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JOINT OWNERSHIP OF CORPORATE SECURITIES IN NORTH CAROLINA REVISITED

MARK B. EDWARDS and RICHARD A. WOOD, JR.*

As any attorney can testify, there is a persistent myth cherished by the populace that the ownership of property in two or more names is desirable. Accordingly, people frequently place real and personal property in joint names. When an attorney encounters real property or bank accounts in joint names, he can advise the owners with some degree of certainty as to the incidents of the type of ownership they have created.¹ If he discovers corporate securities in joint names, however, he cannot be sure what has been created under the laws of North Carolina, nor can he definitively advise his clients of the incidents and ramifications of this form of ownership.

The 1967 Session of the North Carolina General Assembly enacted a statute directed toward the problem of jointly-held corporate securities. This article will examine that statute in detail in light of the problems it was intended to alleviate and will attempt to offer suggestions for its construction, interpretation and possible amendment.

I. THE STATUTE

The statute enacted by the 1967 Session of our General Assembly provides:

Joint ownership of corporate stock and investment securities.—

(a) In addition to other forms of ownership, shares of corporate stock or investment securities may be owned by a husband and wife as joint tenants with the right of survivorship, and not as tenants in common, in the manner provided in this section.

(b) (1) A joint tenancy in shares of corporate stock or investment securities as provided by this section shall exist when such

* Members of the North Carolina Bar. A previous article by the authors on the subject of jointly-held corporate securities appeared in Edwards & Wood, *Joint Ownership of Corporate Securities in North Carolina*, 44 N.C.L. REV. 290 (1966) (hereinafter cited as Edwards & Wood).

¹ See, e.g., N.C. GEN. STAT. § 41-2.1 (1966) (bank accounts); Lee, *Tenancy by the Entirety in North Carolina*, 41 N.C.L. REV. 67 (1962) (real property).

shares or securities indicate that they are owned with the right of survivorship, or otherwise clearly indicate an intention that upon the death of either spouse the interest of the decedent shall pass to the surviving spouse.

(2) Such a joint tenancy may also exist when a broker or custodian holds the shares or securities for the joint tenants and by book entry or otherwise indicates (i) that the shares or securities are owned with the right of survivorship, or (ii) otherwise clearly indicates that upon the death of either spouse the interest of the decedent shall pass to the surviving spouse. Money in the hands of such broker or custodian derived from the sale of, or held for the purchase of, such shares or securities shall be treated in the same manner as such shares or securities.

(c) Upon the death of a joint tenant his interest shall pass to the surviving joint tenant. The interest of the deceased joint tenant, even though it has passed to the surviving joint tenant, remains liable for the debts of the decedent in the same manner as the personal property included in his estate, and recovery thereof shall be made from the surviving joint tenant when the decedent's estate is insufficient to satisfy such debts.

(d) Nothing herein contained shall be construed to repeal or modify any of the provisions of G.S. 105-2, G.S. 105-11, and G.S. 105-24, relating to the administration of the inheritance tax laws, or any other provisions of the law relating to the inheritance taxes.²

II. THE ANALYSIS

A. *Position in the General Statutes; Possible Repealer.* This new statute has been enacted as part of Article Eight of the Uniform Commercial Code as adopted in North Carolina and is designated as Section 25-8-407 of the North Carolina General Statutes. This placement of the statute raises the first question that must be asked about its meaning.

Section 25-8-407 will appear as the last section in Chapter 25, Article 8, Part 4 of the General Statutes, entitled "Registration." The official comment to section 8-401 of the U.C.C. states:

In general this section and those which follow it continue the well-settled rules found in the case law as to duty to register and as to liability for improper registration on an unauthorized signature, or where the endorsement is not that of an appropriate person.³

The North Carolina comment similarly states:

² N.C. GEN. STAT. § 25-8-407 (Supp. 1967).

³ N.C. GEN. STAT. § 25-8-401, official comment 2 (1965).

Part 4 of article 8 . . . applies not only to issuers, but also to transfer agents, registrars, or other persons handling security transfers.⁴

These comments, together with the position of the statute in a portion of the U.C.C. dealing with securities registration, raise the question whether the statute is intended to govern the substantive rights of the parties, or whether it is merely an "enabling statute," allowing transfer agents and corporate registrars to regard the shares as jointly-held with a right of survivorship. These parties were heretofore afforded protection under section 55-59(e) of the General Statutes, which provides:

A corporation may treat as absolute owner of shares or other securities the survivor or survivors of persons to whom the same have been or may be issued with the words "as joint tenants," "as joint tenants with right of survivorship," or "as joint tenants with right of survivorship and not as tenants in common" following their names, upon the death of one or more of such persons.⁵

The question posed seems to be answered by the language of the new statute. Subsection (c) provides that "upon the death of a joint tenant his interest shall pass to the surviving joint tenant," and subsection (d) states that the interest of the decedent remains liable for his debts and authorizes recovery of the interest by the decedent's personal representative in certain cases. These provisions deal specifically with the substantive rights of the joint tenants and would be irrelevant in an enabling act. By way of contrast, statutes such as section 55-59(e) and its counterpart as to joint bank accounts, section 53-146, do not purport to govern the rights of the parties *inter se* but merely are intended to afford protection to the corporation or bank in recognizing the survivor as the sole owner of the property.⁶

As is the custom in legislative drafting, the bill enacting the new statute also repealed "all laws and clauses of laws in conflict with

⁴ N.C. GEN. STAT. § 25-8-401, North Carolina comment 4 (1965).

⁵ N.C. GEN. STAT. § 55-59(e) (1965); N.C. GEN. STAT. § 55-59(i) (1965) extends this protection to registrars and transfer agents of corporations subject to the corporation laws of North Carolina.

⁶ See, e.g., *Jones v. Fulbright*, 197 N.C. 274, 148 S.E. 229 (1929). However, as the authors have previously pointed out, the courts of at least one state, Illinois, have interpreted such statutes as governing the substantive rights of the parties. See *Edwards & Wood* 310-11.

this Act.”⁷ It could be argued that section 55-59(e) is in conflict since its terms are significantly broader in that any persons—not just spouses—may be recognized as joint tenants by the corporation. Thus, the registrar or transfer agent need not establish that the joint tenants were husband and wife at the time the stock was issued and at the death of one of the owners, nor must he be concerned with the intent to create a right of survivorship. However, since section 55-59(e) is designed only to give protection to the corporation and its stock transfer agent, rather than to affect substantive rights of the joint owners, the better interpretation would be that it is not in conflict with the new statute.

B. Parties Eligible. Section (a) of the statute limits its application to joint ownership of corporate securities by spouses. While this undoubtedly covers the majority of instances in which joint ownership may be desired, other parties, such as parents and children, must look to pre-existing case law for assistance in establishing a valid joint tenancy. Unfortunately, as shown previously,⁸ that case law yields no clear answers.

Hopefully, the evolution of the new statute is foretold by that of our joint bank account statute.⁹ When first enacted in 1959, its provisions were limited to accounts in the name of husband and wife. This proved to be unduly restrictive and in 1963 the statute was amended to provide that such accounts could be created “in the names of two or more persons”¹⁰ A similar amendment to the new statute dealing with corporate securities would be welcome.¹¹

C. Form of Registration Required. Section (b)(1) provides that the new statute is applicable only when “shares or securities indicate that they are owned with the right of survivorship, or otherwise clearly indicate an intention that upon the death of either spouse the interest of the decedent shall pass to the surviving spouse.” Obviously, securities registered in the form “X and Y as joint

⁷ Ch. 864, § 6, [1967] N.C. Sess. L.

⁸ See discussion of North Carolina case law in Edwards & Wood 292-302.

⁹ N.C. GEN. STAT. § 41-2.1 (1966).

¹⁰ N.C. GEN. STAT. § 41-2.1 (1966).

¹¹ To eliminate any questions posed by the position of the statute, such an amendment might also remove the statute from its present position in the Uniform Commercial Code and insert it in Chapter 41 of the General Statutes, concerned with estates in which property may be held or in Chapter 55, the general corporation law.

tenants with right of survivorship and not as tenants in common" meet the requirements of the statute.

Suppose, however, that corporate securities are registered in the name of "X and Y as joint tenants" or simply as "X and Y." Do such registrations sufficiently indicate that the parties intended to confer a right of survivorship on one another? The answer is, of course, that on their face, they do not. The attorney or personal representative dealing with such registrations should decline to recognize such securities as being governed by the statute, absent a ruling by the courts to the contrary.

Would a court admit extrinsic evidence to show that the parties intended to create a joint tenancy governed by the statute? The statute requires that the "share or securities" indicate the intent of survivorship, which could be interpreted to exclude any evidence of intent other than the registration itself. Even if extrinsic evidence were permitted, the parties would be faced with the prospect of tedious and expensive litigation to establish the ownership of the shares.

The problems concerning registration could be eliminated by providing in the statute the exact words necessary to come within the provisions of the statute. While this would arguably work against those persons who desire to be governed by the statute but are ignorant of its terms, such an amendment would have the offsetting benefits of clarity and certainty.¹²

D. Application to Brokerage Accounts. Section (b)(2) of the new statute provides that broker and custodian accounts come within the statute where "by book entry or otherwise" the intent of the parties to create a right of survivorship is indicated. Funds derived from the sale of securities or held for their purchase are also jointly held.

This is an excellent provision in a day when more and more investors utilize the conveniences of "street accounts" with their brokers. The provision does necessitate, however, an examination of the broker's books and account records. Good practice dictates that brokers should require the execution of written agreements when opening joint accounts, and these agreements normally con-

¹² N.C. GEN. STAT. § 25-8-407(b)(1) (Supp. 1967). Such a provision was suggested by the authors in the statute proposed in their earlier article. See Edwards & Wood 312. See also the language of N.C. GEN. STAT. § 55-59(e) (1965).

tain language expressly creating a right of survivorship.¹³ Absent such agreements, however, extrinsic evidence would be the only proof of the intent of the parties to establish the right of survivorship and bring the account within the statute. Long inaction with notice of the form of account might be deemed sufficient indicia of intent by a court.

E. *Inter Vivos Effects; "Interest."* Strangely, the statute has no provision concerning the rights of the joint tenants *inter partes* as to income from, voting rights under, and transfer of jointly held securities. A consideration of these points raises a basic question—What is the "interest" of a joint tenant under the statute?

Subsection (c) of the statute provides that upon the death of one of the joint tenants, his "interest" passes to the survivor, but the statute does not define what that "interest" is, nor how it is to be determined. At common law, joint tenants were presumed to have equal shares of the whole.¹⁴ On the other hand, our joint bank account statute provides that, for purposes of liability for debts of individual depositors, the interest of each depositor is determined by "the extent to which each has contributed to the unwithdrawn account" during their joint lifetimes, and upon the death of one, the fund is deemed owned equally between or among the depositors.¹⁵ Thus, the "interest" of one tenant might be regarded as a one-half interest with the other spouse having an equal interest, or it might be deemed a greater or lesser share, depending on the proportionate consideration furnished by each.

While no definitive solution to this problem can be given, it would seem reasonable to assume that the General Assembly intended that each tenant have an equal "interest" in the securities, regardless of their respective contributions to the cost of the securities. This interpretation avoids the necessity of tracing the source of funds used to purchase the securities—usually a difficult, if not impossible, task. In addition, the specific provision in the bank account statute supports an inference that, by its silence, the General Assembly intended that the common law rule apply to jointly-held securities. Finally, such an interpretation would seem to conform to the inten-

¹³ For example, the agreement currently used by Reynolds and Company states that "upon the death of either of us, all securities, funds and property in the account shall be the sole property of the survivor."

¹⁴ 48 C.J.S. *Joint Tenancy* § 6 (1947).

¹⁵ N.C. GEN. STAT. § 41-2.1(b)(2) (Supp. 1966).

tions of most laymen creating the joint tenancy, since almost without exception, they regard each joint owner as having an equal interest in the property. However, these conjectures can be laid to rest only by interpretation of the statute by our courts or amendment of the statute by the Legislature.¹⁶

Apart from the question of how a tenant's interest is determined, one must ascertain the rights of the tenants *inter partes* during their joint lives. At common law, joint tenants shared equally in the proceeds of the property,¹⁷ and had a right to partition the property and receive outright their respective portions.¹⁸ Their respective interests could be subjected to their individual debts.¹⁹ By contrast, under a tenancy by the entirety, the husband is entitled to all income during coverture,²⁰ neither party may partition so long as the marriage continues,²¹ and the property is not subject to the individual debts of the spouses.²² The question then becomes whether the new type of joint ownership created by the statute partakes of the characteristics of a joint tenancy or a tenancy by the entirety.

Although the new estate superficially resembles a tenancy by the entirety in that its privileges are limited to husband and wife, it has long been settled law in this state that there can be no tenancy by the entirety in personal property.²³ While it is within the legislative prerogative to change this rule of law, it is doubtful that the Gen-

¹⁶ In their initial article, the authors proposed that the interest of each joint tenant be in proportion to the consideration furnished by him. Edwards & Wood 313, 317. Comments by readers of that article and further reflection by the authors have convinced them that equal ownership is easier to administer and more in keeping with the probable intent of the parties. The present statute's ambiguity could be eliminated by an additional provision that "in any joint tenancy created under this section, each joint tenant shall have an equal interest with every other joint tenant in the securities so held, in the income or proceeds therefrom, and in any accretions or additions thereto."

¹⁷ 48 C.J.S. *Joint Tenancy* § 9 (1947).

¹⁸ *Id.* at § 4. See N.C. GEN. STAT. § 46-42 to -44 (1966) for the North Carolina procedure to partition jointly-held personal property.

¹⁹ 48 C.J.S. *Joint Tenancy* §§ 4, 16 (1947). See *Woolard v. Smith*, 244 N.C. 489, 94 S.E.2d 466 (1956) (dictum).

²⁰ *Lee, Tenancy by the Entirety in North Carolina*, 41 N.C.L. REV. 67, 79 (1962).

²¹ *Id.* at 68.

²² *Id.* at 84.

²³ *Bowling v. Bowling*, 243 N.C. 515, 91 S.E.2d 176 (1956); *Wilson v. Ervin*, 227 N.C. 396, 42 S.E.2d 468 (1947); *Turlington v. Lucas*, 186 N.C. 283, 119 S.E. 366 (1923).

eral Assembly so intended, since to do so would run counter to the modern trend of conferring upon married women property rights equal to those of their husbands.²⁴ Thus, one might assume that dividends from jointly held securities will belong to the tenants equally,²⁵ and that the securities would be subject to partition under section 46-42 of the General Statutes.²⁶ Moreover, if one tenant could force a severance of the joint tenancy by partition proceeding, or by sale of his separate interest, the judgment creditors of an individual tenant should be deemed to have the right to reach the interest. Since only spouses can establish a joint tenancy under the statute, it would seem by analogy to a tenancy by the entirety that a divorce would result in a severance of the tenancy and that the parties would thereafter own the stock as tenants in common.²⁷ Again, by analogy to entirety property, the spouses should be deemed to hold the proceeds of a sale of jointly owned securities as tenants in common.²⁸

F. *Recovery of Shares*. Subsection (c) of the statute provides that the "interest" of a deceased joint tenant remains liable for his debts "in the same manner as the personal property included in his estate" even after that "interest" has passed to the surviving joint tenant. In the event the probate estate is insufficient to satisfy the decedent's debts, his personal representative may recover the shares from the surviving joint tenant.

No statutory procedure for the recovery of the securities is provided, but the most likely method would be a special proceeding instituted in the county in which the estate is being administered.²⁹ Since the statute provides that the shares remain liable, "as personal

²⁴ See *Turlington v. Lucas*, 186 N.C. 283, 119 S.E. 366 (1923).

²⁵ Stock dividends would be issued in the same form—jointly—as were the original securities. However, it would seem that cash dividends, which usually are not re-invested, would belong to the co-owners equally without right of survivorship. The question would become crucial where one co-owner died before a cash dividend check had been converted to cash. Note, moreover, that section (b)(2) of the statute does not provide that funds derived from cash dividends and held in a brokerage account are held jointly with right of survivorship.

²⁶ As a matter of practice, stock transfer agents will transfer jointly registered securities only upon signatures of all joint tenants. Unless all such signatures can be obtained, partition is the only method of dividing the securities.

²⁷ See *Lee, Tenancy by the Entirety in North Carolina*, 41 N.C.L. REV. 67, 97 (1962).

²⁸ *Id.* at 78.

²⁹ See N.C. GEN. STAT. § 1-393 (1953).

property," such securities should be recovered and used before real estate is sold to pay debts.³⁰ The greatest problem facing the personal representative under the statute, however, is not the mechanics of recovery but the amount he should seek. Until clarification is obtained by statutory amendment or judicial decision, the diligent personal representative should take the position that the decedent's "interest" was equal to the amount of his contribution, not merely a pro-rata share, when a larger amount would thus be recoverable.

G. Inheritance Tax Provisions. Section (d) of the statute provides that no provisions of the inheritance tax laws, specifically sections 2, 11, and 24 of chapter One Hundred Five of the General Statutes, are repealed by the new statute. The practical effect of this provision is to make it certain that inheritance tax waivers will be required by transfer agents before effecting transfer upon the death of a joint tenant.

H. Effective Date. The session law enacting the new statute established October 1, 1967, as its effective date.³¹ Thus, the statute applies to securities registered and brokerage accounts opened after that date, but what is the status of securities registered and accounts opened before October 1, 1967?

Statutes are presumed to have only prospective effect, absent clearly expressed retroactive intent.³² Moreover, to regard this statute as having retroactive effect would raise the question of unconstitutional impairment of vested contract rights.³³ Accordingly, absent judicial sanction to the contrary, the statute should be regarded as prospective only in effect. Those desiring to establish

³⁰ Before realty may be sold to pay debts, it must be shown that "the personal estate of a decedent" is insufficient to pay the decedent's debts and costs of administration. N.C. GEN. STAT. § 28-81 (1966).

An interesting problem would arise if an estate contained both a jointly-held bank account of which the surviving tenant was someone other than his spouse, and corporate securities held as joint-tenants with the surviving spouse. N.C. GEN. STAT. § 41-2.1(b)(4) requires the legal representative of the deceased to apply the one-half of a jointly-held bank account paid over to him to the decedent's debts if "all other personal assets of the estate have been exhausted." [Emphasis added]. In this situation, should the legal representative first pursue and exhaust proceeds of jointly-held securities before using the bank account proceeds or should both assets be used proportionately to pay debts?

³¹ Ch. 864, § 3, [1967] N.C. Sess. L.

³² *Ashley v. Brown*, 198 N.C. 369, 151 S.E. 725 (1930); E. CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 277 (1940).

³³ *State v. Haynie*, 169 N.C. 277, 84 S.E. 385 (1915); E. CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 278; Edwards & Wood 315 n.93.

clearly valid joint tenancies of corporate securities or brokerage accounts should re-register the securities in a form "clearly evidencing" the intent to create a right of survivorship or execute new brokerage agreements containing language providing for a right of survivorship.³⁴

I. *Conflict of Laws*. Some question may be raised concerning the applicability of the new statute to securities of foreign corporations because of the conflict of laws rule set forth in the Uniform Commercial Code. That rule is set forth in section 25-8-106 as follows:

The validity of a security and the rights and duties of the issuer with respect to registration of transfer are governed by the law (including the conflict of laws rules) of the jurisdiction of organization of the issuer.

Thus the stock transfer agent or personal representative dealing with jointly-held securities of a foreign corporation must look to the laws of that state, including conflict of laws rules, to determine the validity of the registration and transfer. Fortunately, however, the majority rule seems to be that when stock in a corporation created under the law of one state is transferred between residents of another state, the law of the state in which the transferor resides governs the transaction and the rights of the parties *inter se*.³⁵ The

³⁴ In their original article, 44 N.C.L. REV. at 314, the authors proposed an express legislative sanction of the execution of agreements between stockholders as to stock issued before the effective date of the statute, as follows:

The provisions of this section shall not apply to any securities registered as provided in subsection (a) which were issued prior to the effective date of this section, unless the persons in whose names said securities have been issued shall execute and file with the corporation issuing such securities or with its transfer agent or registrar an agreement indicating that this section shall apply.

A written agreement in substantially the following form shall be sufficient to secure the application of this section:

We,, and
, owners of shares of (*specify security*) of (*specify corporation*), represented by certificate number (s), hereby agree that our ownership in the above-mentioned securities shall be as joint tenants with right of survivorship in accordance with North Carolina General Statutes Section

This day of, 19.....

..... (SEAL)

..... (SEAL)

..... (SEAL)

³⁵ H. GOODRICH, CONFLICT OF LAWS § 162 (4th ed. 1964). See also Edwards & Wood 295 n.21.

transfer agent or personal representative would thus be directed back to the law of North Carolina in all instances where the securities were acquired by persons then resident in North Carolina or where such securities were first issued in joint names in this state.

III. SUMMARY

Joint ownership of property has many pitfalls for the unwary, and its benefits are frequently exaggerated. Therefore, joint ownership should not be blindly advocated. In some factual situations, however, it can be desirable, and despite its disadvantages, it *will* be used indiscriminately by many persons. Thus, the statute reviewed in this article stands as a step in the right direction, for it offers some guidance as to the effects of a form of ownership which will often be encountered. Some suggestions could be offered, however, to increase its beneficial results. First, its provisions should be broadened to include all persons, not merely husband and wife. Secondly, greater specificity as to the form of registration required would be desirable. Most importantly, however, the statute should be amended to make certain the *inter vivos* rights of the joint tenants and to define more precisely the "interest" of each tenant. With these changes, an area of substantial controversy in North Carolina law would be clarified and, hopefully, laid to rest.