

NOTE

A MATTER OF MORE WORTH: AN INTENT-BASED APPROACH TO FAILED TENANCIES BY THE ENTIRETY

Arin Sheehan[†]

“Marriage is a matter of more worth / Than to be dealt in by attorneyship.”

WILLIAM SHAKESPEARE, HENRY VI, PART I act 5, sc. 5, l. 55–56.

A failed tenancy by the entirety occurs when a conveyance is made to an unmarried pair either as [1] tenants by the entirety or [2] as spouses; because such pairs lack the requisite unity of marriage, a tenancy by the entirety cannot be created. In most states in both instances, the unmarried pair will instead merely hold the property as tenants in common, where there is no right of survivorship. This Note takes the position that this is inequitable and instead advocates for a framework where states treat unwed grantees the same as their married counterparts as relating to the creation of the right of survivorship, thus furthering equality between married and unmarried pairs.

This Note includes a survey of states that maintain tenancy by the entirety, analyzing what the current outcome of failed tenancies by the entirety is, and what the outcome would be under this proposal.

INTRODUCTION.....	846
I. CONTINUED RELEVANCE OF TENANCY BY THE ENTIRETY.....	849
II. CURRENT STATUS OF FAILED TENANCIES BY THE ENTIRETY	850
A. Conveyance to Unwed Pair as Tenants by the Entirety	851
B. Conveyance to Unwed Pair as Spouses	852
1. Section 6–2.2(d) of New York’s Estates, Powers and Trusts Law	853

[†] J.D., Cornell Law School, 2027; B.S. in Applied Economics and Management, Cornell University, 2022. Thank you to Professor Chang for inspiring this line of research and generously sharing your feedback and advice on this piece. As with all things, this work is dedicated to Sydney, Ellie, Lily, and Nolan.

III. PROPOSING INTENT-BASED APPROACH 857

 A. Reasoning for a Revised Approach 857

 B. Proposed Model 858

 C. Rejection of Good Faith Requirement 859

 D. Limiting Principles..... 862

IV. OUTCOME 863

 A. Conveyance to Unwed Pair as Tenants
 by the Entirety 863

 1. *Implying Joint Tenancy* 864

 2. *Implying Tenancy in Common*..... 864

 B. Conveyance to Unwed Pair as Spouses 865

 1. *Implying Joint Tenancy* 866

 2. *Implying Tenancy in Common*..... 868

CONCLUSION..... 869

APPENDIX 870

INTRODUCTION

Anna and Bob bought their home shortly after their wedding ceremony. They were not wealthy, but Anna had an eye for interior design and Bob was not a half-bad handy-man—together, their house became a home that the pair spent the remainder of their days together in. Bob passed away just shy of their thirtieth wedding anniversary. His illness and death were not unexpected, as he had always been in poor health, but that didn’t make it easier for Anna to come home to the empty house the pair had built together.

Bob left all he had to his son from his prior marriage, Otto—Anna always knew this was going to be the case. She had her own savings, which would carry her through to the end of her life. Their home, however, she believed would go to her, since the property was expressly conveyed to the pair as tenants by the entirety. Through the right of survivorship, at the death of one spouse, the property immediately passes entirely to the remaining spouse.¹

At one point, Anna did care deeply for Otto—but since Bob’s death, any remaining positive feelings have melted away in the ensuing battle over ownership for the house. It came to light shortly after Bob’s funeral that Anna and Bob were not

¹ RESTATEMENT (FOURTH) OF PROP. § 1.7 (A.L.I., Tentative Draft No. 6, 2025) (“[T]enants by the entirety must have equal fractional interests, and upon the death of a tenant by the entirety, the surviving tenant by the entirety owns the entire real property . . .”).

married. They never had been, nor could they have been, legally wed. Bob never obtained a binding divorce from his prior wife—maybe he forgot to sign the final papers, or maybe he went to a foreign country for a divorce decree that was non-binding. Ultimately, why the divorce failed is irrelevant—Anna and Bob were not a legally married pair when their home was conveyed to them as tenants by the entirety.

It broke Anna's heart to learn that, in all her years spent with Bob, they were not bound in legal marriage. Still, worse news was yet to come. This was a failed tenancy by the entirety—a conveyance to a pair that, had the pair actually been married, would have been successful in creating a tenancy by the entirety. However, the pair not being wed, either a tenancy in common (without the right of survivorship) or a joint tenancy (with the right of survivorship) is created.

When Otto learned that his “step-mother” was never married to his deceased father, he brought an action to quiet title, seeking partition by sale of the property as Bob's heir. In most states, Otto would succeed. Anna would receive only the sum from partition by sale of the property and would need to forge for herself, in her own twilight years, a new way of living in a world without her husband. This occurs under the theory that, Anna and Bob never being married, the conveyance of the house to the pair as tenants by the entirety created merely a tenancy in common. These states have reasoned that, there being no language stating a desire to create a right of survivorship, the intent to create one cannot be implied merely from the language of tenancy by the entirety. In a minority of states, Anna would prevail—the use of the language “tenancy by the entirety” would be enough to imply the right of survivorship; thus, the conveyance created a joint tenancy. In these states, courts have reasoned that to hold otherwise would be to ignore the intent expressed in the conveyance.²

Let's rewind—in this example, property was conveyed to Anna and Bob as tenants by the entirety. If the property was conveyed to Anna and Bob merely as wife and husband, without express language creating a tenancy by the entirety, Otto would succeed in every state but New York.³ While a conveyance to a married pair as wife and husband would succeed in

² See *infra* Part II.

³ By statute, the property would have been held by Anna and Bob as joint tenants, with its characteristic right of survivorship. See N.Y. EST. POWERS & TRUSTS LAW § 6-2.2(d) (McKinney).

creating a tenancy by the entirety (and therefore the right of survivorship) in most states, a conveyance to an unmarried pair as wife and husband only creates a tenancy in common (and therefore no right of survivorship).

This Note takes the position that this outcome is inequitable.⁴ The prevailing law on the subject of failed tenancies by the entirety is illogical and varies greatly across states—this Note advocates for a framework that states should tailor to their own default survivorship presumptions to create a more standardized outcome in such cases. Courts have taken varying approaches dependent on the specific language used in the conveyance when resolving failed tenancies by the entirety, which this Note will expand upon to develop an approach that effectuates the grantor's intent as it relates to establishing the right of survivorship between grantees.

As a baseline, it is important to remember that married couples retain special privileges in concurrent property ownership that are not extended to their unmarried counterparts.⁵ Tenancy by the entirety is one of these special privileges, which remains a valid form of concurrent ownership in twenty-four states and the District of Columbia.⁶ While the traditional four unities of joint tenancy have waned in importance, the additional pillar of marriage required for a valid tenancy by the entirety has remained a steadfast requirement of the ownership form.⁷

Much of the case law on the subject of failed tenancies by the entirety attempts to deduce what form of ownership the

⁴ This hypothetical is based loosely on a number of cases on the subject of failed tenancies by the entirety—while the details may be heightened, the outcome is real. Living putative spouses are deprived of property because of the illegitimacy of the marriage underlying the conveyance. See *In re* 832 Monroe St., 498 A.2d 1090, 1093–94 (Del. 1985) (petitioner, the putative wife of the decedent, occupied the home conveyed to the pair as tenants by the entirety for over twenty years—at the death of her supposed spouse, the decedent's portion passed to his will beneficiaries rather than to petitioner); *Brissett v. Sykes*, 855 S.W.2d 330, 331–32 (Ark. 1993) (while the pair held themselves out as married, they never legally wed—at the death of one of the parties, the property deeded to them as spouses passed to her heirs, rather than to the living putative spouse).

⁵ See generally Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARG. L. REV. 423 (2001) (describing the privileges of tenants by the entirety and proposing an expansion of those privileges to non-married persons).

⁶ RESTATEMENT (FOURTH) OF PROP. § 1.7 cmt. a (A.L.I., Tentative Draft No. 6, 2025).

⁷ RESTATEMENT (FOURTH) OF PROP. §§ 1.6–1.7 (A.L.I., Tentative Draft No. 6, 2025); 1 JOYCE PALOMAR, PATTON & PALOMAR ON LAND TITLES § 224 (3d ed. 2002); *United States v. Craft*, 535 U.S. 274, 280 (2002) (“A tenancy by the entirety is a unique sort of concurrent ownership that can only exist between married persons.”).

grantor would have conveyed the property in had the grantor been aware that the pair was not legally married. Implicit in this question is the assumption that it would be different depending on that legal relationship rather than using the four corners of the document to best effectuate the will that is actually expressed within. This Note proposes an intent-based approach where the court looks to the conveyance itself rather than making normative assumptions regarding the will of the grantor and treating the conveyance's language as mere surplusage. This proposal will primarily impact grantees in precarious situations that they themselves may have had no part in creating (like our hypothetical Anna)—widows and widowers who, for whatever reason, whether it be personal choice or the misrepresentation of their putative spouse, were not legally wed to a decedent partner. Historically, this has resulted in real property that was conveyed to this unwed pair—either as spouses or as tenants by the entirety—passing to the decedent's heirs rather than the supposed surviving spouse. This Note provides a path to standardize reasoning across states and remedy resulting inequities from failed tenancies by the entirety.

I

CONTINUED RELEVANCE OF TENANCY BY THE ENTIRETY

At common law, tenancy by the entirety required the same four unities for a joint tenancy (time, title, possession, and interest), in addition to the characteristic unity of marriage,⁸ which now may be replaced by its legal equivalent.⁹ While the unities of time, title, and interest have been weakened by statute and interpretation over time, the unity of marriage has consistently been required at the time of conveyance for a tenancy by the entirety to be created.¹⁰ If a pair becomes married after owning property already, their subsequent marriage does not automatically convert ownership to a tenancy by the entirety.¹¹

Tenancy by the entirety at common law hinged on the legal fiction of the single unity of the married pair; the two are

⁸ PALOMAR, *supra* note 7, § 224; *see also* *Craft*, 535 U.S. at 280–81.

⁹ Largely prior to marriage equality, this often was directly addressed through state legislation or case law, permitting domestic partners, those in civil unions, and other legal equivalents to hold property as tenants by the entirety. *See* D.C. CODE § 46-601; *Hennefeld v. Twp. of Montclair*, 22 N.J. Tax 166, 183–84 (Tax Ct. 2005).

¹⁰ RESTATEMENT (FOURTH) OF PROP. § 1.6 cmt. a (A.L.I., Tentative Draft No. 6, 2025).

¹¹ PALOMAR, *supra* note 7, § 224.

seized of the entirety, with no moieties between them.¹² For a married woman, however, her property rights were subsumed entirely in her husband's—post-coverture, married women's property acts led to the destruction of tenancy by the entirety in many states;¹³ in those it remained, it moved to more closely resemble joint tenancy.¹⁴ Tenancy by the entirety retains two major distinctions from joint tenancy—it cannot be unilaterally severed¹⁵ and provides unique creditor protection for non-debtor spouses.¹⁶

II

CURRENT STATUS OF FAILED TENANCIES BY THE ENTIRETY

In approaching conveyances made to unwed pairs, courts have distinguished between language that purports to convey property to that unwed pair as spouses and to that unwed pair as tenants by the entirety. The latter has been held in some states to imply a right of survivorship, some by statute and some by judicial interpretation; the former only creates a right of survivorship in New York, by statute.¹⁷ In refusing to acknowledge the right of survivorship implied by use of either [1] spousal language¹⁸ or [2] expression of intent to create a tenancy by the entirety, this Note argues that courts have merely

¹² John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1 BYU L. REV. 35, 38 (1997). The somewhat antiquated term of “moieties” merely refers to shares; in tenancy by the entirety, there are no shares, and therefore no moieties. *Id.* at 39.

¹³ For more details regarding the abolition of tenancy by the entirety post-coverture, see *id.* at 41.

¹⁴ See *id.* at 43 (“Despite the married women’s property acts, for many married women holding property with their husbands as tenants by the entirety, the husband was still ‘the one.’ . . . With glacial slowness, in a process not completed until late in the twentieth century, state after state legislated to equalize the rights of the spouses over property held in the tenancy by the entirety.”).

¹⁵ Carrozzo, *supra* note 5, at 430 (“Unique to the tenancy by the entirety is its indestructibility by a unilateral act of either spouse.”). Joint tenancy, by contrast, can be unilaterally severed into a tenancy in common at any time. RESTATEMENT (FOURTH) OF PROP. § 1.6 cmt. b (A.L.I., Tentative Draft No. 6, 2025).

¹⁶ See *infra* note 98 and accompanying text.

¹⁷ See N.Y. EST. POWERS & TRUSTS LAW § 6–2.2(d) (McKinney).

¹⁸ This Note primarily refers to married pairs as “spouses”—the shift toward inclusive language in the context of tenancy by the entirety is now often reflected in statutory amendments. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 6–2.2 (McKinney) (relevant statute is triggered by use of “husband and wife, spouses, husbands, or wives” in conveyance; revision occurred in 2019). Case law on the subject typically refers to pairs as “husband and wife,” which is retained in this Note where relevant.

guessed at the true desire of the grantor rather than using what information is expressly provided within the four corners of the document.

A. Conveyance to Unwed Pair as Tenants by the Entirety

For conveyances to unmarried pairs as tenants by the entirety, six states (Arkansas,¹⁹ Illinois,²⁰ Indiana,²¹ Maryland,²² Massachusetts,²³ and Pennsylvania²⁴) and the District of Columbia²⁵ imply a right of survivorship (thus creating a joint tenancy), either through judicial interpretation or expressly by statute. In these states, the use of such language as “tenants by the entirety” is sufficient to indicate the grantor’s intent to create the right of survivorship.

Ten states (Alaska,²⁶ Delaware,²⁷ Florida,²⁸ Michigan,²⁹ Missouri,³⁰ New Jersey,³¹ North Carolina,³² Rhode Island,³³ Tennessee,³⁴ and Wyoming³⁵) have expressly refused to extend the right of survivorship (thus creating a tenancy in common). In these states, the use of such language as “tenants by the entirety” alone is insufficient to indicate the grantor’s intent to

¹⁹ *Wood v. Wood*, 571 S.W.2d 84, 85–86 (Ark. 1978).

²⁰ “A devise . . . to 2 grantees who are not in fact husband and wife that purports to create an estate by the entirety shall be construed as having created an estate in joint tenancy.” 765 ILL. COMP. STAT. 1005 / 1c.

²¹ “[W]hen property is conveyed to individuals by the entirety or entireties, regardless of whether those individuals are husband and wife, a presumption arises that the grantor intended to convey the property with the right of survivorship.” *Powell v. Est. of Powell*, 14 N.E.3d 46, 52 (Ind. Ct. App. 2014).

²² *McManus v. Summers*, 430 A.2d 80, 87 (Md. 1981).

²³ “A conveyance or devise of land to two persons as tenants by the entirety, who are not married to each other, shall create an estate in joint tenancy and not a tenancy in common.” MASS. GEN. LAWS ch. 184, § 7.

²⁴ *Maxwell v. Saylor*, 58 A.2d 355, 355–56 (Pa. 1948).

²⁵ *Coleman v. Jackson*, 286 F.2d 98, 102–03 (D.C. Cir. 1960).

²⁶ Alaska prohibits the right of survivorship between unmarried parties. *See* ALASKA STAT. § 34.15.130.

²⁷ *In re* 832 Monroe St., 498 A.2d 1090, 1092, 1094 (Del. 1985).

²⁸ *In re* Est. of Suggs, 405 So. 2d 1360, 1361 (Fla. Dist. Ct. App. 1981).

²⁹ *In re* Est. of Kappler, 341 N.W.2d 113, 114 (Mich. 1983).

³⁰ *In re* Est. of Snyder, 880 S.W.2d 596, 599–600 (Mo. Ct. App. 1994).

³¹ *Wyckoff v. Young Women’s Christian Ass’n*, 117 A.2d 162, 167 (N.J. Super. Ct. Ch. Div. 1955).

³² *Grant v. Toatley*, 94 S.E.2d 305, 307 (N.C. 1956).

³³ *Cavanagh v. Cavanagh*, 375 A.2d 911, 915 (R.I. 1977).

³⁴ *Knight v. Knight*, 458 S.W.2d 803, 807–08 (Tenn. Ct. App. 1970).

³⁵ *In re* Est. of Thomas, 2009 WY 10, 199 P.3d 1090, 1092, 1095 (Wyo. 2009).

create the right of survivorship.³⁶ The remaining states (Hawaii, Kentucky, Mississippi, Oklahoma, Oregon, Vermont, and Virginia) have inconclusive case law on the subject. The fact that a conveyance is made to an unmarried pair as tenants by the entirety typically does not undermine any intent expressed by the inclusion of an explicit survivorship provision.³⁷

B. Conveyance to Unwed Pair as Spouses

Most states have reasoned that there are conceivable other motives that an unwed pair would convey property to themselves as spouses, and therefore, such a conveyance does not necessarily convey the intent to create a right of survivorship.³⁸ “Merely describing grantees as ‘husband and wife’ is insufficient to establish an intent to create a survivorship interest.”³⁹ The fact that a conveyance incorrectly identifies a pair as spouses also generally does not undermine the intent expressed by the explicit survivorship provision.⁴⁰

Most states, except for New York, have expressly held that a conveyance to an unmarried pair as spouses creates only a tenancy in common, regardless of whether such a conveyance would be sufficient to create a tenancy by the entirety if the pair was actually married.⁴¹ Those who have not expressly held as such

³⁶ Where an instrument conveys property to an unmarried pair explicitly as tenants by the entirety “*with the right of survivorship*,” a joint tenancy is generally created. *In re Est. of Thomas*, 199 P.3d at 1092, 1095 (Wyo. 2009) (a conveyance to two siblings “as tenants by the entirety [sic] with right of survivorship, and not as tenants in common,” unambiguously created a joint tenancy); *Morris v. McCarty*, 32 N.E. 938, 939 (Mass. 1893) (property conveyed to an unwed pair “tenants by the entirety, and not as tenants in common” created a joint tenancy, because a tenancy in common was expressly rejected).

³⁷ A conveyance to an unmarried pair as tenants by the entirety with an explicit survivorship provision (for example, expressly stating “with the right of survivorship”) creates a joint tenancy and not a tenancy in common. *Gant v. Gant*, 379 S.E.2d 331, 332–33 (Va. 1989); *Funches v. Funches*, 413 S.E.2d 44, 46 (Va. 1992); *In re Est. of Thomas*, 199 P.3d at 1092, 1095.

³⁸ See, e.g., *Teacher v. Kijurina*, 76 A.2d 197, 202 (Pa. 1950) (including language of husband and “his wife” in the deed may merely have been to keep up the pretense of the relationship, rather than create a right of survivorship); see *Kepner*, *infra* note 78 and accompanying text (contemplating an unwed pair who has property conveyed to them as spouses to conceal their unwed status).

³⁹ *Brissett v. Sykes*, 855 S.W.2d 330, 333 (Ark. 1993).

⁴⁰ See *Gibson v. Shoulta*, No. 2003-CA-002023-MR, 2005 WL 195109 at *1–2 (Ky. Ct. App. Jan. 28, 2005); *In re Est. of Rodio*, 397 A.2d 381, 381–83 (N.J. Super. Ct. Ch. Div. 1978).

⁴¹ See, e.g., *Huston v. Lambert*, 281 A.2d 511, 512 (Del. Ch. 1971); *Singleton v. Cushman*, 70 N.E.2d 642, 643–44 (Ind. Ct. App. 1947); *Daniels v. Daniel*, 106 N.W.2d 818, 820–21 (Mich. 1961); *Anderson v. Stacker*, 317 S.W.2d 417, 421

have limited or inconclusive case law on the subject.⁴² New York has developed its own approach to such conveyances, codified by Section 6-2.2(d) of New York's Estates, Powers and Trusts Law.

1. *Section 6-2.2(d) of New York's Estates, Powers and Trusts Law*

New York is unique in how it has approached instances of conveyances to unwed pairs as spouses. Section 6-2.2(d) (originally Section 6-2.2(c)) of the Estates, Powers and Trusts Law (EPTL 6-2.2(d)) reversed the presumption that a conveyance to an unwed pair as spouses would create a tenancy in common, expressly stating that: "A disposition of real property . . . to persons who are not legally married to one another but who are described in the disposition as husband and wife, spouses, husbands, or wives creates in them a joint tenancy, unless expressly declared to be a tenancy in common."⁴³ This act has been interpreted as non-retroactive, and so conveyances made before September 1, 1975, retain New York's original rule.⁴⁴

New York has some of the most robust case law on the subject of failed tenancies by the entirety,⁴⁵ which in part triggered the passage of this act to quell the resulting "unnecessary litigation" arising from the need to determine ownership amongst the unwed pairs.⁴⁶ A memorandum by the New York State Law Revision Commission related to the creation of the act frames the purpose as more narrow, highlighting that the concern was not with the expectations of the unwed pairs, as this Note

(Mo. 1958); *Balazinski v. Lebid*, 168 A.2d 209, 211 (N.J. Super. Ct. App. Div. 1961); *Lawrence v. Heavner*, 61 S.E.2d 697, 699 (N.C. 1950); *Merit v. Losey*, 240 P.2d 933, 939-40 (Or. 1952); *Est. of Bruce*, 538 A.2d 923, 926-27 (Pa. Super. Ct. 1988).

⁴² See *infra* Appendix.

⁴³ N.Y. EST. POWERS & TRUSTS LAW § 6-2.2(d) (McKinney) (formerly § 6-2.2(c)).

⁴⁴ See *In re Est. of Kolodij*, 380 N.Y.S.2d 610, 617 (Sur. Ct. 1976) ("EPTL § 6-2.2 . . . cannot be applied retroactively, nevertheless the rationale for such a provision is persuasive."); *Turchiano v. Woods*, 381 N.Y.S.2d 775, 777 (N.Y. Sup. Ct. 1976) (holding that EPTL § 6-2.2 cannot be applied retroactively to divest the inheritors in interest of the decedent).

⁴⁵ See generally *Crawley v. Shelby*, 323 N.Y.S.2d 222 (App. Div. 1971) (a pre-EPTL 6-2.2(d) case exploring failed tenancies by the entirety); *Thurmond v. McGrath*, 334 N.Y.S.2d 917 (Sup. Ct. 1972) (the inciting case for the passage of EPTL 6-2.2(d)); *Bucci v. Bucci*, 508 N.Y.S.2d 573 (App. Div. 1986) (a case on the non-retroactivity of EPTL 6-2.2(d)).

⁴⁶ Memorandum from The New York State Assembly on "AN ACT relating to the Creation of a Joint Tenancy in Respect to Dispositions Made to Persons Not Legally Married to One Another but Who Are Described as Husband and Wife" (June 10, 1975) (New York State Bill Jacket, L.1975, c. 263).

emphasizes, but rather with good faith purchasers for value.⁴⁷ The memorandum cites *Thurmond v. McGrath*, the facts of which are not particularly unique in the universe of invalid marriages. Charles and Julia Scaramutz purchased a home as husband and wife in 1954—when Julia died, Charles conveyed his interest to Martin McGrath.⁴⁸ Charles and Julia, however, were never legally married, and Julia's successors in interest sought one-half of the property on the grounds that the property was held by Charles and Julia as tenants in common.⁴⁹ The court rejected McGrath's request for relief, granting him merely one-half of the property and calling on the appellate court or the legislature to address the apparent resulting inequity.⁵⁰

The Law Revision Commission stated that the prior presumption in favor of a tenancy in common in cases of conveyances to unwed pairs as spouses "produce[d] unnecessary litigation concerned with whether or not there exists sufficient evidence of the intention of the parties" and "defeat[ed] the legislative policy . . . of maintaining a legal system which promotes the free sale and exchange of real property, because such a rule often penalizes a good faith purchaser for value."⁵¹ Due to the unique value of land, title insurance and causes of action in fraud were insufficient to remedy the damage done to good faith purchasers for value.⁵²

The act was not universally accepted, with the New York State Bar Association (NYSBA) opposing the bill as "designed to overcome the law . . . which prohibits common law marriages"⁵³ and contravening "long-standing public policy" of favoring tenancy in common over joint tenancy.⁵⁴ For their concern

⁴⁷ N.Y. L. REVISION COMM'N, MEMORANDUM OF THE LAW REVISION COMMISSION RELATING TO THE CREATION OF A JOINT TENANCY IN RESPECT TO DISPOSITIONS MADE TO PERSONS NOT LEGALLY MARRIED TO ONE ANOTHER BUT WHO ARE DESCRIBED AS HUSBAND AND WIFE, McKinney's Session Laws of N.Y. at 1539 (1975); see also Memorandum from the Assistant Director of the Law Revision Commission on Assembly Bill No. 3968 (June 13, 1975) (New York State Bill Jacket, L.1975, c. 263) ("The sole purpose of the subject bill is to protect an innocent third-party purchaser for value" (emphasis added)).

⁴⁸ *Thurmond v. McGrath*, 334 N.Y.S.2d 917, 918 (Sup. Ct. 1972).

⁴⁹ *Id.*

⁵⁰ *Id.* at 919-20.

⁵¹ N.Y. L. REVISION COMM'N, RECOMMENDATION TO THE 1975 LEGISLATURE, McKinney's Session Laws of N.Y. at 1542 (1975).

⁵² *Id.*

⁵³ Supplemental Report from the Senate and Assembly Committees of the New York State Bar Association on EPTL, Section 6-2.2 (1975) (New York State Bill Jacket, L.1975, c. 263).

⁵⁴ *Id.*

regarding public policy, the NYSBA cited the relative impermanency of joint tenancy, as it can be terminated in a number of ways and subsequently result in a tenancy in common.⁵⁵ However, EPTL 6-2.2(d) does not provide any additional benefits associated with marriage to the grantees. Expressly, the act relates only to real property or cooperative shares.⁵⁶ Joint tenancy can be severed with ease,⁵⁷ while common-law marriage still requires formal divorce proceedings,⁵⁸ which are (typically) required for severance of any tenancy by the entirety supported by the common-law marriage⁵⁹—while the NYSBA cited the severability of joint tenancy as a concern, this works against their argument that such a presumption contravenes the state prohibition on common-law marriage. It is the view of this Note that the impermanence of joint tenancy is one of the benefits of this approach, by permitting grantees to alter their form of ownership after conveyance if either no longer desires the right of survivorship.

The act has not solved all confusion, and the resulting case law has been contradictory, especially where New York courts have applied pre-EPTL 6-2.2(d) case law for those conveyances made before the 1975 enactment date. Prior to the enactment of EPTL 6-2.2(d), in a 1971 case *Crawley v. Shelby*, a conveyance using the express language of tenancy by the entirety “show[ed] with certainty an intention to avoid the creation of a tenancy in common, [with] no other interpretation on the use of said language being permissible, and established instead a joint tenancy.”⁶⁰ This directly contradicted a 1970 case that said the exact opposite.⁶¹ However, after the enactment of EPTL

⁵⁵ *Id.*

⁵⁶ N.Y. EST. POWERS & TRUSTS LAW § 6-2.2(d) (McKinney) (“[R]eal property . . . or shares of stock of a cooperative apartment corporation . . .”).

⁵⁷ Joint tenancy can be severed unilaterally, even without notice to the cotenant. N.Y. REAL PROP. LAW § 240-c (McKinney).

⁵⁸ *See, e.g.*, *Baron v. Suissa*, 906 N.Y.S.2d 50, 51 (App. Div. 2010).

⁵⁹ In New York, tenancy by the entirety can only be terminated by a judicially decreed separation or divorce or the execution of a written instrument conforming to the requirements of General Obligations Law § 3-309. *Dominello v. Dominello*, 502 N.Y.S.2d 502, 503 (App. Div. 1986) (citing N.Y. GEN. OBLIG. LAW § 3-309 (McKinney)).

⁶⁰ *Crawley v. Shelby*, 323 N.Y.S.2d 222, 223 (App. Div. 1971) (finding that conveyance to an unwed pair as “tenants by the entirety” demonstrated the grantor’s intent to avoid creating a tenancy in common).

⁶¹ *Place v. Cundaro*, 309 N.Y.S.2d 714, 715–16 (App. Div. 1970) (explaining that in a conveyance to an unwed pair as tenants by the entirety, the “deed failed to manifest the requisite intent to establish a joint tenancy,” thus creating a tenancy in common).

6–2.2(d), in *Bucci v. Bucci* in 1986, a pre-EPTL conveyance to an unwed pair as tenants by the entirety—the same language as used in *Crawley v. Shelby*—created a tenancy in common due to the nonretroactivity of EPTL 6–2.2(d).⁶² Other New York courts have read the statute narrowly, as only impacting conveyances to a pair as spouses and not as tenants by the entirety⁶³—which is contradicted by the reasoning in cases like *Bucci*.⁶⁴ In at least some cases, therefore, New York courts have read EPTL 6–2.2(d) as preempting the case law regarding conveyances to unwed pairs as tenants by the entirety, despite such conveyances still triggering the primary concern of the legislature in passing the original act, which is the protection of good faith purchasers for value.

The reasoning behind enacting EPTL 6–2.2(d) was not focused on effectuating the will of the grantor; instead, it focused on the rights of a good faith purchaser for value.⁶⁵ This is distinct from the primary focus of this Note; however, that the New York State policy contributes to the alienability of real property demonstrates an added benefit to the proposed approach. Far from preventing confusion, however, the narrowness and lack of clarity from EPTL 6–2.2(d) in its failure to address conveyances to unwed pairs as tenants by the entirety has resulted in contradictory rulings, supporting the need for a broader and clearer standard for such conveyances. This proposal provides such a standard, where courts must merely consider the effect the conveyance would have if the pair were legally wed, a well-settled area of law that would prevent such contradiction.

⁶² *Bucci v. Bucci*, 508 N.Y.S.2d 573, 574 (App. Div. 1986).

⁶³ A conveyance to siblings as tenants by the entirety only created a tenancy in common, because “[the] deed [did] not describe [plaintiff] and defendant as husband and wife.” *Jackson v. Pichler*, 803 N.Y.S.2d 553, 554 (App. Div. 2005). However, the conveyance in this case was made prior to the passage of EPTL 6–2.2(d), so it is unclear whether the court should have considered the provision at all given its nonretroactivity. See also *Brunwasser v. Scharf*, No. 160898/2021, 2024 WL 1417211 at *3 (N.Y. Sup. Ct. Apr. 2, 2024) (“[I]f the legislature intended that a failed tenancy in the entirety presumptively becomes a joint tenancy they could have written the statute to say so.”), *aff’d sub nom.* *Brunwasser v. Blanker*, 229 N.Y.S.3d 434 (App. Div. 2025). However, the court found a joint tenancy was established on other grounds, namely an affidavit of the drafter. *Id.* at *5.

⁶⁴ *Bucci*, 508 N.Y.S.2d at 574 (“At the time this property was purchased by the decedent and the defendant, a conveyance to two persons who were not legally married ‘as tenants by the entirety’, was deemed to create only a tenancy in common, unless expressly declared to be a joint tenancy In 1975, this presumption was reversed by statutory amendment so that a joint tenancy would be created.” (emphasis added)) (citation omitted).

⁶⁵ See sources cited *supra* note 47 and accompanying text.

III

PROPOSING INTENT-BASED APPROACH

A. Reasoning for a Revised Approach

Marriage holds a less honored position in the American tradition than it once did.⁶⁶ The law regarding conveyances should reflect this changing attitude,⁶⁷ by treating the true marital status of parties as irrelevant when interpreting the intent to create a right of survivorship in a conveyance.

Marriage rates in the United States have steadily declined since the mid-1980s.⁶⁸ Over the same period, the share of cohabitating individuals has increased, and this trend is expected by some to continue⁶⁹—cohabitation refers to individuals who are romantically involved but for whatever reason are not legally married or are not yet legally married.⁷⁰ In 1968, only a fraction of a percent of young adults lived with an unmarried partner; as of 2018, 9.4% of individuals ages eighteen to twenty-four live with an unmarried partner, and 14.8% of individuals ages twenty-five to thirty-four do as well.⁷¹ While there has not been a total elimination of the social stigma associated with cohabitation, with 14% of U.S. adults in a 2019 Pew Research Center survey believing it is never acceptable for an unwed pair to cohabit and 16% believing it is only acceptable if the pair plans to get married, cohabitation has much wider

⁶⁶ See generally Wade F. Horn, *Marriage Matters: Family Structure and the Decline of the Middle Class* (Sep. 29, 2014) (unpublished conference paper presented at the Association for Public Policy Analysis and Management 2014 International Conference); Linda J. Waite, *Marriage and Family*, in *HANDBOOK OF POPULATION* 87–108 (Dudley L. Poston & Michael Micklin eds., 2005).

⁶⁷ This is not dissimilar to shifting legal perspective on tenancy by the entirety after the end of coverture—when the subsummation of the woman in the marriage unity no longer was a preferred legal reality, courts changed their view of tenancy by the entirety to better align with modern views of gender equality. See Orth, *supra* note 12, at 41–43.

⁶⁸ Sally C. Curtin & Paul D. Sutton, *Marriage Rates in the United States, 1900–2018*, CDC: NAT'L CTR. FOR HEALTH STAT. (Apr. 2020), https://www.cdc.gov/nchs/data/hestat/marriage_rate_2018/marriage_rate_2018.pdf [<https://perma.cc/KRT8-HBER>].

⁶⁹ Jagadeesh Gokhale, *Change in American Families: Favoring Cohabitation over Marriage*, PENN WHARTON BUDGET MODEL (Feb. 19, 2025), <https://budgetmodel.wharton.upenn.edu/issues/2025/2/19/change-in-american-families-favoring-cohabitation-over-marriage> [<https://perma.cc/Z245-5RCL>].

⁷⁰ See Benjamin Gurrentz, *Living with an Unmarried Partner Now Common for Young Adults*, U.S. CENSUS BUREAU (Nov. 15, 2018), <https://www.census.gov/library/stories/2018/11/cohabitation-is-up-marriage-is-down-for-young-adults.html> [<https://perma.cc/792W-8KFN>].

⁷¹ *Id.*

societal acceptance among young people than among their older counterparts.⁷² This undermines the reasoning of some courts in failed tenancies by the entirety cases—in those cases, the court held that express tenancy by the entirety or spousal language could be intended to hide the invalidity of the pair's marriage and was therefore not intended to imply the right of survivorship.⁷³ As stigma against cohabitation has fallen, it is less rational to assume such calculated and deliberate deception in the conveyance.

There are other social considerations that highlight the unfairness of adding barriers to obtaining similar protection to unwed pairs as to married ones. According to data from a 2020 Gallup poll, only 21% of LGBTQ+ identifying adults are legally married, compared to 47.7% of the U.S. population broadly.⁷⁴ A higher percentage of LGBTQ+ adults live with domestic partners as well.⁷⁵ This may indicate a cultural attitude less favorable toward marriage than for other groups. This also does not acknowledge what is widely seen as marriage inequality for adults with disabilities, who often cannot legally wed without losing their health benefits.⁷⁶ Besides the equity concerns, this proposal, as highlighted by the passage of the relevant New York statute, grants additional protection for good faith purchasers for value and promotes the alienability of property.⁷⁷

B. Proposed Model

Through judicial interpretation or legislative action, states that retain tenancies by the entirety should adopt an approach to failed tenancies by the entirety that treats married and unmarried pairs equally when a conveyance expresses a desire to create a right of survivorship. This approach is outlined in this

⁷² Juliana Menasce Horowitz, Nikki Graf & Gretchen Livingston, *Marriage and Cohabitation in the U.S.*, PEW RSCH. CTR. (Nov. 6, 2019), <https://www.pewresearch.org/social-trends/2019/11/06/marriage-and-cohabitation-in-the-u-s/> [<https://perma.cc/R864-KRE8>].

⁷³ See cases cited *supra* note 37.

⁷⁴ Jeffrey M. Jones, *One in 10 LGBT Americans Married to Same-Sex Spouse*, GALLUP (Feb. 24, 2021), <https://news.gallup.com/poll/329975/one-lgbt-americans-married-sex-spouse.aspx> [<https://perma.cc/HE2E-F96W>].

⁷⁵ *Id.*

⁷⁶ Tammy LaGorce, *Seeking Marriage Equality for People with Disabilities*, N.Y. TIMES (Aug. 25, 2022), <https://www.nytimes.com/2022/08/25/style/marriage-equality-disabled-people.html> [<https://perma.cc/6B63-YE4U>].

⁷⁷ See *supra* note 47.

proposal through establishing a standardized framework that can subsequently be applied to each state's existing default concurrent ownership form for actually married pairs.

If a conveyance is made to an unwed pair as spouses, in a state where a conveyance to a legally wed pair as spouses would create a tenancy by the entirety, the right of survivorship should be upheld, and a joint tenancy should therefore be created. Similarly, if a conveyance is made to an unwed pair as spouses, in a state where such a conveyance to a legally wed pair would create a tenancy in common, a tenancy in common should be created. If a conveyance is made to an unwed pair as tenants by the entirety, if such language would be sufficient to create a tenancy by the entirety in a legally wed pair, the conveyance should be presumed to create a right of survivorship between the unwed pair.

Alternatively put, conveyance to a pair as spouses or as tenants by the entirety should have the same effect in creating a right of survivorship regardless of if the pair is in fact married. The presumption should be rebuttable by extrinsic evidence—this is different from EPTL 6-2.2(d), where the joint tenancy is only rebuttable if the conveyance is expressly declared to be taken as a tenancy in common. Having a rebuttable presumption will provide relief in those situations where the grantor did not intend to create the right of survivorship—however, in the absence of such evidence, the intent expressed in the conveyance should prevail.

C. Rejection of Good Faith Requirement

The standard for failed tenancies by the entirety should not be governed by a good faith requirement, and instead the concurrent ownership form taken should be derived from what is expressed in the conveyance. This is notable to discuss, as the only major proposal to remedy the inequity resulting from failed tenancies by the entirety was put forth in 1952 and hinged on the good faith of the unwed grantees. In a Rutgers Law Review article, “The Effect of an Attempted Creation of an Estate by the Entirety in Unmarried Grantees,” author Donald Kepner categorized types of failed tenancies by the entirety: distinguishing when (1) both parties are aware that they are unmarried; (2) one spouse conceals the barrier to the pair's legal marriage, and the other believes they are legally married; (3) one spouse abandons the other, and, in good faith believing them to be deceased, the remaining spouse attempts to remarry; (4) a divorce decree is obtained and a spouse relies on this divorce

decree when entering into another marriage—the divorce decree is later determined to be void, rendering the second marriage invalid; and (5) the spouses are legally married, but the marriage is later annulled.⁷⁸ Kepner goes on to advocate for a position where, when a pair mistakenly and in good faith believes they are married, conveyances to them as spouses or as tenants by the entirety should result in joint tenancy, as best to effectuate the grantor's expressed desire for the right of survivorship.⁷⁹ However, Kepner states, if the parties know they are unmarried, then it is "reasonable to infer" from the conveyance to them as spouses that they do not intend to provide for survivorship.⁸⁰

While Kepner's proposal would be a step toward a more rational approach, it still falls short due to the difficulty in determining when parties believe themselves, in good faith, to be married. Some states have already distinguished between good faith and bad faith in failed tenancies by the entirety. Florida, in particular, has paid special attention to the good faith consideration—while generally a failed tenancy by the entirety results only in a tenancy in common,⁸¹ a putative spouse who is unaware that their marriage is invalid (good faith spouse) can still reap the benefits of a tenancy by the entirety, while the putative spouse (or their estate) who is aware of the invalidity (bad faith spouse) may be estopped from depriving the other party of survivorship.⁸² In the relevant cases in Florida, the estate of a bad faith husband was estopped from arguing against his bigamous wife's right of survivorship,⁸³ and a bigamous wife unaware of the invalidity of her marriage was able to retain her right of survivorship over the objection of her deceased partner's legal wife.⁸⁴ However, where a pair did not have a ceremonial marriage, meaning they could not possibly be married even if the purported wife believed them to be, a Florida court refused

⁷⁸ Donald Kepner, *The Effect of an Attempted Creation of an Estate by the Entirety in Unmarried Grantees*, 6 RUTGERS L. REV. 550, 554–55 (1952).

⁷⁹ *Id.* at 556–57.

⁸⁰ *Id.* at 557.

⁸¹ The use of the express language of tenancy by the entirety in the conveyance was insufficient to show intent to create a right of survivorship when the pair was not actually married. *In re Est. of Suggs*, 405 So. 2d 1360, 1361 (Fla. Dist. Ct. App. 1981).

⁸² See *Mason v. Mason*, 174 So. 2d 620, 621 (Fla. Dist. Ct. App. 1965).

⁸³ See *Alexander v. Colston*, 66 So. 2d 673, 675 (Fla. 1953).

⁸⁴ See *Mason*, 174 So. 2d at 621.

to extend estoppel.⁸⁵ In at least some states, then, this demonstrates a strong emphasis on good faith of the putative spouse making a claim for the right of survivorship.

In nearly all instances before a court that involve an invalid marriage, one or both of the former “spouses” are deceased, and the subsequent action is between the living party and the estates, or just between the estates.⁸⁶ With neither or only one grantee living, and with memories and emotions frenzied by the legal fight for the property in question, deriving such good faith is a challenge that should not muddy the system. Additional questions are raised by a good faith requirement: Does good faith only need to be present at the time of the conveyance, or must it persist until the death of the bad faith spouse? Does the court consider whether a “reasonable” partner would have been aware of the invalidity of the marriage, or merely the objective belief of the good faith spouse? Concerns regarding the rights of spouses who are unaware of their marriage’s invalidity would be better served by a standardized rule.

Additionally, Kepner does not consider cases where conveyance to tenants by the entirety is accidental. In these cases, a grantor has mistakenly conveyed property to a pair that has never purported to, nor in many cases ever could be, wed.⁸⁷ A good faith standard would fail to capture cases such as these, where an individual evidently lacks a complete understanding of ownership types yet still expresses a desire to create a right of survivorship.

Rather than grappling with these hypotheticals, the rule imposed should be standardized regardless of the grantee’s good faith knowledge of the validity of their marriage. The District of Columbia Circuit’s reasoning outlined in *Coleman* provides a basis for the view the court should take toward good faith in failed tenancies by the entirety—in that case, the lower

⁸⁵ See, e.g., *Jablonski v. Caputo*, 297 So. 2d 310, 311–312 (Fla. Dist. Ct. App. 1974).

⁸⁶ See, e.g., *In re 832 Monroe St.*, 498 A.2d 1090, 1092 (Del. 1985) (Petitioner was the still-living putative wife of the decedent); *Brissett v. Sykes*, 855 S.W.2d 330, 331 (Ark. 1993) (Petitioner was the still-living putative husband of the decedent); *Thurmond v. McGrath*, 334 N.Y.S.2d 917, 918 (Sup. Ct. 1972) (Petitioner was the successor in interest of the putative husband of the decedent); *Coleman v. Jackson*, 286 F.2d 98, 99 (D.C. Cir. 1960) (Petitioner was the still-living putative husband of the decedent); *In re Est. of Hamilton*, 299 A.3d 542, 546 (D.C. 2023) (case brought by respective estates of each decedent).

⁸⁷ See generally *In re Est. of Hamilton*, 299 A.3d at 549–50 (D.C. 2023) (a man conveyed property to himself and his son as tenants by the entirety); *Powell v. Est. of Powell*, 14 N.E.3d 46, 52 (Ind. Ct. App. 2014) (deed conveyed property to brothers as tenants by the entirety); *Pa. Bank & Tr. Co. v. Thompson*, 247 A.2d 771, 771 (Pa. 1968) (conveyance to brothers as tenants by the entireties).

court found that the plaintiff was aware her putative spouse had a living wife and that the plaintiff herself “did not live with [her supposed husband] in good faith as his wife,” but on appeal this was summarily dismissed as irrelevant in determining the pair’s ownership.⁸⁸

D. Limiting Principles

This proposal does not seek to effectuate for unmarried pairs all that is implied by a tenancy by the entirety, nor does it take the position that tenancy by the entirety should be possible between those who are not either [1] legally married or [2] in a statutorily recognized equivalent to marriage.⁸⁹ Tenancy by the entirety characteristically features non-unilateral severability of the right of survivorship⁹⁰ and creditor protection,⁹¹ neither of which should, by default, be extended to unmarried pairs.

For tenancies by the entirety, the right of survivorship cannot be extinguished in the absence of dissolution of the marriage,⁹² via other statutory provided avenue,⁹³ or both spouses’ consent (either mutual agreement to sever or through joint transfer of the property).⁹⁴ This additional safeguard is not replicated by merely mirroring the right of survivorship in a joint tenancy, which can be severed

⁸⁸ *Coleman v. Jackson*, 286 F.2d 98, 103 (D.C. Cir. 1960) (“Whatever society and we may think of the illicit relationship, the law recognizes the right of the participants to hold property jointly and to give or bequeath property to each other without limitations imposed because of the relationship.”).

⁸⁹ See *supra* text accompanying note 9.

⁹⁰ RESTATEMENT (FOURTH) OF PROP. § 1.7 (A.L.I., Tentative Draft No. 6, 2025).

⁹¹ *PALOMAR*, *supra* note 7, § 224 (“[A] creditor of one spouse may not be able to reach property or proceeds from property held in tenancy by the entirety.”).

⁹² Dissolution of the marriage severs the tenancy by the entirety into a joint tenancy or tenancy in common, depending on the law of the state. The conversion to a tenancy in common is based on the assumption that a pair that has divorced no longer wishes to grant the right of survivorship to their ex-spouse. See, e.g., *Awramenko v. Awramenko*, 192 N.Y.S.2d 15, 17 (Sup. Ct. 1959); *Sisco v. N.J. Bank*, 376 A.2d 1287, 1289 (N.J. Super. Ct. Law Div. 1977), *rev’d in part, modified in part*, 385 A.2d 890 (N.J. Super. Ct. App. Div. 1978). In some states, a divorce converts a tenancy by the entirety into a joint tenancy, thus retaining the right of survivorship. See, e.g., *Shepherd v. Shepherd*, 336 So. 2d 497, 499 (Miss. 1976).

⁹³ Some states permit other limited action to sever a tenancy by the entirety. See *In re Est. of Violi*, 482 N.E.2d 29, 31–32 (N.Y. 1985) (“[S]ection 3–309 of the General Obligations Law . . . permits division or partition of real property held in a tenancy by the entirety if clearly expressed in such an instrument.”).

⁹⁴ Neither spouse can convey, encumber, or alienate property held by the entireties without the consent of the other. See RESTATEMENT (FOURTH) OF PROP. § 1.7 cmt. f (A.L.I., Tentative Draft No. 6, 2025) (“[T]he fractional interest of a tenant by the entirety is neither unilaterally transferable nor devisable or inheritable before severance.”).

unilaterally at any time.⁹⁵ This is an intentional component of this proposal—requiring government intervention for severance without an underlying legal relationship would force those unmarried pairs into a marriage-like gray area and could trigger concerns similar to those raised by common-law marriage, as raised by the NYSBA in the passage of EPTL 6-2.2(d) in New York State.⁹⁶ The impermanence of the right of survivorship in a joint tenancy reflects the—at least legal—impermanence of the unmarried pair’s relationship. The value of impermanence also demonstrates why this proposal does not take the position that conveyances to unmarried pairs as tenants by the entirety or as spouses should result in a tenancy in common in the life estate with cross-contingent remainder: this form of conveyance creates an indestructible right of survivorship.⁹⁷

This also does not address the creditor benefits of a tenancy by the entirety—the creditors of only one debtor-spouse are unable to reach property that is held by the entireties.⁹⁸ However, these protections are based on the legal fiction of the married pair forming a single entity.⁹⁹ There is no equivalent single legal entity formed by an unmarried pair, and therefore no basis to extend creditor protections.

IV OUTCOME

Applying the proposed model to conveyances to unwed pairs would yield the following results in states with various default rules for conveyances to married pairs:

A. Conveyance to Unwed Pair as Tenants by the Entirety

Under this proposal, a conveyance to an unwed pair as tenants by the entirety would imply the intent to create a right

⁹⁵ N.Y. REAL PROP. LAW § 240-c (McKinney).

⁹⁶ See *supra* note 53 and accompanying text.

⁹⁷ RESTATEMENT (FOURTH) OF PROP. § 1.5 cmt. d (A.L.I., Tentative Draft No. 6, 2025).

⁹⁸ For more information regarding the creditor benefit of tenancy by the entirety, see generally Damaris Rosich-Schwartz, *Tenancy by the Entirety: The Traditional Version of the Tenancy Is the Best Alternative for Married Couples, Common Law Marriages, and Same-Sex Partnerships*, 84 N.D. L. REV. 23 (2008). Federal tax liens overcome these protections. *United States v. Craft*, 535 U.S. 274, 288–89 (2002).

⁹⁹ “Tenancy by the entireties is based on the common law concept that husband and wife are but one legal entity” *In re Martin*, 269 B.R. 119, 122 (Bankr. M.D. Pa. 2001).

of survivorship, thus creating a presumption in favor of a joint tenancy between the pair. This would apply in nearly every state that retains tenancy by the entirety.

1. *Implying Joint Tenancy*

All States and D.C., Except Alaska and Oregon.

Blackacre was granted to brothers Jack and Drew as tenants by the entirety, despite the pair never holding themselves out as married nor legally being able to be wed. Because such a conveyance in their state would create a tenancy by the entirety if Jack and Drew were actually a married pair, the right of survivorship is implied, and a joint tenancy is created in the absence of evidence of a contrary intent.

A conveyance to a married pair as tenants by the entirety without additional language expressly creating a right of survivorship is presumed to create a tenancy by the entirety. Therefore, a conveyance to an unmarried pair as tenants by the entirety would imply a right of survivorship and therefore create a joint tenancy.

2. *Implying Tenancy in Common*

Alaska¹⁰⁰ and Oregon.¹⁰¹

Blackacre was granted to Erica and Ashlyn as tenants by the entirety. The pair held themselves out as married despite

¹⁰⁰ In Alaska, joint tenancy is abolished by statute, and the right of survivorship can only exist between spouses. ALASKA STAT. § 34.15.130. The Alaskan courts view tenancy by the entirety as “but a species of joint tenancy, their incidents being identical,” and any conveyance must explicitly declare that a married couple will take as tenants by the entirety with right of survivorship to overcome the presumption in favor of tenancy in common. See *Carver v. Gilbert*, 387 P.2d 928, 932–33 (Alaska 1963). As such, Alaska must be an exception to the proposed model—a conveyance to an unwed pair necessarily cannot create a right of survivorship.

¹⁰¹ In Oregon, “a conveyance of real property made to two or more persons with a declaration of rights of survivorship ‘creates a tenancy in common in the life estate with cross-contingent remainders in the fee simple’”; this is referred to as an “Erickson Deed” in the State of Oregon. *State Farm Fire & Cas. Co. v. Jensen*, 604 F. Supp. 3d 1096, 1108 (D. Or. 2022) (quoting OR. REV. STAT. § 93.180); *Domestic P’ship of Branam & Beaver*, 202 P.3d 886, 891 (Or. Ct. App. 2009); *Erickson v. Erickson*, 115 P.2d 172, 176 (Or. 1941). The right of survivorship may not exist outside of a tenancy by the entirety, except in a conveyance to trustees or personal representatives. OR. REV. STAT. § 93.180; OR. REV. STAT. § 93.190. As such, a conveyance to an unwed pair as tenants by the entirety cannot create a right of survivorship—while it could be read to imply a life estate with cross-contingent remainders in fee simple, this proposal takes the position that this is an unfavorable outcome for such grantees, given the non-severability of the ownership form.

being unable to be wed due to existing prior marriages. Even so, in their state the right of survivorship can only exist in a valid tenancy by the entirety, so the pair holds the property as tenants in common.

In Alaska and Oregon, only tenants by the entirety may hold the right of survivorship.¹⁰² As such, the right of survivorship cannot be implied between unwed pairs. Historically, this was also the case in Illinois, but this has likely been abrogated by ensuing revision.¹⁰³

B. Conveyance to Unwed Pair as Spouses

Most states follow the common-law presumption that a conveyance to a married pair as spouses that otherwise satisfies the four unities creates a tenancy by the entirety.¹⁰⁴ A minority of states require explicit use of “tenancy by the entirety” to create such a form of ownership or require express language of a right of survivorship.¹⁰⁵ Currently, every state with tenancy by the entirety, except for New York, creates only a tenancy in common when a conveyance is made to an unwed pair as spouses. Under this proposal, whether the state follows the common-law presumption will determine what form

¹⁰² ALASKA STAT. § 34.15.130; OR. REV. STAT. § 93.180.

¹⁰³ In Illinois, the Joint Tenancy Act in the state previously only permitted the creation of a tenancy by the entirety when the conveyance expressly refers to the pair as spouses. 765 ILL. COMP. STAT. 1005/1c (1995) (“Whenever a devise, conveyance, assignment, or other transfer of property . . . maintained or intended for maintenance as a homestead by both husband and wife together during coverture shall be made and the instrument of devise, conveyance, assignment, or transfer expressly declares that the devise or conveyance is made to persons, *named and expressly identified in that instrument as husband and wife*, not as joint tenants or tenants in common but as tenants by the entirety, the estate created shall be deemed to be in tenancy by the entirety.” (emphasis added)) (amended 2002); *Travelers Indem. Co. v. Engel*, 81 F.3d 711, 712 (7th Cir. 1996) (“[T]he plain language of [the Illinois Joint Tenancy Act] requires the instrument to expressly declare that the grantees are husband and wife.”). Subsequent revision of the Joint Tenancy Act in 2002 removed the language that specified the instrument should expressly identify the grantees as husband and wife, and Illinois case law has since supported that use of the language of tenancy by the entirety is sufficient to create that form of co-ownership. See 765 ILL. COMP. STAT. 1005/1c (2002); *In re Werner*, 410 B.R. 797, 805 (Bankr. N.D. Ill. 2009) (“In Illinois, a tenancy by the entirety estate is *created* when the instrument of conveyance expressly declares that the transfer is made to tenants by the entirety.” (emphasis added)).

¹⁰⁴ “Language sufficient to create a joint tenancy, therefore, will generally create a tenancy by the entireties if the grantees are married at the time of the conveyance to them.” PALOMAR, *supra* note 7, § 224.

¹⁰⁵ See discussion and cases cited *infra* Section IV.B.2.

of ownership a conveyance to an unwed pair as spouses creates—if the common-law rule is followed, a joint tenancy will be created. If explicit tenancy by the entirety language is required, a tenancy in common will be created.

1. *Implying Joint Tenancy*

Arkansas,¹⁰⁶ Delaware,¹⁰⁷ D.C.,¹⁰⁸ Florida,¹⁰⁹ Indiana,¹¹⁰ Maryland,¹¹¹ Massachusetts,¹¹² Michigan,¹¹³ Missouri,¹¹⁴ New

¹⁰⁶ Property conveyed to spouses is presumed to be held as tenants by the entirety. *Dunavant v. Dunavant*, 986 S.W.2d 880, 882 (Ark. Ct. App. 1999). While Arkansas has a statute that purports to “forever abolish[]” the right of survivorship, joint tenancies (with the right of survivorship) can still be created. ARK. CODE ANN. § 28-8-101; ARK. CODE ANN. § 18-12-603; *see also* *Ferrell v. Holland*, 169 S.W.2d 643, 646 (Ark. 1943).

¹⁰⁷ In Delaware, “a conveyance of real estate to a husband and wife creates an estate by the entirety.” *Heitz v. Sayers*, 121 A. 225, 228 (Del. Super. Ct. 1923).

¹⁰⁸ “Under District of Columbia law . . . the language in an instrument which would create a joint tenancy will make a husband and wife owners by the entireties.” *Morrison v. Potter*, 764 A.2d 234, 237 (D.C. 2000) (quoting *Warman v. Strawberry*, 587 F.Supp. 109, 111 (D.D.C. 1983)).

¹⁰⁹ “A conveyance to spouses as husband and wife creates an estate by the entirety in the absence of express language showing a contrary intent.” *Aderhold v. Aderhold*, 983 So. 2d 43, 44 (Fla. Dist. Ct. App. 2008) (quoting *Beal Bank, SBB v. Almand & Assocs.*, 780 So. 2d 45, 54 (Fla. 2001)).

¹¹⁰ Indiana follows the common-law rule. *See Underwood v. Bunger*, 70 N.E.3d 338, 343 (Ind. 2017).

¹¹¹ “Maryland retains the estate of tenancy by the entirety in its traditional form,” where a conveyance to a married pair is presumed to create a tenancy by the entirety. *Beall v. Beall*, 434 A.2d 1015, 1021 (Md. 1981) (citing *Columbian Carbon Co. v. Kight*, 114 A.2d 28 (Md. 1955)).

¹¹² In Massachusetts, “[a]bsent a clear showing that a joint tenancy was intended . . . a husband and wife hold property as tenants by the entirety.” *Finn v. Finn*, 204 N.E.2d 293, 295–96 (Mass. 1965). When interpreting deeds, “unless [the conveyance] expressly negates the existence of a tenancy by the entirety, the common law operates to establish this form of coownership.” *Id.*

¹¹³ Language deeding property to spouses, without explicit language creating a tenancy by the entirety, creates a joint tenancy. *See* MICH. COMP. LAWS § 554.44; MICH. COMP. LAWS § 554.45.

¹¹⁴ “In Missouri, a conveyance of real property to a husband and wife as co-grantees is presumed to create a tenancy by the entirety” *Ronollo v. Jacobs*, 775 S.W.2d 121, 123 (Mo. 1989).

Jersey,¹¹⁵ New York,¹¹⁶ North Carolina,¹¹⁷ Pennsylvania,¹¹⁸ Tennessee,¹¹⁹ Vermont,¹²⁰ Wyoming.¹²¹

Blackacre was granted to Andrew and Sydney as “husband and wife,” despite the pair being unmarried. Because such a conveyance would create a tenancy by the entirety if Andrew and Sydney were actually married, the right of survivorship is implied, and a joint tenancy is created, in the absence of evidence of a contrary intent.

A conveyance to a married pair as spouses, without additional language expressly creating a right of survivorship, is presumed to create a tenancy by the entirety in these states. Therefore, under this proposal, a conveyance to an unmarried pair as spouses would imply a right of survivorship and therefore be presumed to create a joint tenancy.

¹¹⁵ A conveyance to a pair as spouses creates a tenancy by the entirety. N.J. STAT. ANN. § 46:3-17.2.

¹¹⁶ Already by statute, a conveyance to an unwed pair as spouses creates a joint tenancy, so the proposed rule would have no impact. N.Y. EST. POWERS & TRUSTS LAW § 6-2.2(d) (McKinney).

¹¹⁷ “Unless a contrary intention is expressed in the conveyance, a conveyance of real property . . . to spouses vests title in them as tenants by the entirety.” N.C. GEN. STAT. § 41-56.

¹¹⁸ “[T]he type of ownership which is created in property when a husband and wife are involved, regardless of how the relationship is denominated and in the absence of clear and convincing evidence to the contrary, is as tenants by the entireties.” *Const. Bank v. Olson*, 620 A.2d 1146, 1150 (Pa. Super. Ct. 1993).

¹¹⁹ Conveyance to a married pair as spouses creates a tenancy by the entirety. TENN. CODE ANN. § 66-1-109; *see Bennett v. Hutchens*, 179 S.W. 629, 630 (Tenn. 1915). While Tennessee statute purports to abolish the right of survivorship for joint tenants, the Tennessee courts have construed this to merely abolish the default right of survivorship in joint tenancy and allows for its creation “where the instrument creating the estate either by express language or necessary implication manifests an intention to create a right of survivorship.” TENN. CODE ANN. § 66-1-107; *Bryant v. Bryant*, 522 S.W.3d 392, 404 (Tenn. 2017) (quoting *Peebles v. Peebles*, 443 S.W.2d 469, 470 (Tenn. 1969)).

¹²⁰ Conveyances to spouses are presumed to create a tenancy by the entirety. *See* VT. STAT. ANN. tit. 27, § 2.

¹²¹ “Unless the deed specifies another form of ownership, the designation of tenants on an instrument of conveyance or transfer of real property as ‘husband and wife,’ ‘spouses’ or similar language, shall be deemed to establish a tenancy by the entirety.” WYO. STAT. ANN. § 34-1-140.

2. *Implying Tenancy in Common*

Alaska,¹²² Hawaii,¹²³ Illinois,¹²⁴ Kentucky,¹²⁵ Mississippi,¹²⁶ Oklahoma,¹²⁷ Oregon,¹²⁸ Rhode Island,¹²⁹ Virginia.¹³⁰

Blackacre was granted to Mikey and Abbey as "husband and wife," despite the pair not yet being married. Because such a conveyance would create a tenancy in common in their state if Mikey and Abbey were actually married, the right of

¹²² Joint tenancy is abolished by statute in Alaska, and the right of survivorship can only exist between spouses. ALASKA STAT. § 34.15.130; *see also* Voss v. Brooks, 907 P.2d 465, 469 (Alaska 1995) (holding that a lack of awareness of the Alaska prohibition on joint tenancy for unmarried couples did not justify reforming the contract to create a right of survivorship).

¹²³ Hawaii requires that conveyances to spouses expressly state the intent to create a tenancy by the entirety—otherwise, the conveyance creates only a tenancy in common. HAW. REV. STAT. § 509-1; *see* Kupau v. Waiahole Water Co., 37 Haw. 234, 241 (1945).

¹²⁴ A conveyance to a married pair in Illinois, without express language indicating an intent to create a tenancy by the entirety, creates only a tenancy in common. 765 ILL. COMP. STAT. 1005/1c.

¹²⁵ The right of survivorship is not implied in conveyances to spouses unless expressly provided for. KY. REV. STAT. ANN. § 381.050.

¹²⁶ It is presumed that conveyances to spouses create tenancies in common, "unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy or entirety with the right of survivorship." MISS. CODE ANN. § 89-1-7.

¹²⁷ Oklahoma rejects the common-law presumption that a conveyance to a married pair as spouses creates a tenancy by the entirety, citing the rejection of the default nonentity of the wife and a general opposition to the right of survivorship. *See* Helvie v. Hoover, 69 P. 958, 960 (Okla. 1902).

¹²⁸ By Oregon statute, the right of survivorship is abolished in all but conveyances to trustees or personal representatives. *See* OR. REV. STAT. § 93.180; OR. REV. STAT. § 93.190.

¹²⁹ In Rhode Island, a conveyance to a pair as spouses, even when the pair are validly married, creates merely a tenancy in common. *See* Van Ausdall v. Van Ausdall, 135 A. 850, 852 (R.I. 1927).

¹³⁰ For spouses to take property as tenants by the entirety, "[a]n intent that the part of the one dying should belong to the other shall be manifest from a designation of the spouses as 'tenants by the entireties' or 'tenants by the entirety.'" VA. CODE ANN § 55.1-136. Despite this statute, Virginia courts have held that "[t]he strict common-law principle that a conveyance to a husband and wife creates a tenancy by the entirety remains the law in Virginia," resulting in a tenancy by the entirety when a conveyance was made to a pair not as spouses, but "as joint tenants with the common-law right of survivorship." *In re Sampath*, 314 B.R. 73, 75, 102 (Bankr. E.D. Va. 2004). This takes to the extreme the common-law understanding that "[t]he same words of conveyance, which would make two other persons joint tenants, will make the husband and wife tenants of the entirety." 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 112 (N.Y., O. Halsted 1827). This results in a rule that still requires some indicia of intent to create the right of survivorship besides recitation of the spousal relationship—applying this, a conveyance to an unwed pair as spouses would still only result in a tenancy in common.

survivorship is not implied, and a tenancy in common is created, in the absence of evidence of a contrary intent.

A conveyance to a married pair as spouses, without additional language expressly creating a right of survivorship, is presumed to create tenancy in common. Therefore, under this proposal, a conveyance to an unmarried pair as spouses would not imply a right of survivorship and would be presumed to create a tenancy in common.

CONCLUSION

The current outcome for failed tenancies by the entirety in the majority of states results merely in a tenancy in common for unwed grantees, and it is clear that good faith requirements are insufficient to remedy the resulting inequity. This proposal leads to a more standardized approach for those states that retain tenancies by the entirety and better effectuates the intent expressed by the grantor. Conveyances to unwed pairs as tenants by the entirety would result in tenancies in common in two states and joint tenancies in twenty-three states. Conveyances to unwed pairs as spouses would result in tenancies in common in eight states and joint tenancies in seventeen states. By accepting this approach, states would ultimately treat unwed grantees the same as their married counterparts as relating to the creation of the right of survivorship, thus furthering equality between married and unmarried pairs.

APPENDIX

Current Outcome of Failed Tenancies by the Entirety Compared to Proposed Outcome

	<i>“To A and B, as spouses”</i>		<i>“To A and B, as tenants by the entirety”</i>	
	Current Outcome	Proposed Outcome	Current Outcome	Proposed Outcome
<i>Alaska</i>	Tenancy In Common	Tenancy In Common	Tenancy In Common	Tenancy In Common
<i>Arkansas</i>	Tenancy In Common	Joint Tenancy	Joint Tenancy	Joint Tenancy
<i>Delaware</i>	Tenancy In Common	Joint Tenancy	Tenancy In Common	Joint Tenancy
<i>D.C.</i>	Inconclusive	Joint Tenancy	Joint Tenancy	Joint Tenancy
<i>Florida</i>	Tenancy In Common	Joint Tenancy	Tenancy In Common	Joint Tenancy
<i>Hawaii</i>	Tenancy In Common	Tenancy In Common	Inconclusive	Joint Tenancy
<i>Illinois</i>	Inconclusive	Tenancy In Common	Joint Tenancy	Joint Tenancy
<i>Indiana</i>	Tenancy In Common	Joint Tenancy	Joint Tenancy	Joint Tenancy
<i>Kentucky</i>	Inconclusive	Tenancy In Common	Inconclusive	Joint Tenancy
<i>Maryland</i>	Tenancy In Common	Joint Tenancy	Joint Tenancy	Joint Tenancy
<i>Massachusetts</i>	Tenancy In Common	Joint Tenancy	Joint Tenancy	Joint Tenancy
<i>Michigan</i>	Tenancy In Common	Joint Tenancy	Tenancy In Common	Joint Tenancy
<i>Mississippi</i>	Inconclusive	Tenancy In Common	Inconclusive	Joint Tenancy
<i>Missouri</i>	Tenancy In Common	Joint Tenancy	Tenancy In Common	Joint Tenancy
<i>New Jersey</i>	Tenancy In Common	Joint Tenancy	Tenancy In Common	Joint Tenancy
<i>New York</i>	Joint Tenancy	Joint Tenancy	Inconclusive	Joint Tenancy
<i>North Carolina</i>	Tenancy In Common	Joint Tenancy	Tenancy In Common	Joint Tenancy
<i>Oklahoma</i>	Tenancy In Common	Tenancy In Common	Inconclusive	Joint Tenancy
<i>Oregon</i>	Tenancy In Common	Tenancy In Common	Inconclusive	Tenancy In Common
<i>Pennsylvania</i>	Tenancy In Common	Joint Tenancy	Joint Tenancy	Joint Tenancy
<i>Rhode Island</i>	Tenancy In Common	Tenancy In Common	Tenancy In Common	Joint Tenancy
<i>Tennessee</i>	Tenancy In Common	Joint Tenancy	Tenancy In Common	Joint Tenancy
<i>Vermont</i>	Inconclusive	Joint Tenancy	Inconclusive	Joint Tenancy
<i>Virginia</i>	Inconclusive	Tenancy In Common	Inconclusive	Joint Tenancy
<i>Wyoming</i>	Tenancy In Common	Joint Tenancy	Tenancy In Common	Joint Tenancy