

Joint Tenants or Tenants in Common?

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Laurie H. Pawlitza: When writing a will, it's important to pay attention to the way title to the matrimonial home was registered

Lawyers often say that estate litigation is like “family law with dead people” because, in both disciplines, emotions tend to run high.

A recent case decided by Justice Reid of the Ontario Superior Court confirms the lawyers’ adage, with sometimes surprising results.

In this case, decided last month, the deceased, who had adult children from his first marriage, had remarried — a situation that often provides fodder for a dispute.

The two had been married for 16 years. About five years after they married, they bought a home and took title to it as joint tenants. They lived together in that home until he died in 2015.

In the ordinary course, joint tenancy means that if one of the joint tenants dies, the property passes to the survivor. If, on the other hand, a couple has taken title as “tenants in common,” it means that if one owner dies, the deceased’s share will pass to his or her estate, which will then be distributed under the terms of the deceased’s will.

Shortly before his death, the man made a will that said, among other things, that on his death his wife could continue to have the use of his one-half interest in the matrimonial home until either her death, her decision to cohabit with another person, or until she no longer wanted to live there. After that time, the house was to

be sold and the net proceeds divided, with the wife receiving her 50 per cent and the husband's 50 per cent going to his two daughters.

About two years after their father's death, the daughters started litigation against their stepmother, asking that the house be sold so they could get their share of the net proceeds.

Even though the house had been registered in the joint names of the father and the wife, the daughters claimed that there was a "course of dealing" between the deceased and their stepmother that severed the joint tenancy.

In rare cases, title to a property owned by parties jointly can be deemed to have been "severed" and a court can find that the joint owners are actually holding as tenants in common — leaving the surviving owner holding only half of the property instead of property in its entirety.

In this case, the judge hearing the application relied on the Ontario Court of Appeal decision of *Hansen Estate*, a case that dealt with a separated couple who continued to hold property as joint tenants after one of the spouses died.

In *Hansen Estate*, the Court of Appeal confirmed that there were three ways for joint owners to be deemed to have severed their joint tenancy: if one of the owners disposes of his or her interest in the property, if there was a mutual agreement between the co-owners, or if there was a course of conduct by the co-owners from which it can be inferred that both owners intended to sever the joint tenancy.

In the recent case, the daughters argued that their father and his wife had embarked on a course of conduct that severed the joint tenancy.

Unlike *Hansen Estate*, however, the daughters were unable to point to any marital discord or separation between their father and his wife. Nor had their father cut his

wife out of his will. In addition, the spouses continued to have intermingled finances until their father's death.

Despite this, the judge said he was obligated to consider "the evidence as a whole."

The judge heard evidence through affidavits from friends of the two daughters, and from several long-time friends of the deceased. Several stated that the deceased said in their presence that he intended to leave his half of the matrimonial home to his daughters, with his wife continuing to hold the other half.

In addition, one of the daughters produced a tape recording, said to have been recorded in the hospital before the deceased's death, in the presence of the deceased, one of the daughters and the wife.

During the conversation, the wife indicated that she understood and agreed that the girls were getting the deceased's 50 per cent share of the property, and seemed to take credit for ensuring that they would be provided for in his will.

At the hearing, the wife's evidence was that she could not really remember the conversation and was not sure when it happened, but explained her comments by saying that she and the deceased had earlier agreed that they would "go along" with what the daughters said, to appease them.

In responding to the evidence from the husband's long-time friends who said that the wife was present when the deceased told them that the house would be divided between the girls and his wife, the wife again said she did not want to argue or contradict her husband with friends present.

In assessing the evidence, Justice Reid relied on the evidence of the deceased's friends, as well as on the recording.

In a somewhat odd twist, and without citing any precedent, the judge acknowledged that the recording by the daughter was illegally obtained, but that he could still rely on it, saying that “the unauthorized recording of a conversation does not make the evidence inadmissible, regardless of whether it was legal to do so.”

Not surprisingly, given the evidence accepted, the judge found that there was a mutual course of dealing between the deceased and his wife, and as a result, the joint tenancy registered on title was deemed to be severed: The deceased daughters therefore owned half of the property.

Justice Reid then turned to deciding whether the house should be sold immediately. The daughters were obviously anxious to liquidate their half of the house and argued that it was unfair to deprive them of their inheritance indefinitely.

Here, the judge parted company with the daughters, saying that to make such an order would be to specifically set aside the wife’s life interest in the house set out in her husband’s will, which allowed her to live there until she died, moved out or re-partnered.

In the end, considerable time and money could have been saved if the deceased — or his lawyer — had only paid attention to the way title to the matrimonial home was registered when the deceased did his will.

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