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Severing a joint tenancy: Patience v Snyder, 2000

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Document to sever joint tenancy is deemed recorded only when all recording prerequisites have been met.

Patience v Snyder (2000) 78 CA4th 1001, 93 CR2d 265

Kenneth Derrick and Diana Patience, an unmarried couple, held title to their home as joint tenants. After they ended their relationship, Patience moved out and Derrick continued to live in the home until he died. Eight days before his death, Derrick signed a quitclaim deed conveying his interest in the home to Georgie Wilson. Derrick died at 11:55 a.m. on March 29, 1995. At 11:15 a.m. that day, 40 minutes before Derrick's death, Derrick gave the deed to a third party (Rotarius), who presented the deed to a clerk in the county recorder's office for recording, without having completed a preliminary change of ownership report and another form required before the deed could be recorded. By the time Rotarius had completed the forms and paid the recording fees, Derrick had died. The recorded deed bore a time-stamp of 12:54 p.m., nearly one hour after Derrick's death.

Patience sued Wilson to quiet title to the property and to cancel the quitclaim deed, alleging that the deed was invalid because it had not been recorded before Derrick's death, as required by CC §683.2(c). Wilson argued that under CC §1170 the deed was deemed recorded when it was "deposited" with the recording clerk 40 minutes before Derrick's death. The trial court granted summary judgment for Patience.

The court of appeal affirmed. Civil Code §683.2(c)(1) provides that, to effectively terminate a joint tenant's right of survivorship, a deed to sever a joint tenancy must be recorded before the death of the severing joint tenant. Civil Code §1170 provides that a deed is deemed recorded when it is "deposited" with the proper officer in the recorder's office for recording. The issue was the meaning of the word "deposit." Here, the deed was not deemed "deposited" with the recorder until all of the statutory prerequisites to recordation (*e.g.*, completion of a preliminary change of ownership report and payment of recording fees) had been satisfied. "The mere act of giving a document to the clerk for recording is not sufficient in itself to constitute a 'deposit.'" 93 CR2d at 271. There was no "deposit" at 11:15 a.m. because Rotarius did not irrevocably relinquish control of the deed at that time and the necessary forms had not been completed. The court concluded that (93 CR2d at 273):

[u]nless a document has satisfied the requirements necessary to qualify as a recordable document—unless it "counts" as something that will ultimately be copied and indexed—it cannot be considered "deposited" *for recordation* or "deemed *recorded*." [Emphasis in original.]

▶***THE EDITOR'S TAKE:*** This lengthy note is really three separate comments.

1. *What is recording?* While this opinion contains a fascinating discussion of how to determine whether a proper recording has occurred under California's statutory definition of recording, it is hard for me to believe that any practitioner is ever likely to need the learning it provides. The decision may be fun to discuss in law school classes, but is hardly of vital

importance to everyday practice, even where lawyers—rather than escrow and title companies—are still recording documents for their clients.

The statement in CC §1170 that recordation consists of depositing the document with the proper officer in the recorder's office has never been very helpful, and, in fact, has been a definition that the courts have always had to get around. If taken literally, it would treat a document as recorded for constructive notice purposes even though the recorder never indexed it and no one could ever find it, which would make a shambles of our entire system of priorities. Title searchers would have to report to their clients that there appeared to be no recorded claims against their titles, but there might be some that were unindexed or misindexed and yet were nevertheless valid because they had been deposited with the recorder's office. That would not be a very comforting basis for deciding to pay good money for the seller's title.

This embarrassment was resolved many years ago by making a distinction between recording for notice purposes (giving constructive notice to everyone else) and recording for public act purposes (making it impossible to deny that the act had occurred). Recording for notice purposes occurs only after there is proper indexing and does not come within the ambit of CC §1170. See *Dougery v Bettencourt* (1931) 214 C 455, 6 P2d 499. Thus, depositing the document with the recorder, despite the statute, is not always recording it.

Now another dent has been made in what is left of that statutory definition. Recording now does not mean depositing the document with the recorder, unless the recorder also properly *accepts* it. If some formalities prohibit the recorder from accepting the document as presented (*e.g.*, the payment of fees or the delivery of some ancillary supporting documents), then recording within the meaning of §1170 does not occur until those requirements have been met.

That is a fine principle, but it is not at all what the statute says, as the dissent points out. The statute uses "deposited" rather than "accepted" as its touchstone. I expect that the majority knows that, too, but decided that it was better to get a sensible result than to take a problematically drafted statute too literally. (Personally, I think the legislature should simply repeal this unnecessary statutory definition so courts could avoid these unintended consequences.)

2. *Is there a depository intent?* As far as odd definitions go, I found the majority's definition of "deposit" to be as quirky as the legislature's definition of "recording." Rotarius was held to have not truly deposited the deed with the recorder because he did not relinquish control of it in an irrevocable or irretrievable way, according to the opinion. Now, I know that for a deed to be properly delivered, the grantor has to perform an irrevocable act, but I did not think that a second irrevocable act had to follow it. If Rotarius was the grantor's agent (as the court said he was), I don't see why an irrevocable attitude has to be manifested twice—if the grantor truly delivered the deed and thereby passed title, why must he again think that it's too late to change his mind when he hands that deed to the recorder? On the other hand, if Rotarius was the grantee's agent (as he appears to me), I would have never thought that any special state of mind was required of the grantee except to not reject the tendered document.

3. Severing joint tenancies. For me, interpretation of the California severance statute (CC §832.5) is less troublesome than is the existence of the statute itself. Secret severances are a

common problem that joint tenants face, and secret *fraudulent* severances are even worse. A dying joint tenant can secretly sever the joint tenancy easily by conveying to a third person and not telling his partner of that fact, even if his deed is promptly recorded, because at times like this his partner is more likely to be with him in the hospital rather than down searching in the recorder's office. He can act even more cruelly by having the severance occur only if he dies first and not if he manages to survive her (after, say, a mutual accident or common illnesses). While the statute requires that his document be recorded *before* his death (the problem in this case), it does allow for postmortem recordation if the document was notarized *before* then. That allows the child of a scheming partner to notarize now, wait and see who dies first, and then decide whether to record or not record, according to which works best.

It's true that, to play this game, the document has to be notarized within three days of dying, which is often hard to calculate in advance. But it is not impossible where death is imminent (or subject to the possibility of euthanasia to hasten it). And notarization is not the same kind of public act that recording is; no one else will know that a deed has been notarized, or notarized a second or third time, if that becomes necessary. The statute invites bizarre behavior as death approaches.

I have suggested elsewhere (see Bernhardt, *Secretly Severing Joint Tenancies*, 19 CEB RPLR 125 (May 1996)) that joint tenants should employ "marital deeds of trust" (my invention) to protect themselves against the risk of furtive unilateral severances. The legislature could really help in this field by permitting the creation of indestructible joint tenancies, guaranteeing that survivors will not be swindled out of their expectancies. That certainly is what most couples really expect and want and should be able to have. It is truly a shame that we make it so hard for them to accomplish this. *Roger Bernhardt*