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Comments

***681 ESTATES AND PROBATE--ELLIS V. ELLIS: SURVIVORSHIP PROPERTIES IN TENNESSEE REMAIN UNAFFECTED BY THE 120 HOUR PROVISION OF THE TENNESSEE UNIFORM SIMULTANEOUS DEATH ACT**

Eric Butler [FN1]

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Shortly after marrying in 1944, Neil Ellis (Husband) and Virgie Mae Ellis (Wife) executed separate reciprocal wills, each naming the other spouse as the sole beneficiary. [FN1] In April 1998, Wife became conservator over Husband due to his age and deteriorating mental condition. [FN2] On February 11, 1999, Husband died, followed by Wife's death three days later. [FN3] Husband's heirs claimed half of the property the couple held as tenants by the entirety because Wife failed to survive Husband by 120 hours. [FN4] *682 Wife's estate objected, arguing that the entirety property vested immediately in Wife because Husband predeceased her, and he therefore had no interest in the entirety property that could pass through his will. [FN5]

The trial court denied the motion of Husband's heirs to intervene in the probate proceedings. [FN6] The Tennessee Court of Appeals affirmed, holding that the entirety property passed outside of probate and that Wife took the property by survivorship in fee simple absolute immediately upon Husband's death. [FN7] The Tennessee Supreme Court held, affirmed. [FN8] The Tennessee Uniform Simultaneous Death Act does not require a spouse to survive by 120 hours before taking fee simple title to property held with the decedent as tenants by the entirety. *Ellis v. Ellis*, 71 S.W.3d 705, 714-15 (Tenn. 2002).

Two or more people owning the same land at the same time have concurrent estates. [FN9] Concurrent estates can exist in one of three forms: a joint tenancy with a right of survivorship, [FN10] a *683 tenancy in common, [fn11] OR A TENANCY by the entirety. [fn12] A HUSBAND AND Wife are the only persons who can hold property as tenants by the entirety in Tennessee. [FN13] The husband and wife are viewed as one person, per tout et non per my, meaning each person holds the entire estate through an undivided interest in the whole. [FN14]

In 1835, the Tennessee Supreme Court set out the common law treatment of a tenancy by the entirety upon the death of one spouse in *Taul v. Campbell*. [FN15] In *Taul*, the wife owned a parcel of land prior to marrying her husband. [FN16] After the marriage, the couple executed a deed of the land in question to a third party. [FN17] The very next day, the third party executed a deed of the land back to the Taul's as husband and wife. [FN18] Shortly after these transactions, the wife died intestate without issue. [FN19] She left only *684 her husband, her brothers, and her sisters as survivors. [FN20] The parties asked the court to resolve the issue of whether the real property in question passed to the husband in fee simple at the wife's death. [FN21]

The court in Taul began by examining the nature of the deed back to the Tauls from the third party. [FN22] Analyzing common law principles, the court noted that the husband and wife were viewed as one person in the eyes of the law, and a deed to the husband and wife created in them one estate. [FN23] Relying on earlier common law precedent, the court stated the basic common law rule as follows: “The result of the British and American decisions is the same, without an exception--that husband and wife take one indivisible estate, which continues, after the death of either natural person, the same estate in the survivor” [FN24] Relying on the common law rule, the court held that upon the wife's death, the husband became the owner of the land in fee simple. [FN25]

In 1921, the Tennessee Supreme Court set forth the common law approach to handling the simultaneous deaths of tenants by the *685 entirety in *McGhee v. Henry*. [FN26] The husband and wife obtained a parcel of land by deed following their marriage in 1910. [FN27] In 1919, the husband and wife died together in a burning building, making survivorship unascertainable. [FN28] The wife's son from a prior marriage filed suit, arguing he was entitled to one-half of the land held by the couple as tenants by the entirety. [FN29] The court began by noting that when the unity of husband and wife is broken by one spouse's death, the tenancy by the entirety ends. [FN30] Therefore, upon the death of one spouse, the entire property becomes vested in the surviving spouse in fee simple absolute. [FN31] Determining how the entirety property should be divided when both spouses die in the same tragedy, without proof of who survived the other was, however, an issue of first impression in Tennessee. [FN32]

The *McGhee* court reasoned that a tenancy by the entirety becomes a tenancy in common when a couple divorces. [FN33] Therefore, by analogy, property held in a tenancy by the entirety should be distributed as if the spouses were tenants in common when death occurs simultaneously. [FN34] The result is that a one-half interest passes through the estate of each spouse. [FN35] The court, in reaching this conclusion, upheld the common law rule regarding the simultaneous deaths of tenants by the entirety, and stated that “if two or more persons perish in the same disaster and there is no *686 fact or circumstance to prove which survived, there is no presumption whatever on the subject.” [FN36] Therefore, equal division of the property held in a tenancy by the entirety occurs when the parties die simultaneously in a common disaster. [FN37]

Since the common law did not presume that one person survived the other, the party seeking to obtain full title as heir or beneficiary of one of the decedents who perished in the common disaster had the burden of proving survivorship. [FN38] Common law cases attempting to show survivorship often resulted in morbid recreations of the decedents' deaths, as the 1944 case of *Davis v. Mitchell* [FN39] demonstrates. In his will, testator left a large estate in trust to his grandson, naming the grandson's wife as beneficiary should the grandson die during the term of the trust. [FN40] The grandson and his wife, while traveling to Kentucky, stopped to ask directions. [FN41] The man they approached for assistance shot both the husband and wife, and both died as a result of their wounds. [FN42]

Following the couple's death, the wife's heirs filed suit to contest the distribution of the trust and other estate assets. [FN43] The *687 heirs attempted to prove the wife survived the husband, thus entitling them to an interest in the trust through her estate. [FN44] The wife's heirs called the first officer on the scene to testify that he found the husband already dead, but that the wife lived for a few moments longer before succumbing to her injuries. [FN45] The officer stated that he found the wife sitting in the passenger seat, and as he approached her she sat up to speak, but fell back in her seat and appeared to be dead. [FN46]

At trial, the jury found that the wife survived the husband, [FN47] and on appeal the court examined whether

the evidence presented at trial supported the jury's verdict. [FN48] The court stated that the common law rule--that survivorship is not presumed, but must be proven--requires the court to look at all the evidence available in determining order of death. [FN49] The court stated that on appellate review, the court generally defers to the fact finder's determination of the truthfulness and credibility of witnesses' testimony. [FN50] Therefore, the court upheld the jury finding that the wife survived her husband. [FN51]

As Davis demonstrates, proving survivorship at common law could hinge upon evidence of who gasped the last breath or made the slightest body movements before death. [FN52] In the case of wills, a devisee or legatee only had to survive the testator for an instant *688 in order to take. [FN53] The same outcome occurred for simultaneous deaths involving survivorship property at common law. [FN54] The result was that property could pass from one estate to another estate rather than both estates retaining an individual one-half interest. [FN55] In 1940 the National Conference of Commissioners on Uniform State Laws passed the Uniform Simultaneous Death Act (USDA) in an attempt to solve the inequities that resulted from the operation of the common law rule. [FN56] In the prefatory notes, the committee set forth the intent behind the USDA as follows:

The reason for the difficulty of administration (of estates) is that it is impossible to know which of the persons has survived. Yet the "common law rule" in effect says that the person who claims by virtue of an alleged survivorship must prove the survivorship, which is tantamount to demanding the impossible.

The theory of the present Act makes no effort whatever to resolve the unresolvable. The formula is a simple one and easily applied. The theory of the present Act is that as to the property of each person he is presumed to be the survivor and it is administered accordingly. [FN57]

The 1940 USDA contained a provision applying to joint tenancies and tenancies by the entireties to cover situations where insufficient proof of survivorship exists. [FN58] The USDA initially *689 sought to achieve two primary goals: to prevent property from passing between estates (and, thereby, protect the decedent's presumed intent by preventing the other person's relatives from taking), and to ensure that administrative expenses and resources are not wasted by probating the property of two estates in a very short period of time. [FN59] The Tennessee General Assembly adopted the USDA in 1941, [FN60] creating the Tennessee Uniform Simultaneous Death Act (TUSDA). [FN61] The Tennessee Act also incorporated the USDA provision governing joint tenancy and tenancies by the entirety. [FN62]

In 1976, the Tennessee Supreme Court applied the TUSDA to a tenancy by the entirety in *Brundige v. Alexander*. [FN63] In *Brundige*, the wife left her husband the residuary of her estate in her will. [FN64] After execution of the will, the husband and wife died when a train hit the car in which they were riding, making the order of survivorship unascertainable. [FN65] The husband's children from a prior marriage claimed they were entitled to the residuary by virtue of Tennessee's anti-lapse statute. [FN66] The court found it necessary, *690 before applying the anti-lapse provision, to first ascertain whether the beneficiary died before the testator by applying the relevant section of the TUSDA. [FN67] The court noted that the common law did not presume survivorship when persons died in a common disaster, and the party asserting survivorship had the burden of proof. [FN68] The court then pointed out that the TUSDA replaced the common law by creating a substantive rule of law that applies when there is insufficient evidence that one person survived the other. [FN69]

The husband's children argued that since the couple held the property as tenants by the entirety, section 31-504 of the TUSDA governing survivorship property applied. [FN70] The statute provides in relevant part that "(w)here there is no sufficient evidence that two (2) joint tenants or tenants by the entirety have died otherwise than simultaneously, the property so held shall be distributed one-half (1/2) as if one had survived and one-half (1/2) as if the other had survived." [FN71] The wife's heirs argued that the anti-lapse provision only applies to

property passing under a will, and since property *691 held as tenants by the entirety passes outside of the will, [FN72] the anti-lapse statute did not apply to this case. [FN73]

The court determined that the property held as tenants by the entirety could not pass as it normally would—automatically vesting in the surviving spouse, because survivorship was unascertainable. [FN74] Accordingly, the court found that section 31-504 of the TUSDA dictated that the couple's simultaneous deaths frustrated the usual rule governing tenancy by entirety at the death of one spouse. [FN75] The court held that in the case of a common disaster, where there is no proof of survivorship, each spouse's estate receives a one-half interest that passes through his or her will. [FN76] Thus, the wife's one-half interest passed through the residuary clause of her will, and by virtue of the anti-lapse provision, the husband's children succeeded to that interest. [FN77]

As Brundige demonstrates, the portion of the TUSDA regarding survivorship properties only applies to instances where the survivorship of one person can not be proven by sufficient evidence, [FN78] in which case, the TUSDA and the USDA will simply divide the property as if each spouse survived the other. [FN79] Where proving survivorship was possible, however, presenting sufficient evidence to prove survivorship under statutes based on the USDA *692 language often required the presentation of the same gruesome evidence required at trials under the common law. [FN80]

In 1958, the Arkansas Supreme Court, construing language identical to that found in section 31-3-102 of the TUSDA, [FN81] elaborated on the meaning of “simultaneous” under the 1940 USDA. In *Smith v. Smith*, [FN82] the husband and wife had no children, and executed reciprocal wills leaving their estates to one another at death. [FN83] Following an automobile accident, the husband died at the scene, but the wife lived seventeen days past her husband. [FN84] The husband's estate argued that the simultaneous death statute applied to “common disasters,” that since the couple died from the same disaster, the couple died simultaneously. [FN85]

The court, however, found that the Arkansas legislature intended the statute to apply only if evidence of survivorship did not exist. [FN86] In addition, the court dismissed the relevance of the “common disaster” by noting that two people can die simultaneously from separate natural causes, with the deaths being unrelated to a common disaster. [FN87] The court emphasized that the evidence clearly showed that the wife survived the husband by seventeen days. [FN88] The court rejected the argument set forth by the husband's estate, and held that the plain ordinary meaning of the term “simultaneous,” as defined in the dictionary, means at the same time. [FN89]

*693 Of course, this interpretation of the USDA still allowed property to pass to a surviving spouse who might not live long enough to enjoy the use of the property. [FN90] Thus, the goals underlying the USDA were frustrated when one person survived the other for an insignificant period of time. [FN91] The Uniform Law Commissioners recognized the problem with the USDA's treatment of near simultaneous death cases when they promulgated the 1969 Uniform Probate Code (UPC). [FN92] The UPC's solution requires a person to survive the decedent by 120 hours (five days) before he or she could take. [FN93] The UPC provision sought to further the decedent's presumed intent by limiting the passing of property to only those persons who could personally benefit from its use. [FN94] The original 1969 UPC, however, only applied the 120 hour provision to intestacy and wills, and did not cover non-probate transfers through life insurance or survivorship properties. [FN95] In 1990, the drafters amended the UPC to cure this deficiency by making the 120 hour provision applicable to just such nonprobate transfers. [FN96] In 1991, the commissioners amended the USDA to reflect the changes in the UPC, and likewise enacted a provision applying the 120 hour provision to survivorship properties. [FN97]

***694** In 1997, the Tennessee General Assembly followed suit and adopted a 120 hour provision similar to, but not precisely the same as, those seen in the UPC and USDA. [FN98] The 120 hour provision adopted by the Tennessee General Assembly in 1997 provides as follows:

(a) An individual who fails to survive the decedent by one hundred twenty (120) hours is deemed to have predeceased the decedent for purposes of the homestead allowance, year's support allowance, exempt property, elective share and intestate succession, and the decedent's heirs are determined accordingly.

(b) A devisee who fails to survive the testator by one hundred twenty (120) hours is deemed to have predeceased the testator, unless the will of the decedent contains language dealing explicitly with simultaneous deaths or deaths in a common disaster or requiring that the devisee survive by a stated period of time in order to take under the will.

(c) If it is not established by clear and convincing evidence that an individual who would otherwise be an heir or devisee survived the decedent by one hundred twenty (120) hours, it is deemed that such individual failed to survive for the required period. This section is not to be applied if its application would result in property of any nature escheating to the state. [FN99]

When the legislature added the 120 hour provision to the TUSDA in 1997, they left section 31-3-104, regarding survivorship property, untouched, [FN100] and did not make reference to it in the new 120 hour provision found in section 31-3-120. [FN101]

***695** With the arrival of *Ellis*, the Tennessee Supreme Court had its first opportunity to discuss the applicability of Tennessee's 120 hour provision to tenancies by the entirety. [FN102] Husband's heirs argued that they were entitled to one-half of the decedents' property held as tenants by the entirety because Wife failed to survive Husband by 120 hours. [FN103] They argued that the 120 hour provision applies to all cases, including those involving tenancy by the entirety. [FN104]

Wife's heirs argued that they were entitled to one-hundred percent of the property. First, they contested that the term simultaneously in section 31-3-104 means at the same time, and that therefore, Wife, who died three days after Husband, did not die simultaneously with Husband. [FN105] Next, relying on traditional principles of real property, Wife's heirs further argued that property held as tenants by the entirety does not pass through a will, but automatically vests a fee simple title in the surviving spouse at the death of the other spouse. [FN106]

The court began its analysis by surveying the scope of the 120 hour provision in section 31-3-120. [FN107] The court found that the 120 hour provision can indeed apply beyond common disaster cases, and thus may apply when the spouse or other beneficiary dies of separate and unrelated causes. [FN108] In this case, Husband made no provision in his will requiring Wife to survive him by a stipulated amount of time in order to take. [FN109] Section 31-3-120(b) clearly states that when a testator's will fails to set forth property ***696** distribution in the event of simultaneous death, the 120 hour provision will act as the default survival period. [FN110] The court noted, however, that the 120 hour default rule only applies to property Husband held separate from Wife and that passed to her by his will. [FN111] Therefore, the 120 hour provision in section 31-3-120 applied to Husband's separate property that he devised to Wife. [FN112]

In contrast, the court found that section 31-3-120 makes no mention of property held as tenants by the entirety. [FN113] The court thus disagreed with Husband's heirs that property held as tenants by the entirety is subject to the 120 hour provision. [FN114] Reverting instead back to the common law rule in Tennessee, the court stated that property held as tenants by the entirety cannot be passed by will because it vests full title in the

surviving spouse at the other spouse's death. [FN115] Therefore, section 31-3-120(b) “(does not require) a spouse to survive the other by 120 hours in order to obtain fee simple title to property formerly held by the entirety.” [FN116]

Husband's heirs next argued that even if section 31-3-120 did not specifically mention tenancies by the entirety, the word “simultaneous” should be construed to mean death within 120 hours. [FN117] Husband's heirs based this argument on the premise that the legislature applied the 120 hour provision of the TUSDA to *697 other simultaneous death situations, and therefore intended that simultaneous mean within 120 hours in all contexts. [FN118] Husband's heirs contended that the legislative intent, when applied to section 31-3-104 dealing with tenancies by the entirety, requires a spouse to survive the other by 120 hours in order to take a fee simple in the entirety property. [FN119]

In confronting this issue, the court emphasized that one of the major guideposts for the court in statutory construction is that it should construe a statute so that it comports with its component parts. [FN120] The court noted that a deeply rooted premise of the Tennessee common law is “that property held in a tenancy by the entirety passes immediately to the surviving spouse upon the death of the other spouse.” [FN121] The court reasoned that if the General Assembly had meant the interpretation argued by Husband's heirs, the result would be that a deceased spouse, unable to hold an interest in property at common law, would continue to hold his undivided interest in the entirety property for an additional 120 hours after his death. [FN122]

The court continued by noting that the General Assembly has the authority to change the common law by enacting legislation; [FN123] however, it must set forth a clear intention to do so. [FN124] Upon examining the TUSDA, the court found insufficient legislative intent to override the common law rule that upon the death of one tenant, the other tenant by the entirety becomes vested with a fee simple absolute. [FN125] In addition, the court reiterated that section 31-*698 3-120 contains no specific language applying the 120 hour survival provision to tenancies by the entirety. [FN126]

The court also gave weight to the fact that the 1997 amendments to the TUSDA, enacting the 120 hour provision in section 31-3-120, were based on provisions of the amendments to the 1993 Revised USDA and the 1969 UPC. [FN127] The court noted that the drafters of the UPC and USDA chose to place the 120 hour provision relating to property held in co-ownership with a right of survivorship in a separate provision. [FN128] The court reasoned that by enacting provisions from a model or uniform law, the legislature is presumed to also adopt the intent of the drafters of that uniform law. [FN129] However, since the legislature did not follow the UPC or USDA by failing to likewise adopt separate provisions applying a 120 hour provision to survivorship properties, the court concluded the legislature intended to depart from the uniform acts. [FN130]

The court concluded by defining the term “simultaneous” in section 31-3-104, as it applies to property held as tenants by the entirety, to mean at the same time. [FN131] Since Wife did not die at the same time as Husband, but three days later, the property held by the couple in a tenancy by the entirety vested Wife with fee simple title automatically upon Husband's death. [FN132]

The Tennessee Supreme Court's refusal to hold that the 120 hour provision of section 31-3-120 applies to tenancies by the entirety is correct under a literal reading of the TUSDA. [FN133] This is especially true in light of the fact that the TUSDA is based upon provisions of the USDA and UPC, each of which--unlike the TUSDA--includes provisions specifically applying the 120 hour survival requirement to property held in co-ownership with rights of survivorship. [FN134]

Following the Ellis court's holding that the 120 hour provision in section 31-3-120 does not apply to tenancies by the entirety *699 under section 31-3-104, [FN135] two possible outcomes remain in effect in Tennessee. First, as in Ellis, if there is sufficient proof of survivorship, the property will pass to the surviving spouse in fee simple, even though he or she may derive no beneficial use from it when survivorship is only for a few hours or days. [FN136] Second, if no sufficient evidence of survivorship exists, the couple will be treated as dying simultaneously under section 31-3-104 of the TUSDA. [FN137] Had Husband and Wife in Ellis died of natural causes with survivorship being unascertainable, their entireties property would have been divided equally among their respective estates. [FN138]

The inequity under the TUSDA can occur in the first instance, particularly when one spouse survives by only a few hours or days. Without a 120 hour survival requirement, survivorship property can pass to a person who will never be able to enjoy it beneficially. Both the USDA and UPC sought to prevent such an outcome by applying a 120 hour survival requirement to survivorship properties. [FN139] A 120 hour survival provision applied to survivorship property would ensure more efficient and equitable distribution of property in these close cases.

Although a 120 hour provision does prevent the injustices seen at common law with proving survivorship, it also violates one of the cardinal rules of property ownership; a deceased person cannot hold title to land. [FN140] In essence, under a 120 hour survivorship rule, property owned in a tenancy by the entirety would remain in limbo for five days (120 hours) after the death of one spouse. Not having a readily ascertainable owner at death raises several issues that could complicate concurrent ownership principles. The husband's undivided one-half interest cannot be held by his estate during this period because only husband and wife can hold property as tenants by the entirety. [FN141] If the estate does hold the husband's one-half undivided interest for 120 hours, *700 it would have to be as a tenant in common with the wife. [FN142] Should the wife survive the 120 hour period, is the estate then converted back into a tenancy by the entirety so that she takes her fee simple? This would be impossible because the wife is by definition a single person when her husband dies. A tenancy by entirety, as stated above, can only be created in husband and wife. These concerns, however, did not prevent the drafters of the UPC or USDA from applying the 120 hour survival requirement to survivorship properties.

Although the court did not address the issue in Ellis, it is interesting to note that the 120 hour provision in section 31-3-120 also fails to reference life insurance policies. [FN143] As is the case with survivorship properties, both the UPC and the USDA provide in separate provisions that the 120 hour provision does apply to insurance policies. [FN144] The court's ruling in Ellis would suggest that since section 31-3-120 fails to mention life insurance policies, the 120 hour provision does not apply to them either. This gives rise to the same problems of proving survivorship and the injustice that can occur with distribution of property held in a tenancy by the entirety. [FN145]

Did the legislature intend to exclude insurance policies and survivorship properties from the 120 hour provision, or was it mere oversight? The argument can be made that the legislature intended section 31-3-120(c) to be a catchall provision, thereby encompassing insurance policies and survivorship properties. [FN146] Without explicit legislative application of the 120 hour provision to survivorship properties, the Tennessee Supreme Court's holding in Ellis is justifiable. Yet the disparate treatment of simultaneous deaths under the TUSDA that results from the Ellis holding *701 certainly seems to warrant legislative amendment. Legislative amendment to the TUSDA, making the 120 hour provision applicable to survivorship properties, would bring uniformity and consistency to all instances in which receipt of a beneficial interest hinges on survivorship.

[FN1]. Associate Staff, The University of Memphis Law Review; Juris Doctor Candidate, May 2004, The University of Memphis Cecil C. Humphreys School of Law; B.S., May 2000, Middle Tennessee State University, cum laude. I would like to extend a special thanks to Professor Ralph Brashier for his dedication to both the topic and his students.

[FN1]. *Ellis v. Ellis*, 71 S.W.3d 705, 708 (Tenn. 2002). A reciprocal or mutual will is defined as a will “in which two persons, usu(ally) a husband and wife, establish identical or similar testamentary provisions disposing of their estates in favor of each other.” Black’s Law Dictionary 1592 (7th ed. 1999). Each spouse’s will provided that at death their respective property should go to the other spouse. *Ellis*, 71 S.W.3d at 708. The will did not address the issue of simultaneous death. *Id.* In addition, the couple never had any children during their marriage. *Id.*

[FN2]. *Ellis v. Ellis*, No. M1999-00897-COA-R3-CV, 2001 WL 356714, at *1 (Tenn. Ct. App. Apr. 11, 2001). Acting as Husband’s conservator, Wife sold the couple’s real and personal property to help pay for Husband’s nursing home costs, and placed the proceeds into joint and separate accounts. *Id.*

[FN3]. *Ellis*, 71 S.W.3d at 708. Both Husband and Wife died of natural causes. *Id.*

[FN4]. *Id.* Husband’s heirs filed a motion to intervene in the probate of Wife’s will. *Id.* Only Wife’s will was presented to the court for consideration; however, due to the nature of the survivorship interest, the court found it necessary to construe both wills. *Id.* at 710. The heirs of Husband based their argument on [Tennessee Code section 31-3-120](#), the 120 hour survival provision of the Tennessee Uniform Simultaneous Death Act. *Id.* For the text of [section 31-3-120 of the Tennessee Code](#), see *infra* text accompanying note 99.

[FN5]. *Ellis*, 71 S.W.3d at 709. The heirs of Wife based their argument on section 31-3-104 of the Tennessee Uniform Simultaneous Death Act, the provision governing survivorship properties. *Id.*; see *infra* note 71 and accompanying text.

[FN6]. *Ellis*, 71 S.W.3d at 709.

[FN7]. *Id.*

[FN8]. 8. *Id.* at 714-15.

[FN9]. 9. Concurrent estates are distinguished from each other according to which of three qualities they exhibit: alienability, devisability, or inheritability. 4 Thompson on Real Prop. § 33.02 (David A. Thomas ed., 1994). Alienability refers to the property being transferable during life by sale or gift. *Id.* Devisability refers to the tenant’s ability to transfer the property at death by devise. *Id.* Inheritability refers to the property being able to pass to a tenant’s heirs at death. *Id.*

[FN10]. 10. At common law, for a joint tenancy with a right of survivorship to exist four unities had to be present: interest, title, time, and possession. *Id.* § 31.06(b). A joint tenant has an interest that he or she can alienate, but the interest is not a devisable or inheritable interest. *Id.* § 32.02. Upon the death of one joint tenant at common law, the survivor becomes owner of the property in fee simple. 8 Tenn. Jur. Cotenancy § 2 (2002). The Tennessee General Assembly abolished common law survivorship in joint tenancies by statute; however, the statute does not prohibit survivorship where an instrument clearly exhibits an intent that it remain. *Id.*; see [Tenn. Code Ann. § 66-1-107 \(2000\)](#).

[FN11]. Tenancy in common is a form of concurrent estate, but unlike a joint tenancy, each tenant's interest is alienable, devisable, and inheritable. 4 Thompson, *supra* note 9, § 32.02. Only the unity of possession is necessary for a tenancy in common to exist. *Id.* § 32.06(a).

[FN12]. Tenancy by the entirety not only requires the same four unities required for a joint tenancy, but also requires the additional unity of marriage. *Id.* § 33.06(b). An interest in a tenancy by the entirety is not devisable or inheritable, and it cannot be alienated without the consent of both tenants. *Id.* § 33.02. Unlike joint tenancy, the tenancy by entirety cannot be partitioned and the right of survivorship can only be destroyed by termination of the marriage. *Id.* Tenancy by the entirety not only requires the same four unities required for a joint tenancy, but also requires the additional unity of people. *Id.* § 33.06(b).

[FN13]. 1 Page on Wills and Admin. of Estates § 455 (Jack W. Robinson, Sr. & Jeff Mobley eds., 5th ed. 1994).

[FN14]. 4 Thompson, *supra* note 9, § 33.06(a).

[FN15]. *Taul v. Campbell*, 15 Tenn. (7 Yer.) 319, 333 (1835).

[FN16]. *Id.* at 319.

[FN17]. *Id.*

[FN18]. *Id.* This was commonly referred to as a “straw man transaction”-- one spouse who owned land would convey the land to a third party, and the third party would convey the land back to the husband and wife to create a tenancy by the entirety. See *Moore v. Cole*, 289 S.W.2d 695, 699 (Tenn. 1956). The Tennessee General Assembly abrogated the need to use a straw man by allowing a spouse to make a direct conveyance to the other spouse, so long as there is a clear intention to create a tenancy by the entirety. *Tenn. Code Ann.* § 66-1-109 (2000).

[FN19]. *Taul*, 15 Tenn. at 319.

[FN20]. *Id.*

[FN21]. *Id.* at 321.

[FN22]. *Id.* at 333. The Tennessee General Assembly adopted legislation in 1784 abolishing survivorship in real and personal property because of the perceived injustice that occurs to the deceased tenant's family when the property goes to the surviving tenant. *Id.* at 322. Although the legislation specifically mentioned joint tenancies, the court was asked to interpret the statutory language to determine whether it applied to tenancies by the entirety. *Id.* at 332.

[FN23]. *Id.* A deed to husband and wife at common law created in them a tenancy by the entirety, even though the instrument did not specifically purport to create one. *Bennett v. Hutchens*, 179 S.W. 629, 630 (Tenn. 1915). A deed granting real property to “William Farley and wife” creates a tenancy by the entirety in the couple regardless of the fact that the wife is not specifically named. *Ballard v. Farley*, 226 S.W. 544, 545 (Tenn. 1920). A tenancy by the entirety may be created when personal property is conveyed to husband and wife, with the surviving spouse becoming outright owner of the personal property at the death of the other spouse. *Campbell v. Campbell*, 66 S.W.2d 990, 991 (Tenn. 1934).

[FN24]. [Taul](#), 15 *Tenn.* at 337. The justification for allowing survivorship in a tenancy by the entirety at common law was that the property would ultimately end up passing to the descendants of the couple when the last spouse died anyway. *Id.* at 323. Injustice could occur, however, by allowing survivorship in a tenancy in common, especially where the tenants are from different families, thereby excluding the decedent's heirs entirely. *Id.*

[FN25]. *Id.* at 337.

[FN26]. 234 S.W. 509, 509-10 (*Tenn.* 1921).

[FN27]. *Id.* at 509.

[FN28]. *Id.*

[FN29]. *Id.* The husband's five children from a previous marriage argued that each child should get a one-sixth interest in the property and that, therefore, the wife's son should only take a one-sixth interest. See *id.*

[FN30]. *Id.*

[FN31]. *Id.* at 510; see also [Beddingfield v. Estill & Newman](#), 100 S.W. 108, 110 (*Tenn.* 1907) (stating that when one spouse in the tenancy by entirety dies, the other spouse automatically becomes the holder of a fee simple, as nothing passes into the deceased spouse's estate); [White v. Watson](#), 571 S.W.2d 493, 495 (*Tenn. Ct. App.* 1978) (“It is a well recognized rule that an interest of a tenant by the entirety cannot be passed by will.”). But see, e.g., [Hicks v. Boshears](#), 846 S.W.2d 812, 818 (*Tenn.* 1993) (finding that the felonious murder of the wife by the husband does not vest the husband with a fee simple, but converts the tenancy by the entirety into a tenancy in common).

[FN32]. [McGhee](#), 234 S.W. at 510.

[FN33]. *Id.* (citing [Hopson v. Fowlkes](#), 23 S.W. 55, 57 (*Tenn.* 1893)).

[FN34]. *Id.*

[FN35]. *Id.*

[FN36]. *Id.*

[FN37]. See *id.*; see also [Covington v. Murray](#), 416 S.W.2d 761, 764 (*Tenn.* 1967) (holding that “when death comes to both at the same instant, (the entireties property) must descend as if husband and wife had been tenants in common”); [In re Guardianship of Plowman](#), 398 S.W.2d 721, 723 (*Tenn.* 1966) (stating that Tennessee now has a simultaneous death act which would apply to the factual setting in McGhee, and would operate in the same manner as that ruling when both spouses die in a common disaster).

[FN38]. 2 Page, *supra* note 13, § 918.

[FN39]. 178 S.W.2d 889, 896-97 (*Tenn. Ct. App.* 1943); see also [In re Estate of Schmidt](#), 261 Cal. App. 2d 262, 270 (*Cal. Ct. App.* 1968) (holding that simultaneous death statute does not apply when there is evidence as to survival or particular circumstances exist that tend to show survivorship); [Stewart v. Russell](#), 227 S.W.2d 1011, 1016 (*Mo.* 1950) (stating that where defective water heater leaked carbon monoxide into house, and couple and their children were found dead and badly decomposed several days later, there was no sufficient evidence of

survivorship).

[FN40]. [Davis](#), 178 S.W.2d at 894. The grandson was single at the time of the testator's death, but subsequently married. *Id.*

[FN41]. *Id.* at 895.

[FN42]. *Id.* at 896.

[FN43]. *Id.* at 894. The wife's heirs attempted to show that the trust from the grandfather to the grandson was a vested interest, even though the grandson was not married at the time of the grandfather's death. *Id.* Therefore, they argued, the wife, as the survivor, became entitled to the trust according to the grandfather's will. *Id.*

[FN44]. *Id.*

[FN45]. *Id.* at 896-97. The officer laid out the scene to the jury in graphic detail, recounting the massive amount of blood pouring onto the pavement from the husband's body. *Id.* He stated he felt for a pulse on the husband, but found none. *Id.* at 896. The officer noted for the jury that the seats of the car were saturated with blood, which he had to soak up with newspapers before someone could sit and drive the car away to be processed for evidence. *Id.* at 897.

[FN46]. *Id.* at 895-96.

[FN47]. *Id.* at 895.

[FN48]. *Id.* at 898-99.

[FN49]. See *id.* at 898.

[FN50]. *Id.* at 898-99.

[FN51]. *Id.* at 898. Concerning the issue of whether the wife had a vested right in the trust, the court held that the trust did not pass to the wife at the husband's death based on separate grounds relating to the administration of trusts. *Id.* at 914.

[FN52]. See *id.* at 898; Restatement (Third) of Prop.: Wills & Other Donative Transfers § 1.2 cmt. a (1999).

[FN53]. Restatement (Third) of Prop.: Wills & Other Donative Transfers § 1.2 cmt. a (1999).

[FN54]. *Id.*

[FN55]. See *id.* cmt. b.

[FN56]. [Unif. Simultaneous Death Act §§ 1-11](#) (amended 1991), 8B U.L.A. 159-89 (2001).

[FN57]. [Unif. Simultaneous Death Act](#) prefatory note, 8B U.L.A. at 160-61.

[FN58]. [Unif. Simultaneous Death Act § 3](#), 8B U.L.A. at 176. The relevant portion of the USDA covering joint tenancy and tenancy by the entirety provides as follows: Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed

one-half as if one had survived and one-half as if the other had survived. *Id.* (emphasis added).

[FN59]. Restatement (Third) of Prop.: Wills & Other Donative Transfers § 1.2 cmt. b (1999).

[FN60]. Act of Feb. 11, 1941, ch. 59, 1941 Tenn. Pub. Acts 187 (codified as amended at [Tenn. Code Ann. §§ 31-3-101 to-107](#) (2001)) (emphasis added) (“providing for the disposition of property where there is no sufficient evidence that persons have died otherwise than simultaneously”).

[FN61]. *Id.* In the same enactment, the Tennessee General Assembly adopted the USDA provision governing insufficient evidence of simultaneous death for purposes of insurance policies. *Id.* § 4, at 188 (codified as amended at [Tenn. Code Ann. § 31-3-105](#)).

[FN62]. *Id.* § 3, at 187 (codified as amended at [Tenn. Code Ann. § 31-3-104](#)). For the relevant text of [section 31-3-104 of the Tennessee Code](#), see *infra* text accompanying note 71.

[FN63]. 547 S.W.2d 232 (Tenn. 1976).

[FN64]. *Id.* at 232-33.

[FN65]. *Id.* at 232.

[FN66]. *Id.* at 233. Tennessee's anti-lapse statute, designed to prevent property from lapsing as it would under common law, provides as follows:

Whenever the devisee or legatee or any member of a class to which an immediate devise or bequest is made, dies before the testator, or is dead at the making of the will, leaving issue which survives the testator, the issue shall take the estate or interest devised or bequeathed which the devisee or legatee or the member of the class, as the case may be, would have taken, had that person survived the testator, unless a different disposition thereof is made or required by the will. [Tenn. Code Ann. § 32-3-105\(a\)](#) (2001) (emphasis added). The purpose of the anti-lapse provision was to defeat lapses of property at common law where the beneficiary of a will died with or before the testator. [Dixon v. Cooper](#), 12 S.W. 445, 446 (Tenn. 1889). The legislature thought that if the testator's property could not go to the beneficiary designated, the testator would want it to go to the beneficiary's heirs. [White v. Kane](#), 159 S.W.2d 92, 94-95 (Tenn. 1942). By using the term “issue” in the statute, the legislature intended that the provision only apply to lineal descendants of the devisee or legatee. *Id.* at 95.

[FN67]. [Brundige](#), 547 S.W.2d at 233. The general provision of the TUSDA dealing with disposition of property when there is insufficient evidence of survivorship provides as follows:

Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if the person had survived, except as provided otherwise in this chapter. [Tenn. Code Ann. § 31-3-102](#) (2001) (emphasis added).

[FN68]. [Brundige](#), 547 S.W.2d at 234; see *supra* note 38 and accompanying text.

[FN69]. [Brundige](#), 547 S.W.2d at 234.

[FN70]. *Id.* at 235. Section 31-504 of the TUSDA is currently codified at [section 31-3-104 of the Tennessee Code](#). [Tenn. Code Ann. § 31-3-104](#) (2001).

[FN71]. [Tenn. Code Ann. § 31-3-104](#) (emphasis added).

[FN72]. See supra note 31.

[FN73]. [Brundige](#), 547 S.W.2d at 235.

[FN74]. *Id.*

[FN75]. *Id.* at 235-36.

[FN76]. *Id.*

[FN77]. *Id.*

[FN78]. [Tenn. Code Ann. § 31-3-104 \(2001\)](#); see supra text accompanying note 71.

[FN79]. Restatement (Third) of Prop.: Wills & Other Donative Transfers § 1.2 cmt. b (1999). The Restatement (Third) of Property provides the following example as to how the 1940 USDA operated:

H and W, a married couple with no children, were killed in an automobile accident. Both died intestate. There was no sufficient evidence that they died otherwise than simultaneously H's estate is distributed as if W failed to survive him. W's estate is distributed as if H failed to survive her. Neither inherits from the other. H's estate passes to his relatives and W's estate passes to her relatives, as provided in the applicable statute of intestacy. *Id.* § 1.2 illus. 1 (emphasis added).

[FN80]. See [In re Estate of Campbell](#), 641 P.2d 610, 613 (Or. Ct. App. 1982) (applying Oregon's Uniform Simultaneous Death Act, with language identical to the TUSDA relating to survivorship properties and life insurance policies, and holding that neither survivorship nor simultaneous death is presumed). For an example of the gruesome evidence allowed to prove survivorship under the common law rule, see supra notes 39-46 and accompanying text.

[FN81]. Compare [Tenn. Code Ann. § 31-3-102 \(2001\)](#), with [Ark. Code Ann. § 28-10-101 \(Michie 2001\)](#); see also supra note 67.

[FN82]. 317 S.W.2d 275 (Ark. 1958).

[FN83]. *Id.* at 276.

[FN84]. *Id.* The wife remained unconscious following the wreck until succumbing to her injuries. *Id.*

[FN85]. *Id.* at 281.

[FN86]. [Smith](#), 317 S.W.2d at 282.

[FN87]. *Id.*

[FN88]. *Id.* at 281-82 (“(W)e take judicial notice that one breathing, though unconscious, is not dead.”).

[FN89]. *Id.* at 282.

[FN90]. Edward C. Halbach, Jr. & Lawrence W. Waggoner, [The UPC's New Survivorship and Antilapse Provisions](#), 55 Alb. L. Rev. 1091, 1095 (1992).

[FN91]. *Id.*

[FN92]. *Id.*

[FN93]. *Id.*

[FN94]. *Id.*

[FN95]. *Id.* at 1096.

[FN96]. *Id.* The relevant portion of the 1990 UPC governing tenancies by the entirety provides as follows: (I) f . . . it is not established by clear and convincing evidence that one of two co-owners with right of survivorship survived the other co-owner by 120 hours, one-half of the property passes as if one had survived by 120 hours and one-half as if the other had survived by 120 hours [Unif. Probate Code § 2-702\(c\)](#) (amended 1993), 8 U.L.A. 182 (1998). [Section 2-104 of the UPC](#) contains a separate 120 hour provision governing intestate succession, and [section 2-702\(b\) of the UPC](#) applies the 120 hour provision to wills and other governing instruments. *Id.* §§ 2-104, 8 U.L.A. at 84 & 2-702(b), 8 U.L.A. at 182.

[FN97]. Halbach & Waggoner, *supra* note 90, at 1097. The language of the 1991 USDA applying to co-ownership properties provides as follows:

(I) f . . . it is not established by clear and convincing evidence that one of two co-owners with right of survivorship survived the other co-owner by 120 hours, one-half of the property passes as if one had survived by 120 hours and one-half as if the other had survived by 120 hours [Unif. Simultaneous Death Act § 4](#), amended (1991), 8B U.L.A. 149-50 (2001).

[FN98]. Act of May 29, 1997, ch. 426, § 16, 1997 Tenn. Pub. Acts 770.

[FN99]. [Tenn. Code Ann. § 31-3-120](#) (2000).

[FN100]. For the relevant text of [section 31-3-104 of the Tennessee Code](#), see *supra* text accompanying note 71.

[FN101]. For the relevant text of [section 31-3-120 of the Tennessee Code](#), see *supra* text accompanying note 99.

[FN102]. [Ellis v. Ellis](#), 71 S.W.3d 705, 708 (Tenn. 2002).

[FN103]. *Id.* The Husband's heirs contended that since the will did not provide for simultaneous death, the Tennessee Code imposes a 120 hour survival period as a default rule. *Id.* at 708-09. Therefore, they argued, the decedents are deemed to have both died simultaneously, and the entirety property is distributed according to [Tennessee Code section 31-3-104](#). *Id.* at 709.

[FN104]. *Id.* at 710.

[FN105]. *Id.* at 709.

[FN106]. *Id.*; see also *supra* note 31 and accompanying text for a discussion of the legal principle.

[FN107]. [Ellis](#), 71 S.W.3d at 710.

[FN108]. *Id.*; see *supra* note 87 and accompanying text for a discussion of the legal principle.

[FN109]. [Ellis](#), 71 S.W.3d at 711.

[FN110]. *Id.* For the relevant text of [section 31-3-120\(b\) of the Tennessee Code](#), see *supra* text accompanying note 99.

[FN111]. *Ellis*, 71 S.W.3d at 711. Since the wills did not contain a provision covering simultaneous death, the court held that the 120 hour provision would prevent the wife from taking separate property because she failed to survive by 120 hours. *Id.*

[FN112]. *Id.* The court noted that the Tennessee Court of Appeals remanded this issue because the record did not set forth the couple's separate property. *Id.* at 709 n.3. The Tennessee Supreme Court also remanded this issue to the trial court to determine what part of Husband's estate comprised of separate property. *Ellis*, 71 S.W.3d at 714. In addition, the court noted that [section 32-3-105](#), Tennessee's anti-lapse statute, did not apply because the couple died without issue. *Id.* at 711 n.4; see *supra* note 66 and accompanying text for a discussion of the anti-lapse statute.

[FN113]. *Ellis*, 71 S.W.3d at 711. For the relevant text of [section 31-3-120 of the Tennessee Code](#), see *supra* text accompanying note 99.

[FN114]. *Ellis*, 71 S.W.3d at 711.

[FN115]. *Id.*

[FN116]. *Id.*

[FN117]. *Id.* at 711-12.

[FN118]. *Id.* at 712.

[FN119]. *Id.*

[FN120]. *Id.*; see also *Marsh v. Henderson*, 424 S.W.2d 193, 196 (Tenn. 1968) (holding that “(e)very word used is presumed to have meaning and purpose, and should be given full effect if so doing does not violate the obvious intention of the Legislature”).

[FN121]. *Ellis*, 71 S.W.3d at 712; see also *Sloan v. Jones*, 241 S.W.2d 506, 507 (Tenn. 1951); *Bennett v. Hutchens*, 179 S.W. 629, 630 (Tenn. 1915); *Beddingfield v. Estill*, 100 S.W. 108, 110 (Tenn. 1907).

[FN122]. *Ellis*, 71 S.W.3d at 712.

[FN123]. *Id.*; see also *Lavin v. Jordon*, 16 S.W.3d 362, 368 (Tenn. 2000).

[FN124]. *Ellis*, 71 S.W.3d at 712; see also *Kradel v. Piper Indus., Inc.*, 60 S.W.3d 744, 751 (Tenn. 2001); *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593, 599 (Tenn. 1999).

[FN125]. *Ellis*, 71 S.W.3d at 712.

[FN126]. *Id.*

[FN127]. *Id.* at 713.

[FN128]. *Id.*; see also *supra* note 96-97 and accompanying text.

[FN129]. *Ellis*, 71 S.W.3d at 713-14; see also *Kradel*, 60 S.W.3d at 754 n.6.

[FN130]. *Ellis*, 71 S.W.3d at 714.

[FN131]. *Id.* at 715; see *supra* note 89 and accompanying text for a discussion of a similar holding in Arkansas.

[FN132]. *Ellis*, 71 S.W.3d at 714.

[FN133]. *Id.* at 712.

[FN134]. *Id.* at 713; see *supra* notes 96-97.

[FN135]. *Ellis*, 71 S.W.3d at 714-15.

[FN136]. *Id.* at 711.

[FN137]. See Restatement (Third) of Prop.: Wills & Other Donative Transfers § 1.2 illus. 1 (1999).

[FN138]. See *Tenn. Code Ann. § 31-3-104* (2001); *Brundige v. Alexander*, 547 S.W.2d 232, 235-36 (Tenn. 1976).

[FN139]. See *supra* notes 90-97 and accompanying text.

[FN140]. See *Ellis*, 71 S.W.3d at 712.

[FN141]. See *supra* note 13 and accompanying text.

[FN142]. See 4 Thompson, *supra* note 9, § 33.02. As a tenant in common with the wife, the husband's estate would have an interest that could be alienated. *Id.*

[FN143]. See *Tenn. Code Ann. § 31-3-120* (2000). For the relevant text of *section 31-3-120*, see *supra* text accompanying note 99.

[FN144]. *Unif. Simultaneous Death Act* (1991) § 3, 8B U.L.A. 149 (2001); *Unif. Probate Code* § 2-702(b) (amended 1993), 8 U.L.A. 182 (1998).

[FN145]. See *supra* notes 90-97 and accompanying text.

[FN146]. See *Tenn. Code Ann. § 31-3-120(c)*. For the relevant text of *section 31-3-120(c)* of the *Tennessee Code*, see *supra* text accompanying note 99. Husband's heirs did not argue that *section 31-3-120(c)* was intended by the legislature to be a catchall provision; therefore, the court did not address this issue. See *Ellis*, 71 S.W.3d at 710.

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