 2E.)

Among the more common forms of tenancy in common are those in which the unity of time is violated (*A* acquires an undivided 1/2 interest, then *B* acquires an undivided 1/2 interest) or the unity of interest is violated (*A* has an undivided 2/3 interest, *B* has an undivided 1/3 interest, or *A*

has an undivided 1/2 interest in fee, *B* has an undivided 1/2 interest for life). The right of survivorship does not apply to tenancies in common so that the interest of a cotenant in common is freely devisable and descendible if the nature of his estate allows this.

With the abolition of the common law preference for joint tenancies a grant “to *A* and *B*” without more creates a tenancy in common.

4. Tenancy by Coparcenary and Partition

At the common law, joint tenancies, tenancies by the entirety, and tenancies in common could only be created by purchase; the descent of land to two or more persons (usually women, granted the prevalence of primogeniture) created a curious hybrid known as tenancy by coparcenary. Like joint tenants coparceners were regarded by the law as a unity and could sue and [p*440] be sued jointly. Unlike joint tenants coparceners did not have the right of survivorship.

The chief distinguishing characteristic of coparceners was their ability to force the division of the jointly-held land by a procedure known as *partition*. Joint tenants or cotenants in common could voluntarily partition their land, but until 1539, there was no means by which the land could be partitioned if all the cotenants did not consent. Coparceners, however, could obtain judicial partition of land, even if one of their fellow coparceners were unwilling. The statute of 31 Hen. 8, c. 1 (1539) gave the equity court jurisdiction to compel partition between joint tenants and tenants in common if such partition could be made in kind. It was not until the statute of 31 & 32 Vict., c. 40 (1868) that the English courts were authorized to sell the land and divide the proceeds if partition in kind was impracticable. Comparable statutes exist in all American jurisdictions, and today all types of concurrent interests, except tenancies by the entirety and community property, are partitionable both in kind and by judicial sale. Although the right to involuntary partition does not exist in the case of tenancies by the entirety, the married women’s property acts are generally held to make voluntary partition possible. Even voluntary partition was not possible at common law because of the fictional unity of husband and wife.

Even today, perhaps because of its greater antiquity, many courts prefer partition in kind to sale and division of the proceeds: “The power to convert real estate into money against the will of the owner, is an extraordinary and dangerous power, and ought never to be exercised unless the necessity therefor is clearly established.” *Vesper v. Farnsworth*, 40 Wis. 357, 362 (1876). *See* *Marshall & Ilsley Bank v. De Wolf*, 268 Wis. 244, 67 N.W.2d 380 (1954); *Brooks v. Kunz*, 597 S.W.2d 183 (Mo. Ct. App. 1980). There are of course many situations in which partition in kind is totally impractical, *e.g.*, where the property is a small lot containing a residence. It is clear, however, that many courts prefer partition in kind whenever any leeway is given them by the facts of the case. Why? Is this simply another instance of the survival of irrational attitudes toward land?

Cotenants today may, of course, agree to a voluntary partition. Partition agreements generally must comply with the Statute of Frauds, with the usual equitable exceptions to the Statute. *See* p. S176, *supra*. In the absence of agreement a cotenant may not partition the cotenancy property without recourse to the courts. He or she may convey the interest,¹ but the grantee does not receive a portion of the property but rather the original cotenant’s undivided interest in the whole.

Problems

Fully describe the interests of all parties named or described in the following instruments. Assume the same statutes as in Problems 12–13, *supra*, p. S213.

¹ Strictly speaking, this statement is only true of tenants in common and coparceners. As we have seen in the cases of joint tenancies and tenancies by the entirety, and will see in the case of community property, special rules govern them.

19. *G* grants “to *A*, *B*, and *C*.” *A* conveys to *D*, then dies, survived by his widow, *E*, to whom he has married at the time of the initial grant.

20. *G* grants “to *A* and *B*, husband and wife.” *A* conveys “to *C*”; *B* conveys “to *D*.”

Would it make any difference to your answers if the jurisdiction in question had passed:
[p*441]

(a) a married women’s property act?

(b) a statute abolishing the common law preference for joint tenancy?

5. Tenancy in Partnership

Tenancy in partnership technically did not exist at common law. Partners were nominally tenants in common of partnership property, but equity compelled each partner to use his legal ownership in common for partnership purposes. The Uniform Partnership Act, in force in most American jurisdictions, creates a legal tenancy in partnership in “partnership property” which has the following characteristics:

(1) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property.

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

(3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

(4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears.

UNIFORM PARTNERSHIP ACT § 8 (1914).

Section 25(1) of the Act declares that “A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.” Further characteristics of the tenancy in partnership are then stated as follows:

(a) A partner, subject to the provisions of this act and to any agreement between the partners has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner’s right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

(c) A partner’s right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner’s right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

Id. § 25(2). [p*442]

6. Community Property

As we have seen, the common law did not treat husband and wife as concurrent owners of property unless a concurrent interest was specifically conveyed to them.² Husband and wife were, for many purposes, treated as one, and they each had interests in the other's property, but communal ownership by operation of law was not known. The modern civil law, however, does recognize communal ownership of property by husband and wife, and that institution exists in the following states, probably as a result of their historical connections with the civil law: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

We will have occasion to examine community property in more detail, *infra*, pp. S321–323. Its basic outlines follow:

The principal notion of American community property is that whatever is earned by husband and wife during their marriage is a product of their joint efforts and should belong to them jointly. Property owned by either party at the inception of the marriage and property acquired by gift, bequest, devise, distribution or descent during the marriage is the separate property of each spouse. Anything which is earned by either spouse, however, is community property without regard to the identity of the spouse to whom the earnings accrue.

Historically management and control of the community rested in the husband, while the marriage lasted. This feature of community property, however, has been considerably modified in American community property jurisdictions in favor of joint management and control. Community property is liable for the debts of the community but not for the separate debts of each spouse. As a general rule, the surviving spouse is entitled to one half of the community property, the other half passing according to the will of the deceased spouse or in default of will according to the appropriate statute for intestate succession.

7. Condominiums and Cooperatives

Contemporary American property law recognizes several arrangements for sharing ownership of and responsibility for real property. The cooperative and the condominium, two of the most widely used of these arrangements, can provide individuals with a less expensive alternative to single home ownership, and can help them to shape and control their community and living environment to a greater extent than may be possible under traditional property arrangements. We will discuss the cooperative briefly and then give a fuller treatment to the condominium.

The entity called the cooperative is usually a non-profit corporation which holds title to the cooperative property, often an apartment building, in fee simple. The purchase of the property is normally financed through a "blanket mortgage." The cooperators, as members of the cooperative are called, do not directly own the property they occupy. Rather, they purchase an interest in the corporation which entitles them to a leasehold interest in one of the apartments in the building. The lease will contain certain covenants that regulate the behavior of the residents of the cooperative, [p*443] much as any lease will constrain tenants to act in certain ways. Unlike most tenants, however, cooperators can try to change burdensome restrictions by the procedures for corporate governance set out in the cooperative corporation by-laws and state corporation law.

Upon purchasing a share or shares in the corporation, the cooperator promises to make payments to the corporation to pay a share of the maintenance of the structure and common areas, and a share of the interest and principal on the blanket mortgage in proportion to his percentage interest in the corporation. Lending institutions in many parts of the country will insist that each

² At common law it was probably not possible to convey to a husband and wife in any form other than a tenancy by the entirety. Under the married women's property acts, however, conveyances in joint tenancy and tenancy in common are also possible. The question is one of the grantor's intent.

cooperator secure the debt of the corporation by assuming joint and several liability on the blanket mortgage. This feature of joint and several liability has proved a serious impediment to the formation of cooperatives in many jurisdictions; only in areas such as New York City, where the potential costs of joint and several liability are outweighed by the actual costs of more conventional housing, does the cooperative enjoy widespread usage.

The cooperative fits neatly into the common law scheme of interests in land. The real property interests involved, the fee simple and the leasehold, are already familiar to you. The only peculiarity, other than financing gimmicks, is that the cooperator is both a tenant and an owner of the landlord corporation.

The common law pedigree of the condominium is still the subject of debate. Although the condominium form of ownership has been a fixture in civil law countries for centuries, it has only recently been introduced into the American law of property. This has led some scholars to question whether the condominium as it exists in American property law is simply a repackaging of familiar common law interests, or a new type of estate heretofore unknown in this country. Whatever the outcome of this debate, no one doubts that the condominium is now an integral feature of American law and society. Every American jurisdiction has enacted a condominium enabling act since Puerto Rico first passed such an act in 1958. Condominium associations now number in the tens of thousands; in Florida, where this new form of property holding has enjoyed singular success, nearly 25% of all residential units are condominiums.

In the typical condominium development, the project is initially financed through a loan to the developer secured by a mortgage on the entire property. As units are sold, the mortgage is discharged. The condominium is then managed by an association made up of the unit owners. Members of the condominium association do not purchase an interest in the association. Rather each member holds a direct two-fold interest in the condominium property. First, each member holds his or her own condominium unit in fee simple. This interest can be a fee ownership of a free-standing building in a complex, or merely of the space bounded by the walls of an apartment on the thirty-seventh floor of the condominium building. Second, each member holds a proportional undivided fee interest in the common elements of the condominium. Thus, an owner of one unit in a one-hundred-unit condominium complex will also have a correlative interest in the roads, sidewalks, lawns and tennis courts, lobbies and stairwells, and often in the plumbing and wiring, the furnace or boiler, and the outer walls and roofs of the condominium buildings. This fractional interest is appurtenant to the fee interest in the condominium unit, and generally is not severable from the interest in the unit. Lending institutions will finance the purchase of these individual interests without each owner being jointly and severally liable with fellow owners in the development. [p*444]

These ownership interests will be described in the three documents that are required for the creation of a condominium. The first of these is the declaration of condominium. This document is not a document of conveyance, but nevertheless incorporates many of the functions of a deed. It describes in minute detail the entire condominium property, and the division of interests in that property. It may include a plat or other graphic illustrations of the property that clarify what the written portions of the declaration mean. It will also describe the owners' association, the mechanism for group decision-making, as well as the functions of that association.

The declaration of condominium will also contain restrictive covenants. A restrictive covenant is a provision in a deed that binds present and future purchasers of real property and compels such purchasers to engage in or refrain from certain acts with respect to the property. *See infra*, Ch. 5, § 3. The tendency to use restrictive covenants to protect the integrity of the condominium atmosphere from all kinds of threats, real or imaginary, is one of the distinguishing features of the American variety of condominium ownership. Thus, a restrictive covenant might prohibit a unit owner from seeking a partition of the condominium property, or it might compel the resident to

paint his unit a certain color, or not to park a pickup truck in her driveway, or not to sell his unit without first giving the association the right to buy the unit at the asking price. Condominium developers and active members of the owners' association are often concerned to maintain the planned atmosphere of the condominium, and can be quite vigilant, even ruthless, in enforcing the restrictive covenants to the letter, even where such enforcement places unusual hardship on the individual unit owner. *See, e.g., Schmeck v. Sea Oats Condominium*, 441 So. 2d 1092 (Fla. App. 1983) (modifying district court order compelling unit owner to remove immediately storm shutters installed in violation of covenants, in spite of fact that unit previously had been rendered uninhabitable by water damage, and would be uninhabitable again if shutters were removed.) Thus, restrictive covenants can be a source of much acrimonious litigation in the condominium context. Courts tend to be more flexible in dealing with restrictive covenants in the condominium setting than they might be in other contexts. One court has neatly summarized the prevailing attitude of the courts toward restrictive covenants governing condominiums:

[I]nherent in the condominium concept is the principle that to promote the health, happiness and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive than may be existent outside the condominium organizations. . . . If a rule is reasonable the association can adopt it; if not, it cannot. It is not necessary that conduct be so offensive as to constitute a nuisance in order to justify a regulation thereof.

Hidden Harbour Estates v. Norman, 309 So. 2d 180, 182 (Fla. App. 1975). Is the reasonableness standard sufficient to protect the individual owner's fee interest against the demands of his community? If the law does not permit such restrictions generally, should they be permitted in the condominium context? If so, why?

In addition to the declaration, the condominium must also have a set of by-laws. The by-laws determine how the condominium association will carry out the functions assigned to it in the declaration of condominium. The by-laws [p*445] will also control the election of the officers or board of directors of the association, the assessment and collection of operating and management fees, and the rules of procedure for association meetings and the arbitration of internal disputes. In some jurisdictions, the by-laws will be directly incorporated into the declaration of condominium.

Finally, the deeds for each individual unit must be drawn up. These deeds are the documents whereby the property interests in the condominium are conveyed, and as such, the unit deeds must be recorded. The declaration of condominium and the by-laws also have significant effect on the nature of the interest granted, so they too must be recorded.

Recordation of the declaration of condominium and other documents does not necessarily mean that actual or constructive notice will be imputed to a condominium buyer, as might be the case in other real estate transactions. Because the interests and restrictions involved are so complex, some states require that the prospective buyer be provided with a copy of the declaration of condominium and the by-laws, in the hope that the purchaser will be made aware of the restrictions to which the interest in the unit will be subject. The effect of this kind of requirement is open to debate. The law can require that the seller provide such information of course, but it cannot require the prospective buyer to read it. Do you think that most buyers will bother to read the fine print, even if given the opportunity? Even if they do read it, do you think they will grasp the legal consequences of the provisions contained therein? One at least suspects that many buyers are getting a pig in a poke, and that they have little idea of what they are involved in before a dispute arises. Can you think of a more satisfactory way to ensure that buyers are fully aware of the consequences of their bargain?

the property.¹² We know of no rule of law or equity that forbade Dorothy from making her conveyance subject to that condition or which authorizes us to declare it void. For this reason, the circuit court erred in declaring the possibility-of-reverter provision to be void.¹³

III.

We reverse the circuit court's holding that the possibility-of-reverter provision in the 1989 deed of gift was void. The case is remanded for entry of a final order consistent with this opinion. The final order shall be filed in the land records and may include, in the court's discretion, an additional award of fiduciary compensation.

Reversed and remanded.

¹² For this reason, we find no merit in the administrator's reliance on *Moore v. Holbrook*, 175 Va. 471, 476, 9 S.E.2d 447, 450 (1940), which found a limiting condition to be "ambiguous" and thus insufficiently "clear and decisive" to reduce the otherwise unlimited scope of a devising clause of a will. "If a prior estate in fee is to be cut down to a life estate or taken away altogether by subsequent language it must be by express words or by compelling implication. It cannot be done by ambiguous or doubtful language." *Id.* Here, the possibility-of-reverter clause in Dorothy's 1989 deed of gift uses neither "ambiguous [n]or doubtful language." *Id.*

¹³ Some authorities distinguish between possibilities of reverter that create only "a contingent right of re-entry upon condition broken" and those that do not require re-entry for the reversion to take place. *Sanford*, 192 Va. at 648, 66 S.E.2d at 497 (citation omitted). In the former category, "the original grantor, or its successor, was required to make 'entry, or its equivalent' to exercise the right to reconveyance." *Windsor Indus.*, 272 Va. at 80, 630 S.E.2d at 521. In some cases, that can be a crucial distinction. "Where there is a breach of a condition subsequent upon which the possibility of reverter depends, the estate vested in the grantee does not cease in him and revest ipso facto in the grantor or his successors;" rather, the estate "remains unimpaired in the grantee or his successors until entry, or its equivalent, by the grantor or his successors." *Sanford*, 192 Va. at 649, 66 S.E.2d at 497. Thus, "the right to enforce the forfeiture may be waived" by an untimely or ineffective assertion of the right of re-entry. *Id.* The right of re-entry can be asserted not only by physical re-entry but also by its "equivalent," which we have recognized to include the assertion of the right in court. *Id.* at 649, 66 S.E.2d at 497-98; see also *Pence*, 127 Va. at 455, 103 S.E. at 696 (observing that the grantor must take "appropriate action to have himself reinvested").

In this case, we need not address whether the possibility of reverter in Dorothy's deed of gift created only a contingent right of re-entry. Edward's pleadings in the circuit court specifically asserted a right of re-entry. See *J.A.* at 13-14. And the administrator does not challenge the efficacy or timing of this assertion. Cf. *Sanford*, 192 Va. at 652, 66 S.E.2d at 499 (rejecting as untimely an assertion of a right of re-entry created by a possibility of reverter in a deed conveying real property).

Section 4. ESTATES IN LAND AND THE FAMILY

A. INTRODUCTION

The common law system of estates in land and future interests had its origins in a society many of whose members had strong dynastic tendencies. It developed numerous devices which allowed a person who had amassed wealth to accumulate it and pass it on to future generations virtually intact. What, however, of the present generation? As the materials on marital interests

and concurrent estates, *supra*, § 2E, 2F, should make clear, the common law also had a number of devices, some voluntary, some forced, which allowed a landowner to share his wealth with members of his generation and which gave them some measure of economic protection if he predeceased them.

At common law the positions of husband and wife were quite different from one another with regard to land ownership. At law (the situation was considerably more flexible in equity), a wife gave up all right to management and control of her property while the marriage lasted, but she received a forced share of one-third of all her husband's lands for life (dower) and a fee interest in all of the land which she and her husband had held jointly (tenancy by the entirety), if she survived him. The Statute of Distributions, 22 & 23 Car. 2, c. 10 (1670) provided that a widow (but not a widower) would inherit one-third or one-half (depending upon whether there were surviving descendants) of her husband's personalty in intestacy. A deceased husband's will could provide a greater share of the realty in lieu of dower and could give the widow more or less than her intestate share of personalty. In marked contrast to the Continent, English common law did not provide for any other forced share. After the Statute of Wills, an English testator could disinherit his sons and daughters completely, and the law would do nothing about it.¹

While it is dangerous to generalize about such a long period of history, the dominant themes in the common law scheme seem to have been management and control in the husband-father and protection of the widow. Curtesy, the only forced entitlement of the widower, is probably better seen as a continuation of the husband-father's management and control, rather than as a device for his economic protection. Whether the common law scheme was a satisfactory one for the people of the time (or even whether it was the scheme in many periods, granted the role of local custom, ecclesiastical court administration of wills, and the possibility of "contracting out" of the scheme by private agreement) is a question about which historians disagree and which they are continuing to explore. What does seem clear is that this was what most Americans thought the scheme was when we "received" the common law and that this scheme depends on three critical assumptions, none of which holds true today: (1) The most significant form of wealth is landed wealth. (Today personal property—stocks, bonds, bank [p*506] accounts, insurance, pensions—make up a far greater share of individual and family wealth in the U.S.) (2) The overwhelming majority of marriages will end with the death of one of the partners. (Today more than one-half of all marriages end in divorce.) (3) Wide acceptance of the view that husbands ought to control family property. (Views about the respective roles of spouses have undergone profound change.)

Change in marital property law has come incrementally. So many areas which the law regards as separate fields are involved that changes have frequently been made in one area without considering their consequences for the system as a whole. Further, two major changes, the shift from landed wealth to wealth in personal property and the so-called "rise of the welfare state" occurred at different times. In law school you will deal with marital property in courses on wills, trusts and estates, creditors' rights, tax, family law, and welfare law, to name only the more basic areas of the curriculum. The names of the courses suggest another characteristic of marital property which has delayed fundamental change: marital property law comes into play during family crises and may have little effect on day-to-day dealings of or within the family. The lawyer arrives with the undertaker, the angry creditor, the tax collector, the unsuccessful family counsellor and the social worker. Marital property is more a social than a legal institution, unless and until a family member dies, goes bust, doesn't pay his taxes, gets divorced, or hits Skid Row. The legal system can lose touch with the social system of marital property when the social system changes. As a means of changing that social system, law is likely to have only a limited influence.

¹ This statement applies only to land. The rules for personal property were considerably more complex because of the continued importance of the church and local courts.

Not only has change in the marital property system tended to be incremental rather than fundamental; it has tended to be cumulative. New elements in the system do not displace the old; they are added to it. For example, dower, or a dower substitute, is still available in a number of jurisdictions, but the widow frequently must choose among dower and one or more alternative statutory schemes. *See infra*, p. S313.

Obviously, we have broached a topic that we cannot cover in depth within the confines of this book. This is particularly true because marital property law has seen rapid change in recent years. The succeeding subsections focus on the major aspects of the American marital property system today, with particular reference to those elements of the system which may involve land. With each element of the system you should ask yourself: (1) What happens at death, divorce, bankruptcy and tax-time? (2) Do the costs in encumbrance of titles which result from this device outweigh the benefits it provides? (3) To what extent is this element in the system incompatible with modern notions about the family and the role of the sexes within it? (4) To what extent is the law's treatment of the situation different than it would be if the principals were not married? (5) Should the legislature make a change here and to what extent can change be made without running afoul of the constitutional prohibition of "takings"? We begin with an attempt at an overview focusing on the concept of protection of the surviving spouse, a policy which, we will see, has recently been called into question. We treat here, as well, some devices which are not treated in the succeeding subsections, but which must be kept in mind in evaluating the material in those subsections.

Note on Alternative Methods of Protecting Surviving Spouses

The common law scheme of marital property, as we noted above, seems to reflect twin policies of consolidating management and control in the husband/father [p*507] and of protecting the widow. The women's movement of the 19th and early 20th centuries challenged the first policy, and the passage of the married women's property acts (*supra*, § 2E3) was, at least in part, a result of that effort. The movement to secure the passage of a federal equal rights amendment brought further changes in its wake at the state level. It now seems fair to say that few if any states openly pursue a policy which presumes that the husband should manage and control family property.

But what of the protection of widows? The law was much slower to change in this area, perhaps because there was, and still is, disagreement about the desirable direction for change. Some argue that spouses should be encouraged to be financially independent of each other, so that the law should not force one spouse to provide for his surviving spouse or even encourage voluntary provision. Others argue that in many if not most marriages, the spouses fill different roles. The spouse who has the opportunity to accumulate wealth should be forced to, or at least encouraged to, share that wealth with the spouse who does not have that opportunity.

The law which we have inherited from the immediate past seems based on the assumption that the spouses will play different roles within the marriage. Elements both of forced sharing and of encouraged sharing are present in it, but there is considerable ambiguity over whether this sharing is based on entitlement or on some notion of welfare. What is clear is that until quite recently the law, in many instances, assumed that the wife would be the poorer of the spouses. Thus, many elements in the law accorded more protection to widows than to widowers. Recently, many states have removed this differentiation between the sexes from their laws. The tendency seems to have been to accord widowers the same protection as widows rather than to reduce the protection for widows.

Today, schemes for protection of surviving spouses fall roughly into two categories, voluntary and involuntary, but the categories overlap. Some of the voluntary schemes are so much a matter of course (like spouses taking title to the family home in their joint names) or so favored (like

testamentary provision for the surviving spouse, which is strongly encouraged by the tax laws) that it is easier to use them than not to use them. On the other hand, there are few elements in the schemes which are so mandatory that a determined spouse or couple cannot avoid them by contract or estate planning. It might be better to say that some schemes for the protection of the surviving spouse depend on one or both of the spouses "signing up" for them, while others will happen unless one or both of them "sign off" them. The "sign-up" schemes include co-ownership with survivorship provisions, testamentary provision, trusts, life insurance and pensions. The "sign off" schemes include intestate distribution statutes, the statutory forced share of the surviving spouse, dower and curtesy, statutory allowances against an estate, homestead provisions, community property, and social welfare legislation.

Co-ownership with survivor provisions. This is probably the most common of the "sign-up" devices. Not only is it a common way for spouses to hold real property (*infra*, p. S284), but many spouses hold much of their intangible personal property (stocks, bonds, bank accounts) in this form of co-ownership as well. Joint and survivor bank accounts, for example, serve as a method of providing ready funds for a surviving spouse during that period of time when an estate is likely to be ensnared in probate. We will have occasion to examine *infra*, p. S304, how wise it is for spouses to hold so much of their property in this form of ownership.

Testamentary provisions. Recent empirical studies of wills suggest that provision for the surviving spouse is the dominant motive of most married people who make wills. See Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 A.B.F. RESEARCH J. 319. Many married testators, perhaps a majority, make a will to ensure that their surviving spouses will take all of their property rather than the fraction that the intestate distribution statutes provide.

Trusts. Trusts may be established by will or *inter vivos* as an estate planning device. They are used by spouses who wish to provide for professional management of their assets, to minimize taxes, and to provide for their spouses, their children, and even their grandchildren, all at once. If some form of co-ownership is the most common estate planning device today for those of modest means, the trust is probably the most common device for the well-off.

Life Insurance. "Life insurance is often the greatest asset in an estate and can be a very important factor in planning large as well as small estates." J. TRACHTMAN, ESTATE PLANNING 88 (1968). One of the chief, but certainly not the only, purpose of life insurance is to provide a fund of ready cash to provide security for survivors at a time when the decedent's estate may be tied up in probate.

Pensions. Pensions are a method by which employed individuals, in effect, delay part of their compensation for work done until such time as they may retire. Until recently whether or not a pension arrangement provided for survivorship or death benefits to a spouse was largely a matter of contract between employer and employee. Now the matter is regulated by Federal statute; the Retirement Equity Act of 1984 requires covered pension plans to provide automatic spouse benefits. See 29 U.S.C. § 1055 (1988).

Forced Shares. The growth in importance of personal property and the abolition in some states of dower has led most common law (as opposed to community property) states to curtail the freedom of a husband (and in an increasing number of states a wife) to disinherit his spouse. This curtailment has taken the form of allowing the surviving spouse to elect to take against the will what would otherwise have been the spouse's intestate share (which has been expanded to include both real and personal property). See *infra*, p. S309.

Intestacy. Intestacy is a condition which occurs when all or part of a decedent's estate has not been disposed of by will. The central problem of intestate succession is, of course, who takes and in what order. Most states solve both problems by resorting to a schedule of priorities based upon

the closeness of kinship, however defined and by whatever means measured. Some states employ guidelines for that determination based upon the canon law computation of the degrees of kinship, a survival from the days when wills of personalty were administered by church courts. Other states attempt to spell out by statute the order of priority for intestate succession. All common law (as opposed to community property) states give the surviving spouse at least one-third of the deceased spouse's estate in intestacy. Many give a larger fraction, depending on whether or not there are surviving children or descendants or other close relatives. *See infra*, pp. S307–309. [p*509]

Dower and curtesy. A number of jurisdictions still have dower; a few have curtesy. The common law forms are usually modified by statute. *See infra*, p. 313.

Statutory allowances and homestead. These provisions are entirely creatures of statute and vary markedly from state to state. *See infra*, pp. S311–312.

Community property. This alternative form of marital property exists in eight Western states. *See supra*, § 2F6. It contains an automatic protection for the surviving spouse because each spouse owns one-half of the community. Whether this is more or less protection than that provided in the common-law states and whether the community property scheme corresponds better than the common law scheme (as modified) with modern notions of the family are issues treated at the end of this section.

Welfare Legislation. The broad scheme of federal social security legislation is found in Title 42 of the United States Code. For our purposes, only two parts of that title are relevant—the provisions for Old Age, Survivors and Disability Insurance (OASDI) (the program we commonly call “Social Security”), and Aid to Families with Dependent Children (AFDC).

OASDI not only furnishes retirement and disability benefits to a covered worker, it also provides regular income to a worker's surviving spouse or dependent child, even though the spouse or child does not qualify for coverage in his or her own right. These benefits obviously are essential to the livelihood of a widow or widower who has never had a paying job and has no other means of support. They also augment the smaller benefits of those spouses who have divided their time between work within and outside the home or worked part-time or held lower paying jobs. A qualifying widow or widower will receive benefits equal to those to which the deceased would have been entitled as a retired person. *See* 42 U.S.C. § 402 (1988); Martin, *Social Security Benefits for Spouses*, 63 CORNELL L. REV. 789 (1978).

AFDC, established by 42 U.S.C. §§ 601–13 (1988), creates a fund to support state programs which seek to provide a minimum of financial security to families so that economic factors will not necessitate the dissolution of family units which contain dependent children. Specifically included are families in which one parent has died. The type and amount of benefits are set by the separate states so long as the guidelines established by the federal legislation are followed.

B. CONCURRENT INTERESTS

Review the materials on concurrent interests, *supra*, § 2F. Is there anything more involved in joint tenancies, joint bank accounts, and *inter vivos* gifts with strings than a simple desire to avoid probate? For whatever reason the joint tenancy of both land and chattels is extremely popular.

Hines, *Real Property Joint Tenancies: Law, Fact and Fancy*, 51 IOWA L. REV. 582 (1966), contains an attempt to find out just how popular joint tenancies of realty are. The author searched the conveyancing records of five disparate Iowa counties in order to determine the relative frequency of tenancies in common and joint tenancies. (Iowa does not recognize tenancies by the entirety.)

Hines found that before the Depression, holdings in joint tenancy were almost non-existent,

but since then this form of concurrent property-holding has dramatically increased in frequency, until in 1964 an average of fifty-two [p*510] percent of all land transactions created joint tenancies. The author also found joint tenancy to be a more popular way of taking title to property in urban areas than in rural areas, and that the prevalence of joint tenancies in farm property varied inversely with the size of the property.

Hines speculates as to the reason for this dramatic increase in joint tenancies (no similar increase exists for tenancies in common) but arrives at no single explanation. Among the factors he suggests are pressure from mortgage lending institutions during the Depression, mistaken or partially mistaken notions about the tax laws, a desire to avoid probate, and the “emancipation” of women. Hines, *supra*, at 587–91. Once the idea caught hold, he speculates, it became embedded in the societal wisdom of brokers, bankers and realtors, so that any legal cautions about its tax consequences (*see* Tax Note, *infra*, p. S305) and the precarious nature of the law surrounding it in some states (*see* pp. S287–291 *infra*) have had little or no effect. Hines, *supra*, at 591.

What effect should the popularity of the joint tenancy have on a legislature contemplating a rationalization of the common law scheme of concurrent interests? Under what circumstances should this form of co-ownership be encouraged? Presumed? Barred?

HOLBROOK V. HOLBROOK

Supreme Court of Oregon.
240 Or. 567, 403 P.2d 12 (1965).

O’CONNELL, J. Plaintiff seeks a declaratory decree declaring her to be the sole owner of a certain parcel of land. Defendant appeals from a decree for plaintiff.

Plaintiff, Bertha Clyde Holbrook, was the wife of William H. Holbrook. In contemplation of divorce they entered into a property settlement agreement which made provision for the disposition of the land in question which, at the time of the agreement, was owned by William and Bertha. The agreement provided in part that “the parties shall be and become joint tenants with right of survivorship in the property”. The agreement contained the following paragraphs:

“It is further agreed that the said joint tenancy shall be accomplished by the parties executing a deed to their entire present estates in said property to Eleanor L. Anderson with instructions that she convey the same to the parties herein as joint tenants and not as tenants in common or as tenants by the entirety, but with right of survivorship between them, which right of survivorship shall continue without regard to whether or not a divorce shall be granted to one or the other of the parties.

“It is further understood and agreed that during the lifetime of the husband, he shall be entitled to have and receive all rents, issues and profits of the property above described in this paragraph with the duty to maintain the same and to pay all lawful taxes, liens and other charges and assessments on the same which shall accrue during his lifetime.

“At anytime during his lifetime the husband shall have the right to make a bona fide sale of the property at a reasonable price to any third person or party, and in event of such sale the wife shall join with him in such conveyance and shall be entitled to receive as her own property, one-half of the net principal and interest, if any, to be received from such sale.”

On October 22, 1958, William and Bertha executed a quitclaim deed to Eleanor L. Anderson and two months thereafter, William and Bertha were [p*511] divorced. The following January, Eleanor L. Anderson quitclaimed to William and Bertha, describing them “as joint tenants with right of survivorship and not as tenants in common.” Subsequently, on January 8, 1963, William conveyed to his nephew James W. Holbrook, an undivided one-half interest in the land in question. William died on November 3, 1963.

It is defendant’s position that the deed from Eleanor Anderson to William H. Holbrook and

Bertha Clyde Holbrook created a common law joint tenancy which was subject to severance. It is contended that the deed from William Holbrook to defendant, James W. Holbrook, effected a severance as a consequence of which James Holbrook and Bertha Holbrook held as tenants in common.

If, as defendant contends, the estate held by William and Bertha was a common law joint tenancy, then, of course, William's conveyance to James would convert the joint estate into a tenancy in common. But we have held that ORS 93.180 abolishes the common law joint tenancy in this state. *Halleck v. Halleck et al.*, 216 Or. 23, 337 P.2d 330 (1959). In the *Halleck* case we recognized that a right of survivorship can be created in co-grantees but that unlike the concurrent interest of joint tenants, the interest created by a conveyance to co-grantees with a right of survivorship could not be destroyed by severance.

We see no essential difference between the language in the deed from Eleanor Anderson to William and Bertha Holbrook and the language in the deed construed in the *Halleck* case. Since we regard the *Halleck* case as controlling, it follows that William and Bertha were not vested with a joint tenancy as the same was known at common law and that there was, therefore, no power of severance in either of them.

As in *Halleck* (216 Or. at 40) we read the language, "as joint tenants with right of survivorship and not as tenants in common," as creating concurrent estates for life with contingent remainders in the life tenants, the remainder to vest in the survivor. The effect of that language in a conveyance creates the equivalent of a common law joint tenancy except for the power of severance.

It is argued that the bulk revision of the Oregon Statutes in 1953 had the effect of removing from the statutes the prohibition against the creation of a common law joint tenancy. In the 1953 revision the statutes relating to the creation of joint tenancies were brought together into one section, but the revised section retained the language "joint tenancy is abolished." It is apparent that this revision was in form only and was not intended to change the substantive statute law. This was our assumption in deciding the *Halleck* case.

There seems to be no reason for forbidding the creation of the common law form of joint tenancy. However, the legislature has seen fit to abolish it and we have found no way to read out of the statute (ORS 93.180) the express declaration that "joint tenancy is abolished." It would appear that there is need for legislation on the subject.

The decree of the trial court is affirmed.

Notes and Questions

1. Why do you think that Oregon passed the statute at issue in the principal case? The statute in effect at the time the case was decided read in its entirety as follows:

Every conveyance or devise of lands, or interest therein, made to two or more persons, other than to executors and trustees, as such, creates a [p*512] tenancy in common unless it is expressly declared in the conveyance or devise that the grantees or devisees take the lands as joint tenants. Joint tenancy is abolished and all persons having an undivided interest in real property are deemed and considered tenants in common.

OR. REV. STAT. § 93.180 (1982).

This mysterious statute was derived from two statutes, the first passed in 1854 which read substantially as does the first sentence of the former § 93.180, as quoted above. Another statute passed in 1862 read substantially as does the second sentence of the former § 93.180. As you probably know already, where two statutes conflict the more recently adopted prevails over the less recently adopted. One of the problems with which the court in the instant case was faced is

that when the Oregon statutes were revised in 1953, the revisers incorporated in the new revision both the 1854 and the 1862 statutes, which the legislature then proceeded solemnly to adopt. Hence, both the first and the second sentence of the former § 93.180 were technically adopted at the same time.

Justice O'Connell's call for further legislation on the topic was not answered by the Oregon legislature until 1983, when the statute was amended to read as follows:

Every conveyance or devise of lands, or interest therein, made to two or more persons, other than to a husband and wife, as such, or to executors or trustees, as such, creates a tenancy in common unless it is in some manner clearly and expressly declared in the conveyance or devise that the grantees or devisees take the lands with right of survivorship. Such a declaration of a right to survivorship shall create a tenancy in common in the life estate with cross-contingent remainders in the fee simple. Joint tenancy is abolished and the use in a conveyance or devise of the words "joint tenants" or similar words without any other indication of an intent to create a right of survivorship shall create a tenancy in common.

OR. REV. STAT. § 93.180 (1999).

2. If you were advising a client pending a divorce would you recommend a settlement like the one in the *Holbrook* case in a state without the Oregon statute? In a state (not Oregon) which had a statute with the same wording? *See* *Nash v. Martin*, 90 Ga. App. 235, 82 S.E.2d 658 (1954); *Jones v. Jones*, 185 Tenn. 586, 206 S.W.2d 801 (1947).

3. If you were advising a married couple living in Oregon on how to take title to their home what options would you present?

Notes on Concurrent Interests and Legislation

1. The cases involving the concurrent interests are legion. Unfortunately, the state legislatures' approaches to treating these interests have been quite diverse, and the state courts, following the legislatures' lead, have created even more diversity. The extreme device used in Oregon of simply abolishing joint tenancies has not found favor with most of the states, but every state either by statute or judicial decision has sought to reverse the common law presumption that a grant to two or more persons creates a joint tenancy as opposed to a tenancy in common. Can you see why?

The Illinois provision is typical:

No estate in joint tenancy in any lands, tenements or hereditaments . . . shall be held or claimed under any grant, legacy or conveyance . . . unless the premises therein mentioned shall expressly be thereby declared to pass not in tenancy in common but in joint tenancy; and every such estate . . . (unless otherwise expressly declared as aforesaid . . .), shall be deemed to be in tenancy in common . . .

ILL. COMP. STAT. ch. 765, § 1005/1 (2012).

The Illinois courts have held that a grant to two persons "with full rights of survivorship and not as tenants in common" is sufficient under the statute to create a joint tenancy (*Shipley v. Shipley*, 324 Ill. 560, 561, 155 N.E. 334, 335 (1927)), and the common way to create such a tenancy in Illinois today is "to A and B as joint tenants with rights of survivorship and not as tenants in common." In nearby Michigan, however, which has a similar statute (MICH. COMP. LAWS ANN. § 554.44 (2012)), this same language will create not a joint tenancy but joint life estates followed by a contingent remainder in fee to the survivor. *See* *Ballard v. Wilson*, 364 Mich. 479, 110 N.W.2d 751 (1961). The difference between the two is substantial both as to the power of severance and as to the tax consequences. *See* Kahn, *Joint Tenancies and Tenancies by the Entirety in Michigan-Federal Gift Tax Considerations*, 66 MICH. L. REV. 431 (1968).

The problem is further complicated by the fact that small real estate transactions are frequently consummated by real estate agents who have little legal training, and lawyers who are sound asleep and who mindlessly fill in the blanks on a printed form. Consider the following case: The relevant statute provided: “Every conveyance or devise of real estate made to 2 or more persons shall be construed to create an estate in common and not in joint tenancy, unless it shall be expressed therein that the estate is to be holden by the grantees or devisees as joint tenants, or to them and the survivor of them, or [p*513] unless other words are used clearly expressing an intention to create a joint tenancy.” N.H. REV. STAT. ANN. § 477:18 (2012). A deed was drafted the granting clause of which conveyed the land “to Jules L. and Georginia T. and to the survivors of them.” The habendum and warranty clauses referred “to the grantees, their heirs and assigns.” Does the instrument create a joint tenancy or tenancy in common under the above statute? Of what relevance, if any, is the fact “that the deed in dispute is not a model form to create a joint tenancy and that the notary public who prepared it was not a model draftsman”? See *Gagnon v. Pronovost*, 96 N.H. 154, 157, 71 A.2d 747, 750 (1949) (dissenting opinion), *aff’d on rehearing*, 96 N.H. 158, 71 A.2d 750 (1950) (holding no joint tenancy created and that evidence outside the document would not be admitted as to the true intent of the parties). An even more extreme example of ineptitude, this time that of a lawyer, may be found in *Walter v. Ham*, 68 A.D. 381, 75 N.Y.S. 185 (1902): “To A and B, as joint tenants and tenants in common.”

Such confusion would be serious enough if the joint tenancy were a relatively uncommon form of grant. It is even more serious when we consider that the joint tenancy is so popular in the family context. For a good collection of the cases, see Annot., 46 A.L.R.2d 523 (1956).

2. Another common law peculiarity which state legislatures have sought to abolish is that portion of the requirement of the “four unities” *supra*, p. S238, under which O could not convey to himself and another as joint tenants, apparently because such a conveyance violated the unity of time. See 4 J. THOMPSON, REAL PROPERTY § 1777 (repl. ed. 1979). (This conclusion does not follow ineluctably. Can you see any contrary argument? See Annot., 44 A.L.R.2d 595, 598 n. 4 (1955).) The requirement is easily satisfied by the use of a straw man conveyance.¹ O conveys to T (a friend or lawyer) who immediately conveys back to O and the prospective joint tenant, and the unities are thus preserved. Scriveners, notaries and real estate agents, however, don’t know about this, so the legislatures help them out by passing statutes like the following:

....

(2) Any deed from husband to wife or from wife to husband which conveys an interest in the grantor’s lands and by its terms evinces an intent on the part of the grantor to create a joint tenancy between grantor and grantee shall be held and construed to create such joint tenancy, and any husband and wife who are grantor and grantee in any such deed heretofore given shall hold the premises described in such deed as joint tenants.

(3) Any deed to two or more grantees which, by the method of describing such grantees or by the language of the granting or habendum clause therein evinces an intent to create a joint tenancy in grantees shall be held and construed to create such joint tenancy.

¹ “The term ‘straw man’ originated in the early British halls of justice. Professional witnesses loitering in such halls signalled their willingness to testify to any matter – for a price – by wearing straw in their shoes.” Note, *The Use of Straw Men in Massachusetts Real Estate Transactions*, 44 B.U. L. REV. 187, 187–88 (1964). From this shady origin the straw man came to be used in more legitimate ways, particularly as a conduit in real estate transactions. The opprobrium attached to this origin has not, however, been completely forgotten. See *Houtz v. Heilman*, 228 Mo. 655, 669, 128 S.W. 1001, 1005 (1910). For other uses of straw men and the problems which arise in choosing a straw man carelessly, see, Cook, *Straw Men in Real Estate Transactions*, 25 WASH. U. L.Q. 232 (1940); Note, *supra*.

WIS. STAT. § 230.45 (1925), as amended by the Law of July 25, 1933, ch. 437, §§ 2(2)–(3), 1933 Wis. Laws 940.² [p*514]

In the first case to come up under this statute the scrivener who drafted the instrument was an experienced abstractor and real estate broker, but not a lawyer. He took a form labelled “Warranty Deed to Husband and Wife as Joint Tenants” and filled in the blanks as follows: party of the first part, “Bertha Hass,” parties of the second part, “Bertha Hass and Herbert W. Hass of Marathon County, mother and son, and the survivor of them in his or her own right.” The court, after struggling with the instrument a bit, held that it created a tenancy in common for their joint lives with a remainder in fee simple to the survivor. *Hass v. Hass*, 248 Wis. 212, 21 N.W.2d 398 (1946), noted in 1947 WIS. L. REV. 117; 44 MICH. L. REV. 1144 (1946).

Shortly after the *Hass* decision (1950), the Wisconsin legislature amended § 230.45(3) to read:

Any deed to two or more grantees, including any deed in which the grantor is also one of the grantees, which, by the method of describing such grantees or by the language of the granting or habendum clause therein evinces an intent to create a joint tenancy in grantees shall be held and construed to create such joint tenancy.

WIS. STAT. § 230.45(3) (1965) (repealed 1969). (Why did the legislature not repeal (2) of § 230.45, *supra*? Can you see any difference between the two provisions? Consider a grant from O “to A as joint tenant with O.” The grant is made prior to the effective date of the amended statute. Does it make any difference if O and A are married?)

Three years after the *Hass* decision the Wisconsin Supreme Court faced a similar case. In 1940, prior to the passage of the amended § 230.45(3), Emil Moe deeded his farm to himself and his sister, Emma, as joint tenants. She predeceased him and her heirs claimed an interest in the farm. Emil argued: (a) that a valid joint tenancy had been created giving him a right of survivorship, or (b) relying on the *Hass* decision, that he was entitled to survivorship in any case. The trial court upheld his second contention but was reversed on appeal, the Supreme Court declaring that the lower court had no power to make survivorship an incident to a tenancy in common. *Hass v. Hass*, *supra*, was distinguished on the grounds that the deed therein, as contrasted to Moe’s, had contained the words “an absolute fee forever in the remainder to the survivor” *Moe v. Krupke*, 255 Wis. 33, 37 N.W.2d 865 (1949). Is this distinction persuasive? Compare the principal case. Does it make any difference that Moe stated in his deed that the grantees were to take as joint tenants, which includes survivorship rights under the common law?

In 1969 the Wisconsin legislature tried again and with some minor amendments in 1971 the relevant provisions stand today.³

² The basic provisions of this statute go back to the WIS. REV. STAT. ch. 56, §§ 44–45 (1849): “§ 44. All grants and devises of lands, made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.” “§ 45. The preceding section shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife.” Section 44 became § 230.44 in the 1925 statutes, and § 45 became § 230.45(1) after the amendments in 1933. In the intervening period it had become clear, mostly as the result of judicial decision, that Wisconsin had abolished the tenancy by the entirety. See Patrick W. Cotter, *Observations on the Law of Joint Tenancy in Wisconsin — Conclusion*, 40 MARQ. L. REV. 92 (1956).

³ “Relevant” is, however, to be taken in a narrow sense. The ellipsis in § 700.19(1) reads: “except a phrase similar to “survivorship marital property,” and that in § 700.19(2) reads: “This subsection applies to property acquired before January 1, 1986, and, if ch. 766 does not apply when the property is acquired, to property acquired on or after January 1, 1986.” This language refers to the Wisconsin’s adoption as of January 1, 1986, of marital property provisions quite similar to community property.