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Sunday, January 21, 2018

Issue 388

Issues added on the 7th and 21st of every month.

HIGHLIGHTS

* A Justice of the Alberta Court of Queen's Bench has concluded that when a parent gives an adult child a joint interest in land which is intended by the parent to be a gift, the gift may include a "irrevocable" right of survivorship, such that the parent cannot later change their mind and prevent the child from receiving the parent's interest in the property if the parent dies first, by taking legal steps to "sever" the joint tenancy. In this case, a stepfather acting on his own behalf and as attorney for an incapacitated mother, attempted to sever a joint tenancy of the two parents and their daughter in a quarter section of farmland after a Court in an earlier case had upheld the daughter's claim by ruling that the mother and the stepfather had intended to make a gift to the daughter when they transferred a joint interest in the property to her. The decision contains an in-depth discussion of the law concerning joint tenancies and the right of survivorship. [Editor's note: The decision, and the previous Court decision between the parties, illustrates the dangers of using joint tenancy as an Estate planning device.]. (Pohl v. Midtal, CALN/2018-003, [2017] A.J. No. 1238, Alberta Court of Queen's Bench)

NEW CASE LAW

Pohl v. Midtal;

CALN/2018-003,

Full text: [2017] A.J. No. 1238;

2017 ABQB 711,

Alberta Court of Queen's Bench,

R. Khullar J.,

November 20, 2017.

Joint Tenancy -- Transfer of Farmland by Parents to Adult Children -- Whether the Transfer includes an Irrevocable Gift of a Right of Survivorship.

Melva Pohl ("Melva") and the Litigation Representatives for James and Vivian Midtal (the "Midtals") applied to the Alberta Court of Queen's Bench based on an Agreed Statement of Facts to determine the issue of whether or not the Midtals were entitled to severe a joint tenancy with respect to lands held as joint tenants by the Midtals and Melva.

Vivian Midtal had 5 children when her first husband died. She married Gordon Midtal in 1974. Melva was Vivian's eldest child. She and her husband were the only members of Vivian's family who farmed.

In June, 2004, Gordon and Vivian added Melva as a joint owner to the title of their home quarter (the "Home Quarter"). Vivian made a Will at the same time which left nothing to Melva.

Gordon made a Will in 2010 which left nothing to Melva, but which indicated he had already provided for her.

In August of 2007, Gordon became Vivian's attorney because Vivian's mental health was deteriorating.

With respect to the jointly owned Home Quarter, the plan had been for Melva and Dennis to move into the house on the lands when Vivian and Gordon were no longer living there.

By 2010, Vivian had moved into long term care off the farm, and the relationship between Gordon and Melva and Dennis began to deteriorate.

In September of 2012, Gordon commenced an action against Melva claiming that a resulting trust arose from the transfer of the joint interest in the Home Quarter.

In October of 2014, Moreau, J issued a decision dismissing Gordon's action, on the basis that Melva had rebutted the presumption of the resulting trust by demonstrating that the transfer of the joint interest in the Home Quarter to her was a gift: Midtal v Pohl, [2014] A.J. No. 1173, 2014 ABQB 646, 598 AR 136; CALN/2015-009.

Moreau, J concluded at para. 118 of her 2014 decision that:

> In all of the circumstances, I conclude that Melva has rebutted the presumption of a resulting trust. Gordon and Vivian's transfer of a joint interest in the Home Quarter to Melva constituted an irrevocable inter vivos gift and the right of survivorship vested when the gift was made: Fuller v Fuller Estate, [2010] B.C.J. No. 1901, 2010 BCCA 421 at para. 53.

In February, 2015, Gordon (acting on his own behalf and as Vivian's attorney) served Melva with a written notice of his intention to register a transfer that would sever the joint tenancy of the land.

In March of 2015, Gordon registered a transfer to sever the joint tenancy. The resulting title showed Gordon and Vivian as the owners of an undivided two thirds interest in the land as joint tenants, and Melva as the owner of an undivided one third interest in the land.

Following Vivian's death in 2016, Gordon registered a transfer conveying Vivian's interest in the Home Quarter to him, resulting in Gordon owning an undivided two thirds interest in the land.

Gordon died in May of 2017, before the matter came to trial.

Khullar, J [at para. 67 and 68] found in favour of Melva, and concluded that Gordon and Vivian were not entitled to exercise their rights to sever the joint tenancy because, on the facts of this case, the gift creating the joint tenancy also included an irrevocable right of survivorship. As a result of the deaths of Gordon and Vivian, it was declared that Melva was entitled to be the sole owner of the Home Quarter as the surviving joint tenant.

Khullar, J observed, at para. 27, that a right of survivorship is inherent to the creation of a joint tenancy, and that if the right of survivorship continues until the death of a joint tenant, the interest of the deceased joint tenant extinguishes and passes to the surviving joint tenants:

> "...so, the right of survivorship is a key part of any gift of a joint interest in property and is, arguably, one of the key elements of a joint tenancy."

Khullar, J commented, at para. 29, that it is easy to sever a joint tenancy:

> [29] It is quite easy to sever a joint tenancy. A joint tenant can sever the joint tenancy by transferring his or her interest in the property to himself or herself as a tenant in common. This is what Gordon did (acting on his own behalf and as Vivian's attorney).

Khullar, J further commented that in this case there was no dispute that the correct steps were taken under the Law of Property Act and the Land Titles Act to sever the joint tenancy, but that the issue was whether Gordon and Vivian's joint interest in the land included an irrevocable right of survivorship, and whether Gordon and Vivian had given up their right to sever the joint tenancy [at para. 30].

Khullar, J considered the decision of the Supreme Court of Canada in Pecore v Pecore, 2007 SCC 17, [2007] S.C.J. No. 17, [2007] 1 SCR 795 ("Pecore") at para. 37 to 40, and concluded, at para. 41 and 42:

> [41] Pecore adapted the concept of joint tenancy, as the joint tenants in that case did not have the same rights with respect to the property; they had the same legal ownership, but the daughter's beneficial interest did not crystalize until her father's death. The Supreme Court of Canada recognized that:

> - joint tenants can have different beneficial interests in the property; and
>
> - it is necessary to determine the intention of the transferor at the time the joint tenancy is created to determine if an inter vivos gift is made with different beneficial interests.
>
> So, the question becomes, if an inter vivos gift of a joint interest in property is made, is it possible for that gift to include an irrevocable right of survivorship?
>
> [42] I think the answer to that question must be yes. Joint tenants can agree by contract that they will not sever the joint tenancy: see Bruce Ziff, Principles of Property Law, 6th ed (Toronto: Carswell, 2014) at 350-1; and Haan v. Haan, [2015] A.J. No. 1369, 2015 ABCA 395, 609 AR 371. Therefore, one should be able to relinquish his or her right to sever a joint tenancy by irrevocably gifting the right of survivorship to another. I think this conclusion is the logical implication that flows from Pecore. Whether such a gift was made will depend on the transferor's intention at the time the gift was made.

Khullar, J declined to follow the decision of the Manitoba Court of Appeal in Simcoff v Simcoff, [2015] A.J. No. 1369, 2009 MBCA 80, 245 Man R (2d) 7 ("Simcoff") and decided, instead, to follow the decision of the Saskatchewan Court of Appeal in Thorsteinson Estate v Olson, 2016 SKCA 134, [2016] S.J. No. 578, 404 DLR (4th) 453 ("Thorsteinson") stating, at para. 50:

> [50] ...If the facts of Pecore are used, the finding is that the father intended the daughter to be the beneficial owner of the joint accounts when he died, but he would be the beneficial owner of the joint accounts when he was alive. In order to give effect to that intention, the implication is that the father will not or cannot exercise the right of severance while he is alive, though he can use all of the assets in the accounts to his own benefit. By analogy, in the case at bar, Gordon and Vivian could use the Home Quarter in any way to their own benefit while joint tenants with Melva. But, in order to give effect to their gift of survivorship to Melva, when they created the joint tenancy, they gave up their right to severance. To find otherwise would defeat the point of a gift of property that will only take effect upon the death of the transferor. To the extent this is seen as a stretch of the law of joint tenancy, the first step of that stretch was taken in Pecore.

Khullar, J observed, at para. 59, that Moreau, J had made a number of key findings in her decision and that, among other things, when they transferred the land it was their intention that Melva and Bryce would receive the Home Quarter as part of their Estates by transferring it to them as joint tenants. Khullar, J. concluded, at para. 64:

> [64] Gordon and Vivian clearly intended that Melva would get the Home Quarter on their deaths. To give effect to their intention, an inference can and

should be drawn that they gave up their right of severance in 2004, when they made Melva a joint tenant.

CREDITS

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