REL: September 24, 2021

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2021

1200383

Norma J. Peinhardt and Larry Wayne Todd

v.

Louise Peinhardt and Amelia Peinhardt

Appeal from Cullman Circuit Court
(CV-06-322)

MENDHEIM, Justice.

Norma J. Peinhardt and Larry Wayne Todd, who sought in the Cullman Circuit Court a sale of certain real property and a division of the

sale proceeds, appeal from the January 25, 2021, summary judgment entered against them and in favor of Louise Peinhardt and Amelia Peinhardt. We reverse and remand.

I. Facts

Louis Peinhardt ("Louis") died on May 14, 1964. Louis had three children by his first wife, Emma Kress Peinhardt: Amelia Peinhardt ("Amelia"), Herman Louis Peinhardt ("Louis Jr."), and Louise Peinhardt ("Louise"). Louis and his second wife, Marie Peinhardt ("Marie"), also had a daughter, Linda P. Chambers ("Linda"), who is married to Leon Chambers ("Leon"). On April 3, 1965, Marie, Linda, and Leon executed a deed granting title to real property ("the subject property") to Louis Jr., Amelia, and Louise. A residence was located on the subject property, situated on County Road 436 in Cullman. The deed was recorded in the Cullman Probate Court the same day it was executed.

The April 3, 1965, deed, in pertinent part, provided:

> "Know All Men By These Presents: That Marie Peinhardt, a widow of Louis Peinhardt, deceased, Louise Peinhardt, Amelia Peinhardt, Herman Louis Peinhardt, and Linda P. Chambers who are all and the only heirs at law of Louis Peinhardt, deceased, ...; and being as such heirs at law,

joint owners and tenants in common of the premises hereinafter described and they further being desirous of selling said premises for the purposes of partition and division among said joint owners and tenants in common, and Marie Peinhardt, as the widow of Louis Peinhardt, Deceased, who joins in this conveyance for the purpose of releasing any interest of dower or otherwise in the following described property; and Leon Chambers, as the husband of Linda P. Chambers, who joins in this conveyance to transfer and convey any and all the interest he might own in said property. And that in consideration of the sum of Twenty Thousand and 00/100 ($20,000.00) Dollars, and other good and valuable consideration to the undersigned grantors in hand paid by the grantees herein, the receipt whereof is acknowledged, we, Marie Peinhardt, a widow, Linda P. Chambers, in whom is the legal title and her husband, Leon Chambers, who joins in to convey any and all the interest he might own, do grant, bargain, sell and convey unto Louise Peinhardt, Amelia Peinhardt, and Herman Louis Peinhardt for and during their joint lives and upon the death of either of them, then to the survivor or survivors of them in fee simple together with every contingent remainder and right of reversion all of their right, title and interest in and to the following described real estate situated, lying and being in Cullman County, Alabama, to-wit:

"[Description of the subject property that contains the residence on County Road 436 in Cullman.]

"Further, that as part of the above consideration, the grantors herein convey to Louise Peinhardt, Amelia Peinhardt and Herman Louis Peinhardt for and during their joint lives, and upon the death of either of them, then to the survivor, or survivors of them in fee simple, together with every contingent remainder and right of reversion all of their right, title and interest in and to the personal estate owned by Louis

> Peinhardt at the time of his decease, together with all of our undivided interest inherited by said grantors under the laws of descent and distribution of the State of Alabama from the Estate of Louis Peinhardt, Deceased,
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> "TO HAVE AND TO HOLD, to the said grantees for and during their joint lives and upon the death of either of them, then to the survivor, or survivors of them in fee simple, and to the heirs and assigns of such survivor or survivors forever, together with every contingent remainder and right of reversion."

(Capitalization in original; emphasis added.)

On June 21, 2006, Louis Jr. filed a complaint in the Cullman Circuit Court, seeking a sale for division of the subject property, against Amelia and Louise.[1] In that complaint, Louis Jr. alleged that "[t]he parties are

[1]We note that the parties in this case have argued as if this dispute concerns the entire subject property described in the April 3, 1965, deed. However, it appears that because Louis died intestate, his children -- Amelia, Louise, Louis Jr., and Linda -- immediately upon his death each inherited an undivided one-fourth share in the subject property as a whole, subject to Marie's dower interest (a one-third choate dower interest in Louis's real property as a whole). See Title 16, § 1(1) and § 9, and Title 34, § 41(3), Ala. Code 1940 (Recomp. 1958). Thus, in the April 3, 1965, deed, Marie was granting her one-third choate dower interest in the subject property, Leon was granting his curtesy/spousal rights as Linda's husband (see Title 16, § 12, Ala. Code 1940 (Recomp. 1958)), and Linda was granting her one-fourth undivided interest in the subject property from intestate succession to Amelia, Louise, and Louis Jr.

tenants in common of" the subject property. Louis Jr. alleged that the subject property could not be equitably divided among the parties, and thus he sought a sale of the subject property for division of the proceeds. Amelia and Louise filed an answer to the complaint in which they alleged that "[t]he parties hold title to the property in a Joint Survivorship capacity" and that therefore the subject property was not subject to division.

For reasons that are not entirely clear from the record, the case remained idle in the Cullman Circuit Court for several years.[2] However, on June 22, 2016, Louis Jr. executed a warranty deed in which he

[2]An order in the record dated January 20, 2010, states: "This case came before the Court on January 19, 2010 for review. After conference and upon oral motion, this case shall remain on the Administrative Docket for yearly review. Same shall be returned to the active trial docket upon motion of either party." On June 7, 2016, Louis Jr. filed a motion stating that the parties had "reached an agreement whereby this case be placed on the Court's administrative docket until such time as either party may file a motion to set the case for trial." The circuit court granted that motion the following day. On September 20, 2019, the circuit court entered an order requiring the parties to go to mediation and stating that, if the mediation was unsuccessful, the case would be set for trial. On May 29, 2020, the circuit court set the case for a trial to be held on June 22, 2020.

purported to convey his interest in the subject property to his wife, Norma J. Peinhardt ("Norma"), and his stepson, Larry Wayne Todd ("Larry"), "as joint tenants with a right of survivorship."[3] That deed was recorded the following day in the Cullman Probate Court.

On July 15, 2020, Louis Jr. filed a motion to amend his complaint and to add additional plaintiffs. Specifically, Louis Jr. sought to add Norma and Larry as plaintiffs to his complaint for a sale for division; the amended complaint noted Louis Jr.'s conveyance of his interest in the subject property to Norma and Larry, and it again alleged that Louis Jr., Amelia, and Louise "are tenants in common of the real property." On the same date, July 15, 2020, the circuit court granted the motion to add Norma and Larry as plaintiffs in the action.

On July 27, 2020, Louis Jr., Norma, and Larry filed an amended complaint in the circuit court. The amended complaint alleged that all

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[3]Louis Jr. had no constraints on what he chose to do with the one-fourth interest in the subject property that he held from intestate succession, so this dispute apparently concerns whether there were restrictions on the share of the subject property he received from Marie, Leon, and Linda, even though the parties do not argue it in those terms. See note 1, supra.

"[t]he parties are tenants in common of the real property." On July 28, 2020, Amelia and Louise filed an answer to the amended complaint in which they again asserted that the subject property was not subject to division because they "hold life estates to the real property sought to be sold" and they "do not consent to the sale of the subject real property for division." On December 2, 2020, Amelia and Louise filed an amended answer in which they asserted that they "hold title to the property as tenants in common in a joint survivorship capacity. Therefore, they are not subject to a partition sale under the statutes cited and Alabama case law."

On December 4, 2020, Amelia and Louise filed a summary-judgment motion in which they contended that a survivorship provision was part of the April 3, 1965, deed, and that

> "[a] survivorship provision between cotenants is upheld in this State pursuant to § 35-4-7, Code of Alabama, 1975, amended. A tenancy in common for life with contingent remainder in fee in the survivor differs from a joint tenancy in that the right of survivorship in one tenant in common is not destructible by the act of the other. Durant v. Hamrick, 409 So. 2d 731 (Ala. 1981)."

Amelia and Louise therefore argued that Louis Jr.'s June 22, 2016, conveyance of his interest in the subject property to Norma and Larry was a nullity because Amelia and Louise had not granted consent to the conveyance. An affidavit from Amelia was attached to the summary-judgment motion. In the affidavit, Amelia stated that the intent behind the April 3, 1965, deed was for Louis Jr., Amelia, and Louise to "buy out the interest of Marie Peinhardt and Linda P. Chambers [in the subject property] for a total sum of $20,000.00" and that Louis Jr., Amelia, and Louise

> "specifically requested to own the property with right of survivorship so that none of us would ever have to move off the property as long as we lived and the property would remain intact so that the last one of us living would be able to continue to live on the property. We were told at that time that the property could never be sold or divided without all three of us agreeing to do so if we owned it with the right of survivorship provision."

On December 9, 2020, Louis Jr. died, and on December 22, 2020, his attorney filed a suggestion of death with the circuit court.[4] On January 8,

[4]Louis Jr.'s death was not an impediment to the continuance of this litigation. Rule 25(a)(1) & (2), Ala. R. Civ. P., provide:

"(a) Death.

"(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5[, Ala. R. Civ. P.,] and upon persons not parties in the manner provided in Rule 4[, Ala. R. Civ. P.,] for the service of a summons, and may be served in any county. Unless the motion for substitution is made not later than six months after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall in the absence of a showing of excusable neglect be dismissed as to the deceased party.

"(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties."

In this case, with the advent of Louis Jr.'s death, his rights in the subject property were extinguished regardless of the outcome of the litigation. If Louis Jr.'s conveyance of the subject property to Norma and Larry is ruled to be permissible, then Louis Jr.'s former interest in the subject property belongs to Norma and Larry, who were added as plaintiffs to the action before Louis Jr.'s death. If Louis Jr.'s conveyance is ruled to be impermissible, then his interest in the subject property was extinguished upon his death and Amelia and Louise own all interest in the

2021, Norma and Larry filed a response to Amelia and Louise's summary-judgment motion. In that response, they contended that the language of the April 3, 1965, deed dictated that Louis Jr., Amelia, and Louise held the subject property as joint tenants and that, therefore, the right of survivorship was destructible through a conveyance or sale by one owner of his or her interest in the subject property without the consent of the other owners. Consequently, they argued that Louis Jr.'s June 22, 2016, conveyance of his interest in the subject property to them was legally permissible.

In reply to Norma and Larry's filing, Amelia and Louise filed with the circuit court on January 12, 2021, a second affidavit from Amelia that was substantially similar to her first one but added a few details from her perspective about the day the April 3, 1965, deed was executed:

> "Our attorney was Jim Berry. I, Amelia Peinhardt, along with Louise Peinhardt, Herman Louis Peinhardt, Marie Peinhardt, Linda P. Chambers, and Leon Chambers met at the law office of James 'Jim' Berry which was located in the Plaza Building close to the Court House in Cullman, Alabama to sign the deed on April 3, 1965. Also with us at the time was our uncle,

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property.

> Walter Daniel. On that day and just before the deed was executed, and in everyone's presence we were told by Attorney Jim Berry that the property could never be sold or divided without all three of us, me, Louise Peinhardt and Herman Louis Peinhardt, agreeing to do so if we owned the property with the right of survivorship provision. This is what we wanted. The deed was then signed and was taken to the court house by Walter Daniel to record."

On January 25, 2021, the circuit court entered a "Final Order" granting a summary judgment in favor of Amelia and Louise. After providing a rough outline of the facts and the summary-judgment standard of review, the circuit court described what it believed to be the core issue in the case and explained its rationale for ruling in Amelia and Louise's favor:

> "The dispositive issue in this case appears to be whether the 1965 deed created a joint tenancy with a right of survivorship, which could be destructible by the unilateral acts of a single grantee, or whether it created a tenancy in common, with a right of survivorship that is not destructible, except with the unanimous agreement of all grantees. In this case, the deed of conveyance clearly provided that upon the death of one or more of the grantees, the interest of the deceased grantee would pass to the survivor or survivors among them. The question then, is whether a joint tenancy or tenancy in common was created.
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> "'"Where a conveyance provides for concurrent ownership with the survivor to receive the fee, analysis of the

survivor's interest must begin with determining whether the grantees took as tenants in common or as joint tenants. See Durant v. Hamrick, 409 So. 2d 731, 738 (Ala. 1981). If they took as tenants in common, then the estate created is characterized as a tenancy in common with indestructible cross-contingent remainders in fee to the survivor." ' [Ex Parte Arvest Bank, 219 So. 3d 620, 625 (Ala. 2016) ([q]uoting, Johnson v. Keener, 425 So. 2d 1108, 1109 (Ala. 1983)[)]. '[A] joint tenancy with a right of survivorship can be unilaterally destroyed by the acts of one of the owners, thereby defeating the survivorship interest in the property.' Fadalla v. Fadalla, 929 So. 2d 429[, 434] (Ala. 2005). See, also, Nunn v. Keith, 289 Ala. 518, 268 So. 2d 792 (1972).

"After review of the motion for summary judgment, the response of [Norma and Larry] and the submissions of the parties, and after careful consideration of the relevant law, the court finds that the 1965 deed created a tenancy in common for life with a contingent remainder in favor of the survivor or survivors. The right of survivorship interest created in 1965 cannot be destroyed by the unilateral acts of any one of them. Durant v. Hamrick, 409 So. 2d 731, (Ala. 1981); Fadalla v. Fadalla, 929 So. 2d 429 (Ala. 2005). Therefore, the purported transfer by Louis Peinhardt, Jr. in 2016 is not effective to defeat the rights of Louise and Amelia Peinhardt and the property conveyed by the 1965 deed is not subject to a sale for division. [Amelia and Louise] being entitled to a judgment as a matter of law, it is therefore ORDERED and ADJUDGED that the motion for summary judgment filed by [Amelia and Louise] is hereby granted and this action is dismissed, costs taxed as paid. Any other motion or request for relief that is not specifically granted herein is denied. There being no further legal issues pending before the court, this judgment is a final judgment and the clerk shall enter a final disposition in [the State Judicial Information System]."

(Capitalization in original.)

On February 19, 2021, Norma and Larry filed a postjudgment motion to alter, amend, or vacate the circuit court's January 25, 2021, judgment. The circuit court denied the postjudgment motion by order the following day. On March 8, 2021, Norma and Larry filed this appeal.

II. Standard of Review

"Our standard of review for a summary judgment is as follows:

> " 'We review the trial court's grant or denial of a summary-judgment motion de novo, and we use the same standard used by the trial court to determine whether the evidence presented to the trial court presents a genuine issue of material fact. Bockman v. WCH, L.L.C., 943 So. 2d 789 (Ala. 2006). Once the summary-judgment movant shows there is no genuine issue of material fact, the nonmovant must then present substantial evidence creating a genuine issue of material fact. Id. "We review the evidence in a light most favorable to the nonmovant." 943 So. 2d at 795. We review questions of law de novo. Davis v. Hanson Aggregates Southeast, Inc., 952 So. 2d 330 (Ala. 2006).'

"Smith v. State Farm Mut. Auto. Ins. Co., 952 So. 2d 342, 346 (Ala. 2006)."

Lloyd Noland Found., Inc. v. HealthSouth Corp., 979 So. 2d 784, 793 (Ala. 2007).

III. Analysis

The parties on both sides agree that the dispositive issue is whether the April 3, 1965, deed created in grantees Louis Jr., Amelia, and Louise a joint tenancy or a tenancy in common with a right of survivorship. See notes 1 and 3, supra (noting that it appears that only a portion of Louis Jr.'s interest in the subject property is at issue in this case). If the estate created was a joint tenancy, then the right of survivorship was destructible, and therefore Louis Jr.'s conveyance of the portion of his interest in the subject property that is at issue in this case was permissible. See, e.g., Durant v. Hamrick, 409 So. 2d 731, 735 (Ala. 1981) ("The conveyance by one joint tenant to a third party destroys the joint tenancy and a tenancy in common among the new owners is created by operation of law."). On the other hand, if the estate created was a tenancy in common with a right of survivorship, then the right of survivorship was not destructible, and Louis Jr.'s conveyance of the portion of his interest in the subject property that is at issue in this case was not permissible

because he did not have consent from Amelia and Louise to execute the conveyance. See Durant, 409 So. 2d at 737 ("A tenancy in common for life with contingent remainder in fee in the survivor differs from a joint tenancy in that the right of survivorship in one tenant in common is not destructible by the act of the other.").

"The destructibility of joint tenancies has been termed 'one of the most confused areas of Alabama law.' Nunn v. Keith, 289 Ala. 518, 520, 268 So. 2d 792, 794 (1972)." Porter v. Porter, 472 So. 2d 630, 632 (Ala. 1985). The confusion arose from this Court's decision in Bernhard v. Bernhard, 278 Ala. 240, 177 So. 2d 565 (1965). In In re Spain, 831 F.2d 236 (11th Cir. 1987), the United States Court of Appeals for the Eleventh Circuit provided a fairly concise summary of the legal landscape that unfolded from Bernhard:

> "Alabama courts historically favored tenancies in common over joint tenancies.[5] Alabama did not recognize a

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[5]Alabama is far from alone in historically favoring tenancies in common over joint tenancies, a favoritism that traces back to English common law:

> "The common-law judges, though not perhaps at first, at

> joint tenant's right of survivorship until 1940, when the Alabama legislature provided that such rights must be enforced where expressly provided for in the instrument of conveyance.[4] Construing this provision, the court in Bernhard v. Bernhard, 278 Ala. 240, 177 So. 2d 565 (1965), held that a deed providing for concurrent ownership and rights of survivorship did not create a joint tenancy, but rather created a tenancy in common with cross contingent remainders to the survivor (i.e. indestructible rights of survivorship).
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> "In 1972, Alabama courts began to soften their harsh attitudes toward joint tenancies. Again construing the 1940 statute, the court in Nunn v. Keith, 289 Ala. 518, 268 So. 2d

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> a quite early period commenced to favor joint tenancy as against tenancy in common, with the result that, by a conveyance to two or more persons, with nothing to indicate a contrary intention, a joint tenancy was regarded as created. This leaning in favor of joint tenancy would seem to indicate a desire to lessen the feudal burdens of the tenants, since only one suit and service was due from all the joint tenants, and on the death of one joint tenant the other acquired his share free from the burdens in favor of the lord which ordinarily accrued on the death of the tenant of land. With the practical abolition of tenures, however, the reason for such policy ceased, and thereafter courts of equity, regarding the right of survivorship as productive of injustice, in making no provision for posterity, showed a disposition to lay hold of any indication of intent in order to construe an instrument as creating a tenancy in common, and not a joint tenancy."

2 Herbert Thorndike Tiffany and Basil Jones, The Law of Real Property § 421 (3d ed. 1939) (footnotes omitted). See also Durant, 409 So. 2d at 736.

792 (1972), overruled Bernhard and found that the Alabama legislature merely intended to provide grantors with the means to create a traditional joint tenancy. The court held that a deed conveying real property to grantees 'as joint tenants, with right of survivorship' did not create a tenancy in common with indestructible rights of survivorship, but instead created a joint tenancy (with its attendant destructible rights of survivorship).

"After November 9, 1972, the date of the Nunn decision, Alabama deeds purporting to create joint tenancies successfully created joint tenancies, not tenancies in common with cross contingent remainders in the survivor. Although the court in Durant v. Hamrick, 409 So. 2d 731 (Ala. 1981), indicated that a tenancy in common with cross contingent remainders to the survivor could be created in this post-Nunn period, this Bernhard-type interest could only be created if the parties clearly state their intention not to create a joint tenancy. Such an interest was created in Durant, where the deed expressly referred to a 'tenancy in common' with rights of survivorship."

"[4]Title 47, Ala. Code § 19 (1940) (current version at Ala. Code § 35-4-7 (1975)):

> " 'When one joint tenant dies before the severance, his interest does not survive to the other joint tenants but descends and vests as if his interest had been severed and ascertained; provided, that in the event it is stated in the instrument creating such tenancy that such tenancy is with right of survivorship or other words used therein showing such intention, then, upon the death of one joint tenant, his interest shall pass to the surviving joint

> tenant or tenants according to the intent of such instrument. This shall include those instruments of conveyance in which the grantor conveys to himself and one or more other persons and in which instruments it clearly appears that the intent is to create such a survivorship between joint tenants as is herein contemplated.' "

831 F.2d at 239. Spain does not, however, relate the whole picture.

> "Although Nunn [v. Keith, 289 Ala. 518, 268 So. 2d 792 (1972),] was applied prospectively in Bringhurst v. Hardin, 387 So. 2d 186 (Ala. 1980), Nunn was also held to apply to deeds created before the decision in Bernhard [v. Bernhard, 278 Ala. 240, 177 So. 2d 565 (1965)]. Thus, what has been called the 'Bernhard window' was created. The Bernhard rule was to continue to apply to deeds creating joint tenancies with right of survivorship executed between the release of the Bernhard decision and the overruling of that decision by Nunn."

Nettles v. Matthews, 627 So. 2d 870, 871-72 (Ala. 1993). Bernhard was released on July 15, 1965. The deed in question here was executed on April 3, 1965. Thus, the deed was executed outside the so-called "Bernhard window," and as such the rule from Nunn v. Keith, 289 Ala. 518, 268 So. 2d 792 (1972), applies to the deed.

In sum, the April 3, 1965, deed either created a joint tenancy or a peculiar form of a tenancy in common that also carries a right of survivorship.

> "In a joint tenancy at common law each tenant was seized of some fractional share while at the same time each owned the whole. The most significant feature of such a tenancy was the right of survivorship. When one joint tenant died, the deceased's share was owned by the surviving tenants jointly, until only one remained, who then owned the fee. The last survivor took nothing by survivorship as he had always owned the whole. The deaths of the other joint tenants merely removed impediments to the survivor's complete ownership. At common law, a joint tenancy could be created only where the four unities of time, title, interest, and possession were present and the destruction of any of these would terminate the joint tenancy. Thus, a conveyance by a joint tenant of his interest in the property would destroy the joint tenancy."

Nunn, 289 Ala. at 520-21, 268 So. 2d at 794. " 'It has consistently been stated that an instrument creating a joint tenancy with right of survivorship must clearly express the incident of survivorship if such was intended by the parties.' " Andrews v. Troy Bank & Trust Co., 529 So. 2d 987, 993 (Ala. 1988) (quoting with approval Parr v. Godwin, 463 So. 2d 129, 134-35 (Ala. 1984) (Torbert, C.J., dissenting)). Conversely, "[a] tenancy in common does not ... have the incidence of survivorship: when one tenant in common dies, his fractional interest in the right to possession and use of the entire property passes to his or her heirs at law -- not the other tenant in common." 2 Tiffany & Jones, The Law of Real

Property § 426 (as updated as of September 2020). However, after Bernhard, it was determined that a type of tenancy in common with a right of survivorship could be created, but that type of tenancy in common also must clearly express the incident of survivorship because it is contrary to the ordinary nature of a tenancy in common. See Durant, 409 So. 2d at 738.

There is no question that the April 3, 1965, deed intended for a right of survivorship to be part of the estate provided to the grantees because the subject property was granted to Louis Jr., Amelia, and Louise "for and during their joint lives and upon the death of either of them, then to the survivor or survivors of them in fee simple together with every contingent remainder and right of reversion ...." Thus, the right of survivorship was expressly stated; the only question is whether the estate created was a joint tenancy or a tenancy in common. "The nature of that estate determines whether [Norma and Larry's] action for compulsory partition will lie. To make this determination, we must consider the language of the deed." Clemmons v. Veasey, 435 So. 2d 1253, 1255 (Ala. 1983).

"In construing deeds, this Court stated in Financial Investment Corp. v. Tukabatchee Area Council, Inc., 353 So. 2d 1389, 1391 (Ala. 1977):

> " 'It is, of course, a fundamental rule of construction that the real inquiry in construing the terms of a deed is to ascertain the intention of the parties, especially that of the grantor, and if that intention can be ascertained from the entire instrument, resort to arbitrary rules of construction is not required. Wilkins v. Ferguson, 294 Ala. 25, 310 So. 2d 879 (1975); Gulf Oil Corp. v. Deese, 275 Ala. 178, 153 So. 2d 614 (1963).
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> " 'The courts, in construing conveyances, must ascertain and give effect to the intention and meaning of the parties, "to be collected from the entire instrument." Brashier v. Burkett, 350 So. 2d 309 (Ala. 1977); Stratford v. Lattimer, 255 Ala. 201, 50 So. 2d 420 (1951).
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> " '... It is, of course, true that where a deed is of doubtful meaning, or where the language of a deed is ambiguous, the intent of the parties to the deed as to what property is conveyed may be ascertained by reference to facts existing when the instrument was made, to which the parties may be presumed to have had reference. Lietz v. Pfuehler, 283 Ala. 282, 215 So. 2d 723 (1968).
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> " 'However, if the language is plain and certain, acts and declarations of the parties cannot be resorted to, to aid construction. Id.; Hall v. Long, 199 Ala. 97, 74 So. 56 (1916).

> " '....
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> > " 'In ascertaining the intention of the parties, the plain and clear meaning of the deed's terms must be given effect, and parties must be legally presumed to have intended what is plainly and clearly set out. Camp v. Milam, 291 Ala. 12, 277 So. 2d 95 (1973).' "

Priest v. Ernest W. Ball & Assocs., Inc., 62 So. 3d 1013, 1017 (Ala. 2010).

Amelia and Louise rely on introductory language in the April 3, 1965, deed to support their contention that the deed granted a tenancy in common with a right of survivorship. The deed begins by stating:

> "That Marie Peinhardt, a widow of Louis Peinhardt, deceased, Louise Peinhardt, Amelia Peinhardt, Herman Louis Peinhardt, and Linda P. Chambers who are all and the only heirs at law of Louis Peinhardt, deceased, ...; and being as such heirs at law, joint owners and tenants in common of the premises hereinafter described and they further being desirous of selling said premises for the purposes of partition and division among said joint owners and tenants in common ...."

(Emphasis added.) To Amelia and Louise, the direct references in the deed to a tenancy in common settle the issue.

In contrast, Norma and Larry rely upon the language in the granting clause of the April 3, 1965, deed, which states:

> "[W]e, Marie Peinhardt, a widow, Linda P. Chambers, in whom is the legal title and her husband, Leon Chambers, who joins in to convey any and all the interest he might own, do grant, bargain, sell and convey unto Louise Peinhardt, Amelia Peinhardt, and Herman Louis Peinhardt for and during their joint lives and upon the death of either of them, then to the survivor or survivors of them in fee simple together with every contingent remainder and right of reversion all of their right, title and interest in and to the following described real estate situated, lying and being in Cullman County, Alabama, ..."

(Emphasis added.) This same language -- "for and during their joint lives and upon the death of either of them, then to the survivor or survivors of them in fee simple together with every contingent remainder and right of reversion" -- is repeated in the deed, and much of it is also included in the habendum clause. Norma and Larry argue that the foregoing language grants a joint tenancy.

We agree with Norma and Larry's interpretation of the deed. Read as a whole, the introductory language that mentions "tenants in common" refers to the owners of the subject property following Louis's death, based on intestate succession, i.e., Marie, Linda, Leon, Louis Jr., Amelia, and

Louise.[6] The deed states that the owners shared the subject property as "joint owners and tenants in common" and that some of those "joint owners and tenants in common" -- namely, Marie, Linda, and Leon -- were "selling said premises for the purposes of partition and division among" some of the other "joint owners and tenants in common" -- namely, Louis Jr., Amelia, and Louise. In other words, the introductory language discussing "joint owners and tenants in common" does not describe the estate conveyed to the grantees but, rather, it describes the estate possessed by the owners following Louis's death. The relevant language for determining the type of estate conveyed to the grantees is the granting clause, which we quoted above, the key portion of which provides that the subject property was "grant[ed], bargain[ed], [sold] and convey[ed]" to Louis Jr., Amelia, and Louise "for and during their joint lives and upon the death of either of them, then to the survivor or survivors of them in fee

[6]See notes 1 and 3, supra. Title 16, § 9, Ala. Code 1940 (Recomp. 1958), provided that, "[w]hen an inheritance, or share of an inheritance, descends to several persons, they take as tenants in common, in proportion to their respective rights, unless it is otherwise provided by law."

simple together with every contingent remainder and right of reversion." As Norma and Louise observe in their appellate brief, nearly identical language -- "for and during their joint lives, and upon the death of either of them, then to the survivor of them in fee simple, together with every contingent remainder and right of reversion" -- was used in the granting clause of the deed at issue in Johnson v. Keener, 425 So. 2d 1108, 1108 (Ala. 1983), and the Johnson Court unequivocally stated that by this language "the parties took the property as joint tenants." Id. at 1109.

But Johnson is far from the only case in which this Court has concluded that a deed using nearly identical granting language conveyed a joint tenancy. In Ex parte Arvest Bank, 219 So. 3d 620 (Ala. 2016), this Court reasoned:

> "There is no dispute that the Nilands met the requirement in § 35-4-7[, Ala. Code 1975,] of clear intent to create a right of survivorship. The warranty deed by which Evelyn conveyed the property to herself and Raymond was titled 'Warranty Deed Jointly for Life with Remainder to Survivor,' and the text of the deed stated that Evelyn conveyed the property to Evelyn and Raymond 'for and during their joint lives, and upon the death of either of them, then to the survivor of them in fee simple, together with every contingent remainder and right of reversion.'

> "....
>
> "Because the warranty deed conveying the property to Raymond and Evelyn contained a clear expression of intent to create a joint tenancy with a right of survivorship that fulfilled the unities of interest, title, and possession, Evelyn and Raymond created a joint tenancy with a right of survivorship."

Id. at 626-27 (emphasis added). In Nettles v. Matthews, supra, the Court related:

> "In 1967, Lonnie E. Carter and his wife, Grace Nettles Carter, were issued a warranty deed conveying property 'for and during their joint lives and upon the death of either of them, then to the survivor of them in fee simple, together with every contingent remainder and right of reversion.' In other words, the Carters owned the property in joint tenancy with right of survivorship."

627 So. 2d at 871 (emphasis added). In Clemmons v. Veasey, supra, "[t]he deed was a conveyance by Veasey as grantor to herself and the Clemmonses as grantees 'for and during their joint lives and upon the death of either of them, then to the survivor of them in fee simple ... together with every contingent remainder and right of reversion.' " 435 So. 2d at 1254. The Clemmons Court observed: "The granting and habendum clauses used here (the language quoted above is from the granting clause) are identical to those used in Johnson v. Keener, 425

So. 2d 1108 (Ala. 1983). We there determined that such language creates not a tenancy in common, but a joint tenancy." Id. at 1255 (footnote omitted). In Smith v. Smith, 418 So. 2d 898 (Ala. 1982), the Court explained:

> "The habendum clause of the deed before this Court explicitly provides that the property was conveyed to 'Perry Smith and Katie Lou Smith during their joint lives, and upon the death of either of them, then to the survivor of them in fee simple forever.' This is precisely the language necessary to establish a concurrent ownership as joint tenants with right of survivorship under Code 1975, § 35-4-7."

Id. at 900 (emphasis added). In Kempaner v. Thompson, 394 So. 2d 918 (Ala. 1981), the Court recounted:

> "On April 12, 1974, each executed a deed conveying their two houses and lots to themselves, 'for and during their joint lives and upon the death of either of them, then to the survivor of them in fee simple.' ...
>
> "....
>
> "There appears to be no dispute in this case that the Thompsons intended to and did create a valid joint tenancy with right of survivorship."

Id. at 919-20 (emphasis added). See also McClung v. Green, 80 So. 3d 213, 214, 219 (Ala. 2011).

In short, language nearly identical to that used in the granting and habendum clauses of the April 3, 1965, deed has repeatedly been interpreted as creating a joint tenancy. We see no reason to depart from that understanding in this case. Even if it could be said that the introductory language of the deed and the language in the granting clause conflict, "the granting clause in a deed determines the interest conveyed, and unless there is repugnancy, obscurity or ambiguity in that clause, it prevails over introductory statements or recitals in conflict therewith, and over the habendum, too, if that clause is contradictory or repugnant to it." Slaten v. Loyd, 282 Ala. 485, 487-88, 213 So. 2d 219, 220-21 (1968). In other words, the language in the granting clause would control our interpretation of the deed anyway. But, as we explained above, we do not view the deed language mentioning "tenants in common" as conflicting with the granting clause, which conveyed the subject property to the grantees "for and during their joint lives and upon the death of either of them, then to the survivor or survivors of them in fee simple," because the introductory language refers to the grantors, while the granting clause and the language that follows it refer to the grantees. Therefore, because

the intention of the parties to the deed "'can be ascertained from the entire instrument, resort to arbitrary rules of construction is not required.'" Priest, 62 So. 3d at 1017 (quoting Financial Inv. Corp. v. Tukabatchee Area Council, Inc., 353 So. 2d 1389, 1391 (Ala. 1997)). Likewise, because "'the language is plain and certain, acts and declarations of the parties cannot be resorted to, to aid construction,'" id., and so we cannot consider Amelia's affidavit explanation of the parties' intentions.

A careful reading of the April 3, 1965, deed and a consistent interpretation of language nearly identical to that used in the granting clause in previous cases dictates that Louis Jr., Amelia, and Louise were conveyed a joint tenancy with a right of survivorship with respect to the portion of the subject property at issue. In a joint tenancy, the right of survivorship is destructible without consent from the joint owners. See, e.g., Fadalla v. Fadalla, 929 So. 2d 429, 434 (Ala. 2005) (noting that "a joint tenancy with a right of survivorship can be unilaterally destroyed by the acts of one of the owners, thereby defeating the survivorship interest in the property"). Consequently, Louis Jr.'s June 22, 2016, conveyance of

his interest in the subject property to Norma and Larry destroyed the right of survivorship, and the result was an ordinary tenancy in common between Norma, Larry, Amelia, and Louise. See Porter, 472 So. 2d at 633 ("When one or all of the unities of time, title, and interest are destroyed the joint tenancy is severed and a tenancy in common results."). Therefore, the circuit court's summary judgment in favor of Amelia and Louise, and against Norma and Larry, is due to be reversed.

IV. Conclusion

The April 3, 1965, deed conveyed a joint tenancy in the portion of the subject property at issue rather than a tenancy in common with a right of survivorship. As a result, Louis Jr.'s conveyance of his interest in the portion of the subject property at issue was permissible. Accordingly, we reverse the judgment of the circuit court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Stewart, and Mitchell, JJ., concur.

Sellers, J., concurs in the result.