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Secretly Severing Joint Tenancies

Roger Bernhardt

Re v Re (1995) 39 CA4th 91, 46 CR2d 62 (reported at 18 CEB RPLR 330 (Nov. 1995)), was an interesting variation of the common and distressing problem of one joint tenant surreptitiously destroying the survivorship rights of the other. Steven Re did not get along with his sister Pamela or his mother Jane, and threatened to partition the joint tenancy real estate they all held. Pamela and Jane got back at him by conveying their two-thirds interests to themselves (as joint tenants). This severed their former joint tenancy with Steven, making him a tenant in common as to his one-third interest, and passing Jane’s one-third interest to Pamela as surviving joint tenant when Jane died a few years later. So, instead of becoming a one-half owner (as one of two surviving joint tenants), Steven remained a one-third owner (as a preexisting tenant in common). Jane and Pamela executed their deed in 1989, but it was not recorded until the day after Jane died in 1992; thus, Steven probably first learned at his mother’s funeral what they had done to him.

Steven thought that the scheme should have failed because it did not comply with CC §683.2(c), which provides that an instrument severing a joint tenancy is not effective unless it is either recorded before the severing joint tenant dies or else notarized less than three days before death and recorded less than seven days after that death. However, because there is a statutory exception for a deed “from a joint tenant to another joint tenant” (CC §683.2(d)(3)), the deed from the two women was not required to comply with these formalities because they were both grantors and grantees. Such a technical dodge is not available to a married joint tenant who wishes to punish his or her younger or healthier spouse, because you don’t get even with your mate by conveying directly to her or him. In such cases, the statute is supposed to prevent “potentially fraudulent behavior.” Estate of England (1991) 233 CA3d 1, 284 CR 361. However, I think the statute prevents lesser and remote fraud without having any real effect on the more likely and serious fraud of secretly denying a surviving spouse her expected survivorship rights.

Had Pamela and Steven been a married couple who had purchased their house in joint tenancy (without mom), Pamela might have had her deed to herself recorded before rather than after she died, and Steven still would not have known about it, since recordation gives constructive but not actual notice. (When was the last time you looked at the records to see what is going on with your own title?) Even with a pre-death recordation, Steven would have learned only at the funeral that his wife’s half of the house did not go to him. Further, pre-death notarization makes the arrangement even less likely to be discovered (and more likely to be undone if the wrong spouse outlives the other), because there is no way to find out whether your spouse has had an instrument notarized; these are not public records.

However, to worry about when the survivor learns of the betrayal is to miss the larger point, which is how to prevent the betrayal from occurring in the first place. For instance, in Estate of England, supra, James executed an instrument 12 days before his death purporting to sever his 20-year joint tenancy with his wife Vonda and instead give his interest to his son William. He failed because he did not comply with the statute by having the document notarized or recorded before his death, but statutory compliance would not have improved Vonda’s situation.

What Vonda thought when she and James purchased their house was that the survivor would be sure to take the entire property on the other’s death, i.e., that the joint tenancy was “indestructible.” We lawyers know that it isn’t, and that there is no easy way to make it so.

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Because California is a community property state, James and Vonda could not take as tenants by the entireties, which does prevent either spouse from conveying without the other’s consent. They could have taken title as community property, which does prevent unilateral severance by virtue of the two-signature requirement of Fam C §1102(a), but James still could have disinherited Vonda by merely devising his half interest by will to his son. Prob C §§100, 6101. So California couples confront the unpleasant fact that, depending on how they choose to hold title, they can prevent each other either from conveying to outsiders (community property), or from devising their interest by will to outsiders (joint tenancy), but not both.

I can think of three possible solutions for a couple wanting to give each other the necessary assurance on this score, although I have never actually tried any of them. Perhaps readers will contribute their own ideas, criticisms and experiences.

1. The couple could take title as joint life tenants with a remainder to the survivor (contingent, of course, since the remainderman is currently unascertained). Then, if James secretly conveyed, his son’s interest would endure only as long as James stayed alive. This sounds cumbersome and costly, but I see no reason why appropriate language could not be approved by the Real Property Law Section of the State Bar and then printed on a form deed distributed to brokers by the California Association of Realtors, or at least kept in an attorney’s own form files.

2. The spouses could execute an agreement between themselves not to sever their joint tenancy. Civil Code §683.2 seems to imply that such an agreement would work, providing as it does that “[n]othing in this section authorizes severance of a joint tenancy contrary to a written agreement of joint tenants.” The section goes on to say that “a severance contrary to a written agreement does not defeat the rights of a purchaser or encumbrancer for value in good faith and without knowledge of the written agreement.” Civil Code §683.2(b). The requirement that the purchaser pay value, however, will take care of gratuitous conveyances to relatives, and the presence of the other spouse on the premises (as well as recordation of the document) should impute notice to any third party buyer (despite the section’s careless use of “knowledge” rather than “notice” as the standard). I realize that this may technically violate the rule against restraints on alienation, but since alienability is left fully intact so long as there are two signatures on the deed (which is the requirement for community property), it is hard to think this is any more a violation of public policy than a no-assignment clause in a lease. If such an agreement works, attorneys could have them ready for clients’ use as part of a standard matrimonial health check up.

3. The couple could take by a deed (again, preprinted) that named them as beneficiaries of a trust and designated a third party as trustee, whose sole task would be to convey or encumber the title on the mutual instructions of both spouses. Because the trust arrangement created in a deed of trust situation requires no additional documentation, I see no reason why this marital trust deed should need to be any more elaborate than as described.

I prefer the idea of a marital deed of trust, probably because real estate attorneys are so familiar with deeds of trust in general; but the real question is, which device would the title companies be most willing to insure? (Also, the title companies are probably easier to work with than the legislature.)