STANDARD NO. 408

PROBLEM:

May the examiner conclude that a joint tenancy was created by a conveyance from the owner(s) to others, or to self (selves) and another (others), or to selves only, that:

A. expressly names the grantees "as joint tenants" (with or without "and not as tenants in common"), or does not expressly name the grantees "as joint tenants" but does expressly provide for the right of survivorship, or otherwise indicates by appropriate language the intent to create a joint tenancy anywhere in the conveyance; or,

B. expressly names the grantees "as tenants by the entirety"?[1]

RECOMMENDATION:

A. Yes, for conveyances on or after August 8, 1953; no for prior conveyances. (For conveyances that mention joint tenancy only in the consideration clause prior to September 28, 2011, see Title Standard No. 409.)

B. Yes, for conveyances on or after September 28, 2011; no for prior conveyances.

DISCUSSION:

A. The Maine joint tenancy statute, 33 M.R.S. §159, abrogated the English common law favor of joint tenancy effective March 15, 1821: "Conveyances not in mortgage and devises of land to 2 or more persons create estates in common unless otherwise expressed." Whether conveyances to two or more persons made prior to 1821 created a joint tenancy if no tenancy was expressed depends on applicable Massachusetts law.

Palmer v. Flint, 156 Me. 103, 161 A.2d 837 (1960) followed *Appeal of Garland*, 136 A. 459, 464 (Me. 1927) that "the evidence establishing [a joint tenancy] must be clear and convincing", reiterating the four essential unities of time, title, interest, and possession that were always necessary at common law for the creation of a joint tenancy. *Palmer* nevertheless overruled *Garland*'s judicial notice "that joint tenancies are not regarded with favor in this state", noting that:

> In recent years . . . [a] high percentage of conveyances to husband and wife, or to persons in close relationship, especially of residential property, have contained these words ['as joint tenants and not as tenants in common'] *in some part of the instrument of conveyance*. They have been placed in deeds with the obvious intention of creating an estate in joint tenancy . . . . [J]oint tenancies in this jurisdiction, for many practical reasons, are now being looked upon with favor rather than with disfavor. These deeds, if possible, should be construed as joint tenancies in the estate parted with by the grantor. 156 Me. at 112-113, 161 A.2d at 842. (Emphasis added.)

The alternate formulations quoted in the Problem and in Recommendation A were rendered equally effective to create a joint tenancy in the 1953 original second paragraph, first sentence,

[1] The right of severance, a unique attribute of joint tenancy, is so rarely mentioned in deeds of record and reported cases as noted in *Palmer v. Flint* (156 Me at 107), that it is not included in the statement of the PROBLEM. (Nor was it mentioned in the joint tenancy statute until 2011.) For severance of joint tenancy see Title Standard No. 410.

of §159 that obviated the need for an intervening straw conveyance in a conveyances from the owner to self and another as joint tenants (as amended in 1974[2] by the bracketed changes):

> A conveyance of real property by the owner thereof to himself and another or others[,or by the owners thereof to themselves or to themselves and another or others], *as joint tenants or with the right of survivorship*, or which otherwise indicates by appropriate language the intent to create a joint tenancy between [~~himself~~ such owner or owners] and such other or others [or between themselves] by such conveyance, shall create an estate in joint tenancy in the property so conveyed between all of the grantees, including the grantor. (Emphasis added.)

In light of the 1960 *Palmer* dictum and the 1953 statutory alternatives "as joint tenants or with the right of survivorship" the examiner should consider that a conveyance that fails to recite either or both of "as joint tenants" and "not as tenants in common" but which specifies rights of survivorship passes the "clear and convincing" test.

For conveyances to self (selves) and another (others) after September 28, 2011, the statute is augmented by examples of language that is sufficient to create a joint tenancy. The four unities remain nevertheless necessary to create a joint tenancy with the exception of 'time' and 'title' in conveyances to self (selves) and another (others).

Conveyances prior to 1953 from the owner(s) to self (selves) and another (others) transferred nothing to self because at common law a conveyance to self, being nugatory, precluded the unities of time and title, failed to create a joint tenancy, and created a tenancy in common between the parties "upon the ground that the grantor did not intend to divest himself of his complete title". *Strout v. Burgess,* 144 Me. 263, at 284, 68 A.2d 241, at 254 (1949).

Thus the Law Court has been on record in favor of joint tenancies over "the technical rules of the common law" since the *Palmer* decision while legislative amendments have obviated the unities of time and title in conveyances to self and another and otherwise enhanced the creation of joint tenancies from 1953 to 2011. In conveyances executed on or after the 2011 amendments there is explicitly no limit on the location of expression of intent to create a joint tenancy.[3]

B. Tenancies by the entirety, which when recognized in Maine did not create a joint tenancy (and which never included a right of severance), have not been recognized in Maine "since the [1844] enactment of the statute authorizing married women to hold property", *Palmer,* 156 Me. at 111-112, 161 A.2d at 841. Although apparently common in conveyances of Massachusetts property between spouses, the words "as tenants by the entirety" or otherwise to that effect in conveyances of Maine property have long been understood to fail to create a joint tenancy. Unless it is otherwise indicated such conveyances executed on or after September 28, 2011 will definitively create a joint tenancy in Maine.

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[2] P.L. 1973, c. 788, §164, effective April 1, 1974. See also 33 MRS §775, Form 10, as amended by P.L. 1975, cc. 104, and 623, effective July 1, 1975.

[3] The effective dates in the Recommendation are informed by the rule of judicial construction that statutes are prospective in effect unless a contrary legislative intent is "plain" ((*Nickels v. Nichols*, 105 A. 386 (Me. 1919); *Bowman v. Geyer,* 143 A. 272 (Me. 1928), cited in *Coates v. Maine Employment Security Commission*, 406 A.2d 94 (Me. 1979)).