THE PARADOXES OF JOINT TENANCIES

John V. Orth*

Editors' Synopsis: This article, a follow-up to an earlier work by the same author, scrutinizes the unique and paradoxical nature of the joint tenancy. The paradox that sits at the heart of the joint tenancy is the fact that each joint tenant owns both a part and the whole of the subject estate. The author illustrates this contradiction by examining two recent cases in which courts have divided over which aspect of the paradox, and thus which aspect of a joint tenant's ownership rights, should take priority over the other. A comparison of the two cases' outcomes shows that, even now, courts disagree on the resolution of this issue, and the article concludes that, unless the joint tenancy undergoes fundamental revision, the paradox that is the result of its present form will continue to cause confusion and produce inconsistent results.

A paradox, a paradox, a most ingenious paradox!
W.S. Gilbert, The Pirates of Penzance

I. INTRODUCTION

In an earlier article entitled *The Perils of Joint Tenancies*, I described the risks that joint tenancies in real property pose for the joint tenants.[1]

---

* William Rand Kenan, Jr. Professor of Law, University of North Carolina School of Law. A.B. 1969, Oberlin College; J.D. 1974, M.A. 1975, Ph.D. 1977, Harvard University. Professor Orth contributes the chapters on concurrent estates in *Thompson on Real Property* (David A. Thomas ed. 2011).

[1] *See* John V. Orth, *The Perils of Joint Tenancies*, 44 REAL PROP. TR. & EST. L.J. 427 (2009). The present article, like the previous one, is limited to a discussion of joint tenancies in real property. While joint ownership of personal property—such as joint bank and brokerage accounts—bears some similarities to joint tenancies in land, there remain significant differences due to the different nature of the assets involved. Also in this article as in the previous one, I will assume only two joint tenants, although the joint estate may be held by any finite number of joint tenants. For the authorities supporting the perils described in this paragraph and the next, see the earlier article.

First, each joint tenant can exercise the power to sever the estate, and thereby eliminate the right of survivorship, without the knowledge or consent of the other joint tenant. Second, the unity of interest required for the creation and continued existence of a joint tenancy means that the undivided fractional shares held in joint tenancy must always be equal, regardless of any inequality in contributions to the purchase price or the intent of the parties to hold unequal shares. Third, while each joint tenant must account to the other joint tenant for benefits received from the jointly owned estate, neither joint tenant is obligated to account to the other for the value of personal occupancy of more than one-half nor is either joint tenant obligated to disclose to the other favorable information, such as an attractive offer to purchase the entire estate. Finally, because eliminating at least one of the required four unities[2] effects the joint tenancy's severance, actions clearly intended to sever the estate and eliminate the associated right of survivorship—such as attempting to devise the undivided share or even filing a partition action—but that leave the unities intact will not be effective.

The joint tenancy poses risks not only for the joint tenants, but also for the continued existence of the estate of joint tenancy itself. Judges attempting to prevent the unintended consequences caused by the failure of some separated or divorced joint tenants to sever the joint estate have discovered implied agreements to sever, even if no severing event actually occurred. Statutes designed to prevent the mechanical operation of the right of survivorship from producing outrageous results—such as benefiting a joint tenant guilty of intentionally causing the death of the other joint tenant—have raised complex questions about the extent of each joint tenant's interest: Should the slayer be permitted to retain a fee simple in one-half? Only a life estate in one-half? Or should the slayer lose all interest in the jointly owned property? Statutes designed to prevent the estate from being used to avoid inheritance or estate taxes and statutes designed to recover the cost of public assistance provided to an incapacitated joint tenant have further complicated the operation of the estate. Hostility to the right of survivorship and impatience with the doctrine of the four unities in a growing number of courts and legislatures threaten to make the operation of the joint tenancy unreliable in practice.

---

[2] The doctrine of the four unities requires that "joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession." 2 WILLIAM BLACKSTONE, COMMENTARIES *180. All four unities must be simultaneously present at the creation of the joint tenancy and throughout its existence. *See id.* The loss of any one terminates the estate, causing it to default into a tenancy in common. *See id.* at *185, *192.

The perils of joint tenancies are largely traceable to the paradoxical doctrines that form its foundation. In the old language of the law, each joint tenant is seised *per my et per tout*—in other words, each has an undivided share, but each also owns the whole.[3] Ownership of the whole explains the right of survivorship. While both joint tenants are alive, they own the whole estate together.[4] At the death of one joint tenant, the survivor owns the whole estate alone, so the individual share is neither devisable nor inheritable.[5] It is said to disappear at the death of its owner.[6] By contrast, with tenancies in common each co-tenant holds a part but not the whole, so no right of survivorship exists and the individual share is consequently devisable and inheritable.[7] In tenancies by the entirety, which are limited to married couples, each spouse holds neither a part nor the whole.[8] Individual spouses do not own the estate in its entirety as individuals, but as a couple in a marital unit.[9] The death of one spouse ends the tenancy by the entirety, leaving the survivor as sole owner.[10] If the marital unit dissolves by divorce, the estate defaults into a tenancy in common.[11]

---

[3] *See id.* *182. The Law French word *my*, equivalent to the English *moiety*, means generally *share*, or more particularly, *half*. Blackstone translates the phrase *per my et per tout* as "by the *half* or *moiety*, and *by all*." *Id.*

[4] *See* CORNELIUS J. MOYNIHAN & SHELDON F. KURTZ, INTRODUCTION TO THE LAW OF REAL PROPERTY 273–74 (4th ed. 2005).

[5] *See id.* at 277.

[6] *See id.*

[7] *See id.* at 281.

[8] *See id.* at 286.

[9] *See id.*

[10] Although describing tenancies by the entirety as including a right of survivorship has become common, *see, e.g.*, UNIF. PROBATE CODE § 1-201(26) (amended 2008), 8 pt. 1 U.L.A. 15 (Supp. 2011) (defining joint tenants with right of survivorship to include tenants by the entirety), it is not, strictly speaking, accurate. Indeed, the tenancy by the entirety is not, strictly speaking, a concurrent estate at all, but rather an estate with one owner—the married couple. Thus, it is similar to ownership by a corporation. *See* John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common Law Marital Estate*, 1997 BYU L. REV. 35, 38 (describing Sir William Blackstone's initial reluctance to include tenancy by the entirety in his discussion of concurrent estates).

[11] If the estate of tenancy by the entirety were only a joint tenancy limited to married persons, ending of the marriage logically would cause the estate to default to an ordinary joint tenancy because the four unities would remain unimpaired. However, the inconvenience of this result, which would leave divorced spouses in an estate with the right of survivorship, has led to its rejection. In this instance, practicality trumps logic. *See* 4 THOMPSON ON REAL PROPERTY § 33.08(d) (David A. Thomas ed., 2d ed. 2004).

While ownership of the whole explains the right of survivorship, ownership of a part explains how each joint tenant has a presently alienable interest. *Inter vivos* transfer of a joint tenant's undivided share by sale or gift terminates the joint tenancy by destroying all the unities except the unity of possession and thereby converts the estate into a tenancy in common.[12] In tenancies in common, each co-tenant can alienate the individual share *inter vivos* or by devise or, by doing neither, allow it to pass by intestate succession. In tenancies by the entirety, neither spouse can alienate an individual share. While the marriage lasts, the couple must act as a unit.

The power of the joint tenant to alienate an undivided interest in fee simple but not to devise it or let it pass by inheritance makes the estate unique among interests in property. A life estate is alienable but cannot be devised by the life tenant or inherited by the life tenant's heirs and the interest—whether retained by the life tenant or transferred to another (an estate *pur autre vie*)—cannot extend beyond the death of the life tenant.[13] A power of appointment does allow the donee to transfer an interest in fee simple.[14] If the power is exercisable *inter vivos*, the appointive property is alienable; if the power is testamentary, the appointive property is devisable, and because powers are personal, the power is not inheritable by the heirs of the donee.[15] But powers can exist independent of any present ownership interest, and even in the case of a general power presently exercisable, the donee has no interest in the property until and unless the power is exercised.[16] A power is not a property.[17]

---

[12] As indicated earlier, for purposes of this article, I am assuming only two joint tenants, although more could possibly exist. In cases involving more than two joint tenants, severance eliminates only the severed share from the joint tenancy. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *186.

[13] A life estate is not devisable by the life tenant or inheritable by the life tenant's heirs. If transferred to another, the estate is devisable and inheritable until the end of the measuring life. *See* RESTATEMENT OF PROPERTY § 151 (1936).

[14] *See* 3A HORNER PROBATE PRACTICE & ESTATES § 69:3 (Michael P. McElny ed., 2011).

[15] *See* 4 *id.* § 79:42.

[16] A life estate coupled with an *inter vivos* power to alienate the estate in fee simple approximates a joint tenant's property interest, although unless the life estate is shared with a co-owner, the life tenant is sole owner for the duration of the present interest. *See id.*

[17] *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 17.3 cmt. a (1986) ("The donee does not own the property subject to the power. . ."). Section 505(b)(1) of the Uniform Trust Code recognizes a property interest in the donee of an *inter vivos* general power if levied upon by a creditor. *See* UNIF. TRUST CODE § 505(b)(1) (amended 2005), 7C U.L.A. 535 (2006). However, not all states have accepted this change. *See, e.g.*, N.C. GEN. STAT. § 36C-5-505(b) (2009) (codifying the traditional rule that a power is not a property).

The right of survivorship is also unique among property interests. Although the joint tenancy is sometimes analogized to an estate for joint lives with alternative contingent remainders in fee simple in the survivor, a joint tenancy differs because either joint tenant can eliminate the other's right of survivorship by a simple conveyance.[18] By contrast, neither holder of a joint life estate plus contingent remainder can eliminate the equal interest of the other.[19] While the interest in the joint life estate is alienable and the contingent remainder in fee simple may be,[20] alienation of one or both leaves the other's interest unimpaired. Likewise, although the right of survivorship in joint tenancy resembles a will because it provides for succession at death, it differs from a will because the right of survivorship is coupled with a present interest. Although the right of survivorship, like an expectancy in a will, is not a vested interest and may be eliminated without notice or consent, severance of a joint tenancy does not eliminate the joint tenant's undivided share.[21] The erstwhile joint tenant simply becomes a tenant in common.[22]

Two recent cases illustrate the paradoxes of joint tenancies. The first demonstrates that each joint tenant simultaneously owns both the whole and a part. The second demonstrates that a grant in joint tenancy creates both a present interest in an undivided one-half and a chance of future sole ownership of the whole estate.

II. EACH JOINT TENANT OWNS BOTH THE WHOLE AND A PART

In *Clayton v. Clayton*,[23] the issue was whether a lease terminated by merger when the landlord devised her reversion to the tenant and his son as joint tenants. A mother who owned land in fee simple leased it to her son, James, who subleased it to a mining company in return for a tonnage royalty.[24] The mother subsequently died, devising the land subject to the lease to James and his son, Camden, as joint tenants with right of survivorship.[25] James continued to collect royalties from the mining company and refused

---

[18] *See* 4 THOMPSON, *supra* note 11, § 31.06(g).

[19] *See id.*

[20] At common law, contingent remainders were generally inalienable. *See* MOYNIHAN & KURTZ, *supra* note 4, at 186. Today, in many states they are made alienable by statute. *See, e.g.*, N.C. GEN. STAT. § 39-6.3(a) (2009) (making all future interests alienable and devisable).

[21] *See* THOMPSON, *supra* note 11, § 31.08(d).

[22] *See id.*

[23] 75 So.3d 649 (Ala. Civ. App. 2011).

[24] *See id.* at 651.

[25] *See id.*

to share them with Camden, who sued for one-half of the accrued royalties.[26] Holding that the merger terminated the lease, the trial judge ruled in favor of Camden.[27]

A divided Alabama appellate court affirmed.[28] Merger occurs "when a greater and less, or a legal and equitable estate, meet and coincide in the same person."[29] Because each joint tenant is "seized of some equal share while at the same time each owns the whole," the majority agreed that the lease terminated by merger.[30] When the landlord's reversion passed to the tenant—even though the tenant and another now hold the reversion in joint tenancy—the lease and reversion "merged, the one drowned in the other."[31] Quoting a prior state supreme court case, the majority commented: "There can be no greater absurdity, than to place [a man] in the relation of being his own landlord, and his own tenant, at one and the same time; bound himself to pay, and to receive rent."[32] The dissenting judges would have reversed the trial court, reasoning that in this case the same person did not hold both estates: the landlord was the unit formed by the joint tenancy of James and Camden and the tenant was James.[33] By emphasizing the first aspect of the paradox—each joint tenant holds the whole—the trial judge and the majority of the appellate judges were correct that James was both landlord and tenant. But by emphasizing the second aspect of the paradox—each joint

---

[26] *See id.*

[27] *See id.* at 651–52. The decision contains no discussion about the continued vitality of the sublease once merger terminates the head lease, perhaps because in this case both joint tenants seem to affirm the sublease (now, presumably, a lease).

[28] *See id.* at 655.

[29] *Id.* at 657 (Moore, J., dissenting) (quoting Welsh v. Phillips, 54 Ala. 309, 316 (1875)) (internal quotation marks omitted).

[30] *Id.* at 653 (majority opinion) (quoting Porter v. Porter, 472 So.2d 630, 634 (Ala. 1985)) (internal quotation marks omitted).

[31] *Id.* (quoting Welsh v. Phillips, 54 Ala. 308, 316 (1875)) (internal quotation marks omitted); *see also* D.P. SIMPSON, CASSELL'S NEW LATIN DICTIONARY 370 (1959) (defining *mergo*, the Latin root of the English verb *merge*, as "to dip, plunge into liquid, immerse").

[32] *Id.* at 653 (quoting Otis v. McMillan & Sons, 70 Ala. 46, 59 (1881)) (internal quotation marks omitted).

[33] *See id.* at 657. This argument is more persuasive regarding the tenancy by the entirety. *See* Woolard v. Smith, 94 S.E.2d 466, 470 (N.C. 1956) (holding that a married couple is "an entity separate from the individuals"). Sir William Blackstone pointed out that because a man and his wife are considered one person in law, when they take title to property, "they cannot take the estate by moieties [halves], but both are seised of the entirety." 2 WILLIAM BLACKSTONE, COMMENTARIES *181. The difficulty with extending this reasoning to joint tenancies is that unmarried joint tenants are separate persons in law and do take by the part as well as by the whole.

tenant holds an undivided share—the dissenting judges were correct that the identity of landlord and tenant was not complete.[34]

III. JOINT TENANCY CREATES BOTH A PRESENT INTEREST IN AN UNDIVIDED ONE-HALF AND A CHANCE OF FUTURE SOLE OWNERSHIP OF THE WHOLE

In *Clayton*, the issue was what it means for a joint tenant to hold both the whole and a part; in *Snyder v. Heidelberger*,[35] the issue was when did an injury occur if an intended grantee does not receive an interest in joint tenancy. Several years before his marriage to the plaintiff, the husband transferred legal title to his Illinois residence to the trustee of a land trust, with himself as life tenant and his son by a prior marriage as remainderman.[36] In 1997, the husband married the plaintiff and shortly thereafter instructed the defendant attorney to retitle the property in joint tenancy with his new wife.[37] Apparently unaware of the land trust, the defendant prepared a quitclaim deed, which was duly signed and recorded, conveying legal title to the property from the husband as sole owner to the husband and plaintiff as joint tenants.[38] Because the husband no longer had any legal interest in the property, the quitclaim was of null effect.[39] In 2007, the husband died, and two months later the plaintiff's stepson demanded possession of the property.[40] When the widow refused to vacate, the stepson brought a forcible entry

---

[34] *See id.* at 659–60 (Moore, J., dissenting) (arguing that the common law rule of merger should not be applied automatically when doing so would disadvantage the prior owner of one of the estates). In addition, they would refuse to recognize merger when "the party in whom the two interests are vested does not intend such a merger to take place." *Id.* at *9 (quoting Mobley v. Harkins, 128 P.2d 289, 291 (Wash. 1942) (internal quotation marks omitted)). On the modern preference for intention over mechanical rules, see John V. Orth, REAPPRAISALS IN THE LAW OF PROPERTY 85–94 (2010).

[35] 933 N.E.2d 1235 (Ill. App. Ct. 2010), *rev'd*, 953 N.E.2d 415 (Ill. 2011).

[36] The case does not identify the trustee of the land trust.

[37] *See Snyder*, 933 N.E.2d at 1236.

[38] At common law, a grant from a sole owner to himself and another as joint tenants resulted in a tenancy in common because of the absence of the necessary four unities. THOMPSON, *supra* note 11, § 31.06(c). Most states, including Illinois, have changed this rule by statute. *See, e.g.*, 765 ILL. COMP. STAT. 1005/1b (1990). Whether the transfer is in joint tenancy or tenancy in common, a presumption in favor of a gift of a one-half share arises when the grantor is a spouse and the grantee is the married couple. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 5.2, at 179–80 (3d ed. 2000).

[39] *See Snyder*, 933 N.E.2d at 1236.

[40] *See id.*

and detainer action against her, and the court awarded him possession based on the terms of the land trust.[41]

In 2008, the plaintiff sued her husband's attorney for malpractice.[42] The defendant pleaded that the action was barred by the Illinois statute of repose, which bars actions for professional malpractice, without regard to knowledge of an injury, brought "more than 6 years after the date on which the act or omission occurred,"[43] except "[w]hen the injury caused by the act or omission does not occur until the death of the person for whom the professional services were rendered."[44] In the latter case, "the action may be commenced within 2 years after the date of the person's death."[45] The trial court concluded that the injury occurred when the husband executed the quitclaim in 1997 and dismissed the plaintiff's action as barred by the statute.[46]

A bitterly divided Illinois Court of Appeals reversed and remanded in a decision in which the three judges adopted three different positions on when the plaintiff's injury occurred, although two concurred in the result that the plaintiff's malpractice action was not barred.[47] Justice McLaren, who authored the opinion of the court, held that the action was timely because the injury occurred at the husband's death.[48] Justice McLaren analogized the present case to a recent Illinois Supreme Court decision, *Wackrow v. Niemi*,[49] another professional malpractice action, in which an attorney, who also failed to notice that legal title to certain realty was held in a land trust, drafted an amendment to a client's revocable *inter vivos* trust that would have directed the property to the plaintiff at the client's death. In *Wackrow*, the Illinois Supreme Court held that the plaintiff's injury did not occur until the client's death and that the malpractice action was timely.[50] For Justice

---

[41] *See id.*

[42] At common law, the plaintiff's action would have been barred because she was not in privity with the defendant. Her husband, not herself, had been the lawyer's client. Many states, including Illinois, now permit plaintiffs to maintain such actions as third party beneficiaries of the professional relationship between lawyers and their clients. *See, e.g.*, Pelham v. Griesheimer, 440 N.E.2d 96 (Ill. 1982).

[43] 735 ILL. COMP. STAT. 5/13-214.3(c) (2011).

[44] *Id.* at 5/13-214.3(d).

[45] *Id.*

[46] *See Snyder*, 933 N.E.2d at 1237.

[47] *See id.* at 1239.

[48] *See id.*

[49] 899 N.E.2d 273 (Ill. 2008).

[50] *See id.* at 280.

McLaren, "the animating principle" of *Wackrow* was that "as long as the client who had intended to convey an interest to the plaintiff was still alive, the attorney's error could be remedied at any time, by the drafting of a deed or other conveyance that effectuated his intent."[51] In *Snyder*, the husband could have completed the transfer of the entire estate to the plaintiff at any time prior to his death by conveying to her a share in joint tenancy—"the interest that he had intended her to receive"[52]—presumably by first terminating the land trust and then making the grant.[53]

Justice Jorgensen, concurring in the result, reasoned that the plaintiff had actually suffered two injuries in this case: she suffered the first in 1997, "when, as a result of the alleged negligence, the deed did not convey to her a one-half undivided interest"; and the second in 2007, when her husband's "one-half undivided interest" failed "to pass to plaintiff upon his death."[54] While the statute of repose barred an action based on the first injury, an action based on the second injury was still timely. To that extent, Justice Jorgensen found common ground with Justice McLaren in concluding that the action was not barred.[55]

Justice O'Malley, in dissent, would have affirmed the trial court's ruling barring the plaintiff's action.[56] Justice O'Malley concluded that the injury occurred only at the execution of the quitclaim deed when the plaintiff failed to receive the interest in joint tenancy as intended.[57] "The fact that plaintiff's interest did not grow into full ownership is not a separate injury—it is a consequence of the underlying injury caused by the failure to convey her interest to her in the first place."[58] Justice O'Malley pointed out that the majority did not agree on a rationale and expressed hope that read-

---

[51] *Snyder*, 933 N.E.2d at 1238.

[52] *Id.*

[53] If the land trust was revocable, then the settlor–husband could equally have substituted his wife as remainderman. However, the case assumes that the husband intended her to receive a present legal interest in joint tenancy, not an equitable future interest. Equally, if the land trust was revocable, the husband could have revoked it and executed a will leaving the residence to his wife if she survived him; but, again, the case assumes that the husband intended her to receive a present legal interest in joint tenancy, not a mere expectancy.

[54] *Snyder*, 933 N.E.2d at 1240 (Jorgensen, J., specially concurring).

[55] *See id.*

[56] *See id.* at 1243 (O'Malley, J., dissenting).

[57] *See id.*

[58] *Id.* at 1243.

ers of the three opinions "will be more careful than my colleagues in ascertaining what holding has garnered two votes from this panel."[59]

The root of the problem in this case lies in the paradox that a grant in joint tenancy creates a present right in an undivided share and a right of survivorship in the whole. By focusing on the second aspect of the paradox—a grant in joint tenancy creates a right of survivorship—Justice McLaren analogized the joint tenancy to a revocable *inter vivos* trust, giving a beneficiary no right to possession until the settlor dies with the trust unrevoked, a situation that resembles a devisee's expectancy under a will.[60] Justice McLaren concluded that the exception in the Illinois statute of repose—when the injury caused by the act or omission does not occur until the death of the person for whom the professional services were rendered—applies to an action by a disappointed devisee or beneficiary in a revocable *inter vivos* trust and therefore applies to an action by a disappointed joint tenant as well.[61]

Joint tenancy resembles a will and a revocable *inter vivos* trust, but it differs too. A testator can eliminate a devisee's expectancy by revoking the will, and the settlor of a revocable *inter vivos* trust can eliminate a beneficiary's interest by revoking the trust, just as one joint tenant can eliminate the other joint tenant's right of survivorship by severing the joint tenancy. But one joint tenant cannot eliminate the other joint tenant's present interest in an undivided one-half. Also unlike a joint tenancy, neither a will nor a revocable *inter vivos* trust used as a will substitute conveys a present interest.[62] Had a valid joint tenancy been created in this case, the plaintiff would have immediately received an undivided one-half interest that was aliena-

---

[59] *Id.* at 1241.

[60] *See id.* at 1238 (majority opinion). This case reflects the recent trend to subject revocable trusts, at least when used as part of a comprehensive estate plan, to many of the same rules that apply to wills. Just as a testator remains the owner of property that will later pass under a will (if unrevoked), so is the settlor of a revocable *inter vivos* trust now recognized as having all the powers of an owner over the trust property. *See, e.g.*, UNIF. TRUST CODE § 603(a) (amended 2005), 7C U.L.A. 553 (2006) ("While a trust is revocable [and the settlor has capacity to revoke the trust], rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor."); Linthicum v. Rudi, 148 P.3d 746, 750 (Nev. 2006) (holding that "a beneficiary's interest in a revocable *inter vivos* trust is contingent at most").

[61] *See Snyder*, 933 N.E.2d at 1239.

[62] Recognition of the transfer of a present interest was once the touchstone for distinguishing an *inter vivos* gift from a testamentary gift and therefore determining which set of formalities was required. Nowadays, courts are increasingly willing to characterize many gifts effective at death as nontestamentary and therefore not requiring the formalities of a will.

ble, although not devisable or inheritable, plus a right of survivorship.[63] Thus, the plaintiff would have received sole ownership if she outlived her husband and neither of them severed the joint tenancy during life.[64] If the marriage ended in divorce, the estate would probably have been severed by agreement or incident to equitable distribution, leaving each joint tenant with one-half of its value.[65]

By focusing successively on both aspects of the paradox—a grant in joint tenancy creates a present interest in an undivided one-half and it creates a right of survivorship in the whole—Justice Jorgensen concluded that the failure of the grant caused the plaintiff two injuries—loss of her present interest and loss of her right to her husband's interest at his death.[66] The difficulty is that a joint tenant actually gains nothing at the time of the death of the other joint tenant.[67] The decedent's interest simply disappears, leaving the surviving joint tenant, who already held the whole estate along with the other joint tenant, now holding it alone as sole owner.[68] Of course, if the plaintiff predeceased her husband, her interest would have been the one to disappear.

In a further paradox, Justice O'Malley also focused on both aspects of the paradoxical estate—a grant in joint tenancy creates a present interest and a right of survivorship—but concluded that the two were conveyed either at the same time or not at all.[69] Failure to create the joint tenancy initially caused a single injury—loss of the present interest coupled with the right of survivorship.[70] Without the present interest in joint tenancy, there is no right of survivorship.[71]

On appeal, the Illinois Supreme Court agreed with Justice O'Malley, reversed the court of appeals and affirmed the decision of the trial court that

---

[63] *See* Orth, *supra* note 1, at 428.

[64] *See id.*

[65] In some states, legislation terminates joint tenancies held by married couples on the occasion of divorce. *See* UNIF. PROBATE CODE § 2-804(b) (amended 2008), 8 pt. 1 U.L.A. 217 (1998 & Supp. 2011) (Divorce "severs the interest of the former spouses in property held by them at the time of the divorce . . . as joint tenants with the right of survivorship . . ., transforming the interests of the former spouses into tenancies in common.").

[66] *See Snyder*, 933 N.E.2d at 1239.

[67] *See* Orth, *supra* note 1, at 428.

[68] *See id.* at 427.

[69] *See Snyder*, 933 N.E.2d at 1241.

[70] *See id.* at 1242.

[71] *See* Orth, *supra* note 1, at 427.

the statute of repose barred the plaintiff's action.[72] Only a single injury occurred—the original failure to create the joint tenancy.[73] The case stands as a reminder that although joint tenancies have the potential to determine ownership at death, they are not the equivalent of wills or revocable *inter vivos* trusts used as will substitutes. The execution of a will or a revocable trust conveys no right to possession during the life of the testator or settlor.[74] By contrast, a grant in joint tenancy has the paradoxical effect of creating at the same time both a present possessory interest and a chance of future sole ownership of the whole.

IV. CONCLUSION

So long as the joint tenancy endures in anything like its present form, its paradoxes will continue to cause confusion. Because the estate seems deeply rooted in popular practice, that may be for a very long time indeed—unless, that is, the perils that threaten its existence finally undo it.

---

[72] *See* Snyder v. Heidelberger, 953 N.E.2d 415, 421 (Ill. 2011).

[73] *See id.* at 420.

[74] As to wills, this rule has been familiar since biblical days: "Now where there is a testament it is necessary for the death of the testator to be established; for a testament takes effect only when a death has occurred: it has no force while the testator is still alive." *Hebrews* 9:16–17 (King James).