

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM NEWBERRY COUNTY  
Court of Common Pleas

Charles M. Watson Jr., Special Referee

---

Appellate Case No.: 2023-001143

Related Appellate Case No.: 2024-000162

Lower Court Case No.: 2022-CP-36-00326

---

**RECEIVED**

**Apr 24 2025**

**SC Court of Appeals**

Lena Sue Yarborough .....Appellant,

v.

Joel F. Yarborough, III.....Respondent.

---

**APPELLANT’S PETITION FOR REHEARING**

---

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant Lena Sue Yarborough respectfully petitions the Court to rehear its decision in this case. For the reasons below, the Court should grant rehearing, withdraw its previous opinion, and issue a substituted opinion reversing the Special Referee’s Order.

**SUMMARY**

Appellant Lena Sue Yarborough appealed the Special Referee’s order finding Respondent Joel F. Yarborough III, solely owned a tract in Newberry County (“the Newberry Tract”), arguing the Special Referee erred in (1) finding a deed (“the First Deed”) granted by the parties’ mother, Bonnelle G. Yarborough, to Joel created a tenancy in common with right of survivorship

(“TICWRS”), instead of a joint tenancy with the right of survivorship (“JTWRS”), and (2) finding Lena did not present clear extrinsic evidence that Bonnelle intended to create a JTWRS.

The Court issued a per curiam opinion on March 3, 2025, affirming the Special Referee. On the first issue, the Court found “like the court did in [*Smith v. Cutler*, 366 S.C. 546, 623 S.E.2d 644 (2005)], that the granting words in the First Deed are not indefinite; thus, the First Deed is not ambiguous, and like the same words did in *Cutler*, the words in the First Deed conveyed a TICWRS.” The Court then rejected Lena’s argument that the Court should consider the court of appeals’ opinion in *Smith v. Rucker*, 357 S.C. 532, 537, 593 S.E.2d 497, 500 (Ct. App. 2004), in which the court found this same granting clause language “unambiguously” created a JTWRS, because the supreme court later reversed that opinion in *Cutler*. The Court did not reach Lena’s second issue on appeal—the improper rejection of extrinsic evidence about Bonnelle’s intent to create a JTWRS—because, on the first issue, the Court found the First Deed unambiguous, so no extrinsic evidence was necessary to interpret it.

Respectfully, the Court should reconsider its decision on three grounds. *First*, the supreme court in *Cutler* did not hold that the granting clause there, similar to the one at issue here, “unambiguously” created a TICWRS. *Second*, the Court cannot ignore that stretching *Cutler* in this way would upend the great weight of common and statutory law, and other persuasive legal authority, demonstrating that, in 1998—seven years before the supreme court decided *Cutler*—the First Deed’s granting clause more often was meant to create a JTWRS, not a TICWRS. *Third*, because the supreme court in *Cutler* found only that the granting clause “indicates an intention of the parties to share” a TICWRS, and relied on reference to extrinsic facts to put the deed in this ownership context, the Court should also consider the First Deed in the same context and reference

other evidence about Bonnelle’s intent. In so doing, the Court should conclude that the First Deed created a JTWRS and reverse the Special Referee’s Order.

## ARGUMENT

### **I. The court in *Cutler* did not hold that the granting clause at issue “unambiguously” created a TICWRS.**

To begin, the word “unambiguous” is not used anywhere in the opinion in *Cutler*. A close review of *Cutler* reveals the supreme court was not *clearly* decided about *the type of ownership* created by the granting clause at issue, stating only that the granting clause “*clearly* indicates that the parties intended to create a *right of survivorship*.” 336 S.C. at 551, 623 S.E.2d at 647 (emphasis added).

The supreme court then distinguished the granting clause’s clear intent to create a right of survivorship from its other task at hand—to determine “the type of ownership held by both husband and wife and whether the property is subject to partition.” *Id.* In this respect, the court held that the granting clause “*indicates an intention* of the parties to share a tenancy in common for life, with cross remainders for life, with remainder in fees to the ultimate survivor.” *Id.* (emphasis added). And the court’s word choice is important and cannot be set aside. The court in *Cutler* held only that the granting clause “indicated an intention” by the parties to create a TICWRS, not that it unambiguously created a TICWRS.

In this context, moreover, the court specifically noted and discussed extrinsic evidence related to the type of ownership created by the grantor. The court stated, the wife, the grantor, “a woman in her seventies, and [husband], a man in his eighties, married in June 2000. The property at issue was bought by [the wife] and owned by her most of her adult life. No other person owned an interest in the property until after the marriage when [the wife] deeded a share to [the husband].” *Id.* at 548 n.1, 623 S.E.2d at 645 n.1. And the wife *testified* as to her intention in executing the

deed: “she wanted to make sure that if she were to predecease [her husband] that he would get the property.” *Id.* Finally, the court noted, in equity, that the wife and the husband “were married and no act, such as filing for divorce, inconsistent with the intent to remain married had been taken. A successful partition action [instituted by husband’s son] would result in a forced sale of the property which had been [wife’s] home since 1958.” *Id.* at 548, 623 S.E.2d at 645–46.

Only after considering this testimony and the equities—both extrinsic evidence—did the court conclude that the wife intended to create a TICWRS because “the property will go only to the survivor of the parties and the future interest [would] not vest until death of one of the co-owners,” unlike a JTWRS. *Id.* at 551, 623 S.E.2d at 647. The court did not hold, however, that, outside the context of a wife and a husband, or the context of wife’s testimony, a conveyance of land “for and during their joint lives and upon the death of either of them, then to the survivor of them, his and her heirs and assigns forever in fee simple” were words of settled legal import and “unambiguous” as a matter of law for all deeds in all time preceding it as a matter of law.<sup>1</sup>

For these reasons, the court of appeals’ opinion stretches the supreme court’s opinion in *Cutler* too far. *Cutler* did not rule that the granting clause at issue there was unambiguous on its

---

<sup>1</sup> *Davis v. Davis*, 223 S.C. 182, 75 S.E.2d 46 (1953), notably interprets entirely different language in a deed between a husband and a wife as creating a TICWRS, with reference to extrinsic evidence and noting the equitable nature of the result. The court in *Davis* created the estate of TICWRS because South Carolina had abolished tenancy by the entirety, property held between spouses, at that time. *Id.* at 185, 75 S.E.2d at 47. It makes sense that one spouse may want to grant an indestructible right of survivorship to herself and her spouse. In that context, the import of an indestructible future interest is that neither spouse can unilaterally sever the TICWRS without the other spouse’s consent. The purpose of this concept, especially at that time, is obvious in the context of a husband and wife: “It is to prevent the anomaly of a philandering husband conveying his interest to his girlfriend, resulting in wife and girlfriend becoming cotenants upon his death.” Joby C. Castine, *Deeds of Conveyance*, S.C. BAR, at 145 (2019). The point here is that the import of deed language regarding TICWRS is very evolving in South Carolina law, and before *Cutler*, no law indicated that the granting clause in the First Deed was more likely to create a TICWRS, rather than a JTWRS. In fact, the opposite was true.

face in creating a TICWRS, only that it indicated an intention to create such ownership interest, and in context of the extrinsic facts recognized by the *Cutler* court therein, then created such ownership interest. It is error of law for the court of appeals to rule that the First Deed in this case, with a similar granting clause, was unambiguous on its face in creating a TICWRS because of the court's ruling in *Cutler*, and without reference to the context in which the deed was executed in 1998.

**II. The Court ignored that stretching *Cutler* this far upends the common and statutory law, demonstrating that, in 1998, well before *Cutler*, the First Deed's granting clause more often created a JTWRS, not a TICWRS.**

No common or statutory law existing in 1998, at the time Bonnelle executed the First Deed, holding that the granting clause at issue here unambiguously created a TICWRS. Furthermore, ample common and statutory law applicable in 1998 counsels the conclusion that the First Deed's granting clause language was at least subject to more than one interpretation at the time, if not favoring a conclusion that it created a JTWRS. *See Free v. Sandifer*, 131 S.C. 232, 237, 126 S.E. 521, 523 (1925) (stating a deed containing the words "joint" and "survivor" "are apt words for the creation of an estate in joint tenancy"); *see also* S.C. Code Ann. § 62-2-804 (1996) (providing a deed can create a JTWRS when one party conveys to himself and another and "expressly provides for a right of survivorship," and failing to identify any other specific language to that end).

Practitioners commonly considered the plain language of the granting clause in the First Deed to create a JTWRS, not a TICWRS, before *Cutler*. Paul W. Dillingham & Claire T. Manning, *To fee or Not to fee, two deed drafting traps created by recent changes in S.C. Law*, S.C. Lawyer, at 39 (Mar. 2007) (stating that, before 2000, "many practitioners, attempting to create a survivorship form of ownership, used and followed the language: 'for and during their joint lives and upon the death of either of them, then to the survivor of them, his and her heirs and assigns

forever in fee simple” and others commonly used “as joint tenants with rights of survivorship and not as tenants in common”); Claire Manning, *Drafting Survivorship Deeds Continues to be a Concern*, available at <https://letstalkdirtsc.com/2018/03/28/drafting-survivorship-deeds-continues-to-be-a-concern/> (last visited Aug. 31, 2023) (explaining that, before *Cutler*, the granting clause “for an during their joint lives and upon the death of either of them, then to the survivor of them, his and her heirs and assigns forever in fee simple” and “as joint tenants with rights of survivorship, and not as tenants in common” were both commonly used and “most practitioners did not believe different estates were created by the different language commonly in use [but that] joint tenancy was created in both cases”). Most practitioners, in fact, did not know that the granting clause the First Deed could create a TICWRS until the supreme court issued its opinion in *Cutler* in 2005. See *supra*, Dillingham, *et al.*, *To fee or Not to fee*, at 48 (In 1998, “most practitioners did not think different estates were created by the different language” as later suggested by the court in *Cutler*).

What is more, here, Bonnelle executed the First Deed after the General Assembly amended section 62-2-804 of the South Carolina Code in 1996 to allow for a party to convey to herself and another person a JTWRS so long as that party “expressly provides for a right of survivorship.” S.C. Code Ann. § 62-2-804. She also executed the First Deed before the General Assembly later enacted section 27-7-40 of the South Carolina Code in 2001 to provide a method by which a deed could conclusively establish JTWRS by use of the language “as joint tenants with right of survivorship, not as tenants in common.” S.C. Code Ann. § 27-7-40 (“In addition to any other methods for the creation of a joint tenancy in real estate which may exist by law, whenever any deed of conveyance of real estate contains the names of the grantees followed by the words ‘as joint tenants with rights of survivorship, and not as tenants in common’ the creation of a joint

tenancy with rights of survivorship in the real estate is conclusively deemed to have been created.”). There would have been no need for the General Assembly to pass this law if common law already unambiguously set forth the language on how to create a JTWRS rather than a TICWRS. Notably, the General Assembly even stated that the conclusive statutory language was “[i]n addition to any other methods for the creation of a joint tenancy in real estate which may exist by law.” S.C. Code Ann. § 27-7-40 (emphasis added). Stated another way, practitioners used the granting clause language at issue in the First Deed to create JTWRS in 1998. *See also supra*, Dillingham *et al.*, *To fee or Not to fee*, at 39 (similar).

The case law, statutory law, and other persuasive legal authorities all point to the opposite conclusion the Court reached here regarding the effect of the First Deed’s granting clause in 1998. That is, the First Deed’s granting clause language establishes a JTWRS, not a TICWRS.<sup>2</sup> *Cutler* does not change that fact. It did not decide that the granting clause in the deed at issue there was unambiguous, much less had been unambiguously used in the common law in all deeds before it. And the Court erred in overextending the opinion in *Cutler* in this way, disregarding the state of

---

<sup>2</sup> The Special Referee placed significant weight on the fact that South Carolina has long recognized the estate of a TICWRS and particularly in 1953 in *Davis*, 223 S.C. 182, 75 S.E.2d 46. (R. 10); *see also* (R. 5 (“[T]he Supreme Court, in *Cutler*, did not create TIC ROS as a new estate.”)). *Davis* and the recognition of TICWRS in South Carolina, however, has no control over this case. And in fact, the Court can take note that *Davis* also demonstrates the granting clause at issue here was not unambiguous on its face respecting the creation of a TICWRS ownership interest. The granting clause in *Davis* was completely different from the one at issue here. At the time Bonnelle executed the First Deed, there was no law—common or statutory—interpreting the granting clause language at issue here conclusively. And the court in *Davis* recognized that other language, not the granting language at issue here, created the TICWRS, and did so noting that the grantor spouse tried to convey a tenancy by the entirety to both spouses, which had been abolished by that time. 223 S.C. at 185–87, 75 S.E.2d at 47–49. Lena has never argued that a TICWRS cannot be created. Rather, she argues that one was not created here in the First Deed where the titled states: “Warranty Deed (Joint Tenants with Right of Survivorship).” (R. 45).

the law before *Cutler*, and potentially upending the state of the law and intent of many, many grantors before *Cutler*'s time.

**III. The Court should consider other evidence related to Bonnelle's intent as to the type of ownership intended by the granting clause—leading to the conclusion she intended a JTWRS—and find the Special Referee's rejection of this evidence improper.<sup>3</sup>**

The First Deed is notably different on its face from the deed in *Cutler* and facts extrinsic to the First Deed lends itself to the conclusion that the grantor intended to create a JTWRS, not a TICWRS.

First, the *Cutler* deed provided for a “Warranty Deed (Jointly for Life with Remainder to Survivor).” (R. 49). Whereas the First Deed here plainly provides for a “Warranty Deed (Joint Tenants with Right of Survivorship).” (R. 45). This difference matters. In the state of the law at the time, *see supra*, the Title of the First Deed should have extra import to the meaning of the granting language and the intention of the grantor. “The effect of a deed is to be ascertained from the language of the instrument as a whole rather than from the words of particular clauses.” 26A C.J.S. *Deeds* § 204; *see also* 26A C.J.S. *Deeds* § 202 (“It is the duty of the court to construe a deed as a whole, and interpret[ it] to give effect to every part of the document, with all the parts considered together.”). Coupled with the common use of the conveyance of land “for and during their joint lives, and upon the death of either of them, then to the survivor of them, his or her heirs and assigned forever, in fee simple” to create a JTWRS in 1998, the Court should conclude that the First Deed, on its face as a whole, is susceptible to only one reasonable type of ownership interpretation—a JTWRS.

---

<sup>3</sup> In the Special Referee's Order denying Lena's motion to reconsider, the Special Referee erroneously stated that, “[e]ven if [he] were to find the deed ambiguous, no extrinsic evidence of the grantor's intent was presented to [him] in connection with the Plaintiff's motion for summary judgment.” (R. 9). The record belies such conclusion. Lena not only included ample extrinsic evidence of Bonnelle's intent to grant a JTWRS but also submitted substantial argument related to the same. (R. 36–39).

Second, the First Deed does not arise between husband and wife, as was the case in both *Cutler* and *Davis*, where the court considered the equities to weigh in favor of finding a TICWRS. Here, Bonnelle granted the Newberry Tract to herself and Joel, her son. It does not necessarily follow, as is often the case between husband and wife, that a mother, with other children, would intend to grant an indestructible right of survivorship to herself and her son. *See supra* Section I and note 1.

To be sure, there is persuasive evidence of Bonnelle's intent to create a JTWRS in the First Deed. Initially, Bonnelle would have known the difference between a deed entitled "Warranty Deed (Jointly for Life with Remainder to Survivor)," as was the case in *Cutler*, and the First Deed, entitled "Warranty Deed (Joint Tenants with Right of Survivorship)." Bonnelle came to own the Newberry Tract after her mother, Ethel Graham, died in 1994. Ethel Graham originally conveyed the Tract to Bonnelle and herself in Deed 327-334 titled, "Warranty Deed (Jointly for Life with Remainder to Survivor)" in 1990. (R. 50–52). When Bonnelle granted the Tract to herself and Joel as "Joint Tenants with Right of Survivorship" in 1998 in the First Deed though, Bonnelle did not provide for that same language in the title of the First Deed. Instead, while represented by able counsel, Bonnelle expressly titled the First Deed, "Joint Tenants with Right of Survivorship."

Further, when Bonnelle granted herself a life estate with a remainder in fee simple to Lena in the Newberry Tract in Deed 2242-183 in 2020, she obviously believed she had the right to destroy the joint tenancy and create a life estate for herself with the remainder to Lena. She did not believe that she had created an indestructible TICWRS in the First Deed.

In 2020 too, Bonnelle also granted herself a life estate with a remainder to Lena in other properties. Bonnelle granted a life estate with a remainder to Lena in 1807 Livingston, Pomaria, South Carolina in Deed 562-16. (R. 57–60). Notably, Bonnelle held 1807 Livingston with Joel

as “Joint Tenancy with Right of Survivorship.”<sup>4</sup> (R. 61–65). Thus, at the time she granted herself a life estate in the Newberry Tract in 2020, Bonnelle clearly considered the joint tenancy related to 1807 Livingston expressed in Deed 576-221 the same kind of tenancy as expressed in the First Deed.

The same can be said for the relationship between the parties to another tract of land referred to as the Fairfield Tract. In 2020, Bonnelle granted herself a life estate with a remainder in fee simple to Lena in the Fairfield Tract. (R. 69–72). Before then, Bonnelle held the Fairfield Tract with Joel as “Joint Tenancy with Rights of Survivorship,”<sup>5</sup> like 1807 Livingston, as shown in Deed RJ-345. (R. 73–76).

Therefore, in 2020, Bonnelle clearly thought her ownership interest in the Newberry Tract was identical to her ownership interests in 1807 Livingston and the Fairfield Tract, all JTWRs that could be severed unilaterally. This extrinsic evidence supports the construction that Bonnelle must have intended the First Deed to convey a JTWRs and not a TICWRs to herself and Joel.

---

<sup>4</sup> The title of Deed 576-221 is the same as the title of Deed 482-207: “Joint Tenancy with Right of Survivorship.” The granting language in Deed 576-221 is different, stating “Bonnelle G. Yarborough and Joel F. Yarborough, III as Joint Tenants with Right of Survivorship and not Tenants in Common.” (R. 61–65). Importantly, Bonnelle executed Deed 576-221 in 2001, after the General Assembly enacted section 27-7-40(a), requiring the language “not as tenants in common” to be inserted after any creation of a joint tenancy with a right of survivorship. However, Bonnelle executed Deed 482-207, at issue here, three years before the General Assembly enacted section 27-7-40(a), and seven years before the supreme court issued its opinion in *Cutler* interpreting the granting clause language at issue there.

<sup>5</sup> Bonnelle executed this deed in 2002. Again, the title of Deed RJ-345 is the same as the title of Deed 482-207: “Joint Tenancy with Right of Survivorship.” The granting language in Deed RJ-345 is different, stating “Bonnelle G. Yarborough and Joel F. Yarborough, III as Joint Tenants with Right of Survivorship and not Tenants in Common.” Like with 1807 Livingston, Bonnelle executed Deed RJ-345 in 2002, after the General Assembly enacted section 27-7-40(a), requiring the language “not as tenants in common” to be inserted after any creation of a JTWRs. However, Bonnelle executed Deed 482-207, at issue here, in 1998, four years before the General Assembly enacted section 27-7-40(a), and seven years before the court issued its opinion in *Cutler* interpreting the granting clause language at issue there.

## CONCLUSION

For these reasons, the Court should grant this petition for rehearing, withdraw its previous opinion, and issue a substituted opinion reversing the Special Referee's Order and finding the First Deed created a joint tenancy with a right of survivorship that Bonnelle could and did unilaterally sever.

Respectfully submitted,

s/ Beth B. Richardson

Beth B. Richardson (SC Bar No. 69552)  
[brichardson@robinsongray.com](mailto:brichardson@robinsongray.com)  
Sarah C. Frierson (SC Bar No. 104643)  
[sfrierson@robinsongray.com](mailto:sfrierson@robinsongray.com)  
ROBINSON GRAY STEPP & LAFFITTE, LLC  
2151 Pickens Street, Suite 500 (29201)  
Post Office Box 11449  
Columbia, South Carolina 29211  
(803) 929-1400 Telephone  
(803) 929-0300 Fax

***Counsel for Appellant Lena Sue Yarborough***

Columbia, South Carolina  
April 24, 2025