

STATE OF MICHIGAN
IN THE SUPREME COURT

DIMITRIOS ZAVRADINOS,

Plaintiff/Appellee,

Supreme Court No. 135137
Court Of Appeals No. 268570
Oakland County Circuit Court
Lower Court No: 04-062158-CK

-vs-

JTRB, INC., a Michigan corporation, **JTR II, LLC.**,
a Michigan Limited Liability Company, **RT1, INC.**,
a Michigan corporation, **LITTLE DADDY'S OF
BLOOMFIELD HILLS, MICHIGAN, LLC**, a
Michigan Limited Liability Company, **RICHARD ROGOW**,
an individual, **ATHANASIOS PERISTERIS**, an individual,

Defendants

and

ROBERT PROBERT, an individual,

Defendant/Appellant

and

LIZA DANIELLE PROBERT,

Intervening Party/Appellant

HSM LAW OFFICES
BY: RAYMOND FUEL (26538)
Attorneys for Plaintiff
37000 Grand River Ave., Suite 350
Farmington Hills, MI 48335
(248) 442-0510 Fax (248) 442-0518

CAMPBELL, O'BRIEN & MISTELE, P.C.
BY: ROBERT J. FIGA (P47159)
Attorney for Robert Probert and Intervening
Party Liza Danielle Probert only
100 West Big Beaver Rd., Ste. 385
Troy, MI 48084
(248) 743-9800 Fax (248) 743-0900

135137
DFAE's SUPPL

**DEFENDANT ROBERT PROBERT AND INTERVENING PARTY LIZA DANIELLE
PROBERT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO APPLICATION FOR
LEAVE TO APPEAL**

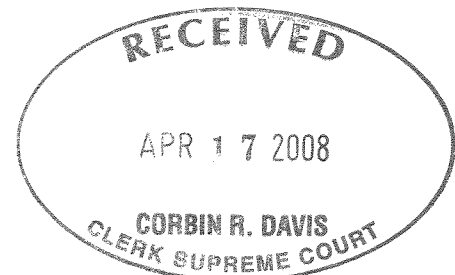


TABLE OF CONTENTS

Table of Contents i

Index of Authorities ii

I. Statement of Material Proceedings and Facts 1

II. Argument

 A. DeYoung v Mesler Correctly Construed MCL 557.151
 to Mean That there is a Statutory Presumption That
 Property Held Jointly by a Husband and Wife is Held
 by Them as Tenants by the Entirety Unless the Title
 or Conveyance Expressly Provides Otherwise 2

 B. The Presumption of Tenancy by the Entirety in Personal
 and Real Property Held by Husband and Wife May Only
 be Overcome by Words Explicitly Disclaiming a Tenancy
 by the Entireties 7

 C. A Provision in the title or Conveyance Specifically Identifying
 the Property Owners as Husband and Wife Does Not Affect
 the Determination Whether the Presumption of a Tenancy by
 the Entirety has been Overcome 8

III. Conclusion 11

INDEX OF AUTHORITIES

STATE CASES

<i>Auditor General v Fisher</i> , 84 Mich 128, 133, 47 NW 574.....	8
<i>Budwit v Herr</i> , 339 Mich 265, 63 NW2d 841 (1954).....	3, 4
<i>Collins v Norris</i> , 314 Mich 145, 147, 22 NW2d 249 (1946).....	9
<i>Constitution Bank v Olson</i> , 423 Pa.Super. 134, 620 A.2d 1146 (Pa.Super.1993).....	10
<i>Department of Treasury v Comerica Bank</i> , 201 Mich App 318; 506 NW2d 283	10
<i>Detroit & Security Trust Co. v Kramer</i> , 247 Mich 468, 226 NW234 (1929)	5
<i>DeYoung v Mesler</i> , 373 Mich 499 (1964)	1, 6, 7, 8
<i>Farmers' & Merchants' Bank of Grand Rapids</i> , 221 Mich 247, 190 NW 699 (1922).....	3
<i>Hoyt v Winstanley</i> , 221 Mich 515; 191 NW 213 (1922)	5, 7
<i>Jackson City Bank & Trust Co. v Frederick</i> , 271 Mich 538, 547, 260 NW 908 (1935).....	8
<i>Long v Earle</i> , 277 Mich 505, 517, 269 NW 577, 581 (1936).....	4, 10
<i>Midgley v Walker</i> , 101 Mich 583 (584)	3
<i>Morgan v Cincinnati Insurance Company</i> , 411 Mich 267, 284, 307 NW2d 53 (1981).....	3, 4
<i>Sanford v Bertrou</i> , 204 Mich 244, 249, 169 NW 880, 882 (1918).....	4
<i>Scott v Flynn</i> , 946 SW2d 248 (Mo.App.E.D.1997)	9
<i>Tyler v United States</i> , 281 US 497, 501, 50 S.Ct. 356, 74 L.Ed. 991 (1930).....	4

U.S. v Craft, 535 U.S. 274, 279,
122 S.Ct. 1414, 152 L.Ed.2d 437 (2002)3, 4

Commissioner of Internal Revenue v Hart,
76 F.2d 864 (6th Cir. 1935)5, 6

.....

CONSTITUTIONS, STATUTES AND COURT RULES

MCL 552.1024

MCL 557.1512, 4, 5, 6, 9

s:\probert\table of contents and authority

I. Statement Of Material Proceedings And Facts

Plaintiff/Appellant Dimitrios Zavrados obtained a judgment against Defendant/Appellee Robert Probert based on obligations that arose in connection with his interest in the Little Daddy's Restaurants in metropolitan Detroit. Zavrados, as creditor, sought to garnish Solomon Smith Barney stock accounts held by Robert Probert and his wife, Danielle Probert (The precise history is stated in the Statement of Material Proceedings and Facts of the Answer to Application). In response to the garnishment, Smith Barney filed a disclosure with the Court indicating that Defendant Robert Probert and his wife Liza Danielle Probert had an interest in 2 current stock accounts held through Smith Barney: Account Numbers 213-03022 (\$54,528.88) and 213-05892 (\$103,608.24), both in the names of Robert Allen Probert and Liza Danielle Probert.

At the evidentiary hearing on December 7, 2005, Exhibit "A" was admitted through Janet Kemp, financial consultant to the Proberts (p. 9 of Transcript) and contained documents related to the two garnished account numbers ending 05892 and 03022 (p. 8 of Trans.). Ms. Kemp testified that account number 05892 opened in March or April of 2001 and the other account 21303022 opened in the beginning of 2000 (p. 9 of Trans.). Ms. Kemp testified that one of the Proberts could "call and ask for a certain dollar amount or whatever to be withdrawn, but the money, the check would be issued in joint account" and in "joint name" and that "both their names would be on it". (See pp. 11-12 of Tr.). Intervening Party Lisa Probert testified that she and Robert Probert had been married since 1993 (p. 27 of Tr.).

II. Argument

A. *DeYoung v Mesler* Correctly Construed MCL 557.151 To Mean That There Is A Statutory Presumption That Property Held Jointly By A Husband And Wife Is Held By Them As Tenants By The Entirety Unless The Title Or Conveyance Expressly Provides Otherwise

In 1927, the Michigan Legislature enacted MCL 557.151, which was described as “[A]N ACT to provide for the joint ownership by husband and wife in joint tenancy of certain classes of personal property with right of survivorship”. MCL 557.151, Act 212 of the Public Laws of 1927, specifically states that certain types of personal property “made payable to persons who are husband and wife, . . . shall be held by such husband and wife in joint tenancy unless otherwise expressly provided, in the same manner and subject to the same restriction, consequences and conditions as are incident to the ownership of real estate held jointly by husband and wife under the laws of this state , with full right of ownership by survivorship in case of death of either”¹

There are generally three legal means of concurrent ownership of property: tenancy in common, joint tenancy, and tenancy by the entirety.

¹ MCL 557.151, states that:

“All bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidence of indebtedness hereafter made payable to persons who are husband and wife, or made payable to them as endorsees or assignees, or otherwise, shall be held by such husband and wife in joint tenancy unless otherwise therein expressly provided, in the same manner and subject to the same restriction, consequences and conditions as are incident to the ownership of real estate held jointly by husband and wife under the laws of this state, with full right of ownership by survivorship in case of death of either.

Tenants in common may each unilaterally alienate their shares through sale or gift or place encumbrances upon these shares. They also have the power to pass these shares to their heirs upon death. *U.S. v Craft*, 535 U.S. 274, 279, 122 S.Ct. 1414, 152 L.Ed.2d 437 (2002) [the issue for the U.S. Supreme Court was whether a husband, as tenant by the entirety under Michigan law, possessed property rights to which a federal tax lien could attach].

Joint tenants possess many of the rights of tenants in common with the main difference that each joint tenant possesses the entire estate rather than a fractional share, and upon the death of one joint tenant, the tenant's share does not pass through will or intestate succession, but rather the remaining tenant(s) automatically inherit it. *U.S. v Craft, supra*, p. 280. Another difference is that in order for a joint tenant to alienate his or her individual shares the estate must first be severed which means converted to a tenancy in common with each tenant possessing an equal fractional share. *U.S. v Craft, supra*, p. 280. A devise by one joint tenant of his share will be inoperative, inasmuch as the right of survivorship takes precedence. *Midgley v Walker*, 101 Mich 583, 584.

Tenancy by the entirety at common law has been defined as an estate in joint tenancy plus the unity of marriage, and are regarded as a modified form of joint tenancy, and thus can only exist between married persons. *In re Farmers' & Merchants' Bank of Grand Rapids*, 221 Mich 247, 190 NW 699 (1922); *Budwit v Herr*, 339 Mich 265, 63 NW2d 841 (1954). A tenancy by the entireties is created when a conveyance of land is made to a husband and wife. *Morgan v Cincinnati Insurance Company*, 411 Mich 267, 284, 307 NW2d 53 (1981). This is a form of single ownership created by marital unity..

An estate in fee given to a husband and wife are “neither properly joint tenants, nor tenants in common, for husband and wife being considered as one person in law . . . , the consequence of which is, that neither the husband nor the wife can dispose of any part, without the assent of the other, but the whole must remain to the survivor”. *Morgan, supra*, p. 284. Like joint tenants, tenants by the entirety enjoy the right of survivorship. *U.S. v Craft, supra*, p. 281. Unlike joint tenancies, however, tenancies by the entirety cannot easily be severed, and it requires the consent of both parties or the ending of the marriage in divorce. *U.S. v Craft, supra*, p. 281; MCL 552.102.

Standard 6.4 of the Michigan Land Title Standards (4th Ed) states a “deed or devise to two persons, who are in fact husband and wife, creates a tenancy by the entireties, unless a contrary intent is expressed in said deed or devise . . .”.

A quick review reflects that tenancy by the entirety is presumed when the two persons holding the property are husband and wife. Property held as tenancy by the entirety does not belong to either spouse, but to a single entity composed of the married persons. Neither spouse has any “separate interest in such an estate.” *Sanford v Bertrau*, 204 Mich 244, 249, 169 NW 880, 882 (1918).; see also *Long v Earle*, 277 Mich 505, 517, 269 NW 577, 581 (1936). An entireties estate constitutes an indivisible “sole tenancy.” See *Budwit v Herr*, 339 Mich 265, 272, 63 NW2d 841, 844 (1954); see also *Tyler v United States*, 281 US 497, 501, 50 S.Ct. 356, 74 L.Ed. 991 (1930) (“[T]he tenants constitute a unit; neither can dispose of any part of the estate with the consent of the other; and the whole continues in survivor”).

Prior to the statutory enactment of MCL 557.151, it was already a common-law rule that a conveyance to husband and wife of real estate creates a tenancy by the entirety

except in respect to conveyances explicitly indicating that some other kind of tenancy is intended. In *Hoyt v Winstanley*, 221 Mich 515; 191 NW 213 (1922), the Michigan Supreme Court held that to create a joint tenancy by a conveyance to a husband and wife, “the words used must be sufficiently clear to negative the common-law presumption that an estate by entirety was intended.” *Id.* at 520. Thus, even the qualifying phrase ‘as joint tenants’, while sufficient to create a joint tenancy in a conveyance to grantees generally, does not avoid the creation of an estate by the entirety when the grantees stand in the marital relation to each other. In *Hoyt*, the language used in the deed was to “Jasper Winstanley and wife as joint tenants” and the Court concluded that this “conveyed an estate by the entirety”. *Id.* at 520. Further, in Michigan where real estate is conveyed to a husband and wife through tenancy by the entirety, upon the death of either, the title in fee is in the survivor. *Detroit & Security Trust Co. v Kramer*, 247 Mich 468, 226 NW234 (1929).

It appears that the first court to examine MCL 557.151 was the Federal Sixth Circuit Court of Appeals in the case of *Commissioner of Internal Revenue v Hart*, 76 F.2d 864 (6th Cir. 1935). The Court stated “[A]s this statute has not hitherto been construed by the Michigan Supreme Court, its meaning under familiar principles becomes one of first impression here” referring to MCL 557.151. The Federal Court of Appeals then ruled that “it is now established law that in the absence of statutory provisions to the contrary, a right of survivorship may be created in personal property” *Commissioner v Hart*, *supra*, p. 865.

One of the issues raised in the *Commissioner v Hart* case was the language “shall be held as husband and wife in joint tenancy”. Importantly, however, the Court

examined the use of the word 'joint tenancy' in the statute. The Court stated that effect must be given to the succeeding clause of the statute "In the same manner and subject to the same restrictions, consequences and conditions as are incident to the ownership of real estate held jointly by husband and wife under the laws of this state". *Commissioner v Hart*, supra, p. 866. The Court then stated:

"[T]he fact that the act uses the term 'joint tenancy' does not require a different conclusion, because that is the generic term applied to a class of tenancies which includes tenancies by the entirety, and the Michigan court has been careful to point out that estates by the entirety are a modified form of joint tenancies, and that the terms are sometimes used interchangeably. *Hoyt v Winstanley*, supra."

The Michigan Supreme Court, in *DeYoung v Mesler*, was requested to rule upon the statutory language of MCL 557.151 and the specific issue for the Court was does MCL 557.151 "which specifically provides that debentures made payable to husband and wife shall be held by them in *joint tenancy* in the same manner as real estate held jointly by them, with full right of survivorship create, instead, a *tenancy by the entireties* in such property?" "We accept the question as stating the issue." *DeYoung*, supra, p. 501.

The Court held that estates by entirety are a modified form of joint tenancy and that "in order not to create a tenancy by the entirety", the words " 'not as tenants by the entirety' " must be used. *DeYoung*, supra, p. 503-504. Thus, *DeYoung* construed MCL 557.151 to mean that certain types of personal property, when held by a husband and wife, creates a presumption that it is held as tenants by the entirety "Unless The Title Or Conveyance Expressly Provides Otherwise".

B. The Presumption Of Tenancy By the Entirety In Personal And Real Property Held By Husband And Wife May Only Be Overcome By Words Explicitly Disclaiming A Tenancy By The Entireties.

The *DeYoung v Mesler* Court stated “to require that in order not to create a tenancy by the entirety in realty conveyed to husband and wife, even the use of the words ‘as joint tenants’ is insufficient. The only alternative is to use the words ‘not as tenants by the entirety’ when such is the intent of the conveyance”. *Id.* at 503-504.

The language on the Smith-Barney investment forms does not expressly overcome the statutory presumption that a tenancy by the entireties was intended. The Proberts were married in 1993 and the accounts were opened in 2000/2001. Both names would have to be on any withdrawal.

“Even the qualifying phrase ‘as joint tenants’, while sufficient to create a joint tenancy in a conveyance to grantees generally, does not avoid the creation of an estate by the entirety when the grantees stand in marital relation to each other” *DeYoung v Mesler*, 373 Mich 499 (1964) (citing *Hoyt v Winstanley* 221 Mich 515). The *DeYoung* case held that:

“The language of the cited case appears to require that in order not to create a tenancy by the entirety in realty conveyed to husband and wife, even the use of the words ‘as joint tenants’ is insufficient. The only alternative seems to be to use the words ‘not as tenants by the entirety’ when such is the intent of the conveyance”. *Id.* p. 503-504.

“To create an estate in joint tenancy in a conveyance to a husband and wife, the words used must be sufficiently clear to negative the common-law presumption that an estate by entirety was intended. Estates in joint tenancy are not favored.” *Id.* at p. 503.

The *DeYoung* Court found, as indicated by the Court of Appeals, that even listing a married couple as “joint tenants” is insufficient to extinguish a tenancy by the entirety, and in order to do so, an express statement of “not as tenants by the entirety” must be indicated. *DeYoung*, p. 503-504

C. A Provision In The Title Or Conveyance Specifically Identifying The Property Owners As Husband And Wife Does Not Affect The Determination Whether The Presumption Of A Tenancy By the Entirety Has Been Overcome

The statute states that certain personal property held by a husband and wife is held the same as real estate held by husband and wife, which is tenancy the entireties. A husband and wife owning property as tenants by the entirety possess the right of survivorship and, thus, upon the death of one spouse, the survivor becomes the sole owner of the property. A tenant by the entirety does not “inherit” his or her deceased cotenant’s interest in the property, but rather, the surviving tenant continues full ownership of the property alone. The death of one spouse does not vest the surviving spouse with interests he or she did not already hold; instead the deceased spouse’s interest is extinguished and the surviving spouse’s whole ownership survives.

An estate by the entirety, though not so delineated, is created by a conveyance to husband and wife. Where property was executed to two persons jointly without disclosing whether they were husband and wife, parol evidence was admissible to show such fact. *Auditor General v Fisher*, 84 Mich 128, 133, 47 NW 574. “A deed to two parties, who are husband and wife, is sufficient to create a tenancy by the entirety, whether the conveyance itself sets forth they are husband and wife or not”. *Jackson City Bank & Trust Co. v Frederick*, 271 Mich 538, 547, 260 NW 908 (1935).

Thus, it is true that even if an instrument does not state “husband and wife”, that as long as the persons are married at the time of the conveyance, then they hold as tenants by the entirety. Therefore, the use of “husband and wife” is not conclusive of whether the property is held as tenants by the entirety. On the other hand, where the parties are not husband and wife at the time of the conveyance, even though the conveyance identifies them as husband and wife, does not create an estate by the entireties. *Collins v Norris*, 314 Mich 145, 147, 22 NW2d 249 (1946). Thus, it appears that the key is whether the persons are married at the time of the conveyance, and not whether “husband and wife” is used, and the only way to overcome the presumption of tenants by the entirety is by language specifically disclaiming a tenancy by the entireties.

Further, MCLA 557.151 states “made payable to persons who *are* husband and wife” [emphasis added], which appears to indicate that the main element is that the two are actually married. Courts in other states have arrived at similar conclusions. In Missouri, the Court of Appeals held that the statutory presumption that a money market account belonging to a husband and wife was a tenancy by the entirety was not rebutted by the language “joint tenants with right of survivorship” appearing on the account card. *Scott v Flynn*, 946 SW2d 248, 251 (Mo.App.E.D. 1997) [attached as Exhibit “A”]. The Missouri court, similar to *DeYoung*, stated that to overcome the presumption, the evidence must be “so strong, clear, positive, unequivocal and definite as to leave no doubt” and that it would be necessary to “designate the account ‘[J]oint Tenants with Right of Survivorship and *Not as Tenants by the Entirety*’ or words to like effect”. *Scott, supra*, p. 251. In *Scott*, the account was titled “W.H. Scott or Abigail C. Scott Joint

Tenants with Right of Survivorship”, *Id.* at 250. The Court held that this language did not overcome the statutory presumption.

The Superior Courts of Pennsylvania (court of appeals) ruled that “[A]n intention to create the entirety is assumed from the deposit of an asset in both names of a husband and wife, without more, and from the fact of a marital relationship” *Constitution Bank v Olson*, 423 Pa.Super. 134, 140, 620 A.2d 1146 (Pa.Super 1993) [attached as Exhibit “B”]. The issue for the Pennsylvania court was whether an account entitled “[a] joint account titled Robert P. Olson & Elizabeth Q. Olson, J.T.W.R.O.S.” The Court further stated that “[T]he case law appears established in that the 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”. *Id.* at 1150. The Court ruled that an account opened by a husband and wife which is controlling and that “[I]t is their [husband and wife] actual marital status and not necessarily the word stated or omitted in the instrument that determines their right to take as tenants by the entireties”. *Constitution Bank*, *supra*, p. 143-144.

A holder of a joint account may withdraw the entire account. *Dep’t of Treas v Comerica Bank*, 201 Mich App 318, 325; 506 NW2d 283 (1993). In Michigan, “[I]t is well settled under the law of this State that one tenant by the entirety has no interest separable from that of the other . . . Each is vested with an entire title”. *Long v Earle*, 277 Mich 505, 517, 269 NW 577, 581 (1936). In the instant case, both names must be on any instrument withdrawing funds – thus making a unity of interest found only in marriage that is diverse from that of a “joint account”.

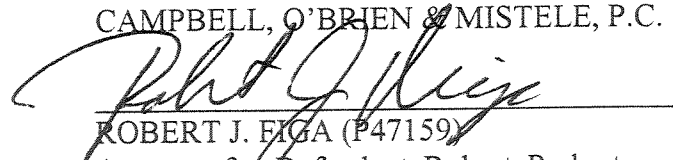
It is the fact of marriage, not the recitation of marriage, that creates the tenancy by the entirety. *In re Sampath*, 314 B.R. 73 (Bkrcty.E.D.Va,2004).

III. Conclusion

Defendant Robert Probert and Intervening party Liza Danielle Probert respectfully requests that this Honorable Court deny the Application for Leave to Appeal.

Respectfully submitted,

CAMPBELL, O'BRIEN & MISTELE, P.C.

A handwritten signature in black ink, appearing to read "Robert J. Figa", is written over a horizontal line.

ROBERT J. FIGA (P47159)

Attorney for Defendant Robert Probert and
Intervening Party Lisa Probert
100 W. Big Beaver Road, Suite 385
Troy, MI 48084

Dated: April 16, 2008

s:/probert/probert brief